Asian Historiography and International law: Uniformity or Unity in Diversity?

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The history of International law whenever traced always alludes to the European Nation States in the 18th-19th c. It is a fact that International Law was made by them, for them and served their interests. The aftermath of the World War II led to many countries in Asia and Africa shaking off their yoke of colonialism. International Law started recognising these new entities on the world stage but only marginally where the US and the Soviet Union were considered the new superpowers. Francis Fukuyama proclaimed 'The End of History' in the triumph of American Liberalism in the 20th Century. With Globalisation came the further crystallisation of International Law where it came to be increasingly realised that Asian States have made a contribution to the evolution and growth of international law doctrines and rules that needs to be recognized as a part of the process to further the goals of global justice.In so far as developing countries in the Asian region are concerned the core of their approach to international law is in its main features articulated by TWAIL [Third World Approaches to International Law].

Are we in the Asian century as proclaimed by theoreticians? Or is the Asian History and its impact upon International Law not a uniform category inundated and Cris-crossed by nation states who are opposed in their world view and consequently the way they influence and look upon International Law [Taiwan, Vietnam, Philippines vis a vis China, India-Pakistan, India-Bangladesh, Japan-China; South East Asia vis a vis South Asia and they vis-a-vis West Asia]. Can one find similarities in dissimilarities or there are too many dissimilarities negating a uniform approach to International law? It is time that 'Asian Approaches to International Law' are recognised and practitioners and academicians trace a Asian history of International Law which is sui-generis in nature.

Turn Towards History of India and International Law

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The history of India and International Law has, for a very long time, remained on the fringes of Indian academia. The interest has been more on the doctrinal (see Chimni [1]) and contemporary aspects (Desai [2], Burra [3], Ranjan [4], Rajpoot [5]) of India's activities vis-a-vis international law. Now, however, one can see the rise in literature being produced discussing India's history as far as practicing international law is concerned. This is not to say that Indian academics working on India and International Law have not worked on its history earlier. Examples of such works include Alexandrowicz[6], Anand[7], Panikkar[8], Mishra[9] etc. However, I argue that this recent 'turn towards history of India and international law' is different because of the following reasons.

Firstly, this turn, it seems, is an extension of turn towards history[10] of international law which began with Martti Koskenniemi asking 'Why history of international law today?[11]' (2004). The previous Indian literatures on this theme might have been motivated out of different considerations. For example, Alexandrowicz's works, it seems, were a result of decolonisation and aimed to present an alternate account of international law and recognition of cultures and practices of the erstwhile colonies. Similarly, Anand, through his works on the history of India (and Asia and Africa) and international law 'was pushing the envelope on the earlier works of Professor CH Alexandrowicz', writes[12] Prabhakar Singh.

However, the current writings on this theme is concerned with more individual instances of historical events, persons or organisations. So, Stephen Legg writes[13] about the Indian Round Table Conference of 1930-1932. Further, both Alexandrowicz and Anand have themselves been studied in detail. Thus, Carl Landauer is writting a two-part series on Alexandrowicz in the London Review of International Law. Anand too has got himself a biographer in Prabhakar Singh.

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[1] B. S. Chimni, *Customary International Law: A Third World Perspective*, 112 (American Journal of International Law, 2018)
[2] https://jnu.ac.in/content/desai
[3] http://www.sau.int/faculty/faculty-profile.html?staff_id=32
[4] https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=446970
[5] http://aniruddharajput.academia.edu/research#papers
[6] C. H. Alexandrowicz, David Armitage, & Jennifer Pitts, *The Law of Nations in Global History*, (Oxford University Press, 2017)
[7] http://www.publicinternationallaw.in/rpanandwritings
[8] D. G. E. Hall, *Asia and Western Dominance: A Survey of the Vasco Da Gama Epoch of Asian History 1498–1945*, (International Affairs, Volume 30, Issue 2, 1954)
[9] Pankaj Mishra, *From the Ruins of Empire*, (Penguin India, 2013)
[10] George Rodrigo Bandeira Galindo, *Martti Koskenniemi and the Historiographical Turn in International Law*, (European Journal of International Law, Vol. 16, Issue 3)
[11] M Koskenniemi, *Why History of International Law Today*, (Rechtsgeschichte, 2004), available at https://scholar.google.com/scholar_lookup?title=Why+History+of+International+Law+Today?&publication+year=2004&author=Koskenniemi+M.&journal=Rechtsgeschichte&volume=4&doi=10.12946/rg04/061-066
[12] Jochen von Bernstorff and Philipp Dann, *The Battle for International Law: South-North Perspectives on the Decolonization Era*, (Oxford University Press, 2019)
[13] Stephen Legg, *Imperial Internationalism: The Round Table Conference and the Making of India in London, 1930–1932*, (Humanity, Volume 11, Issue 1, 2020)

Secondly, this turn is also because of the rise of popular nationalism in India. Thus, Shashi Tharoor's speech [14] in the Oxford Union Debate resulted in a widespread demand for reparations from Britain. Tharoor converted his speech in a book titled An Era of Darkness: The British Empire in India.[15]

[14] Dr Shashi Tharoor MP - Britain Does Owe Reparations, (July 14, 2015), available at <https://www.youtube.com/watch?v=f7CW7S0zxv4>

[15] Shashi Tharoor, *An Era of Darkness: The British Empire in India*, (Aleph, 2016)

A Constitutional Approach to the Evolution of Islamic International Law: Lessons from Afghanistan

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Ancient scholarship on international legal studies paid particular attention to Islamic international law as a set of Islamic rules which regulated the interactions of Muslim caliphates with non-believer tribes or those of other religions. With the rise of modern states, Islamic international law has held less visibility in international law parlance because contemporary scholars have argued that "all Muslim states" have *discarded* Islamic perspectives of international law and have instead adopted the tenets of modern international law. However, an analysis of constitutions in Islamic countries reveals that some Muslim-majority states have based their international interactions on updated versions of Islamic international law. The present paper elucidates and evidences this claim in the following manner. Using the example of the present Afghan Constitution which portrays Islamic law as a check on the state's power and foreign relations and obliges the state to "observe" the universal declarations, international treaties and interstate agreements, it charts how Afghanistan has gradually adapted the classical doctrine of Islamic international law into its pliant current form: previous Afghan constitutions had defined Islam as the state religion with no mention of Afghanistan's obligation to "observe" the universal declarations, international treaties and interstate agreements. Assessing this contemporary development of Afghan constitutional history, this study offers challenging lessons against the ongoing dominant debate on the relevance of Islamic international law in today's world: (1) Afghanistan, as a Muslim state, has not necessarily *abandoned* Islamic international law. Rather, it has modified and adapted the ancient version of Islamic international law into a modern and flexible form that can be used in contemporary international relations, and (2) Afghanistan's experience suggests that the emergence of modern Islamists, their impact and that of international players on constitution-making processes in some Islamic countries have induced such a *metamorphosis* in traditional form of Islamic international law.

Indonesia and the New Legal Order for the Oceans: a Third World Agenda

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The story of Indonesia's struggle for the law of the sea could become an example of how a third world country, a newly independent state can also shape the international legal order for the ocean. With the establishment of the United Nations has created an opportunity for other than western European countries to also shape the future of international legal order. And Indonesia has shown how persistence, determination, and diplomacy, Indonesia has succeeded in promoting their national interest through international law. Furthermore, not only Indonesia gains success from the UNCLOS. Developing states, landlocked states, and all humankind have benefitted from the convention. Therefore there should be more success story from the third world in shaping the future of international law.

International Law and the Struggle for the Ocean

For hundreds of years, the ocean has and always been a battlefield of struggle amongst civilization. The wealth of the ocean ranging from fish until navigational trade routes have provided and promises an economic development for many civilizations. In the modern history of the nation, the ocean has been a center of a geopolitics struggle. International law, therefore, has become a tool to accommodate and legitimize the interest of western civilization to utilize, explore, and exploit the wealth of the ocean.

In 1494, two major maritime powers at that time, Spain and Portugal, were competing on who owns the right of the newly discovered islands to then become their colony. To solve the conflict between Spain and Portugal, Pope Alexander VI draw a line of demarcation about 320 miles in which Spain could control lands discovered of the west line, and Portugal has the rights to new lands discovered to the east. The agreement concluded on a Treaty that is famously known as the Tordesillas treaty. Therefore for two hundred years, Spain and Portugal have the exclusive rights to navigate the ocean to formed and discover the new world which then becomes their colony.

However, as the other European countries grow economically, they also want to find a new world to become their colony and support their economy. Therefore, the Dutch East Indies Company (Vereenigde Oostindische Compagnie/VOC) ask Hugo Grotius, who was an advisor of the public prosecutor in the Court of Appeal in The Hague to make a legal opinion to become a legal justification for the VOC to also sail and explore the ocean. Hugo Grotius who then become well known as the father of modern international law, then wrote a book entitled Mare Liberum, 'the Free Seas' published in 1609. In his book, he argued that the ocean belongs to no one, and thus, no state could claim sovereignty over it. Therefore all countries have the same rights to navigate the world oceans, not only limited to Spain and Portugal. His books become phenomenal, and important to become the legal basis of the freedom of navigation. With Mare Liberum on their side, the East Indies Company started to explore the world to find a new world where they could find spices as the main commodity of their trade business.

Indeed as Professor Anthony Anghie argued, in the nineteenth century, International law has been used as a tool for the European countries to legitimize their conquest and colonize many countries in Asia and Africa. And seas as the only way that the European countries to explore

and find a new world to become a colony, has been very crucial to regulate and assure that they have the legal access to explore the ocean. Therefore for hundreds of years, Hugo Grotius's doctrine on Mare Liberum has been very crucial to legitimizing access to colonialism. Therefore there is a different perspective of how the European view international law and how the third world in Asia and Africa views International law. In the ninetieth century, International law has been successfully promoting and increases many western economies by legitimizing colonialism. However, on the other hand, many Africa and Asian countries including Indonesia has seen international law as a tool that is used to suppressed and colonize their nation, and it becomes the source of poverty even for many years after the colonization period has ended.

This article, therefore, will explore Indonesia's struggle in shaping the international law of the sea, to make sure that there will be a new international law that promotes justice and equality for Indonesia as archipelagic states which have a vast water area to get the benefit of the ocean so it will promote economic development for Indonesia.

Nusantara and the Ocean Civilization

Throughout the history of the Nusantara archipelago (Before it became Indonesia), the ocean has always been a very important source of power, trade, and security. Before the colonization period, the earliest kingdoms of Majapahit and Sriwijaya have utilized the ocean not only as a source of power to spread their influence in Asia but also to control trade and marine resources. Indonesia's strategic location between China and India trade routes has contributed significantly to shaping Indonesian maritime culture and identity. Therefore, its geographical nature has shaped the archipelago as a strong maritime kingdom.

However, all the maritime vision in Nusantara is gone when the Dutch colonial government comes to governing. The Dutch colonial government precluded the archipelago from their maritime outlook, to become an agricultural-based nation. Locals in Indonesia has forced to harvest spices and other agricultural products to support the Dutch colonial government. Therefore, for more than 300 years since Nusantara being colonized by the Dutch, they lost their maritime identity that before has been very crucial in supporting their economy.

Early Indonesia Independence and International Law

In 1945, Indonesia has successfully proclaimed its Independence from the Dutch Government. The proclamation remains the most historic moment in Indonesia's history. The short speeches gave by the later- President Soekarno; the founding father of Indonesia has changed the nation's history forever. A country that has been colonized by the Dutch for more than three hundred years now can breathe freely as an independent nation. However, it does not mean that Indonesia immediately got all the ocean resources and could build their economy. The struggle was real and international law very much plays a significant role in Indonesia to build its nationhood. Even though it is debatable whether recognition from other states is an essential part of a newly independent state, Indonesia sent a delegation to Egypt to announce that Indonesia has proclaimed its independence. And Egypt became the first country that recognizes Indonesia's independence, followed by India and many other Arabs, Asia, and African countries.

In the early years of Indonesia's independence, Indonesia has managed to show to the world its existence. On September 28, 1950, Indonesia was admitted as the 60th Member State of the

United Nations. And under the leadership of President Soekarno, Indonesia secured strategic positions between western blocs led by the United States and the communist bloc. Indonesia also has a free and active foreign policy principle in which Indonesia believes it should not lean towards any side between western or communist bloc, but instead Indonesia should maintain a neutral foreign policy that should be based on Indonesia's national interest.

Bandung Conference and International Law

President Soekarno at that time is one of the most influential leaders from the newly independent states. Along with Jawaharlal Nehru form India, Kwame Nkrumah from Ghana, Gamal Abdel Nasser from Egypt, Josip Broz Tito from Yugoslavia, and some other newly independent states leaders were creating a non-bloc movement that becomes a very important move in the world politics. And in April 1955, Indonesia along with Burma (Myanmar) Pakistan, Sri Lanka, and India hosted a historic conference in Bandung, Indonesia. The Bandung conference then becomes a groundbreaking event that shapes the new world history and also the history of international law. The event was a major success where twenty-nine countries participated in the conference and it represents 1.5 billion people or 54% of the world population at that time.

The conference was aimed to oppose colonialism and neocolonialism by any nation as well as to promote Asia and Africa's economic and cultural cooperation. The conference turns out gave more than just that. It also gave a major intellectual impact on many intellectuals in Asia and Africa to rethink the current international legal order. And to think about how to create a more just international legal order. Many scholars, therefore, regarded the conference as the birthplace of the third world approach to international law (TWAIL). As a result, the conference has a major impact of the creation of many international events such as Non-Aligned Movement (NAM), United Nations Conference on Trade and Development (UNCTAD), New International Economic Order (NIEO) and also to create the more justice legal regime for the world oceans. A legal regime that could give more benefit for the newly independent states to be able to utilize and the resources of the ocean to promote their economic development.

Djuanda Declaration

In 1957, two years after the successful Bandung conference organized in Bandung Indonesia, there was another major event in Indonesia struggle in shaping the new legal order for the oceans, which is the Djuanda Declaration. It was started when Prime Minister Djuanda realized that the geographical nature of Indonesia that consists of thousands of islands create a threat because that Indonesia was only entitled to very limited territorial water that surrounding each island, and major warship from maritime countries was often come and passing through the Indonesian archipelagic waters legally. Therefore, at that time Chaerul Saleh, one of his cabinet ministers consulted and asked a young legal scholar, Mochtar Kusumaatmadja from Padjajaran University, who was just graduated from Yale University School of Law in the United States, whether it is possible or not to close all the waters between Indonesia's archipelagic islands, to avoid any foreign warship come across the archipelago. Mochtar Kusumaatmadja at that time immediately answered that it definitely cannot because it will breach freedom of navigation that has been regarded as international law. However, Chaerul Saleh argued the opposite, he argued that as a newly independent state, Indonesia should have the courage in creating a new international norm that will benefit from Indonesia, and force Mochtar to think a legal argument on how to make the vision legal under international law.

After long contemplation and discourse, Mochtar Kusumaatmadja advised the Prime Minister Djuanda to make a unilateral declaration that stipulated that Indonesia regarded that the surrounding waters of the Indonesian archipelago belong to Indonesia and therefore Indonesia has full sovereignty. The declaration then announced internationally. Soon after that, many major maritime states such as the United States, United Kingdom, Japan, The Netherlands, send a strong protest condemning that Indonesia's Djuanda Declaration has breach international law of the sea. Even though the Djuanda Declaration has provoked a lot of protests from many maritime states, it has become an inspiration and motivation for Indonesia to fight for the recognition of the archipelagic states' regime in the international law of the sea conference.

Indonesia and the United Nations Conference and the law of the Sea

The Djuanda Declaration has crate an Indonesia core national interest to fight in the United Nations Conference of the Law of the Sea, which is to be recognized as an archipelagic state. The first conference was started in 1958 in Geneva and concluded at the third conference in 1982 when the document signed in Kingston Jamaica. During the long conference, Indonesia was struggling through the diplomatic channel to be recognized as an archipelagic state under the UNCLOS. The countless bilateral meeting, informal cocktail, and exchange of diplomatic notes have been paid after the United Nations Convention on the law of the Sea (UNCLOS). Article 46 of UNCLOS defined an "archipelagic State" means a State constituted wholly by one or more archipelagos and may include other islands. Under the definitions, the archipelagic state's regime that has been fought by Indonesia for more than thirty years since the Djuanda Declaration is finally recognized under international law.

The UN conference on the law of the sea, as become one of the most important battlefields between the newly independent states and the established maritime states. Each of these states was fought for their interest to be recognized in International law. Many states fought to have more territorial sea, exclusive economic zone, and even the freedom of navigation. However one of the most successful regimes introduced by the convention is the common heritage of mankind. Which a Maltese Ambassador first introduced, Arvid Pardo who argued that the international seabed should be governed under the regime of the Common Heritage of Mankind. His proposal, which then accepted by UNCLOS, becomes one of the successful regimes for the third world to avoid a first come first serve basis which will benefit the developing states. Therefore, UNCLOS is often regarded as one of the most successful and important treaties not only for the newly independent developing states but also for the whole humankind.

Archipelagic State Concept a *Quid pro Quo*

Even though Indonesia has finally being recognized as an archipelagic state under UNCLOS, it is not a zero-sum game. There was a bargain between Indonesia, neighboring states, and other maritime states so they finally agreed to recognize the archipelagic state's regime under UNCLOS. There are at least four obligations that have to be fulfilled. First, Indonesia has to designate an archipelagic sea-lanes passage in the Indonesian archipelagic waters as regulated under article 53 of UNCLOS, so that the establishment of archipelagic states regime does not mean a total prohibition of foreign vessels to pass in the Indonesian archipelagic waters. Foreign commercial vessels as well as warships are still allowed to pass the archipelagic waters limited to the designated archipelagic sea-lanes passage. Today, Indonesia has been designated three-archipelagic sea-lanes passage from north to south. However, there is an ongoing debate

on should or shouldn't Indonesia designate the east-west passage. Therefore some consider that Indonesia still partially fulfills the obligations.

The second and third obligation is mandated under Article 51 of UNCLOS, it is stipulated that archipelagic State shall respect existing agreements with other States and shall recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighboring States in certain areas falling within archipelagic waters. The second obligation is Indonesia should respect an agreement that existed before the recognition of the archipelagic state. So that it will not breach any agreement with any countries. The third is the obligation to respect traditional fishing rights in the Indonesian archipelagic waters. Regarding these obligations, Indonesia has concluded a bilateral agreement with Malaysia. The bilateral agreement allows Malaysian traditional fishermen to catch fish in Indonesian archipelagic waters. Both Indonesia and Malaysia have agreed upon the term and conditions such as what is considered as traditional fishing rights, what are the fishing tools, and where it is should be located.

The last and the most controversial obligations are the obligations to respect other legitimate activities in the archipelagic states. Singapore argued that obligation was initially made to accommodate Singapore's interest in the traditional military exercise. In which at that time Singapore proposes that traditional military exercise should be included in article 51. However, Indonesia at that time rejected the Singapore proposal and put the ambiguous provisions instead. During the negotiations, Indonesia argued that to put a traditional military exercise is a very sensitive topic, therefore Indonesia argued that it is better to put an ambiguous term, and in the future, Indonesia might negotiate a bilateral agreement with Singapore that allows the traditional military exercise in a particular Indonesia's archipelagic water.

That being said, Indonesia's success being recognized as an archipelagic state during the UN conference on the law of the sea is not only a one-sided victory. Some obligations have to be fulfilled by Indonesia.

The Legal Use of Force under International Law: Ancient India's Contribution to Customary Practice on 'Just War' Doctrine

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Historically, kingdoms that were militarily and economically strong resort to war to achieve the political and economic objectives with the kingdoms that were less developed on these aspects. Wars were launched on personal reasons of the rulers of the kingdom and their respective interests. In the writings of St Augustine and St Thomas Aquinas, war could be a just cause to avenge injuries suffered and could be waged by a sovereign authority. However, the transformation in this principle in the fifteenth century can be seen in the writings of Hugo Grotius and Francisco de Vittoria, who advocated for the justifiable causes for war. The Charter of the United Nations too refrain the members of the international communities from the threat or the use of force against the territorial integrity or political independence of the states. This concept of 'war as a last resort' can be traced to customary practice in ancient India. The prevailing concept in ancient India was that winning war was a glorious achievement for the king and fleeing the battlefield was worse than death. However, it can be seen that the resort to war should be carried out only after all other measures have been tried and failed. *Yajnavalkya* mentions that war should be the last resort. Further, according to *Manusmriti* victories in war were not advised and not a subject to be highly spoken. The use of war to subjugate another party can only be carried out after the failure of other measures like *sama*, *bheda* and *dana*. *Sukraniti* defines war as an affair between two parties to satisfy their rival interests when all other measures to bring peace had failed. The principles behind this ancient Indian customary practice is that war is against the principles of humanitarian law as loss of lives and resources do not produce a positive result in proportion to the loss that takes place in a battlefield. This paper will examine the origin of the concept of the just war theory from a duty based jurisprudence and its practice in ancient India and argues that the warfare was founded on the duty based principles of *dharma yuddha* on the humanitarian values in warfare.