

For my parents, Seah Say Keow and Quek Soh Choo

Acknowledgements

I owe the completion of this doctoral project to my family's assistance. My parents, in particular, gave unstinting support. Their courage, imagination, and constant tending contributed to my growth as a man. My sister is a pillar. I am very grateful and humbled. It is entirely proper to put on record that my family is pivotal in facilitating my completion of this arduous journey.

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As I settle into another life, far away from the United Kingdom, I am struck by the serendipity of meeting gifted educators during my time in this country. In this lifetime, I am lucky to be accorded this privilege because it is undeniably the most rewarding part of my doctoral journey.

**The ASEAN Character of Non-Intervention: A Study of the
Relationship between General and Regional International
Law**

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I, Daniel Chin Aun Seah, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

Abstract

How has the practice of the Association of Southeast Asian Nations (ASEAN) created a distinctive regional law of non-intervention, and how has general international law influenced the content of that regional law? Answering this question is the aim of this study. The core proposition is that a distinctive regional law of non-intervention is made by ASEAN, which is made possible by general international law, but this influence of general international law can also constrain the scope of regional law. This core proposition is advanced as follows. First, the study demonstrates how an international organisation (such as ASEAN) can make regional law based on the general rules of international law, particularly in relation to an international organisation's separate legal personality. Second, it examines regional law-making, with particular reference to non-intervention's content, which is facilitated by United Nations organs: non-intervention's content is variable because it requires making choices, which are made by reference to the general rules of international law. Third, the core proposition is supported by a case study that analyses how ASEAN (organs) used the general rules of international law (especially in relation to separate legal personality) to create a distinctive regional law of non-intervention, during the long Kampuchean conflict (1978-1990). Fourth, the core proposition is advanced through another case study of ASEAN practice regarding Myanmar: it highlights diminutions in non-intervention's content, in Articles 2 and 10 of the Treaty of Amity and Cooperation (1976) when evaluated against emerging rules general international law, such as the International Law Commission's work on protecting persons during disasters. Fifth, in conclusion, this study explains the implications of its core proposition. Prospectively, regional law would still be distinctively made by ASEAN, but on a narrower basis. This is because of geopolitical changes within Southeast Asia, between the United States and China. Consequently, it is foreseeable that some ASEAN member States might not identify themselves as belonging to Southeast Asia anymore.

Impact Statement

Background

This thesis provides an analytical framework to identify and assess the content of regional international law, which is properly made by ASEAN as a separate legal person at international law. This goal of evaluating the laws that ASEAN can create to advance its regional integration is of general significance as a case-study in international law-making. It is important more specifically as the ASEAN project enters a potentially long period of contestation and uncertainty brought about by emerging rival models of regional cooperation led by China.

National and International Impact

Some of the findings in this thesis have created impact in Southeast Asia, East Asia, and the European Union as follows:

- Contributed to the National University of Singapore's Centre for International Law marquee project on ASEAN Integration through Law project. My research on the ASEAN Charter has been used in three monographs produced under the auspices of this project which studied treaty law-making, compliance, and the conduct of external relations by ASEAN.
- Contributed to the European Union's Frame project, a large-scale, collaborative project which examined the effects of its policies in its relations with other international organisations. My research on the nature of the Treaty of Amity & Cooperation in Southeast Asia (TAC) was used in this project's findings on the engagement of the European Union with ASEAN.
- Engaged knowledge production in other areas of law. My research on the TAC was used by Bing Bing Jia (China) in the context of studying Article 281, UNCLOS, and Maartje de Visser (Singapore) to examine comparative constitutional approaches by the judiciaries in Southeast Asia.

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Acronyms and Abbreviations

AADMER	ASEAN Agreement on Disaster Management and Emergency Response
AALCO	Asian-African Legal Consultative Organization
ACDM	ASEAN Committee on Disaster Management
AHA	ASEAN Coordinating Centre for Humanitarian Assistance
AJIL	American Journal of International Law
ALRC	Asian Legal Resource Centre
AMM	ASEAN Minister's Meeting
APEC	The Asia-Pacific Economic Cooperation Forum
ARF	ASEAN Regional Forum
ARIO	ILC Draft Articles on the Responsibility of International Organizations
ARS	ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts
ASA	Association of Southeast Asia
ASC	ASEAN Standing Committee
ASEAN	Association of Southeast Asian Nations
ASIL	American Society of International Law
ATNIA	Australian Treaties National Interest Analysis
BFDA	Burmese Freedom and Democracy Act
BIICL	British Institute of International and Comparative Law
BYIL	British Yearbook of International Law
CCP	Chinese Communist Party
CFSP	Common Foreign and Security Policy
CGDK	Coalition Government of Democratic Kampuchea
CIA	Central Intelligence Agency
CIL	Centre for International Law
CJIL	Chicago Journal of International Law
CLCS	Commission on the Limits of the Continental Shelf
COMECON	Council for Mutual Economic Assistance
COP	Conference of the Parties
CPM	Communist Party of Malay
CPT	Communist Party of Thailand
CUP	Cambridge University Press
DRC	Democratic Republic of Congo
EEC	European Economic Community
EJIL	European Journal of International Law
ERAT	ASEAN Emergency Rapid Assessment Team
GAOR	General Assembly Official Records
IAEA	International Atomic Energy Agency
ICCPR	International Convention for Civil and Political Rights
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
IFRC	International Federation of the Red Cross
ILC	International Law Commission

ILM	International Legal Materials
ILO	International Labour Organisation
ISEAS	Institute of Southeast Asian Studies
ISIL	Islamic State of Iraq and the Levant
JICL	Journal of International and Comparative Law
JIL	Journal of International Law
KPNLF	Khmer People's National Liberation Front
LNTS	League of Nations Treaty Series
MARPOL	International Convention for the Prevention of Pollution from Ships
MFA	Ministry of Foreign Affairs
MOU	Memorandum of Understanding
MPEPIL	Max Planck Encyclopedia of Public International Law
NAM	Non-Aligned Movement
NLB	National Library Board
NLD	National League for Democracy
NUS	National University of Singapore
OAS	Organization of African States
OED	Oxford English Dictionary
OJLS	Oxford Journal of Legal Studies
OUP	Oxford University Press
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PDR	Lao People's Democratic Republic
PRK	People's Republic of Kampuchea
RIAA	Reports of International Arbitral Awards
SASOP	ASEAN Standby Arrangements and Standard Operating Procedure
SEAC	South-East Asia Command
SLORC	State Law and Order Restoration Council
SPDC	State Peace and Development Council
TAC	Treaty of Amity and Cooperation
TCG	Tripartite Core Group
TWAIL	Third World Approach to International Law
UNCLOS	United Nations Convention on the Law of the Sea
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNTAC	United Nations Transitional Authority in Cambodia
UNTS	United Nations Treaty Series
UNYB	United Nations Yearbook
USA	United States of America
USSR	Union of Socialist Soviet Republics
VCLT	Vienna Convention on the Law of Treaties
ZOPFAN	Zone of Peace, Freedom and Neutrality

What's in a name? That which we call a rose by any other name would smell as sweet. Some names like "rose", acknowledge what exists. Others, like "unicorn", create what otherwise would not exist. In between lies names that simultaneously describe and invent reality. "Southeast Asia" is one of these.¹

In brief, because of Orientalism the Orient was not (and is not) a free subject of thought or action.²

The Judgment seeks to rehabilitate the history of peoples and nations by constructing its edifice on the axiomatic bases of international law...³

¹ Donald K Emerson, "'Southeast Asia': What's in a Name?" (1984) 15 *Journal of Southeast Asian Studies* 1 (No. 1) at 1.

² Edward Said, *Orientalism* (USA: Vintage Books, 1994) at 3.

³ Declaration by Judge Ranjeva, *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (Judgment) [2008] ICJ Rep 12 at para 4 at 103.

Chapter One

A STUDY OF NON-INTERVENTION WITH ASEAN CHARACTER

I. Introduction

1) A Contribution to the Field

How has the practice of the Association of Southeast Asian Nations (ASEAN) created a distinctive regional law of non-intervention, and how has general international law influenced the development and content of that regional law? Answering this question is the aim of this study.

The contribution of this study is its focus on the acts of ASEAN as an international organisation that I shall call “acts with an ASEAN character”, as opposed to the acts of ASEAN states individually, a point to which I return below. These acts with an ASEAN character make a regional (international) law of non-intervention, which is distinctive, because this study focuses on non-intervention’s legal content as created by ASEAN, a separate legal person. In the extant literature regarding non-intervention, there is no distinction between acts with an ASEAN character, and acts of individual ASEAN States (i.e., who are not acting within the auspices of ASEAN).

However, the content of a regional law of non-intervention also develops and changes under the influence of general international law. In this respect, powerful external actors, especially the United States and China, shape the rules of general international law, which is in dynamic tension with the making of a distinctive regional law. Put differently, it is possible to ascertain a distinctive regional law of non-intervention (which applies to the region of Southeast Asia) precisely because general international law provides an analytical framework for the discernment of such rules. Therefore, while general international law makes a distinctive regional law possible, it can also constrain the scope of regional law. To this extent, then, the core proposition of this study is that the regional law of non-intervention is influenced by the rules of general international law.

The following chapters will progressively establish this core proposition. This chapter, however, starts with the problems of the extant literature regarding non-intervention. First, we start with a discussion of the various meanings regarding non-intervention. Second, we consider the specific ways in which the term non-intervention had been used with respect to ASEAN: the literature here is principally studied from an International Relations perspective.

One main problem, it is argued, with the International Relations literature (IR literature) is that the many studies regarding non-intervention are not studies of acts by ASEAN, an international organisation with separate legal personality. Rather these have been studies of disparate acts of individual states acting in their separate capacities. The extensive IR literature has been uncritically assimilated in legal studies of non-intervention, and the implications of this approach are discussed.

2) The Scope of Non-Intervention at General International Law

To appreciate the extent in which the legal literature had assimilated the weight and relevance of the IR literature's contribution with respect to non-intervention, it is useful to outline, as a basis for comparison with the IR literature, the scope of non-intervention at general international law. To this extent, it would appear that the vague nature of non-intervention's scope is difficult to define at general international law.¹ Therefore, this difficulty in defining non-intervention's scope at general international law, because of its vagueness, contributed to the assimilation of the IR literature's account of non-intervention concerning ASEAN.

However, a starting point is Article 2(7) of the UN Charter, which provides that: "nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII." The term "essentially within the domestic jurisdiction" has become associated with non-intervention in the sense that intervention by a State or international organisation in the "internal affairs" of another sovereign State encroaches upon matters which belong to its sovereign exercise of competence. This statement acknowledges that the prescriptive, legislative, and adjudicatory jurisdictions of a State are potentially engaged (subject to the limits imposed by general international law).²

However, the term "domestic jurisdiction" in the context of non-intervention is different from the concept of "jurisdiction" at general international law. At general international law, "jurisdiction" concerns what falls within the authority of one state rather than another state (although sometimes authority is given to more than one state). On the other hand, "domestic jurisdiction" in Article 2(7), UN Charter, concern issues which

¹ See further discussion of vagueness in Chapter Three, Section I.

² Generally see Alex Mills, "Rethinking Jurisdiction in International Law", (2014) 84 BYIL 187.

fall within the authority of a state as opposed to being a matter of international concern. Furthermore, Article 2(7), UN Charter, strictly relates to the limits of the UN's competence to intervene in the affairs of a state, and not the limits on the powers of states to intervene in each other. In contrast, the Friendly Relations Declaration (1970) contains provisions which involve both forms of non-intervention (i.e., intervention by the UN and between States, respectively).³

Arguably, therefore, the reference to "domestic jurisdiction" in Article 2(7), UN Charter, is a vertical division of authority, but "jurisdiction" at general international law is horizontal. It is against this brief survey of the various uses of jurisdiction that non-intervention which prohibits interventions in the "internal affairs" of a sovereign State, as it is used in the Treaty of Amity and Cooperation (TAC), and interventions which are "essentially within the domestic jurisdiction" of a sovereign State are used interchangeably.

Both expressions (i.e., "internal affairs and domestic jurisdiction") are not legal terms of art, especially if we consider the background against which the term "domestic jurisdiction" arose in Article 15(8) of the League of Nations Covenant (1920).⁴ If parties under the Covenant failed to resolve their disputes through diplomatic negotiations, there was recourse to arbitration or judicial process under Articles 12-13. In lieu of all three avenues of pacific settlement of disputes, Article 15(8) finally allowed the League of Nations Council to recommend a settlement if all its members (without the involvement of the disputing parties) voted unanimously in favour. Importantly, however, Article 15(8) required the Council to decline to make a recommendation of a settlement if the dispute involved a State's "domestic jurisdiction". Effectively, therefore, Article 15(8) preserved a State's right of war under the League of Nations Covenant.

One example, however, of content excluded from Article 15(8) concerns a sovereign State's jurisdiction, regulation and treatment of its nationals on another State's territory. In the *Nationality Decrees* case (1923),⁵ the PCIJ held that the dispute between France and the UK over the treatment of French nationals in Tunis-Morocco did not fall under matters essentially under France's "domestic jurisdiction". The

³ See further my discussion of the Friendly Relations Declaration in Chapter Three, Section V.

⁴ League of Nations, OJ Special Supplement 3 (1920).

⁵ *Nationality Decrees Issued in Tunis and Morocco (French Zone)* (1923) PCIJ Series B No 4 (7th February 1923).

reason is because France had reduced her discretion regarding the protectorates of Tunis-Morocco by entering into international engagements with the UK, which the latter was legally entitled to invoke. The PCIJ stated that the question of what constituted a matter which was within the domestic jurisdiction of a State is an “essentially relative question”, which depends on the “development of international relations”. This is an important point because the scope of a State’s domestic jurisdiction, which is protected by non-intervention, and its scope is subject to the developments at general international law.

Another point related to the scope of non-intervention is the vagueness of its content in descriptive and evaluative terms. Put simply, the content of a State’s internal affairs (or domestic jurisdiction) is drafted in a descriptively or evaluatively vague manner, which must be interpreted in relation to the general rules of international law, which engage the legal problem at a given point in time. I illustrate these considerations in the area of Myanmar’s discretion to act during Cyclone Nargis in Chapter Five. For now, it is useful simply to bear in mind the scope of non-intervention, as a matter of general international law, before we consider, by comparison, the IR literature’s account of non-intervention in terms of its relation to the ASEAN Way, a diplomatic practice.

Returning again to Article 2(7), UN Charter, the purpose of this provision concerns the Security Council’s authority under Chapter VII in the pacific settlement of disputes. The term “essentially within the domestic jurisdiction” recognises the exception being accorded to a State’s sovereignty although the Security Council is able to determine the existence of a threat to international peace and security. Article 2(7) of the UN Charter, therefore, is designed to strike a difficult balance between the Security Council’s legal authority to take enforcement measures under Chapter VII against prohibitions by the Security Council to recommend measures which fall within the “domestic jurisdiction” of that State.

Of course, the content of what constitutes matters which are “essentially within the domestic jurisdiction” of that State to trigger the prohibitions against the Security Council are not defined. Indeed, as the UN developed, the Security Council’s Chapter VII powers have curtailed the “domestic jurisdiction” of a State, as attested to, for example, in the Council’s determination that Libya’s actions concerning the destruction of Pan Am Flight 103 over Lockerbie, on 21 December 1988, were a threat

to international peace,⁶ and that Libyan nationals should be extradited under UN Security Council Resolution 731.⁷ Libya's argument was that it had already complied with the Montreal Convention by electing to try its own nationals in lieu of extradition. In short, the Security Council had limited the domestic jurisdiction of Libya to decide on the best cause of action in accordance with the Montreal Convention.

3) Meaning of Non-Intervention and Method of this Study

Having explained the scope of non-intervention at general international law, this part further explains the various uses of the term "non-intervention". Because the term has not been used consistently, the IR literature also studied non-intervention in a particular way, mainly from the perspective of acts by ASEAN States. This explanation matters because it clarifies the point that the (legal) rule of non-intervention can also be applied when assessing the action of one ASEAN state against each other. But these are not acts with an ASEAN character. Acts with an ASEAN character are relevant to the formation of regional rules of non-intervention, which are carried out through ASEAN organs.

The importance of this distinction (between acts by ASEAN States and acts with an ASEAN character) to advance a distinctive regional law of non-intervention are discussed further below. For now, it is enough to note that the IR literature's lack of clarity in making this distinction complicates the legal effort in ascertaining the scope of non-intervention's meaning, which it is now necessary to discuss.

Non-intervention is not a legal term of art. At general international law,⁸ non-intervention is a "rule", "principle",⁹ "norm", or even all of them in the same sentence: "for governments, scholars and international organs alike, the "rule" against interference in internal politics seems to be an article of faith; but despite the

⁶ S/Res/748 (31 March 1992).

⁷ S/Res/731 (21 January 1992).

⁸ There is no conclusive definition of "general international law": in this study, I broadly define the word "general" in "general international law" as legal rules on the international plane, which include (but are not limited to) treaties, custom, and principles, which can be determined by reference to legality. In "Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law" (2006) ILC Yearbook Vol II Part 2 footnote 976 at 179 ("Fragmentation Conclusions"), the International Law Commission (ILC) concluded that, particularly for its work on fragmentation, general international law can be defined in relation to its "logical counterpart", special law (i.e., *lex specialis* as a technique of interpretation and conflict resolution), a distinction that "lawyers are usually able to operate...by reference to the context in which it appears".

⁹ In the *Nicaragua* case, the International Court of Justice began its substantive analysis of non-intervention this way: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 14 ("*Nicaragua*"), para 202 at 106.

frequency of its incantation in international discourse, how the *norm* applies to non-forcible conduct is inadequately understood”.¹⁰

On other occasions, it is called the principle of non-*interference*, as the International Court of Justice (ICJ) in *Nicaragua* refer to: “The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference”.¹¹ Therefore, the legal literature suggests that non-intervention and non-interference seem to be used interchangeably, with the possibility that non-interference is a broader prohibition than non-intervention.¹² As one commentator states: “This policy of “non-interference” was turned into a legal principle when ASEAN states adopted the Treaty of Amity and Cooperation in Southeast Asia in 1976. The difference in terminology adopted - “non-interference”, rather than “non-intervention” - appears significant...it is arguable that the principle of “non-interference” adopted by ASEAN is distinguishable from the principle of “non-intervention”, even prohibiting otherwise lawful forms of interference that would not constitute an “intervention”. Even though this principle of non-interference does not apply outside ASEAN, other Asian states have traditionally abided by ASEAN’s principle of non-interference in dealing with any ASEAN Member States”.¹³

Nevertheless, however non-intervention’s status (or non-interference’s status) is characterised,¹⁴ a key point in this study is that a regional law of non-intervention could still be created by ASEAN practice. In other words, because non-intervention’s

¹⁰ Lori Damrosch, “Politics Across Borders: Non Intervention and Non Forcible Influence Over Domestic Affairs” (1989) 83 AJIL 1.

¹¹ *Nicaragua*, para 202 at 106 (n9).

¹² Maziar Jamnejad & Michael Wood, “The Principle of Non-intervention” (2009) 22 *Leiden Journal of International Law* 345 at 347; Sean Watts, “Low-Intensity Cyber Operations and the Principle of Non-Intervention” in *Cyber War: Law and Ethics for Virtual Conflicts* (Jens David Ohlin, Kevin Govern, and Claire Finkelstein, eds) (Oxford: OUP, 2015) 240 at 255.

¹³ Hitoshi Nasu, “Revisiting the Principle of Non-Intervention: A Structural Principle of International Law or a Political Obstacle to Regional Security in Asia?” (2013) 1 *Asian Journal of International Law* 25 (“Nasu”) at 36.

¹⁴ Furthermore, this study does not examine if non-intervention by ASEAN is *lex specialis*. Broadly, “*lex specialis*” means that when “two or more norms deal with the same subject matter, priority should be given to the the norm that is more specific”: see *Fragmentation Conclusions*, para 5 at 178 (n8). In ILC, “*Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (Report of the Study Group of the International Law Commission)*” (13 April 2006) UN Doc A/CN.4/L.682 (“*Fragmentation Report*”), paras 111-112 at 60-61, the ILC also added that a rule can be special or general in relation to a subject matter (non-intervention, for example), or with regard to the actors of the subject matter whose actions are regulated by the special or general rule (*Fragmentation Report*, p 669). Therefore, it is immaterial to this study’s research question whether non-intervention is *lex specialis*, simply because the special law’s content must be concrete (enough), before difficult distinctions can be drawn between general and special law. Finally, see *Fragmentation Conclusions*, para 4 at 178 (n8): *lex specialis* does not extinguish general international law. Indeed, the established principle of harmonisation applies to interpret potentially conflicting norms, on a specific issue, into a single set of compatible obligations. On doubts concerning *lex specialis*, generally see Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford: OUP, 2013) (“Milanovic”) at 249-261 and Anja Lindroos, “Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*” (2005) 74 *Nordic Journal of International Law* 27.

content is a moving target, which is determined against extant rules at general international law, the ASEAN practice regarding non-intervention arguably reflects regional custom or arguably affects the interpretation of ASEAN's treaty obligations.

With respect to ASEAN, then, this study's core proposition is that ASEAN can create a distinctive regional law of non-intervention. However, it is harder for ASEAN to sustain this distinctive regional content of non-intervention because it is influenced by and subject to general international law. On these grounds and for brevity, therefore, I simply use the expression "non-intervention" throughout this study.

Non-intervention is also a placeholder, i.e., a concept which is used to describe and evaluate different aspects of ASEAN.¹⁵ Most commonly, non-intervention is understood as an ingredient of the "ASEAN Way".¹⁶ The "ASEAN Way" is an ingrained diplomatic practice which emphasises a particular form of elite interaction between politicians of ASEAN member States, in which interventions in other member States' internal affairs are apparently taboo.¹⁷ In short, non-intervention is used as a starting point to study the frequent exceptions to this diplomatic practice.

To date, the IR literature on non-intervention concentrates on studying how much of non-intervention's content remains at general international law (if anything), and its implications (if any) to the "ASEAN Way" or ASEAN in general.¹⁸ Despite this canonical treatment of non-intervention in the IR literature, these are not legal assessments of non-intervention with an ASEAN character. By "character", I mean the invocation of and application by ASEAN on non-intervention, acting as an international organisation, with a separate legal personality distinct from its member States.¹⁹ Hence an ASEAN "character" in this study refers to a regional law of non-intervention, whose content is assessed against the rules of general international law.²⁰

In contrast, the IR literature usefully illustrates various aspects of non-intervention, as practised by different States in Southeast Asia, acting in their sovereign capacities as independent States.²¹ Though these States are also members of ASEAN, their

¹⁵ See Chapter One, Sections II and III.

¹⁶ See Chapter One, Section III.

¹⁷ Generally Hiro Katsumata, "Reconstruction of Diplomatic Norms in Southeast Asia: The Case for Strict Adherence to the 'ASEAN Way'" (2003) 25 *Contemporary Southeast Asia* 104.

¹⁸ See Sections II to V.

¹⁹ I.e., the objective legal personality of an international organisation is inferred from its powers and purposes: *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174 at 178-180. For discussion, see Chapter II, Section III.

²⁰ See above, n8.

²¹ Chapter One, Sections II to V.

actions which implicate non-intervention are not conducted under ASEAN's auspices or through its organs. I refer to these situations as acts by *ASEAN States*, referring to States which are acting in their individual, sovereign capacities.

On the other hand, what I term acts of *ASEAN member States*, through their representatives acting within ASEAN organs, are legally distinct. Such acts involve the exercise of ASEAN's separate personality, through ASEAN. Such actions might be said to have an ASEAN character.

Accordingly, this study offers a fresh perspective on the law of non-intervention with a focus on its ASEAN character. The focus is on ASEAN's practice of non-intervention, and not that of ASEAN States. This study examines how ASEAN, an international organisation, applies the basic constructs of general international law, i.e., separate legal personality and the sources of international law.²² It evaluates how ASEAN practice, through its organs, on non-intervention is legally distinct as regional law, and the extent in which general international law influences this distinct regional law.

Today "Southeast Asia" is a geographically recognised region.²³ However, it is not merely the fact of geographical contiguity that makes "Southeast Asia" a region.²⁴ Because the people who live inside this area, i.e., the "locals", had no reason to see themselves as being related, in any way, during a long period of colonial rule, it was the "outsiders" who legally identified and defined a region on behalf of the "locals".²⁵

Therefore, I argue, regional integration did not begin when the ASEAN Charter came into force in 2008.²⁶ It did not even start when ASEAN was founded in 1967.²⁷ It sprang into life before that, during the Second World War, when outsiders invented "Southeast Asia" as a name for exigent and not disinterested reasons.²⁸ The expression "Southeast Asia" is an external invention, an area which is made "real" through rules of general international law.

²²See James Crawford and Martti Koskenniemi, *The Cambridge Companion to International Law* (Cambridge: CUP, 2012) ("Crawford and Koskenniemi") at 14.

²³Charter of the Association of Southeast Asian Nations (adopted 20 November 2007, entered into force 15 December 2008) 2624 UNTS 223 ("*ASEAN Charter*"), Article 6(2).

²⁴For discussion, see Chapter Two, Section V.

²⁵Wang Gungwu, "Two Perspectives of Southeast Asian Studies: Singapore and China" in *Locating Southeast Asia: Geographies of Knowledge and Politics of Space* (Paul Kratoska, Remco Raben & Henk Schulte Nordholt, eds) (Singapore: NUS Press, 2006) 60 at 61.

²⁶See Chapter Two, Section V.

²⁷Declaration constituting an agreement establishing the Association of South-East Asian Nations (signed 8 August 1967) 1331 UNTS 235 ("*Bangkok Declaration*").

²⁸For discussion, see Chapter Two, Section V.

For two reasons, this focus on the ASEAN character of non-intervention matters. First, there is still no extensive *legal* study on non-intervention in ASEAN practice. Indeed, as I explain below,²⁹ there are signs that the international legal scholarship on point has been distorted by assimilating the IR literature.³⁰ A focus on the ASEAN character of non-intervention, based on the general rules of international law, will offer new perspectives on how non-intervention's content is made, as regional law, through ASEAN.

The real extent of non-intervention's content with an ASEAN character is far more limited, it will be shown, than in the IR literature's account. Significantly, viewed through the lens of an international organisation's separate legal personality, a focus on the ASEAN character of non-intervention will reshape our understanding of regional law-making in Southeast Asia. The regional law of non-intervention is intertwined with general international law. This relationship raises problems for the prospects of a distinct regional law developing and enduring at international law.³¹

Second, this study is a timely foil to the recent growth in "regional" international legal scholarship,³² which seeks to create indigenous knowledge³³ on ASEAN. However, as the "local" scholars in Southeast Asian studies have long learnt,³⁴ our means of understanding and explaining knowledge production are not fully "local".³⁵ Any difference of attitudes regarding this particular form of knowledge production must be transformed, as a mental exercise, when local scholars write about the present.³⁶

²⁹ See Chapter One, Section V.

³⁰ See Chapter One, Section V for the literature cited therein.

³¹ See Conclusions in Chapter Six.

³² A prominent and sustained effort is arguably conducted by the Centre for International Law (CIL) in Singapore, which was only established in 2009. Its scholarly output on ASEAN is prodigious and it is no longer practical to list its output here. At this writing, discrete monographs under the series, "*Integration through Law: The Role of Law and the Rule of Law in ASEAN Integration*" are being published by Cambridge University Press (CUP).

³³ The mission statement for its *Integration Through Law* project says it will "put in place the building blocks for an *authentic body* of ASEAN and Asian integration theory developed in and *with a sensitivity to the particularities and peculiarities of the Region and Continent*": available at <<https://cil.nus.edu.sg/wp-content/uploads/2009/10/Mission-Statement-CIL-ASEAN-Integration-through-Law-Project-12-Oct-2009.pdf>> at 4 (emphasis supplied)(accessed 1 May 2018).

³⁴ Generally Thum Pingtjin, "Southeast Asian Studies as a Form of Power" (2012) 62 *The Newsletter (International Institute for Asian Studies)* (Winter) 12; Ariel Heryanto, "Can There Be Southeast Asians in Southeast Asian Studies?" (2002) 5 *Moussons* 3.

³⁵ For an example, see the language in Malaysia's reliance on Grotius's account of the Johor Sultanate to support its historical claim to the Pedra Branca in *Counter-Memorial of Malaysia, Case Concerning Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (25 January 2005), para 29 at 18: "At time of the Dutch capture of the Portuguese vessel *Catarina* in 1604 on the shore of Johor, Hugo Grotius identified Johor as a Sultanate which 'for long had been considered a sovereign principality'."

³⁶ For instance, the CIL project seeks to develop a "*prolegomena*" for an Asian theory of Integration that, whilst informed by, is not just a crude cut-and-paste of, the experience of other regions, see <https://cil.nus.edu.sg/wp-content/uploads/2016/08/2.2-Project-Design_Mission-Statement.pdf> at 6-7 (accessed 1 May 2018). For a famous prolegomena of international law, see Hugo Grotius, *The Rights*

Through a Third World Approach to International Law (TWAIL), an approach which I shortly explain, this study shows how “regional” knowledge production on ASEAN’s legal efforts at regional integration is always evaluated against general international law.³⁷ These are “universal” standards,³⁸ although they remain largely European and Western standards of international law.³⁹ As an example, consider this striking statement by Cremona *et al* which appears to contribute to indigenous legal scholarship: “If one of the purposes of ASEAN external action is to promote its identity, then that identity is defined and shaped by these principles as well as by the ASEAN *acquis*” (original emphasis).⁴⁰

The word “*acquis*” (*acquis communautaire* for “Community patrimony”) has long been linked to the European Union’s integration.⁴¹ Cremona *et al* do not explain, in their well-meaning effort, why the word “*acquis*” is meaningful to ASEAN’s experience: it bears recalling that their monograph belongs to a series which purports to avoid a “crude cut-and-paste” of another region’s experiences, with sensitivity for “Asian particularities” and “cultural identities”.⁴²

The “local” scholars, therefore, will find it hard to escape from the universal standards, in legal and non-legal knowledge production, when they write about the present and future of ASEAN. In this respect, observe the universal and common grounds in the 2015 joint statement between the ASEAN Summit and the United States:

We recognise that our relationship is grounded in *shared principles*, including the principles and purposes of the Charter of the United Nations and the ASEAN Charter. We are committed to a rules-based approach in Asia, respect for international law and the peaceful resolution of disputes. Our partnership is committed to strengthening democracy, enhancing good governance and the rule of law,

of War and Peace (Vol 3, Book III) (Richard Tuck and Jean Barbeyrac eds, 2005 edn) (USA: Liberty Fund, 2005) at 1741.

³⁷ See the General Editors’ preface in the ASEAN Integration through Law series, for example, in Jacques Pelkmans’s *The ASEAN Economic Community: A Conceptual Approach* (Cambridge: CUP, 2016) at xiii: “...the project is sensitive to ‘non-Law’. It variously attempts to locate the appropriate province of the law in this experience. That is, not only the role of law, but also the areas that are and should remain outside the reach of legal institutionalization with due sensitivity to ASEAN and Asian particularism and political and cultural identities” (emphasis supplied). This point is broadly repeated in the CIL’s mission statement, at 2 (n33).

³⁸ The CIL’s mission statement, at 2 and 9 (n33), accepts this: “ASEAN Member States therefore envisage that *rules of law* and the *Rule of Law* will become a major feature in the future of ASEAN.” Its output will “examine the mechanisms proposed and available for ensuring implementation and compliance – with or without a dispute – the *sharp edge of the rule of law*”. The scholarship will advance “understanding of the *potential and constraints* to the role of law and the rule of law and the relationship between ASEAN law and the domestic law of its Member States” (emphasis supplied).

³⁹ See discussion in Chapter Three, Section III on the influence of Emmer de Vattel and Lassa Oppenheim on non-intervention’s “historical origins”.

⁴⁰ Marise Cremona, David Kleimann, Joris Larik, Rena Lee & Pascal Vennesson, *ASEAN’s External Agreements: Law, Practice and the Quest for Collective Action* (Cambridge: CUP, 2015) at 50.

⁴¹ Generally Carlo Curti Gialdino, “Some Reflections on the Acquis Communautaire” (1995) 32 *Common Market Law Review* 1089.

⁴² See above, n33.

promoting and protecting human rights and fundamental freedoms, encouraging the promotion of tolerance and moderation, and protecting the environment.⁴³

Against this background, therefore, this study adopts a TWAIL-influenced perspective.⁴⁴ A decentralised movement, TWAIL embodies a range of styles.⁴⁵ It is not a method or a theory.⁴⁶ One does not choose, but falls into TWAIL.⁴⁷ Self-awareness is a unifying interest of TWAIL, which is reflected in its concerns with the systemic bias, structural issues, and assimilation of international law.⁴⁸

In some ways, this study is a confessional experience of trying to understand and explain my relationship with the discipline of international law. While researching the history of non-intervention in legal terms, the initial aim was functional. It was necessary to give an overview of its origins, before moving to the content. However, I quickly learnt that reading about non-intervention's history is to participate, as an international lawyer, in shaping the history of non-intervention in Southeast Asia.⁴⁹

Accordingly, TWAIL permits some space to interrogate and understand the influence of general international law on the regional law of non-intervention with an ASEAN character. For these reasons, this study's examination of the ASEAN primary materials in the case studies are slightly different from a legal adviser's role in examining primary materials with a view to rendering legal advice. Some of these ASEAN primary materials, especially the early materials regarding the Kampuchean conflict (1978-1990), were not drafted by lawyers.

⁴³ Joint Statement on the Association of Southeast Asian Nations-United States Strategic Partnership (25 November 2015) between the United States Government and ASEAN Summit (i.e., Heads of State/Government of ASEAN member States) (emphasis supplied), available at <<https://www.whitehouse.gov/the-press-office/2015/11/21/joint-statement-asean-us-strategic-partnership>>.

⁴⁴ Antony Anghie, "TWAIL: Past and Future" (2008) 10 *International Community Law Review* 479 at 480: "...graduate study compels us, in a way, to work out our own truth, our own salvation."

⁴⁵ Generally see Anghie, *ibid* at 480; Sébastien Jodoin and Katherine Lofts, "What's Critical about Critical International Law? Reflections on the Emancipatory Potential of International Legal Scholarship" in *Critical International Law: Postrealism, Postcolonialism, and Transnationalism* (Prabhakar Singh and Benoît Mayer, eds) (Oxford: OUP, 2014) at 326.

⁴⁶ Steven Ratner and Anne-Marie Slaughter, "Appraising the Methods of International Law: A Prospectus for Readers" (1999) 93 *AJIL* 291 explain method and theory as follows: "the application of a conceptual apparatus or framework—a theory of international law—to the concrete problems faced in the international community" (at 292).

⁴⁷ Michael Fakhri, "Introduction - Questioning TWAIL's Agenda" (2012) 14 *Oregon Review of International Law* 1 at 12.

⁴⁸ Generally Karin Mickelson, "Taking Stock of TWAIL Histories" (2008) 10 *International Community Law Review* 355; M. Sornarajah, "Power and Justice: Third World Resistance in International Law" (2006) 10 *Singapore Yearbook of International Law* 19; Antony Anghie and B.S. Chimni, "Third World Approaches to International Law and Individual Responsibility in Internal Conflicts" (2003) 2 *Chinese Journal of International Law* 77.

⁴⁹ On this point, generally see Philip Allott, "Language, Method and the Nature of International Law" (1971) 45 *BYIL* 79 at 119: "the reader is not merely an audience: he is an active participant in the process of finding the law."

In reading the text of an ASEAN primary material, therefore, there is perhaps even more of what Daniel Bethlehem has described as the “invisible” conduct of deciding the law’s content, which a foreign legal adviser will normally face in legal practice.⁵⁰ It will be evident from the case studies below that “invisible” conduct does shape the final text of an ASEAN primary material. By “invisible”, then, I am referring to the “invisible conduct” of political decisions which were not made public but likely culminated in the text of (for example) an ASEAN treaty or ASEAN communiqué.

In other words, it is not helpful to focus exclusively on the plain meaning of the written text of an ASEAN primary material. This is because my study is not a written submission for trial and it is not prepared as a legal opinion for advisory purposes.⁵¹ To adapt Marko Milanovic’s remarks for this context,⁵² this study is an academic examination which can be more candid in suggesting that the influence of general international law on the regional content of non-intervention with an ASEAN character is inevitable.

II. The IR Literature’s Emphasis on Non-Intervention as an Aspect of the “ASEAN Way”

This section shows how the study of non-intervention in the IR literature does not address acts with an ASEAN character. This matters because there is little basis in the IR literature on which to determine, as a matter of law, the content of any distinctive regional law of non-intervention as created by ASEAN.

ASEAN was established on 8 August 1967.⁵³ The founding member States are Indonesia, Philippines, Malaysia, Singapore and Thailand. The turbulent nature of bilateral relations between these founding member States has been widely discussed.⁵⁴ ASEAN is not the first indigenous effort but it is still the most successful effort at creating an international organisation in Southeast Asia.⁵⁵ Its membership

⁵⁰ Generally see Daniel Bethlehem, “The Secret Life of International Law” (2012) 1 *Cambridge JICL* (Issue 1) 23.

⁵¹ For a different context, see Milanovic at 264 (n14).

⁵² Ibid: “It is not the purpose of this study to try to reconcile the conflicting strands of jurisprudence, particularly that of the Strasbourg court...Rather, as I see it, the benefit – perhaps the sole benefit – of an academic examination is that it can be more honest than that. The current Strasbourg approach is so flawed that it cannot be fixed with minor ‘clarification’ here or a ‘distinguishing’ there. What it needs is a radical surgery.”

⁵³ See Bangkok Declaration (n27).

⁵⁴ Generally see Chan Heng Chee, “Southeast Asia 1976: The Handling of Contradictions” (1977) 4 *Southeast Asian Affairs* 3 at 3; Michael Leifer, “Sources of Regional Conflict” and “Southeast Asia” in *Michael Leifer: Selected Works on Southeast Asia* (Chin Kin Wah & Leo Suryadinata eds) (Singapore: ISEAS, 2005) at 37 and 3 respectively.

⁵⁵ For discussion of earlier attempts, see Chapter Two, Section VI.

grew after Brunei was admitted on 7 January 1984.⁵⁶ Despite a decade of diplomatic antagonisms against ASEAN States, Vietnam became a member on 28 July 1995.⁵⁷ Laos and Myanmar became ASEAN Member States on 23 July 1997. Cambodia was the last to be admitted on 30 April 1999.⁵⁸ The ASEAN Charter, the organisation's constituent instrument in treaty form, entered into force on 15 December 2008.⁵⁹

Against this background, the IR literature studies non-intervention as a “political norm” which evolves within this larger group of member States.⁶⁰ As a political norm, non-intervention is explicitly linked to the “ASEAN Way”.⁶¹ This body of knowledge production on non-intervention, which is *related to* ASEAN,⁶² must be treated with care because it barely contains legal rules, from which to draw legal conclusions.

Crucially, the IR literature has not addressed non-intervention with an ASEAN character. As I explain in the case studies, non-intervention has developed regionally, i.e., an “ASEAN practice”, which can be framed, understood, and evaluated as the acts of a separate legal person, at general international law.

However, legal assessments of non-intervention with an ASEAN character have uncritically embraced the IR literature.⁶³ While it is difficult to measure its precise effect on the international legal scholarship that addresses ASEAN, I argue that the limited legal literature on point has effectively surrendered to the IR literature's knowledge production on non-intervention.⁶⁴ In this respect, James Crawford had warned against making undue approximations outside our disciplinary lane of

⁵⁶ 1984 Declaration of the Admission of Brunei Darussalam into ASEAN (7 January 1984), available at <<https://cil.nus.edu.sg/wp-content/uploads/formidable/18/1984-Declaration-of-the-Admission-of-Brunei-Darussalam-into-the-ASEAN.pdf>>.

⁵⁷ See further Chapter Four.

⁵⁸ Generally Rodolfo C Severino, *Southeast Asia in Search of an ASEAN Community: Insights from the Former ASEAN Secretary-General* (Singapore: ISEAS Publishing, 2006) at 53-70.

⁵⁹ Before the Charter entered into force, the only instrument which provided for the establishment of ASEAN and its organs was the Bangkok Declaration (n27): see Chapter Two. On the ASEAN Charter, generally see Daniel Seah, “The ASEAN Charter” (2009) 58 ICLQ 197.

⁶⁰ In the legal literature, it is common to use the word “normative”, which means all norms (including but not limited to rules, principles, and guidelines) which are based on shared understandings that shape state behaviour and can be assessed by reference to legality. For clarity, I will avoid this word as far as possible. On norms generally, see Jutta Bruneo and Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: CUP, 2010), at 350–352.

⁶¹ See Chapter One, Section III.

⁶² I use “related to” and not “about” ASEAN to stress that the IR literature makes no distinction between acts of ASEAN States from those of ASEAN member States: in Sections IV-V below, I explain the implications for this study. For now, it is adequate to bear in mind that the IR literature is referring to actions by Southeast Asian States who sometimes act within ASEAN, and sometimes do not.

⁶³ Generally see Michael Antolik, *ASEAN and the Diplomacy of Accommodation* (London: ME Sharpe, 1990); Mely Caballero-Anthony, *Regional Security in Southeast Asia: Beyond the ASEAN Way* (Singapore: ISEAS, 2005); Shaun Narine, “The English School and ASEAN” (2006) 19(2) *Pacific Review* 199.

⁶⁴ See Chapter One, Section V.

international law.⁶⁵ With due caution, therefore, my survey, in Sections III and IV, highlights a common theme of the IR literature, i.e., non-intervention's connection to the "ASEAN Way", and explains the limits of this approach for a legal study of non-intervention's content.

III. Constructivism: An Intellectual Response to Realism

1) Michael Leifer, a Reluctant Realist

It is necessary to begin with Michael Leifer because he dominated the early knowledge production related to ASEAN.⁶⁶ The constructivist telling of ASEAN emerged later, as a reaction to this early body of scholarship by Leifer. Though Leifer was ambivalent about being described as a "Realist",⁶⁷ his scholarship was primarily concerned with the question of managing regional order in Southeast Asia.⁶⁸

A student of the "English School" of international relations,⁶⁹ Leifer studied ASEAN in the context of its role in contributing to this regional order.⁷⁰ His analytical framework was the balance of power.⁷¹ Because of ASEAN's conduct during the long Kampuchean conflict,⁷² Leifer acknowledged ASEAN's success as a "diplomatic community".⁷³ He remained sceptical about ASEAN's ability to conduct external relations with the major powers such as the United States, China, and Japan.⁷⁴

To Leifer, a stable balance of power must exist between these major powers, before ASEAN could effectively engage them.⁷⁵ Non-intervention received scant attention.

⁶⁵ James Crawford, "International Law as Discipline and Profession" (2012) 106 *Proceedings of the ASIL Annual Meeting* 471 at 478 ("Crawford").

⁶⁶ See above, n62. Most of Leifer's scholarship is compiled in *Bibliography in Honour of Professor Michael Leifer 1933-2001* (Singapore: ISEAS, 2004). He wrote extensively about Southeast Asia: on nationalism, its creation of new States, multilateral institutions, especially ASEAN, and the Asian Financial Crisis in 1997.

⁶⁷ See the reflections by his former doctoral students: Michael Leifer, *Order and Security in Southeast Asia: Essays in Memory of Michael Leifer* (Joseph Chinyong Liow and Ralf Emmers eds) (Oxford: Routledge, 2006) ("*Essays in Memory of Michael Leifer*") at 2.

⁶⁸ As a school of thought, realism is concerned with the acquisition of power as the rational and inevitable goal of foreign policy: see Oona Hathaway and Harold Hongju Koh (eds), *Foundations of International Law and Politics* (New York: Foundation Press, 2005) at 27-47.

⁶⁹ The English School argues that State behaviour cannot be properly understood without considering the role of norms, rules and institutions: see Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (3rd ed) (London: Palgrave, 2002) at 13.

⁷⁰ Wang Gungwu, "Foreword" in *Selected Works on Southeast Asia* at xvi (n 54).

⁷¹ Leifer wrote: "...the term balance of power as a generalization to explain that pattern is less than precise...As an indication of the condition of the relationship between states, it means the distribution of power...Balance of power as an actual policy of states has been...to deny the emergence of any undue dominance...". Michael Leifer, "The Balance of Power and Regional Order" in *The Balance of Power in East Asia* (Michael Leifer, ed) (Basingstoke: Macmillan, 1986) at 145.

⁷² See Chapter Four.

⁷³ See generally Michael Leifer, "The ASEAN Peace Process: A Category Mistake" (1999) 12(1) *Pacific Review* 25.

⁷⁴ *Ibid* at 35-38.

⁷⁵ Generally Yuen Foong Khong, "Michael Leifer and the Prerequisites of Regional Order in Southeast Asia" in *Essays in Memory of Michael Leifer* at 29-45 (n67).

In 1999, Leifer described the Treaty of Amity & Cooperation (1976) as an “attempt to codify appropriate norms” and acknowledged non-intervention’s role in this context: “...in 1976 precepts such as mutual respect for national sovereignty, non-interference in other states’ internal affairs, an injunction against the use of force and engagement in the peaceful settlement of disputes were hardly peculiar to Southeast Asia”.⁷⁶

2) Amitav Acharya

After the Cold War, constructivism proved just right for the times and began to challenge the Realist narrative of a regional struggle by ASEAN for order and security.⁷⁷ To the constructivists, culture did not just produce norms. Norms make culture.⁷⁸

The main argument of constructivism is that regional cooperation between States is a social process, which can yield a transforming effect on the intramural relations of Southeast Asian States.⁷⁹ Constructivism maintains that norms can have a life of their own.⁸⁰ Norms are internalised by the relevant actors and decision makers,⁸¹ which consequently influence State behaviour and promotes peaceful intramural conduct.⁸²

In 2001, Amitav Acharya gave theoretical articulation and content to the expression “ASEAN Way”.⁸³ He offered a distinctive perspective in understanding the “nature and quality of socialisation” in the intramural relations regarding Southeast Asia.⁸⁴ Acharya drew on Karl Deutsch’s security community theory that disagreed with the orthodox perspective that war was the final arbiter between States.⁸⁵ Deutsch argued that a security community was a form of international cooperation that could lead to

⁷⁶ See n73 at 29.

⁷⁷ *Essays in Memory of Michael Leifer* at 8 (n67).

⁷⁸ Amitav Acharya, *Constructing a Security Community in Southeast Asia: ASEAN and the Problem of Regional Order* (3rd ed) (London & New York: Routledge, 2014) (“*Constructing a Security Community*”) at 69.

⁷⁹ *Ibid.*, 44-69.

⁸⁰ *Constructing a Security Community* at xi (n78).

⁸¹ The IR literature does not define the actors: they are primarily the political leaders of the ASEAN member States, a focus which was identified as the knowledge gap in Lee Jone’s monograph on non-intervention (see below, n148).

⁸² *Constructing a Security Community* at xi (n80).

⁸³ For an early attempt, see Estrella Solidum, “The Role of Certain Sectors in Shaping and Articulating the ASEAN Way”, in *ASEAN: Identity, Development and Culture* (RP Anand and P Qisuimbing, eds) (Quezon City: University of Philippines Law Centre & East-West Centre Culture Learning Institute, 1981).

⁸⁴ *Constructing a Security Community* at 8 (n78).

⁸⁵ Karl W. Deutsch, *The Analysis of International Relations* (2nd ed) (Englewood Cliffs, N.J: Prentice-Hall, 1968) (“*The Analysis of International Relations*”). Deutsch’s work marked a break from the orthodox perspective that war was the final arbiter between States.

integration, if the political actors hold stable expectations of peace at present and for the future.

Thus Acharya argued that norms have had an independent role in advancing regionalism through ASEAN.⁸⁶ Over time, Acharya argued, habits of consultation, informal dialogue, and the reciprocal giving of “face” by political actors mitigate intramural problems.⁸⁷ In short, an “ASEAN Way” of diplomatic interaction exists between the political actors.⁸⁸ Therefore, ASEAN is an “imagined community” that is built from the socialisation of norms.⁸⁹

Acharya described these norms as “legal-rational” and “socio-cultural” ones.⁹⁰ It is difficult to understand what he meant.⁹¹ Acharya claimed that, in this respect, non-intervention was “arguably the single most important principle” underpinning ASEAN regionalism.⁹² Pertinently, Acharya recognised non-intervention’s provenance as being partly related to international law, based on a Westphalian state system and was embodied in the constituent instruments of regional organisations.⁹³ To this extent, Acharya cited the sources of non-intervention, which were “firmly enshrined”⁹⁴

⁸⁶ *Constructing a Security Community* at 21-23 (n78).

⁸⁷ *Ibid* at 43-70, especially at 69.

⁸⁸ *Ibid* at 44, 63 and 66.

⁸⁹ Generally Amitav Acharya, *The Making of Southeast Asia: International Relations of a Region* (Singapore: ISEAS, 2012).

⁹⁰ *Constructing a Security Community* at 43-44 (n78).

⁹¹ Acharya’s understanding of international law suggests that the IR literature’s knowledge production on non-intervention contains few recognisable standards for us to draw legal conclusions. In defining norms, he adopted the distinctions between legal and social norms by another scholar: Peter Katzenstein, *Cultural Norms and National Security: Police and Military in Post War Japan* (Ithaca, NY: Cornell University Press, 1998) at 38. Acharya “slightly redesignate(s)” them into legal-rational and social-cultural norms: the most common (if not exclusively so) sources of legal-rational norms in international relations are the universal principles of Westphalian state system”; social- cultural norms reflect the “historical and cultural milieu” of the actors and explain why they might be effective as “*informal instruments*”: see *Constructing a Security Community* at 22 (n78).

Acharya’s (political) views are not necessarily invalid, but it is still unclear what “rational” means: I do not understand him to imply that social-cultural norms are “irrational”. Nor is it correct that, at international law, non-binding instruments are less effective than his “legal-rational” ones: see my discussion of interaction between treaties and non-binding instruments, see further Chapter Two, Section III.

⁹² For consistency, I retain the term “non-intervention” to analyse Acharya’s discussion, which began this way: “Arguably the single most important *principle* underpinning ASEAN regionalism is the *doctrine* of non-interference...As a well-established *principle* of the Westphalian state system, it was firmly enshrined in the charter of the UN...”: *Constructing a Security Community* at 56 (n78) (emphasis supplied).

⁹³ I.e., the Organisation of African Union, Organisation of American States and the Arab League, *Constructing a Security Community* at 56 (n 78).

⁹⁴ *Constructing a Security Community* at 56 (n 78).

in the UN Charter, Bandung Conference,⁹⁵ Bangkok Declaration 1967,⁹⁶ ZOPFAN (1971),⁹⁷ and the Treaty of Amity and Cooperation (TAC, 1976).⁹⁸

Acharya, however, does not explain the relevance of international law to his claim that non-intervention underpins ASEAN regionalism.⁹⁹ Instead he says: "...the doctrine of non-interference can only be understood in the context of the "domestic security concerns of the ASEAN States"". ¹⁰⁰

Acharya contends that, in "operational terms", there are "four main aspects" in the "obligations imposed by ASEAN's doctrine of non-interference".¹⁰¹ These four aspects include: refrain from criticising another member State's political systems;¹⁰² criticising the actions of States for breaching the non-interference doctrine;¹⁰³ no support in any form to rebels who seek to destabilise the effective authority within a member state;¹⁰⁴ assistance to member states who are fighting rebels who seek to destabilise the effective authority.¹⁰⁵

The word "operational" is not explained. It is likely a reference to the practical applications of non-intervention as a diplomatic practice of ASEAN. In short, non-intervention operates in the "ASEAN Way". The following strands of Acharya's reasoning support this point. First, and significantly, refraining from criticisms is an operational aspect of non-intervention.¹⁰⁶ Second, and more broadly, non-intervention "can only be understood" within the context of "domestic security concerns".

Put another way, this implicates a sovereign State's internal affairs: ASEAN member States should refrain from criticising or expressing disapproval of perceived faults in

⁹⁵ Final Communiqué of the Asian-African Conference of the Non-Aligned Countries (Conference of Bandung), text available in George McTurnan Kahin, *The Asian-African Conference, Bandung, Indonesia, April 1955* (Ithaca: Cornell University Press, 1956) at 76-85.

⁹⁶ See above at n27.

⁹⁷ I.e., ASEAN Declaration of a Zone of Peace, Free and Neutrality (ZOPFAN), text available at <<http://www.icnl.org/research/library/files/Transnational/zone.pdf>>.

⁹⁸ Treaty of Amity and Cooperation in Southeast Asia (concluded 24 February 1976) 1025 UNTS 297 ("TAC").

⁹⁹ *Constructing a Security Community* at 56 (n78).

¹⁰⁰ Ibid at 56-57: apart from non-intervention as a "doctrine", a "principle", Acharya also describes it as a "central tenet of intra-regional relations".

¹⁰¹ *Constructing a Security Community* at 57 (n78).

¹⁰² *Constructing a Security Community* at 57 (n78).

¹⁰³ *Constructing a Security Community* at 57 (n78).

¹⁰⁴ *Constructing a Security Community* at 57 (n78).

¹⁰⁵ *Constructing a Security Community* at 57 (n78).

¹⁰⁶ Acharya cited the example of ASEAN's "response to the 'People's Power' revolution in the Philippines in 1986. He recounted the military support of "fellow ASEAN members", including Indonesia, and argued that "ASEAN did not cease its implicit support" for President Ferdinand Marcos: see *Constructing a Security Community* at 57-58 (n78). However, these are acts by ASEAN States because they are bilateral issues and unrelated to ASEAN actions as a legal person. These are not the acts of ASEAN member States *qua* ASEAN.

the ways that another member State manages their “domestic security concerns”.¹⁰⁷ This link between refraining from making criticisms to non-intervention, which in turn operates within the diplomatic practice conducted in an “ASEAN Way”, is a political evaluation.

Making comments is rarely an illegal act at international law, much less an illegal one which is prohibited by non-intervention.¹⁰⁸ Nonetheless, Acharya is the first scholar to make systematic claims about the content of non-intervention related to ASEAN. There are, however, few legal grounds in his work to conclude what role international law plays in the “socialisation”¹⁰⁹ of “legal-rational” norms¹¹⁰ among its political actors. He is concerned with a political study of political actors, their institutions (i.e., ASEAN), and the processes in which they interact.

In his study of ASEAN, Acharya is not concerned with *showing how* the norms influence an outcome.¹¹¹ It is not clear how (whether) the political actors were socialised by non-intervention. This is sometimes a “doctrine” or a “norm”, usually a “principle”,¹¹² but probably all the same from a socialisation perspective. Furthermore, Acharya did not distinguish the separate acts of ASEAN in respect of non-intervention, from that of ASEAN States, acting in their separate, sovereign capacities.

For these reasons, it is difficult to assess Acharya’s political evaluation against legal rules. Yet, as I explain below,¹¹³ it is exactly this sort of political evaluation which has been assimilated by international legal scholarship, and upon which undue consideration has been attached to drawing legal conclusions on non-intervention’s content.

3) Jürgen Haacke

Jürgen Haacke built on Acharya’s scholarship by explicating the origins and evolution of the “ASEAN Way”.¹¹⁴ Haacke argued that the “ASEAN Way” is a diplomatic and

¹⁰⁷ Another example by Acharya is “ASEAN’s non-response to the Thai military’s crackdown on pro-democracy demonstrators in May 1992”: see *Constructing a Security Community* at 58 (n78). In legal terms, if it is a “non-response” by ASEAN, then we should question if this is even an ASEAN act at all.

¹⁰⁸ See Chapter One, Section V, Part 3 below.

¹⁰⁹ *Constructing a Security Community* at 8 (n78).

¹¹⁰ n91.

¹¹¹ This knowledge gap in the IR literature was addressed by Christopher Roberts’s monograph, discussed in Chapter One, Section IV.

¹¹² *Constructing a Security Community* at 56-57 (n78).

¹¹³ See Chapter One, Section V.

¹¹⁴ Jürgen Haacke, *ASEAN’s Diplomatic and Security Culture: Origins, Development and Prospects* (London & New York: Routledge, 2005) (“*ASEAN’s Diplomatic and Security Culture*”) at 11: Haacke

security culture in which the actors – ASEAN leaders and officials – share a “normative terrain”.¹¹⁵ According to Haacke, these norms¹¹⁶ arise because “ASEAN leaders”¹¹⁷ work from the basis of a struggle for recognition as sovereign States, followed by security concerns.¹¹⁸

Against this background, Haacke advances the notion of a diplomatic and security *culture* (not community),¹¹⁹ which is defined as the ASEAN leaders sharing a “common stock of ideas and values”¹²⁰ to enhance their security.¹²¹ For our purposes, Haacke identified six “core” norms in the “ASEAN Way”:¹²² sovereign equality; non-recourse to use of force and peaceful settlement of conflict; non-interference and non-intervention; non-involvement of ASEAN to address unresolved bilateral conflict between members; quiet diplomacy; mutual respect and tolerance.

Haacke is explicit that his contribution to constructivist knowledge, related to ASEAN, rests on his *political* analyses of how the political actors – principally specific ASEAN leaders – behaved.¹²³ The six “core” norms were identified, as an analytical framework, to advance his proposition that norms shape political conduct. But these norms do not dictate the political outcomes.¹²⁴

To summarise: the scholarship by Acharya and Haacke has shaped the knowledge production related to ASEAN. Of particular significance is their articulation of the

confessed that his theoretical assumptions as being “situated in the constructivist camp of International Relations theory, as broadly defined”.

¹¹⁵ Ibid at 1.

¹¹⁶ Although Haacke stated what the core norms contain, he did not explicitly define what “norms” mean to him (for a list of these core norms, see n121): it appears that he was using norms in a behavioural and procedural manner, likely in terms of non-confrontation (“i.e., behavioural) and recourse to informal meetings to resolve differences (“procedural”): *ASEAN’s Diplomatic and Security Culture* at 5-6 and 234 (endnote 7) (n114). Thus these are unlikely to be “norms” in a legal sense, which can be assessed against legality: see n60.

¹¹⁷ In short, there is no difference between genuine ASEAN acts from acts by ASEAN States. Haacke begins this way: “...this book is not only a study of norms. It is equally a work of *foreign policy analysis* and a study of the international politics of Southeast and East Asia...an exploration of the development of the normative terrain underlying intra-ASEAN diplomacy and cooperation cannot be meaningfully separated from an analysis of the reasons why *ASEAN leaders* espouse...particular interpretations and practices associated with ASEAN’s diplomatic and security culture” (emphasis supplied): *ASEAN’s Diplomatic and Security Culture* at 1-2 (n114).

¹¹⁸ Ibid at 16-32 and 216.

¹¹⁹ “Culture” probably means a “discursive space” to “share ideas, norms and practices”, *ibid* at 2. Contrast this with Acharya’s approach of drawing from Deutsch’s security community: n85.

¹²⁰ *ASEAN’s Diplomatic and Security Culture* at 2 (n114).

¹²¹ Haacke defines “security” broadly, from the state leaders’ perspectives, to mean “fears” about “territorial integrity”, “political autonomy”, and the leaders’ “political survival”: *ibid* at 11.

¹²² *Ibid* at 1 and 214.

¹²³ Under “Theoretical Assumptions” of his monograph, for example, Haacke said: “the book also takes seriously the idea that ontological insecurity experienced by particular leaders can readily translate into perceptions of threat in relation to, say, interstate or regime security”: *ibid* at 11.

¹²⁴ Non-intervention was a consideration in the context of an “ASEAN Way”. Haacke concluded that the “ASEAN Way” (with implications for non-intervention) was strained in the case studies of the Kampuchean conflict and flexible engagement imbroglio: *ibid* at 81-112 and 165-191. On the legal irrelevance of flexible engagement, see Section IV.

“ASEAN Way” as a diplomatic practice, which shapes intramural behaviour and the “norms” that comprise it.¹²⁵

Most importantly, Haacke’s identification of non-intervention as a one core norm of the “ASEAN Way” is remarkable:¹²⁶ it does not explain why the core norms were “core” to ASEAN. Nor was there an elaboration how these core norms were identified or where they came from.

These were bold claims: the key result is an authoritative embedding of non-intervention’s proper “home” in the “ASEAN Way”.¹²⁷ Consequently, the constructivist scholarship of this period has become a necessary point of reference - and departure - in the IR literature on ASEAN, even for scholars who do not share a constructivist persuasion.¹²⁸

IV. Recent IR Literature Cannot Escape Constructivism

1) Christopher Roberts

The previous section explained how the early IR literature merged its disciplinary study of non-intervention with his explanation of the “ASEAN Way”, the latter not consisting of acts with an ASEAN character. This literature provides, therefore, no basis upon which to determine the regional content of non-intervention as a matter of law. This section continues with the argument by showing how the more recent IR literature moves away from the canonical focus linking non-intervention’s link with the “ASEAN Way”, by studying its disciplinary contradictions.

This section illustrates that the IR literature, both recent and established, does not provide a firm basis to study non-intervention in legal terms or its distinctive regional content as arising from acts with an ASEAN character.

¹²⁵ For clarity, I am not saying that Acharya and Haacke invented the term “ASEAN Way”. Their scholarship gave the “ASEAN Way” an elaboration that proved useful to practitioners: the former ASEAN Secretary-General, Rodolfo Severino, acknowledged in his practitioner-oriented monograph (n58 at 35-36) that Acharya’s *Constructing a Security Community* (n 78) “lucidly” applied the idea of security community to the “ASEAN Way” of diplomacy. Consequently, this knowledge production on the “ASEAN Way” influenced legal analysis. In discussing decision-making by ASEAN organs (Article 20, ASEAN Charter, n23), Walter Woon (n243, footnote 1 at 157) referred to the “ASEAN Way” by approving Severino’s monograph (n58) as follows: “the genesis of this set of unwritten principles is documented by former Secretary-General Rodolfo Severino...”.

¹²⁶ *ASEAN’s Diplomatic and Security Culture* at 109 (n114).

¹²⁷ See Haacke’s discussion of the “ASEAN Way’s” development through the TAC’s signing in 1976, *ibid* at 63-64. Acharya also briefly acknowledged the TAC: *Constructing a Security Community* at 56 (n78).

¹²⁸ See Chapter One, Section IV.

One notable contribution against the constructivist telling with respect to ASEAN is the work of Christopher Roberts.¹²⁹ He sought to test the constructivist proposition that norms socialised the political actors.¹³⁰ To this end, Roberts's findings are informed by his conduct of "in-depth interviews at the elite and grassroots levels".¹³¹ His contribution lies in linking theory (by Acharya and Haacke, for instance) with empirical evidence.¹³²

Roberts claims that norms exist in the "ASEAN Way" but they are "highly transient".¹³³ This assimilates Haacke's account of norms in the "ASEAN Way".¹³⁴ Like Acharya, Roberts recognised that the Bangkok Declaration (1967),¹³⁵ a non-binding instrument which established ASEAN,¹³⁶ referred to UN Charter's "principles", including the "principle of non-interference".¹³⁷ For Roberts, international law, through the UN Charter, supports the "normative rules" which govern regional interaction as follows:¹³⁸ "rhetorically, the normative rules governing regional interaction have traditionally been...(iii) the non-interference in the domestic affairs of others. Such an interpretation is supported by the (Bangkok) Declaration's reference to the principles of the United Nations Charter which...includes the principle of non-interference."

¹²⁹ Christopher B Roberts, *ASEAN Regionalism: Cooperation, Values and Institutionalisation* (London: Routledge, 2012) (*"ASEAN Regionalism"*): at this stage, ASEAN integration had progressed considerably since the constructivist account of the "ASEAN Way" by Acharya and Haacke in 2001 and 2003, respectively. Roberts was able to frame his study of ASEAN's regionalism by taking into account milestone instruments, such as the Bali Concord II (2003) and ASEAN Charter (2008). He concluded that ASEAN is a "limited economic and security regime" (at 184). Despite this engagement with legal documents, as I shortly explain, this is still a political account related to ASEAN, from which is difficult to draw legal conclusions.

¹³⁰ From the first page, it is evident that Robert's account is related to ASEAN, about Southeast Asia, and not necessarily about genuine ASEAN acts: "...this book assesses the prospects for success...of regionalism against the...diversity of values in Southeast Asia. Further, the book seeks to ascertain the extent to which patterns of interaction (socialization) and institutionalization (in the supranational sense) have generated common values...": *ibid* at 1.

¹³¹ *Ibid* at 4.

¹³² *Ibid* at 3: Roberts used a semi-structured interview approach to complement a standardised survey-work, in which he explained the problems of this approach (at 4-7). He stressed that his sample design was not random but confessed its limitations (at 6). For example, "authoritarian" regimes such as Myanmar and Brunei tended to contain a small elite sample (at 5). Roberts did not clarify whether this implies that, therefore, his survey design and the conclusions are conditioned by his assumptions about the meaning of "authoritarian" and "non-authoritarian" governments, based on more assumptions about the desirability of one over another. Another curious example was his claim that surveys sent (presumably by him) to agencies of the Singapore government were refused and monitored (at 5 and 189, endnote 23). It is reasonable to say that the success of conducting elite interviews, with a qualitative component, greatly depends on an intangible "comfort level": there must be some element of trust between the researcher and interviewed.

¹³³ *Ibid* at 182.

¹³⁴ *Ibid* at 38: "...as Haacke indicates, the overarching 'legal-procedural norms'...emerged...through common and 'interlocking struggles for recognition" (citing Haacke's *ASEAN's Diplomatic and Security Culture*, n114).

¹³⁵ Bangkok Declaration, n27.

¹³⁶ For discussion on the legal status of the Bangkok Declaration, see Chapter Two, Section VI.

¹³⁷ *ASEAN Regionalism* at 45 (n129).

¹³⁸ *Ibid* at 45.

It is evident that Roberts was not referring to “normative rules” in the legal sense of a treaty rule being assessed for legality, such as Articles 2(4) or 2(7) of the UN Charter. Also, as explained already, the explicit link made by Acharya and Haacke between non-intervention and the “ASEAN Way” is vital. It permits a random tossing of norms inside the constructivist box of “ASEAN Way” to yield the argument that, as did Roberts, “ASEAN’s principle of non-interference prohibited the Association from commenting on internal affairs”.¹³⁹ It would appear that Roberts implied that norms generated by the “ASEAN Way” bind member States in their intramural relations.

To support his claims, Roberts cited the example of the “haze”¹⁴⁰ that billowed yearly from uncontrolled forest fires in Indonesia, which severely polluted the air quality of Malaysia and Singapore.¹⁴¹ When Singapore publicly pressed Indonesia to reveal satellite images of the fires that caused the haze, Roberts said that: “Singapore’s actions represented a clear contravention of ASEAN’s modalities where the principle of non-interference prohibits implied and/or overt acts of public criticisms.”¹⁴²

Hence Roberts’s appraisal of non-intervention is concerned with its “clear contravention”, in terms of changes to non-intervention’s content.¹⁴³ Norms, including non-intervention, are unstable and do not constitute socialisation, a point which he claimed is buttressed by findings based on the elite interviews.¹⁴⁴

Yet, in the haze issue which Roberts instanced, Singapore was acting bilaterally with Indonesia.¹⁴⁵ This was not an act carried out by ASEAN as an international legal

¹³⁹ Ibid at 89.

¹⁴⁰ This is a euphemistic term for smog: I adopt the word “haze” because it is used in ASEAN instruments, see ASEAN Agreement on Transboundary Haze Pollution (signed 10 June 2002, entered into force: 25 November 2003), available at <<http://agreement.asean.org/media/download/20140119170340.pdf>>. Article 29(1) only requires six parties to ratify for the treaty to enter into force. Indonesia ratified thirteen years after signing, on 20 January 2015.

¹⁴¹ For the legal issues, generally see Alan Khee-Jin Tan, “The ASEAN Agreement on Transboundary Haze Pollution: Prospects for Compliance and Effectiveness in Post-Suharto Indonesia” (2005) 13 *New York University Environmental Law Journal* 647.

¹⁴² *ASEAN Regionalism* at 90 (n129).

¹⁴³ Ibid at 90.

¹⁴⁴ In his elite survey (ibid at 161-162) for the monograph, Robert framed his question in two ways. First question: Do you believe that the principle of non-interference is as important now as it was a decade ago? (47% replied yes; 39% said no; 14% said unsure). Second question: Are there any circumstances when some ASEAN member-states could be justified in diplomatically intervening in the internal affairs of another member-state or states? (55% said yes; 27% said no; 18% said unsure).

¹⁴⁵ See the formal statements by the Singapore Government to the Indonesia Government over the years: for just a sample, see “MFA Press Statement: Haze Situation in Singapore” (11 October 2006); “Singapore’s Offer of Haze Assistance Package to Indonesia” (7 June 2016). On 18 September 2015, in “MFA Press Statement: Minister for Foreign Affairs and Minister for Law K Shanmugam’s Telephone Call to Indonesia Minister of Foreign Affairs Retno Marsudi”, the Singapore Foreign Minister contacted his Indonesian counterpart and formally said: “Greater regional efforts and cooperation were needed to effectively combat the haze problem. He emphasised that all ASEAN states should follow through and fulfil their obligations under the ASEAN Agreement on Transboundary Haze which all 10 ASEAN

person.¹⁴⁶ Crucially, Roberts's evaluation of Singapore's actions is not based on formal sources, relying instead on two pieces of secondary literature.¹⁴⁷

2) Lee Jones

In a provocative work,¹⁴⁸ Jones offered a distinctive perspective on non-intervention: "...I do not consider only collective interventions by ASEAN as a grouping. ASEAN member-states are so rarely capable of acting *en bloc*¹⁴⁹...Focusing solely on what ASEAN agrees on collectively would unduly overlook vast amounts of state behaviour. Moreover, exploring *member-states'* *conduct* is the only way to actually test the proposition that they are bound by a regional norm of non-interference...*If we observe some ASEAN states intervening but others not, and no collective agreement on intervention is reached, it is clearly illogical to claim that the lack of a corporate ASEAN policy proves the power of non-interference.* It would merely prove *member-states'* inability to reach consensus – which can be explained by reference to the social conflicts underpinning each state's position and the difficulties of coordinating divergent policies."¹⁵⁰

Lee Jones has likely written the first English monograph in the IR literature, which exclusively studied non-intervention by explicitly merging the acts of ASEAN States with legally distinct ASEAN acts. His key proposition is that non-intervention is selectively used as a "technology of power":¹⁵¹ dominant interests are identified,¹⁵²

members have signed": whether there is a genuine ASEAN act here must be determined based on relevant statements by ASEAN organs, which is a separate issue. Press releases by the Singapore Ministry of Foreign Affairs, available at https://www.mfa.gov.sg/content/mfa/media_centre/press_room.html.

¹⁴⁶ Singapore's actions were not mentioned in the ASEAN Summit of 2005. Instead the ASEAN Summit's statement is worded generally: "We noted with satisfaction the concerted action taken by ASEAN Member Countries during the recent severe haze episode by mobilising personnel, aircraft and equipment to suppress the fires and stand ready to provide such assistance during critical periods in the future. We called for swift and more effective inter-agency collaboration and coordination at the national and regional levels to deal comprehensively with the transboundary haze pollution": Chairman's Statement of the 11th ASEAN Summit "One Vision, One Identity, One Community" (12 December 2005) at para 22, available at: <http://asean.org/chairman-s-statement-of-the-11th-asean-summit-one-vision-one-identity-one-community-kuala-lumpur/>.

¹⁴⁷ Roberts (n129, endnotes 92 and 93 respectively, at 90 and 212) cited two secondary sources: James Cotton, "The 'Haze' over Southeast Asia: Challenging the ASEAN Mode of Regional Engagement" (1999) 72 *Pacific Affairs* 331 at 349, and Alan Collins, *Security and Southeast Asia: Domestic, Regional, Global Issues* (Boulder, CO: Lynne Rienner, 2003) 142.

¹⁴⁸ Lee Jones, *ASEAN, Sovereignty and Intervention in Southeast Asia* (UK: Palgrave Macmillan, 2012) ("*ASEAN, Sovereignty and Intervention*").

¹⁴⁹ Original emphasis.

¹⁵⁰ *ASEAN, Sovereignty and Intervention* at 31 (n148): in the light of Jones's explanation, it is unhelpful to decide whether a distinction exists in his terms "member-states" from "ASEAN states".

¹⁵¹ I.e., dominant social forces within ASEAN States control the scope of political conflicts and uphold certain forms of economic and political order, *ibid* at 15-23 and 211.

¹⁵² See his critical reading of the UN Transitional Authority of Cambodia and ASEAN in relation Cambodia during the Kampuchean conflict: *ASEAN, Sovereignty and Intervention* at 128-140 (n148).

the power distribution of the working class and bourgeoisie are studied,¹⁵³ and capitalism is critiqued.¹⁵⁴ Non-intervention, Jones argues, is used by the dominant political actors, mainly the government, to “buy time and space” (whatever this means).¹⁵⁵

Despite Jones’s provocative thesis, his work is also a reaction to the constructivist claim that non-intervention is an element of the “ASEAN Way”. His scholarly ambition is to: “...cut through elite rhetoric to the reality of state practice, to disrupt the major area of scholarly consensus on ASEAN, to question the most common explanations given for the form Southeast Asian regionalism takes, and to provide a sounder basis for policy-making.”¹⁵⁶

Jones did not study “state practice” in the same way that international lawyers identify State practice, from which legal conclusions are drawn.¹⁵⁷ It is doubtful whether Jones wanted to (he did not have to) consider the salience of international law to non-intervention at all. To him, the “sovereign territorial state thus enables some political projects, yet constrains others”.¹⁵⁸ In his reactions to the problems of constructivism and in giving his particular account of non-intervention related to ASEAN, Jones said: “Scholars thus inadvertently side with the ASEAN’s authoritarian regimes, which sought to present left-wing movements as enemies of the state and foreign subversives, rather than people who simply wished to organise their society, economy and politics in a way that threatened existing power relations.”¹⁵⁹

It is against this background that Jones approaches his whole study through Marxist state theory¹⁶⁰ and critical political economy perspectives,¹⁶¹ another intensely political study which still creates gaps which international law can usefully fill.¹⁶²

¹⁵³ Jones: “‘society’ is not principally comprised of smooth ‘socialisation’ and ‘interactions’ ...but by gross inequalities in power and material resources possessed by real human subjects facing profound structural constraints”, *ASEAN, Sovereignty and Intervention* at 221-222 (n148).

¹⁵⁴ I.e., Thailand normalised relations with Myanmar because of trade interests, see *ASEAN, Sovereignty and Intervention* at 180-203 (n148).

¹⁵⁵ *ASEAN, Sovereignty and Intervention* at 20 (n148).

¹⁵⁶ *ASEAN, Sovereignty and Intervention* at 8 (n148).

¹⁵⁷ Generally Michael Wood and Omri Sender, “State Practice”, MPEPIL (2017).

¹⁵⁸ *ASEAN, Sovereignty and Intervention* at 20 (n148).

¹⁵⁹ *Ibid* at 20.

¹⁶⁰ Generally Nicos Poulantzas, *Political Power and Social Classes* (London: NLB, 1973) and Bob Jessop, *State Power: A Strategic-Relational Approach* (Cambridge: Polity, 2008).

¹⁶¹ For an overview of Jones’s approach, see Shahar Hameiri & Lee Jones, “Murdoch International: The ‘Murdoch School’ in International Relations (Working Paper No. 178)” (December 2014) available at <https://www.murdoch.edu.au/Research-capabilities/Asia-Research-Centre/_document/WP178.pdf>.

The “Murdoch School” focuses on social and political conflict in the context of capitalist development to explain institutional and political outcomes: its analytical framework is rooted in the Marxist state theory of Poulantzas and Jessop (*ibid*).

¹⁶² I illustrate the limits of Jones’s arguments in Chapter One, Section V.

V. Limitations of the IR Literature's Knowledge Production on Non-Intervention: The Example of Flexible Engagement and Enhanced Interaction

1) Purpose

This section illustrates the problems with the IR literature's approach to non-intervention with an example. The example will show how a (legal) basis is lacking, on which a distinctive regional law of non-intervention could be determined. It is useful to recapitulate the IR literature's core elements of non-intervention as follows: it is a norm, principle, doctrine, which is connected to a distinctive practice of quiet diplomacy, i.e., the "ASEAN Way";¹⁶³ it recognises its basis in international law as a "legal-rational norm";¹⁶⁴ it studies contraventions of non-intervention and considers the implications for the "ASEAN Way's" style of quiet diplomacy; it does not distinguish acts of ASEAN, an international organisation with legal personality, from acts of ASEAN States.

The IR literature had observed occasions in which Thailand made a deliberate effort in 1997 to reform non-intervention's content through the so-called "flexible engagement".¹⁶⁵ It is an "effort" because nothing significant arose at law. The idea was that ASEAN States¹⁶⁶ should be able to comment on the political developments of one another. Thailand, at least, wanted it to be less restrictive because of its "earnest struggle" for the international acceptance of its "democratic credentials" under the neo-liberal government of Chuan Leekpai, which assumed power in November 1997.¹⁶⁷ Because of the financial crisis, Thailand had to convince the United States government and International Monetary Fund to support its economic recovery.¹⁶⁸

These developments occurred against a broader background of a financial crisis in 1997 in Southeast Asia. A financial crisis caused Thailand, Malaysia, and particularly

¹⁶³ See nn92, 122 and 137.

¹⁶⁴ I.e., UN Charter, ASEAN Charter, and the Bangkok Declaration: nn27, 90, and 134 respectively.

¹⁶⁵ Robin Ramcharan, "ASEAN and Non-interference: A Principle Maintained" (2000) 22 *Contemporary Southeast Asia* 60; Jürgen Haacke, "The Concept of Flexible Engagement and the Practice of Enhanced Interaction: Intramural Challenges to the 'ASEAN Way'" (1999) 12 *Pacific Review* 581.

¹⁶⁶ I.e., acts by ASEAN States which are acting in their individual, sovereign capacities.

¹⁶⁷ *ASEAN's Diplomatic and Security Culture* at 165-190 (n114); *Constructing a Security Community* at 152 (n78); *ASEAN Regionalism* at 105 (n129).

¹⁶⁸ *ASEAN's Diplomatic and Security Culture* at 172-173 (n114); *ASEAN, Sovereignty and Intervention* at 108 (n148).

Indonesia, to experience capital flight problems.¹⁶⁹ Singapore and Indonesia, consequently, suffered from sluggish economic growth. Notably, Suharto of Indonesia was forced to resign his presidency after 31 years in power.¹⁷⁰ Cambodia's admission to ASEAN was delayed¹⁷¹ because of a power struggle between Prime Minister Hun Sen and Prince Ranadrih.¹⁷²

Against this wider background, the IR literature gave "flexible engagement" considerable attention.¹⁷³ Its knowledge production does tell us about political personalities and the wider political background. But the conclusions on non-intervention can be misleading, and are less useful for international lawyers. This is because the IR literature had strongly relied on secondary materials to form political conclusions regarding non-intervention's content.

My purpose, therefore, is to use this example of "flexible engagement" to show the sharp variance between political and legal conclusions on non-intervention's content. This greatly matters. As I shortly explain, the IR literature did not make – it does not want or need to – distinctions between acts by ASEAN States, from ASEAN member States, acting through ASEAN and its organs. Our legal conclusions, however, regarding non-intervention with an ASEAN character must be evaluated against legal rules at general international law.

2) The IR Literature Uses Secondary Sources to Draw Political Conclusions on Non-Intervention

The IR literature made the following points. First, it noted the introspective mood among leaders of ASEAN States after the financial crisis.¹⁷⁴ Acharya referred to the "major blow to ASEAN's credibility".¹⁷⁵ Jones delved into the "widespread social unrest and demands for political reform".¹⁷⁶

¹⁶⁹ Generally M Sonarajah, "South East Asia and International Law" (1998) 2 *Singapore Journal of International & Comparative Law* 221.

¹⁷⁰ Generally Michael R. J. Vatikiotis, *Indonesian Politics Under Suharto: The Rise and Fall of the New Order* (3rd ed) (London: Routledge, 1998).

¹⁷¹ Admitted on 30 April 1999.

¹⁷² John Funston, "ASEAN: Out of Its Depth?" (1998) 20 *Contemporary Southeast Asia* 22.

¹⁷³ See Chapter One, Section V, Part 2.

¹⁷⁴ For a sample of immediate academic reactions after the crisis broke in July 1997, see Leif Roderick Rosenberger, "Southeast Asia's Currency Crisis: A Diagnosis and Prescription" (1997) 19 *Contemporary Southeast Asia* 223; Peter W Preston, "Reading the Asian Crisis: History, Culture and Institutional Truths" (1998) 20 *Contemporary Southeast Asia* 241.

¹⁷⁵ *Constructing a Security Community* at 149-150 (n78).

¹⁷⁶ *ASEAN, Sovereignty and Intervention* at 107-109 (n148).

Second, in terms of Thailand's diplomatic effort, "flexible engagement" is usually attributed to Surin Pitsuwan,¹⁷⁷ then Thailand's foreign minister.¹⁷⁸ Actually, Pitsuwan did not use this term in his formal statements. On 24 July 1998, in his opening statement as Thailand's representative at the 31st ASEAN Ministerial Meeting (AMM),¹⁷⁹ the word "flexible" (not "flexible engagement") was only used once: "We need stronger engagement among ASEAN and we also need equally to adapt ourselves to changing times. We must be *flexible* in our approach to the tasks at hand while steadfastly adhering to the long-standing principles for which ASEAN has stood and which have truly served us well. That, I believe, is the essence of the "ASEAN Way."¹⁸⁰

Pitsuwan suggested that:¹⁸¹ "The principle of non-interference is not the issue and has never been the issue. The name or terminology is also not of any real significance either. Let us instead focus on the real issues — what is at stake for ASEAN and what we together can do about it. For the real issue is how we can work together to strengthen ASEAN's cohesiveness, relevance and effectiveness in dealing with the new challenges of a new millennium...the issues of democracy and human rights are those that we have to increasingly deal with in our *engagement* with the outside world. How are we going to put ourselves on the offensive rather than always be on the receiving end?"¹⁸² Third, therefore, democracy and human rights were possible candidates for "engagement" in "real issues". In pursuit of this goal, Pitsuwan's formal statement lacked sufficient elaboration of what Thailand would do as an ASEAN member State.¹⁸³ Importantly, the term "flexible engagement" did not appear in the AMM's joint communique of 25 July 1998 at all.

Based on Pitsuwan's statement, as Thailand's representative at the AMM, on 24 July 1998, it is difficult to draw legal conclusions relevant to the ASEAN character of non-intervention. Only the formal statements which were raised by representatives of

¹⁷⁷ Generally see *Constructing a Security Community* at 149 (n 78); *ASEAN's Diplomatic and Security Culture* at 167 (n114); *ASEAN Regionalism* at 105 (n129); Ralf Emmers, *Cooperative Security and the Balance of Power in ASEAN and the ARF* (London & New York: RoutledgeCurzon, 2003) at 25.

¹⁷⁸ From 2008-2013, Pitsuwan served as the ASEAN Secretary-General.

¹⁷⁹ See "Opening Statement by His Excellency Dr. Surin Pitsuwan Minister of Foreign Affairs of Thailand at the 31st ASEAN Ministerial Meeting (AMM) Manila, Philippines, 24 July 1998", available at <http://asean.org/?static_post=opening-statement-by-his-excellency-dr-surin-pitsuwan-minister-of-foreign-affairs-of-thailand-at-the-31st-asean-ministerial-meeting-manila-philippines-24-july-1998-2>.

¹⁸⁰ *Ibid* (emphasis supplied).

¹⁸¹ *Ibid*.

¹⁸² *Ibid* (emphasis supplied).

¹⁸³ Generally see Thomas Grant, "Doctrines (Monroe, Hallstein, Brezhnev, Stimson)" MPEPIL (2014) 697 ("*Grant*") at para 1: "The legal significance to attach to a product of a State bureaucracy or other State conduct depends on content, context, and the indicated intention of the State to establish obligations—or not—by a particular act or expression".

ASEAN member States, expressed during this AMM, might count as State practice of ASEAN organs.¹⁸⁴ This is because, as explained above, acts of ASEAN member States, through their representatives acting within ASEAN organs, are legally distinct.¹⁸⁵

Fourth, instead of studying these formal statements, the IR literature focused on “two major speeches”¹⁸⁶ that Pitsuwan had made at a Track II forum¹⁸⁷ and Thammasat University.¹⁸⁸ It is legally relevant to ask if Pitsuwan advanced a formal position (if at all) as Thailand’s foreign minister,¹⁸⁹ or as Thailand’s representative (an ASEAN *member State*), at the AMM.¹⁹⁰ The answer is apparent in Thailand’s response. Its Ministry of Foreign Affairs circulated a position paper to the ASEAN member States, before the 31st AMM. The paper bore a felicitous title - “Thailand’s Non-Paper on the Flexible Engagement Approach”.¹⁹¹

Fifth, another argument in the IR literature was that the Philippines “openly sided” with Thailand’s proposal.¹⁹² For example, Acharya cited the remarks by the Philippines’s Foreign Secretary, Domingo Siazon, who reportedly said: “...when the situation is opportune, more pro-active ASEAN policy among its members may be felicitous and it may not be sufficient just to have a policy of non-intervention”.¹⁹³

¹⁸⁴ At best, the individual statements by each foreign minister reflect the formal position of that ASEAN member State. However, whether these individual statements reflect acquiescence by the AMM (as a whole) and become its “established practice” is an interpretative issue concerning a treaty: see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 at 150. Also see Georg Nolte, “Third Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties” (7 April 2015) UN Doc A/CN.4/683 (“Nolte Report”).

¹⁸⁵ See Chapter One, Section I, Part 1.

¹⁸⁶ *ASEAN’s Diplomatic and Security Culture* at 170 (n114). On this point, also see *ASEAN Regionalism* at 104-105 (n129) and *ASEAN, Sovereignty and Intervention* at 110-111 (n148).

¹⁸⁷ Surin Pitsuwan, “Currency in Turmoil in Southeast Asia: The Strategic Impact”, Remarks at the 12th Asia-Pacific Conference, Kuala Lumpur, 1 June 1998.

¹⁸⁸ Surin Pitsuwan, “Thailand’s Foreign Policy During the Economic and Social Crisis”, Speech at Thammasat University, Bangkok, 12 June 1998.

¹⁸⁹ Roberts attributed remarks to Pitsuwan apparently made during his Track II speech (n187) by using Ramcharan’s article in the *Contemporary Southeast Asia* journal (n165), which is only a secondary source (n129 at 216, endnote 15).

¹⁹⁰ For support, Acharya attributed remarks made by Surin Pitsuwan and his deputy Foreign Minister, Sukhumbhand Paribartara, which were apparently reported in the *Bangkok Post* (13 June 1998) and *Straits Times*, Singapore (13 July 1998): see *Constructing a Security Community* at 162, endnotes 155-156 (n78).

¹⁹¹ Jones (n148 at 250) cited a link for this paper, which seemed to belong to the website of Thailand’s embassy in Washington DC. Perhaps unsurprisingly, to the best of my knowledge, this speech cannot be located on the embassy’s website or generally on the internet now.

¹⁹² *Constructing a Security Community* at 150 (n78).

¹⁹³ *Constructing a Security Community*, endnote 160, at 150 and 162 (n78).

Siazon's remark was based on a news report in the Singapore *Straits Times*, dated 5 July 1998.¹⁹⁴ On 24 July 1998, at the 31st AMM, Siazon delivered an opening statement in his capacity as the Philippines's foreign secretary.¹⁹⁵ Non-intervention was not raised at all.¹⁹⁶

Finally, the IR literature suggested that "enhanced interaction" was adopted, as a compromise, in lieu of "flexible engagement".¹⁹⁷ The term "enhanced interaction" is attributed in the literature to Indonesia's foreign minister, Ali Alatas.¹⁹⁸ For example, Acharya said: "Instead of flexible engagement, the evidently less intervention-oriented notion of 'enhanced interaction' at the suggestion of Ali Alatas was adopted as a policy framework to deal with transnational issues within the region."¹⁹⁹

Furthermore, Roberts cited an interview that he conducted with an advisor to the Thai government,²⁰⁰ who apparently "supported the utility of enhanced interaction" because²⁰¹

Both sides must be able to exchange views...and be able to talk frankly.²⁰²

In political terms, it is likely that Alatas's "face-saving diplomacy"²⁰³ of an "enhanced interaction" was "adopted as a policy framework"²⁰⁴ by ASEAN States. No one knows whether it is really different from "flexible engagement". In 2004, already retired, Alatas publicly stated that, through a newspaper article, "enhanced interaction" allowed "comment on domestic issues that portray all member nations in a negative light".²⁰⁵

¹⁹⁴ "Engagement Policy 'being Considered'", *The Straits Times*, 5 July 1998, at 26.

¹⁹⁵ "Statement of H.E. Domingo L. Siazon, Jr, Secretary of Foreign Affairs of the Philippines and Chairman of the 31st ASEAN Standing Committee At the Opening of the 31st ASEAN Ministerial Meeting Manila", 24 July 1998, available at <http://asean.org/?static_post=winning-the-challenges-of-the-21st-century-statement-of-he-domingo-l-siazon-jr-secretary-of-foreign-affairs-of-the-philippines-and-chairman-of-the-31st-asean-standing-committee-at-the-opening-of-the-3>.

¹⁹⁶ Ibid. Also see "Closing Statement of H.E. Domingo L Saizon, Secretary of Foreign Affairs of the Philippines at the 31st ASEAN Ministerial Meeting", Manila, 25 July 1998, available at <http://asean.org/?static_post=closing-statement-of-he-domingo-l-siazon-jr-secretary-of-foreign-affairs-of-the-philippines-at-the-31st-asean-ministerial-meeting-amm-manila-25-july-1998>.

¹⁹⁷ *ASEAN Regionalism*, endnote 25 at 107 and 216 (n129): he supports this claim with a secondary source by Shigekatsu Kondo, *East Asian Strategic Review* (Tokyo: National Institute for Defence Studies, 2000) at 36.

¹⁹⁸ *Constructing a Security Community*, endnote 166, at 151 and 162 (n 78): he based it on Alatas's diplomatic effort in "No Go on Flexible Engagement" in *The Straits Times*, 25 July 1998, at 23.

¹⁹⁹ *Constructing a Security Community* at 151 (n78)

²⁰⁰ *ASEAN Regionalism*, endnote 25 at 216 (n129): Roberts interviewed Kanala Khantaprab who advised Thailand's Government on 26 December 2001.

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ Ibid at 106.

²⁰⁴ *Constructing a Security Community* at 151 (n78).

²⁰⁵ *Agence France-Presse*, "ASEAN must reinvent itself, loosen non-interference policy – Diplomat", 7 January 2004.

Observe, then, the strong reliance in the IR Literature on secondary sources, namely newspaper pieces and interviews. Of course, intensely political factors were at play: politics is to be found somewhere in the background of all legal conclusions.²⁰⁶ In terms of legal assessment, however, what States say or do not say on the international plane can be legally binding. What matters is that, on 24 July 1998, in his capacity as the Indonesian foreign minister, Alatas said nothing about “enhanced interaction” or “flexible engagement” in his opening statement at the 31st AMM.²⁰⁷ Most importantly, the joint communique of the 31st AMM made no express or overt reference to “enhanced interaction” at all.²⁰⁸

Michael Wood reminds us that the selection and assessment of (secondary) materials, which include elite interviews and newspaper pieces, as evidence of State practice, require judgment and experience.²⁰⁹ Here “experience” entails some form of lawyerly scepticism regarding the probative value of uncorroborated statements, which are made by high-ranking political figures.²¹⁰

This account of the ways and means in which the IR literature uses secondary sources matters: its work is not helpful in forming legal assessments of non-intervention’s content. There is scant distinction between the acts of ASEAN States, from that of ASEAN as a legal person. When the acts of ASEAN States are not analysed as being distinct from those of the AMM, the legal conclusions which we draw from the IR literature can be misleading.²¹¹ For instance, Haacke said: “Significantly, though, ASEAN foreign ministers departed from the Manila meeting, allowing members – not least against the backdrop of the principle of sovereignty – to engage in what was termed ‘enhanced interaction’. This concept conveyed a compromise *reached by ASEAN*.”²¹²

²⁰⁶ Grant, para 31 (n183).

²⁰⁷ “Statement by H.E. Mr. Ali Alatas Minister for Foreign Affairs Republic of Indonesia At the Opening of The 31st ASEAN Ministerial Meeting Manila”, 24 July 1998, available at <http://asean.org/?static_post=statement-by-he-mr-ali-alatas-minister-for-foreign-affairs-republic-of-indonesia-at-the-opening-of-the-31st-asean-ministerial-meeting-manila-24-july-1998>.

²⁰⁸ *ASEAN Regionalism* at 107 (n129): Roberts recognised it as “interesting” that the term “enhanced interaction” did not appear in the “official documents”.

²⁰⁹ See n157, para 34.

²¹⁰ For example see *Nicaragua* at paras 64 and 117 (n9). Also see *In the Matter of the Railway Land Arbitration between Malaysia and Singapore (PCA Case No 2012-01) (Award)* (20 October 2014) at paras 124-133: the tribunal did not attach much weight to the *sworn* witness statement of Lee Kuan Yew’s recollection of some events.

²¹¹ Contrast Hao Duy Phan’s *A Selective Approach to Establishing a Human Rights Mechanism in Southeast Asia: The Case for a Southeast Asian Court of Human Rights* (Hague: Brill Nijhoff, 2012) who concludes: “[i.e., non-intervention’s reaffirmation]...was accompanied by a *commitment* to “enhanced interaction” – a *new term* indicating more discussions *within ASEAN* of cross border issues...” at 112 (emphasis supplied).

²¹² *ASEAN’s Diplomatic and Security Culture* at 182 (n114) (emphasis supplied).

Finally, it is flatly imprecise to say that the AMM “agreed” as follows: “Consequently, the 1998 AMM agreed only to sanction ‘enhanced interaction’ on matters of regional concern, balanced by the official retention of the non-interference principle.”²¹³

VI. Distortive Influence on International Legal Scholarship: ASEAN Practice or Practice by ASEAN States?

1) Purpose

The previous sections have demonstrated how the IR literature did not distinguish between ASEAN states acting in their individual capacities, and acts with an ASEAN character (i.e., ASEAN acting as a legal person qua international organisation). I have also illustrated this point with an example, through the developments regarding flexible engagement.

Despite these problems in relying on the IR literature for a legal study of non-intervention, this section shows how the legal scholarship had assimilated the weight and relevance of the IR literature. This point matters because, unless the problems inherent in the IR literature are acknowledged, it may unduly influence any analysis of how ASEAN makes a distinctive regional law of non-intervention.

As I shortly explain, it is problematic to assimilate these contributions in our drawing of legal conclusions on non-intervention with an ASEAN character. This section argues that the IR literature distorts legal assessments of non-intervention’s content. For clarity, I discuss the matters of assimilation and distortion separately, under two discrete headings, but both are related.

2) Assimilating Non-Intervention’s Content in an “ASEAN Context”

Tan Hsien-Li said this about non-intervention:²¹⁴ “Although these principles²¹⁵ were similar to conventional Westphalian principles regulating international relations, their exercise needed to be *understood within the ASEAN context*. Indeed, they have become synonymous with how ASEAN diplomacy is carried out and these have been termed the “ASEAN Way”.²¹⁶

²¹³ ASEAN, *Sovereignty and Intervention* at 112 (n148) (emphasis supplied).

²¹⁴ Article 2(c) of the TAC (n98) provides that the relations between TAC parties are guided by “non-interference in the internal affairs of one another”.

²¹⁵ I.e., immediately before this paragraph, Tan referenced the six principles (one of them is non-intervention) in Article 2 of the TAC.

²¹⁶ Tan Hsien-Li, *The ASEAN Intergovernmental Commission on Human Rights: Institutionalising Human Rights in Southeast Asia* (Cambridge: CUP, 2011) at 145-146 (emphasis supplied).

It is difficult to determine what the words “ASEAN context” and “ASEAN Way” mean in legal terms, especially if they indicate behaviours which can be assessed against rules at general international law. The words “ASEAN Way” is not used in the ASEAN Charter²¹⁷ - a constituent instrument.²¹⁸ There is only one international legal system.²¹⁹ As international lawyers, we can only understand “the ASEAN context” against general international law.²²⁰ This is why the ASEAN Charter states that “ASEAN and its Member States shall”²²¹ uphold the UN Charter and international law.²²²

Indeed, it is arguable that elements of this diplomatic practice, i.e., “ASEAN Way”, are reflected in the ASEAN Charter, especially the provisions on consensual decision making.²²³ If so, the material questions of law, especially non-intervention’s content in relation to the “ASEAN Way”, become an interpretative matter. This is based on the law of treaties, the general rule of the Vienna Convention being applicable.²²⁴ To this end, “consensus” is determined based on its textual meaning, its context, subsequent conduct, subsequent agreement, and so on.

Accordingly, there are rules of general international law, to evaluate non-intervention’s content in relation to consensual decision-making. It is not the “ASEAN context” or “ASEAN Way”, ostensibly behavioural norms, which prevails at international law. While there may be an “ASEAN Way” to manage—or resolve—differences at sea, on land, in the air, or space, this (ASEAN) way must still be subject to the rules and principles of international law.²²⁵

Since “ASEAN and its member States” agreed to uphold international law and the UN Charter,²²⁶ a choice must be made. Either ASEAN is an international legal person, which carries international rights and obligations on the international plane, or it is

²¹⁷ See n23.

²¹⁸ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (“1969 Vienna Convention”), Article 5; generally see the Nolte Report (n184).

²¹⁹ On the Asian Society of International Law’s role, see Michael Wood’s polite reminder in “What Is Public International Law? The Need for Clarity about Sources” (2011) 1 *Asian Journal of International Law* 205 at 214: “Such regional initiatives are to be greatly welcomed, provided that it is borne in mind, as I am sure it is, that “there is, and can only be, one system of international law in today’s world”.

²²⁰ Cf CIL’s mission of studying ASEAN that emphasises the importance of “due sensitivity to ASEAN and Asian particularism and political and cultural identities” (see n37).

²²¹ I.e., Article 2(2) (emphasis added).

²²² I.e., Article 2(j).

²²³ Article 20(1), ASEAN Charter: “As a basic principle, decision-making in ASEAN shall be based on consultation and consensus”.

²²⁴ 1969 Vienna Convention (n218).

²²⁵ Daniel Seah, “Problems Concerning the International Law-Making Practice of ASEAN: A Reply to Chen Zhida” (2016) 6 *Asian Journal of International Law* 265 at 267. Generally see Crawford at 472 (n65).

²²⁶ Article 2(1), ASEAN Charter (n23).

not. If it is, ASEAN is always subject to powerful claims of universality, manifested as general international law.²²⁷ The international legal system does not contain a permanent hierarchy of a right to intervene or against intervention in international relations – this is a moving target, as I argue in Chapter Three.²²⁸

Useful lawyering relies on legal rules that the whole discipline recognises, understands, and even accepts.²²⁹ While these are formal points, they remain salient. However, the international *legal* scholarship still conflates non-intervention at international law, with non-intervention as part of the “ASEAN Way”. Marise Cremona *et al* says: “...the principle of non-interference and the defence of the ‘sanctity of sovereignty’ are at the heart of policy-makers’ understanding of their foreign policy, the *characteristics of the region and of ASEAN specifically*...”²³⁰

Similarly, in the context of monitoring ASEAN treaties and instruments, Simon Chesterman argued that certain “mechanisms”,²³¹ agreed in 1995,²³² to address the damage caused by haze from Indonesia were:²³³ “...typical in that they did not depart from *ASEAN’s norms* of ‘informality, non-interference and consensus’.”²³⁴

When we evaluate Chesterman’s point on the 1995 mechanisms, against general international law, the conclusion is this: in relation to the haze, non-intervention is legally irrelevant. Although the 1995 mechanism is not binding at international law, general rules at international law still exist to appraise it for legality for two reasons.

²²⁷ For example, see Marko Milanovic’s caveat about human rights being not value-neutral instruments (Milanovic at 6, n14): “I start from the assumption that human rights grounded in universal human dignity are a *good thing* (original emphasis), but that this is not an assumption that I am able, or wish, to defend here. What matters is that this assumption is not just my own personal view, but *the normative premise of the entire body of law that I will be analysing*” (emphasis supplied).

²²⁸ Martti Koskenniemi, *From Apology to Utopia (The Structure of International Legal Argument)* (reissue with new epilogue) (Cambridge: CUP, 2005) at 59.

²²⁹ See Crawford and Koskenniemi at 6 (n22): “international law’s ‘home’ surely is in the context of law...If there is a legal ‘mindset’ then,...what makes international lawyers often incomprehensible...is that they share it.” Also see James Crawford, “The Problems of Legitimacy-Speak”, (2004) 98 *Proceedings of the ASIL Annual Meeting* 261 at 272-273.

²³⁰ n40 at 272 (emphasis supplied).

²³¹ Simon Chesterman, *From Community to Compliance?: The Evolution of Monitoring Obligations in ASEAN* (Cambridge: CUP, 2015) at 66.

²³² Chesterman did not name these mechanisms: but one important, non-binding instrument is the ASEAN Co-operation Plan on Transboundary Pollution, reproduced in the *ASEAN Economic Bulletin* (Singapore: ISEAS, Yusuf Ishak Institute, 1995) at 89-95. I cannot locate this 1995 instrument in the publicly available database that belongs to ASEAN. The text in the *ASEAN Economic Bulletin* claims to be compiled by the Singapore Ministry of Environment (at 95).

²³³ See nn140 and 141.

²³⁴ n231 at 66.

First, despite the 1995 mechanism's non-binding status, it was still an act of an ASEAN organ at general international law.²³⁵ ASEAN acted as a venue to facilitate these comments, although it was conducted as an "informal" ASEAN Ministerial Meeting on the Environment.²³⁶ Second, transboundary pollution is not an "internal affair" of any State both as a matter of first principles because the discussion (i.e., comments) and functional cooperation within this ASEAN organ occurred by consent.²³⁷

3) Distorting Legal Conclusion: Making Comments & Non-Intervention

Non-intervention does not prohibit the making of comments at international law.²³⁸ Even in diplomatic law, it is very hard for a receiving State to prohibit comments, on grounds of non-intervention, which are made by representatives of the sending State.²³⁹ As Eileen Denza explains, "with the greater emphasis in modern international relations on the encouragement and protection of human rights in other States, conflicts between the diplomatic duty of non-interference and objective of promoting observance of human rights are frequent".²⁴⁰

In contrast, the IR literature has stressed the "ASEAN Way" as a diplomatic practice which avoids confrontation through criticisms of each other.²⁴¹ Significantly, it is in this sense that non-intervention is treated as relevant within the ASEAN context. Having participated in drafting the ASEAN Charter, a constituent instrument, Walter Woon is explicit about the connection between non-intervention and the "ASEAN Way":²⁴² "The principle of non-interference in an *ASEAN context* means that the member States do not resort to publicly lecturing one another (or other countries) about their domestic situation...It does not mean that matters of common concern are not raised sub rosa at the informal Foreign Ministers' and leaders' meetings...Advice from

²³⁵ Under Article 10 of the ASEAN Charter (n23), this is a sectoral body, an ASEAN organ at international law. As Chesterman noted (ibid at 66), the arrangements were cooperative but "unusual" because it contained monitoring features, in relation to transboundary pollution of the atmosphere, sea and hazardous waste.

²³⁶ See the text of the Statement (n232 at 89b and 95): "The ASEAN Ministers for the Environment shall review the progress of the implementation of the Plan".

²³⁷ See *Trail Smelter Arbitration (Award)* [1949] 3 RIAA 1905.

²³⁸ For example, see Australia position on non-intervention when it acceded to the TAC in 2005: "...nothing in the (TAC) is to be interpreted as preventing a State Party from engaging on or commenting upon issues of international interest, at "Australia National Interest Analysis" [2005] *ATNIA* 14 at para 29.

²³⁹ Generally see Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (4th ed) (Oxford: OUP, 2016) at 377-378.

²⁴⁰ Ibid at 378.

²⁴¹ See n102.

²⁴² Walter Woon served as Singapore's delegation leader to the High Level Task Force for Drafting of the ASEAN Charter.

family, even when the message is unwelcome, is more palatable than hectoring from outsiders. *The existence of the Charter now justifies this legally.*²⁴³

Once again, it is claimed that non-intervention's content occurs in an "ASEAN context", which exceptionally permits comments to be made (but it is subject to consensus). The reasoning is instructive: it is not general international law, which shapes the "ASEAN context". Plainly, the "ASEAN context" becomes legally justified by a treaty.²⁴⁴

Similarly, Ingo Venzke and Thio Li-ann also assimilated, with more finesse, the IR literature's connection between non-intervention and the "ASEAN Way".²⁴⁵ After taking note of Article 2, TAC in its entirety, which contained the treaty basis of non-intervention, Venzke and Thio said: "Despite the adherence to the *cardinal ASEAN principle of non-interference* in internal affairs as a manifestation of the international law principle of sovereign equality, which formerly justified turning a blind eye to e.g. human rights abuse in a member State, this was never strictly adhered to and has gradually been relaxed. One might add that *Member States have differed on which of these behavioural principles they emphasize*: socialist and military regimes have typically underscored non-interference in national affairs, while other Member States have foregrounded institutional cooperation and friendly relations. Some argue that the "ASEAN Way" will continue but be supplemented by a new rule of law...with the motivation to achieve efficient and predictable action."²⁴⁶

This passage suggests that there is no collective agreement on non-intervention's content. Presumably, this is because individual ASEAN member States emphasise different positions on non-intervention. Arguably, a sharper focus in relation to this matter would involve examining formal statements of the ASEAN organs on a particular case.²⁴⁷ If no statements on non-intervention were made, it is arguable that non-intervention simply did not apply.²⁴⁸

²⁴³ Walter Woon, *The ASEAN Charter: A Commentary* (Singapore: NUS Press, 2016) at 60-61 (emphasis supplied).

²⁴⁴ But see Woon's preface, *ibid* at ix: "I should say at the outset that this is not a law book. It is impossible to write a legal text when there is *so little law involved*. What I have tried to do is explain how *the provisions of the Charter* came to be drafted and how they relate to the realities of diplomatic practice" (emphasis supplied).

²⁴⁵ Thio Li-ann & Ingo Venzke, *The Internal Effects of ASEAN External Relations* (Cambridge: CUP, 2016).

²⁴⁶ *Ibid* at 10.

²⁴⁷ In *The Internal Effects of ASEAN External Relations* at 10, footnote 7 (n245), Thio and Venzke cited an example of non-intervention being "relaxed" because the AMM criticised the Myanmar Government's unhandsome treatment of the monks in 2007. For further discussion, see Chapter Five.

²⁴⁸ See "Statement by ASEAN Chair, Singapore's Minister for Foreign Affairs George Yeo in New York" (27 September 2007): "...expressed their revulsion to Myanmar Foreign Minister Nyan Win over reports

Whether non-intervention has been “relaxed” is not the point.²⁴⁹ Rather, the “internal affairs” aspect in Article 2, TAC to which non-intervention applies is now subject to the obligations of ASEAN membership, under the ASEAN Charter.²⁵⁰ In other words, the subsequent practice of Article 2, TAC, has to be interpreted in accordance with the ASEAN Charter, under the law of treaties at general international law.²⁵¹

To conclude: I have shown how the international legal literature had assimilated the IR literature’s signal contribution to non-intervention’s content as being related to the “ASEAN Way”. There are qualitative implications for the legal reasoning that follows. The conclusion that non-intervention’s content has waned is correct. It is also true that, as a diplomatic practice, the “ASEAN Way” is real, but this reality can be framed and assessed against general international law.

This, then, is the key problem of the IR literature: the many studies regarding non-intervention are not “ASEAN acts” at all. As this study shows, the content of non-intervention with an ASEAN character, which is distinctive as regional law, are much narrower when compared to the IR literature.

VII. Structure of Chapters

This introductory chapter has two broad goals. First, it identifies and explains the core proposition of this study regarding non-intervention with an ASEAN character. There is no extant legal study of regional rules of non-intervention as made by ASEAN (as a separate legal person). The core proposition, then, is that there is a distinctive regional law of non-intervention, which is made by ASEAN, and this is in turn influenced by general international law.

Second, therefore, a substantial part of this chapter focussed on identifying the problems with current studies of non-intervention with respect to ASEAN: it is principally examined from an International Relations perspective. The IR literature

that the demonstrations in Myanmar are being suppressed by violent force and that there has been a number of fatalities”. The word “non-intervention” did not appear in this statement. The statement is available at

<https://www.mfa.gov.sg/content/mfa/overseasmission/washington/newsroom/press_statements/2007/200709/press_200709_03.html>.

²⁴⁹ In *The Internal Effects of ASEAN External Relations* at 10, footnote 7 (n245): Thio & Venzke invited the reader to “consider” Article 2(2)(g) of the Charter which provides for “enhanced consultations”. Presumably Article 2(2)(g) is another example of non-intervention being relaxed. Even so, Article 2(2)(g) is subject to the general rule at international law of interpreting the whole context of the Charter’s purposes, pursuant to Article 31 of the 1969 Vienna Convention (n218). In short, non-intervention is still legally relevant under the ASEAN Charter.

²⁵⁰ See n23. In September 2007, the Charter was not in force (entry into force: 15 December 2008). Be that as it may, we should be looking at the obligation not to defeat the purpose of the ASEAN Charter, under Article 18 of the 1969 Vienna Convention (n218).

²⁵¹ See n224.

concerning non-intervention does not distinguish between acts of individual ASEAN States, and acts with an ASEAN character.

One outcome is that even legal scholarship regarding non-intervention had begun to assimilate uncritically the IR literature's studies as to non-intervention. Despite having shown that no firm legal basis exists to classify the acts studied in this literature as being acts with an ASEAN character, the legal literature's assimilation still occurred. The core proposition of this study, i.e., the distinctive regional law of non-intervention is made by ASEAN and is influenced by general international law, can only be advanced after acknowledging the problems with the extant literature on non-intervention with respect to ASEAN.

The rest of this study proceeds as follows. Chapter Two discusses how international organisations make international law through their organs, as separate legal persons, which are distinct from its member States. Relatedly, it explains how an international organisation can make regional law, and what "regional" means in relation to general international law.

Chapter Three gives a broad account of the "origins" and content of non-intervention at general international law. It argues that determining non-intervention's content requires making choices, but these choices are made by reference to the general rules of international law.²⁵²

Chapter Three illustrates this argument by showing how the canons of Emmer de Vattel and Lassa Oppenheim²⁵³ continue to shape the general rules regarding non-intervention at international law. This chapter also shows how non-intervention's content is protean, a moving target which is facilitated through the venue of an international organisation – the UN's organs.

Chapters One to Three, therefore, show how an international organisation such as ASEAN can make regional law, based on the general rules of international law. The rest of this study uses two case studies to support my core proposition that general

²⁵² On the language of legal scholarship in the *American Journal of International Law* after the terrorist attacks of 11 September 2001, Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge: CUP, 2004) at 348 (footnote 102) asked: "We need only imagine how we might read an article from an Indian academic in the pages of the *Indian Journal of International Law* that adopted the same language...Would it be dismissed as too transparently local and culturally freighted to stand as a piece of objective legal scholarship?"

²⁵³ Chapter Three, Sections II and III; generally see Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: CUP, 2008) at 9.

international law influences (and restricts) this regional law of non-intervention with an ASEAN character.

Accordingly, Chapter Four examines how ASEAN (organs) used the general rules of international law (especially in relation to separate legal personality) to create a distinctive regional law of non-intervention, during the long Kampuchean conflict (1978-1990).

Chapter Five investigates ASEAN practice with respect to Myanmar. It points to the diminution in non-intervention's content, as contained in Articles 2 and 10 of the Treaty of Amity and Cooperation, 1976 (TAC),²⁵⁴ when evaluated against emerging rules general international law. One example includes the International Law Commission's ongoing work on protecting persons during disasters.²⁵⁵

Both case studies in Chapters Four and Five are chosen for two reasons. First, a sustained body of primary materials over a period of time, produced by ASEAN and the United Nations, are available. This availability matters because it allows a comprehensive survey of the range and effect of general international law on the regional law-making of non-intervention with an ASEAN character. Second, despite a focus on just two case studies, both subject matters bear examination because they represented pivotal phases in the development of ASEAN as an international organisation.

ASEAN's conduct during the long Kampuchean conflict is a political coming of age and has been extensively studied in the International Relations literature. This is likely the first legal treatment of ASEAN's conduct during the Kampuchean conflict, which created a distinctly regional content of non-intervention.

The second case study addressed ASEAN's conduct with respect to Myanmar, an ASEAN member State. By now, ASEAN has expanded its membership to admit Myanmar, Lao, Cambodia, and Vietnam (its former political adversary). The various actions of the ASEAN organs against the Myanmar government, which unquestionably implicated Myanmar's internal governance, are remarkable: its actions suggest the regional content of non-intervention had changed through diminution.

²⁵⁴ See n98.

²⁵⁵ Eighteen draft articles on "The Protection of Persons in the Event of Disasters" were adopted by the ILC and submitted to the General Assembly: "Protection of Persons in the Event of Disasters" UN GAOR 71st Session Supp No 10 UN Doc A/71/10 at 12 (4 August 2016); UNGA Res 71/141 (19 December 2016).

This is because, from 1979-1990, ASEAN had taken the regional position that non-intervention protected change of governments in Kampuchea (however deplorable the Khmer Rouge government was). Now, in the 2000s, ASEAN took positions against Myanmar and pressed for specific changes to its political governance, which include the participation of Aung San Suu Kyi. These changes, the diminution to its regional content of non-intervention, reflected changing goals of ASEAN as an international organisation. To achieve these goals, ASEAN had to conduct effective external relations with other international legal persons: it was hard not to be influenced by general international law.

Chapter Six concludes.

Chapter Two

HOW INTERNATIONAL ORGANISATIONS MAKE GENERAL INTERNATIONAL LAW AND REGIONAL LAW

I. Purpose

In Chapter One, we have discussed the problems regarding the IR literature on non-intervention with respect to ASEAN. As explained already, it is not easy to determine the legal content of non-intervention with respect to ASEAN in the IR literature, which is mainly concerned with studying non-intervention as a diplomatic practice. Nonetheless, the legal literature which addressed ASEAN had assimilated the IR literature's conclusions regarding non-intervention.

Having identified this problem, it is now possible to develop the core proposition that ASEAN can create a distinctive regional law of non-intervention, which has an ASEAN character in this sense. Its regional content is made possible by general international law, but this influence of general international law can also constrain the regional law of non-intervention. Therefore, in this chapter, the core proposition is developed by explaining three distinct but related lines of enquiry.

First, this chapter explains how and when international organisations can make international law as international legal persons at general international law, which are separate from the member States that created them. To this extent, therefore, this chapter gives an account of treaties and custom as authoritative sources of binding commitments, under Article 38, Statute of the International Court of Justice.¹ Treaties and custom are explored because they are established indications of State consent, a powerful reflection of the *Lotus* presumption.² Next, this chapter explores how

¹ Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993. For brevity, throughout this study, I use "Article 38" to refer to "Article 38, Statute of the International Court of Justice". On Article 38, generally see Andreas Zimmermann, Karin Oellers-Frahm, Christian Tomuschat & Christian J. Tams, eds, *The Statute of the International Court of Justice* (2nd ed) (Oxford: OUP, 2012).

² I.e., States alone create the law, through consent to binding rights and obligations, and retain freedom of action unless there is a positive law restriction at international law: S.S. "*Lotus*" (*France v. Turkey*) [1927] P.C.I.J. (ser. A) No. 10 (Sept. 7). For one recent example, see the United States' comments on the legal meaning of "human dignity" with respect to the International Law Commission's *Protection of Persons in the Event of Disasters*, 28 April 2016, UN Doc A/CN.4/696/Add1: "The United States disagrees, as a legal matter, ... that "the duty to protect" requires States to adopt legislation proscribing activities of third parties in circumstances that threaten a violation of the principle of respect for human dignity, even though this statement reflects a worthy policy objective. The commentary does not identify the source of this duty, and the sources in this paragraph are all non-binding guidelines and principles. To the extent this is an attempt to develop the law progressively, it should be clearly identified as such and state the legal support for this development". For a critical view of the *Lotus* presumption, generally see Douglas Guilfoyle, "*SS Lotus (France v Turkey) (1927)*" in *Landmark Cases in Public International Law* (Eirik Bjorge and Cameron Miles, eds) (Oxford: Hart Publishing, 2017) 89.

international organisations, as a venue,³ challenge the primacy of consent in treaties and custom, by creating rules at general international law in the form of non-binding instruments.⁴

Second, having explained how international organisations can make international law, the second line of enquiry concentrates on their capacity to make a particular type of international law-making: regional international law. This enquiry matters to the core proposition because it facilitates the arguments in this study that ASEAN, an international organisation, can make regional international law. This type of regional law-making,⁵ which is enabled by general international law, validates the reality of a Southeast Asia as a coherent region in terms of geography and shared values.

However, as illustrated in Chapter Five, general international law can also constrain the scope of regional law-making. It is in this sense that regional international law, as made by ASEAN, is analysed and used in normative terms. It is normative because there are rules that are particular to a regional area, which are legally binding and from which legal consequences can arise, on the basis of general international law. However, this study focuses only on one particular regional law that is important to ASEAN: non-intervention.

Chapters Three-Five will elaborate on and examine the third line of enquiry, i.e., how general international law creates descriptively and evaluatively vague content, as to non-intervention, which allows the regional law of non-intervention to be made by ASEAN.

This chapter, therefore, supports the core proposition with an analytical framework to evaluate these three related lines of enquiry by explaining ASEAN's separate acts, in terms of how the general rules of international law enable international organisations (such as ASEAN) to make distinctive regional international law, whose legal bases are grounded in the sources of international law such as treaties and customary international law. Accordingly, two elements of an international organisation's law-

³ For a comprehensive account of how different international actors, legal sources, and international organisations interact to shape contemporary law-making, see Alan Boyle & Christine Chinkin, *The Making of International Law* (Oxford: OUP, 2007).

⁴ Generally see Jan Klabbers, "The Transformation of International Organizations Law" (2015) 26 EJIL 9; Jan Klabbers, *An Introduction to International Organizations Law* (3rd ed) (Cambridge: CUP, 2015); Robin R. Churchill & Geir Ulfstein, "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law" (2000) 94 *AJIL* 623; Benedict Kingsbury, Nico Kirsch, Patrick B Stewart, "The Emergence of Global Administrative Law" (2005) 68 *Law and Contemporary Problems* 15; Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: CUP, 2005); Jutta Brunnée & Stephen J. Toope, *Legitimacy and Legality in International Law* (Cambridge: CUP, 2010).

⁵ See especially Chapters Three-Five.

making are examined as forming an analytical framework in this chapter. The first is that international organisations serve as a *venue* in which States formulate and discuss law-making in a multilateral setting.⁶ The other is the *outcome* of this multilateral interaction between States: treaties are concluded and customary international law, i.e., custom,⁷ might emerge. Additionally, numerous non-binding instruments such as codes, declarations, and guidelines are also agreed by States.

Legal consequences can (they often do) arise from this form of multilateral interaction between States, at a venue, in an institutionalised sense. This is because general international law accords international organisations a separate legal personality, from which its actions can be evaluated for legality, in a distinctive way which is separate from the member States who created that international organisation.

The purpose of this chapter, therefore, is to explain the core proposition of how regional law is influenced by general rules of international law: it forms the legal basis on which non-intervention's content, a type of regional law with an ASEAN character, is evaluated and evolves in two case studies below. Not only is regional law influenced by general international law, regional law-making can be created by international organisations, as actions which are separate from the member States who created them, because its legal basis is rooted in general international law.

The outcome is that, I argue, this type of regional law-making advances and validates a geographical area in a normative (therefore constructive) sense, as a "region" of "Southeast Asia". In other words, general international law crystallises the reality of Southeast Asia as a region, through its general rules which permit ASEAN to make regional international law and custom, as a separate legal person. This analytical framework used to explain and understand the distinctive regional law-making capacity of ASEAN is further developed in Chapter Three, by concentrating on the law-making of one subject of law which matters to ASEAN: non-intervention.

The descriptive and evaluative vagueness of non-intervention, alongside the regional law-making capacity of ASEAN in term of its basis treaties and regional customary international law, are created by rules of general international law. This point matters because the case studies, in Chapters Four and Five, will show how the same body of practice can be understood as ASEAN having created a regional law of non-

⁶ Generally see Jose E Alvarez, *The Impact of International Organizations on International Law* (Leiden/Boston: Brill Nijhoff, 2017), especially 351-355 and James Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (Cambridge: CUP, 2011) at 21-23.

⁷ For brevity, I refer to it as custom throughout this study.

intervention as regional customary international law and subsequent practice in treaty interpretation. The outcome of this conclusion is to advance the core proposition that both the customary and treaty basis of ASEAN's law-making of non-intervention are distinctively regional, with an ASEAN character, on the basis that general rules of international law enable it but can also constrain the scope of this distinctive regional law-making.

II. Article 38 as a Statement of the Law⁸

1) Treaties

This section explains how two particular rules of general international law, i.e., the rules regarding the making of treaties and the formation of custom, form a wide legal basis which allow law-making to be generated by States or international organisations, as international legal actors. The general rules of international law regarding treaties and custom can be used as an analytical framework to identify, understand, and evaluate the international legal actors (including ASEAN) who are making international law to reflecting their broad agreement as to specific areas of cooperation. This section, therefore, advances the core proposition that a distinctive regional law of non-intervention has been made by ASEAN, which in itself is possible because of the rules of general international law.

Article 38 is strictly an injunction, not a rule, on the ICJ to consider the four sources in its judicial conduct of cases.⁹ At general international law, however, Article 38 is a statement of the sources of international law,¹⁰ a “rule of recognition” for binding obligations.¹¹ Article 38 bears the burden of international relations well. It is a convenient starting point to evaluate legal rights and obligations,¹² an intrinsic part of international law-making.¹³

⁸ See n1. On the role of instruments, generally see Boyle and Chinkin (n3) especially at 210-260; Joost Pauwelyn, Ramses A. Wessel and Jan Wouters, “When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking” (2014) 25 EJIL 733.

⁹ Article 59, ICJ Statute (n1) states that the ICJ's decision has “no binding force except between the parties and in respect of that particular case”.

¹⁰ James Crawford, *Brownlie's Principles of Public International Law* (8th ed) (Oxford: OUP, 2012) at 22.

¹¹ Fernando Lusa Bordin, “The Authority of Codification Conventions and ILC Draft Articles in International Law” (2014) 63 ICLQ 535 at 547; Jean d'Aspremont, “The Idea of ‘Rules’ in the Sources of International Law” (2013) 84 BYIL 103 at 107-114.

¹² n10 at 23.

¹³ Generally ILC, “*Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (Report of the Study Group of the International Law Commission)*” (13 April 2006) UN Doc A/CN.4/L.682 (“*Fragmentation Report*”) at para 86.

There is literature on point that explores how international organisations create a new legal “source”, which is not reflected in Article 38.¹⁴ Instead, I want to stress the relevance of treaties and customs, as paradigmatic sources of Article 38,¹⁵ within international organisations.¹⁶ It is the subject of treaties, to which I first turn.

Although there is no formal hierarchy between the four sources in Article 38, treaties are still the most important source of obligations in practice.¹⁷ Their importance is based on the control that States still exercise, through their tacit or express consent, over international law-making.¹⁸ Legal obligations principally advance the self-interests of States, although it is a separate matter whether those self-interests are aligned with the interests of the population within that State. As a legal source of binding obligations, then, treaties allow States to choose they are willing and able to agree, through consent in treaties.¹⁹

As a consensualist regime, the law of treaties embodies corollaries such as non-retroactivity and good faith.²⁰ Here the legal rules are binding on all States because of its unquestionably universal character, partly because of the “unspoken assumption”²¹ that the 1969 Vienna Convention probably reflects customary international law (with the possible exception concerning reservations to treaties).²² However, international law works because it relies on “something more” than consent,²³ which cannot wholly be based on the whims of particular States.²⁴

I shall shortly elaborate on the vital role of international organisations, as a venue, to make such universal law in treaty form. For now, I want to emphasise two points in relation to treaties as a legal source of Article 38. First, there is a wide range of

¹⁴ See n6 at 18-29 and 351-358; Jose Alvarez, *International Organizations as Law-makers* (Oxford: OUP, 2005) at 273-400.

¹⁵ For a sardonic account, see Jan Klabbers, “Not Revisiting the Concept of Treaty” in *40 Years of the Vienna Convention on the Law of Treaties* (Alexander Orakhelashvili and Sarah Williams, eds.) (London: BIICL, 2010) at 29; on “transnational discourse”, also see Kristina Daugirdas, “Reputation and the Responsibility of International Organizations” (2014) 25 EJIL 991.

¹⁶ Generally see n1 at 763; n10 at 23.

¹⁷ See n13, para 85, at 47.

¹⁸ See further Chapter Six.

¹⁹ See n2; generally see n6 at 3.

²⁰ Articles 4 and 31(1), Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (“1969 Vienna Convention”).

²¹ Anthony Aust, “Vienna Convention on the Law of Treaties (1969)” (2006) *MPEPIL*, para 14.

²² *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7 especially paras 42-46 and 99; also see the ILC’s “Guide to Practice on Reservations to Treaties”, A/66/10 Add.1 (2011).

²³ Wouter Werner, “State Consent as Foundational Myth” in *Research Handbook on International Lawmaking* (Catherine Brölmann & Yannick Radi, eds) (UK: Edward Elgar, 2016) 13 at 16.

²⁴ *Ibid.*

interests that reflect changing social needs and are important for mankind, which justify the evolution of treaties beyond what was originally consented to.²⁵

Second, there are indications of a downward trend in terms of State support for multilateral treaties.²⁶ Through international organisations, including ASEAN, its member States increasingly agree non-binding instruments, such as codes or guidelines. These instruments are not treaties because the member States did not agree to be bound by the commitments at international law. However, this increased recourse to such instruments, through international organisations as venues, interacts with treaty law. For example, such instruments can be evaluated as subsequent practice or as the fulfilling of specific purposes under an international organisation's constituent instrument.²⁷

2) Custom

This part supports the core proposition by elaborating on how the rules at general international law regarding the formation of custom contribute to an analytical framework, from which we can determine the regional law-making of an international organisation. As a source of law, custom is a spontaneous but universally binding form of international cooperation.²⁸ Its two constituent elements, the general practice of States which is accepted as law (i.e., *opinio juris*)²⁹ were recently affirmed by the ILC as the “basic approach”³⁰ to determining custom's content.³¹ In fact, the insistence of several States in retaining the term “*opinio juris*” (alongside the language of general State practice being accepted as law)³² attests to the primacy of consent to custom's formation.

However, Crawford reminds us that custom, at general international law, is not always universally binding.³³ The rules on persistent and subsequent objection, as well as

²⁵ Generally see n23.

²⁶ On “treaty fatigue”, see n8 at 739.

²⁷ Generally Campbell McLachlan, “The Evolution of Treaty Obligations in International Law” in *Treaties and Subsequent Practice* (Georg Nolte, ed.) (Oxford: OUP, 2013) at 69.

²⁸ See statement of ILC member, Mathias Forteau, at 67th session, ILC, “Provisional Summary Record of the 3251st Meeting” (9 June 2015) UN Doc A/CN.4/SR.3251 at 5.

²⁹ See Draft Conclusion 2(3), ILC, “Identification of Customary International Law (Text of the Draft Conclusions provisionally adopted by the Drafting Committee)” (30 May 2016) UN Doc A/CN.4/L.872: “To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)”.

³⁰ *Ibid.*

³¹ Michael Wood, Special Rapporteur, “Third Report on Identification of Customary International Law” (27 March 2015) UN Doc A/CN.4/682 at 4-9; see further Sean Murphy, “The Identification of Customary International Law and Other Topics: The Sixty-Seventh Session of the International Law Commission” (2015) 109 *American Journal of International Law* 822.

³² *Ibid.*

³³ See n10 at 28.

particular custom, which apply to certain group of States, serve to underscore consent's primacy to the opposability of custom, to all States, at general international law.³⁴ However, it bears emphasis that these developments were influenced – sometimes attenuated - through international organisations.

Three examples illustrate this point. First, the role of the International Law Commission's (ILC) is a strong example of carrying out the General Assembly's mandate,³⁵ which has metamorphosed into combining progressive development and codification of international law. Pertinently, in its work on the identification of custom, the ILC's Draft Conclusion Four states that the acts of international organisations can count as evidence for the "formation" or "expression" of customary rules.³⁶ This approach was criticised by the Asian-African Legal Consultative Organization (AALCO) on grounds that the ILC's output³⁷ and ICJ case law are not State practice.³⁸ The Special Rapporteur replied as follows: "Regional views (i.e., of the AALCO) may be important, but on a topic like the identification of customary international law they must surely be seen as a contribution to a universal view of the matter."³⁹

The second example of an international organisation's role in shaping custom is the assertion, by the ICJ (a "principal" organ of the UN, with judicial competences)⁴⁰ in *Nicaragua*,⁴¹ regarding non-intervention's customary status on the basis of the General Assembly's Friendly Relations Declaration (1970). I return to this matter in Chapter Three.⁴²

The third example is the law of the sea. As James Harrison had explained, different types of institutions were involved in shaping its laws, which broadly implicated core issues of jurisdiction and sovereignty.⁴³ From the Hague Codification Conference (1930) to the ILC's Four Geneva Conventions (1958), it was UNCLOS III which finally

³⁴ Ibid.

³⁵ "Establishment of an International Law Commission", UNGA Res 174(II) (21 November 1947).

³⁶ See n29 at 2: "The requirement, as a constituent element of customary international law, of a general practice means that it is primarily the practice of States that contributes to the formation, or expression, of rules of customary international law...In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law."

³⁷ I.e., its draft articles, commentaries, and draft conclusions.

³⁸ See further Section IV, Part 2.

³⁹ Michael Wood, "The Present Position within the ILC on the Topic "Identification of customary international law": in Partial Response to Sienho Yee, Report on the ILC Project on "Identification of Customary International Law" (2016) 15 *Chinese Journal of International Law* 3 at para 5; also see Michael Wood, Special Rapporteur, "Fourth Report on Identification of Customary International Law" (8 March 2016) UN Doc A/CN.4/695 at para 4.

⁴⁰ Article 7(1), UN Charter.

⁴¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 14 ("*Nicaragua*"), para 188 at 100.

⁴² Chapter Three, Section VI.

⁴³ Generally n6 at 23-35.

created a universal legal order.⁴⁴ Despite its ad hoc nature, UNCLOS III was facilitated through the UN, as an important venue, on which its organs such the General Assembly continue to advance the laws of the seas, including Resolution 46/263 in 1994 on implementing Part XI of the resulting UN Convention on the Law of the Sea.⁴⁵

Though not a party to this resulting treaty, even the United States accepted that this treaty's principal provisions represented custom.⁴⁶ It is a powerful testament to the role of international organisations in shaping the qualitative nature of State consent, from an absolutist form to an evolutive granting of consent in a multilateral venue.

III. How International Organisations Make General International Law

1) A Venue to Advance Treaties & Custom with Soft Law

This section continues with the previous argument that general rules of international law, in particular the rules regarding the creation of treaties and custom, form a broad basis on which to identify and evaluate the law-making acts of international legal actors, such as international organisations. In this section, we will examine how these general rules in treaties and custom create international organisations, and endow them in turn with law-making capacity (including soft law), on grounds of their being separate legal persons. The purpose of this section, then, is to demonstrate how general rules of international law provide an analytical framework to identify and evaluate international organisations as being capable of creating regional law, which advances the core proposition that it is (i.e., regional law) influenced by general international law.

As Koskenniemi and Crawford had observed, there is “no denying” that some international law is created and formulated through the institutional venues of international organisations.⁴⁷ Having already surveyed the significance of treaties and custom in creating general rules of international law, this section explores the roles

⁴⁴ Harrison, n6 at 23-35.

⁴⁵ See also “Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982”, A/RES/48/263 (17 August 1994): Resolution 48/263 adopted an annexed treaty text (i.e., the implementation agreement) and urged States to become parties to it; generally see n6 at 86-93.

⁴⁶ For the witness statements by the US Secretaries of State and Defence, as well as that of the Chairman of the Joint Chief of Staff, see generally “Full Committee Hearing The Law of the Sea Convention (Treaty Doc. 103-39): The U.S. National Security and Strategic Imperatives for Ratification” (23 May 2012), available at <<https://www.foreign.senate.gov/hearings/the-law-of-the-sea-convention-treaty-doc-103-39-the-us-national-security-and-strategic-imperatives-for-ratification>>.

⁴⁷ See James Crawford & Martti Koskenniemi eds, *The Cambridge Companion to International Law* (Cambridge: CUP, 2012) at 14.

that international organisations play in advancing treaties and customs. It examines an outcome of this role: the instruments that are made by an international organisation, as a separate legal person, which share a relationship with treaties and custom.

Examples of these instruments include the setting of technical (and non-binding) rules with a universal application,⁴⁸ such as the IAEA⁴⁹ or MARPOL.⁵⁰ These instruments are manifestations of “soft law”,⁵¹ a term which it is hard to define.⁵² “Soft law” instruments create expectations of behaviour but they are still non-binding.⁵³ Therefore, it is common to explain “soft law” as falling along a “continuum” or “spectrum” of international law-making between treaties or custom.⁵⁴ In this study, the following “soft law” instruments which are made through the venues of international organisations are considered:⁵⁵ communiques and statements of ASEAN organs;⁵⁶ UN General Assembly and Security Council resolutions;⁵⁷ ICJ judgments; works of publicists; ILC draft articles and commentaries.

As to the relationship between these instruments with Article 38’s treaties and custom, international lawyers variously explain that these instruments might: fill interstitial gaps;⁵⁸ create a psychological moment;⁵⁹ be interactive;⁶⁰ represent a valuable element of practice;⁶¹ constitute important evidence of international law;⁶² act as an intermediary between treaties and custom.⁶³

⁴⁸ See n6 at 3.

⁴⁹ I.e., International Atomic Energy Agency.

⁵⁰ I.e., International Convention for the Prevention of Pollution from Ships (adopted 17 February 1973, 2 October 1983) 1340 UNTS 184.

⁵¹ The literature is legion: for a sample, see Daniel Thürer, “Soft Law” MPEPIL (2009); Boyle and Chinkin (n3 at 211-229); Jan Klabbbers, “The Undesirability of Soft Law” (1998) 67 *Nordic JIL* 381.

⁵² For a comprehensive rejection, see Kal Raustiala, “Form and Substance in International Agreements” (2005) 99 *AJIL* 581 at 586: “There is no such thing as “soft law”: soft law agreement is not a coherent concept; nor does it accord with state practice”.

⁵³ See n3 at 212.

⁵⁴ For examples, see Thio Li-ann & Ingo Venzke, *The Internal Effects of ASEAN External Relations* (Cambridge: CUP, 2016) at 28-29.

⁵⁵ For clarity: they are indicated in no particular order of importance.

⁵⁶ I will particularly focus on the statements by the ASEAN Summit (i.e., head of states/governments) and ASEAN Ministerial Meeting (ASEAN foreign ministers; now renamed ASEAN Community Council).

⁵⁷ However, Security Council resolutions passed under Chapter VI authorisation are legally binding, as a type of “decisions”, made under Article 25 and Chapter VI, UN Charter.

⁵⁸ Dinah Shelton, “International Law and ‘Relative Normativity’” in *International Law* (Malcolm Evans, ed) (4th ed) (Oxford: OUP, 2014) 137 at 161-162.

⁵⁹ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1995) at 38.

⁶⁰ See n10 at 21 and n3 at 213.

⁶¹ Michael Wood and Omri Sender, “State Practice”, MPEPIL (2017), para 18.

⁶² *Ibid*, para 18.

⁶³ Generally Malgosia Fitzmaurice, “History of Article 38 of the Statute of the International Court of Justice” in *Oxford Handbook of Sources of International Law* (Samantha Besson and Jean d’Aspremont, eds) (Oxford: OUP, 2017) at 179.

Consequently, one vital question that arises from this relationship between instruments with treaties and custom, formed within international organisations, is the matter of acquiescence and its relationship with consent.⁶⁴ As I shortly explain, acquiescence in this sense is a form of tacit consent to the emergence of rules through (for instance) notification or discussion at any fora, but importantly there is no explicit protest against its emergence in response.⁶⁵ Therefore, through the conduct of its representatives within an international organisation's organs, or otherwise in accordance with that international organisation's constituent instrument,⁶⁶ a member State's practice can reflect acquiescence to a potential law-making instrument, in lieu of express consent.⁶⁷

In this respect, it is important to emphasise an important (and orthodox) point about the sources of international law here. There is an informal hierarchy between legal sources, in which treaties enjoy priority over custom.⁶⁸ This informal hierarchy reflects the practical acknowledgement of international legal practice: treaties often indicate particular resources being allocated to negotiating a certain outcome, over a specific time, which culminates in the treaty text.⁶⁹ Put simply, a treaty (compared with custom) reflects the most probative evidence of State consent to the obligations and rights which binding at law.

For clarity and from a technical standpoint, though, ICJ judgments and ILC draft articles and commentaries are obviously not “sources” of law, but their strong influence in advancing general rules of international law is evident. Be that as it may, it is practical, both in legal practice and policymaking, to refer to ICJ judgments (which are subsidiary means under Article 38) and ILC draft articles and commentaries because of the duration and influence being attached to (as well as the stature of particular lawyers who are involved in) producing the judgment or ILC work product on point.

⁶⁴ Georg Nolte, “Third Report on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties” (7 April 2015) UN Doc A/CN.4/683 at paras 49-50 and 72-82.

⁶⁵ For example, see Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R (adopted 27 September 2005).

⁶⁶ Apart from State representatives, there are also technocrat-level employees within the international organisations, which I discuss below (see n131).

⁶⁷ See n23.

⁶⁸ See *Analytical Study (on Fragmentation of international law: difficulties arising from the diversification and expansion of international law) Finalized by the Chairman of the Study Group*, UN Doc A/CN.4/L.682.

⁶⁹ For discussion as to how treaties tend to be more particular than rules of customary international law, see *ibid.*, at 38.

Throughout this study, therefore, my recourse to ICJ judgments and ILC draft articles and its commentaries must be read with these clarifications in mind. Returning, then, to the matter of acquiescence and tacit consent, in *Certain Expenses*, the ICJ reasoned that the General Assembly's power to budget for international peace and security is within Article 17, UN Charter:⁷⁰ the longstanding practice of the UN organs reflect member States' acquiescence and create a rebuttable presumption (despite the Soviet Union's negative vote on occasions).

In its *Walls* opinion, the Court relied on the practice of UN organs, the General Assembly and Security Council, to suggest that UN member States had acquiesced to an evolved interpretation of Article 12, UN Charter.⁷¹ Although Article 12(1) expressly states that the General Assembly should not make a recommendation when the Security Council is exercising its functions over a dispute, it seems that the subsequent practice of both organs and acquiescence of UN members to this practice has effectively rendered the words in Article 12(1) a dead letter.⁷² In its recent work on the subsequent practice and conduct of interpreting treaties, the ILC also endorsed this form of acquiescence as legally valid.⁷³

Acquiescence, I argue, has become a general rule at international law to appraise the legal effects of an international organisation's actions.⁷⁴ In terms of the soft law instruments that the organs of international organisations make, it is implausible as a pure legal point that these instruments can exist on the international plane and not be subject to the general rules of international law.⁷⁵ As Boyle and Chinkin have observed, these instruments which are created by international organisations advance and formalise the international law-making process.⁷⁶ I illustrate this point with two case studies below, regarding ASEAN organs which are prolific in generating a wide range of (non-binding) instruments.⁷⁷

⁷⁰ I.e., Article 17, UN Charter does not contain specific provisions for budgetary or financial arrangements on maintaining peace and security.

⁷¹ Article 12(1), UN Charter provides: "While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests."

⁷² See Jose E Alvarez, "Limits of Change by Way of Subsequent Agreements and Practice" in *Treaties and Subsequent Practice* (Georg Nolte, ed.) (Oxford: OUP, 2013) 123 at 127.

⁷³ Ibid.

⁷⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 at 149.

⁷⁵ See n15 at 32; n8 at 756.

⁷⁶ See n3 at 160-161.

⁷⁷ Chapters Four to Five.

These implications, regarding soft law instruments and acquiescence,⁷⁸ arise from an international organisation's separate legal personality - a legal construct which the ICJ developed in its case law.⁷⁹ There is some irony here. This is because our understanding of soft law instruments and acquiescence is shaped by the case law of the ICJ since *Reparation*, a case which I shortly explain, whose decisions strictly only bind the litigating parties. In fact, its case law, broadly defined as soft law instruments above, has considerably advanced general international law,⁸⁰ particularly in the field of international organisations.

This ready recourse to the ICJ's case law is not just a "subsidiary means", under Article 38(1)(d) of the ICJ Statute, to determine "rules of law". Two separate points bear emphasis. First, as a formal and technical matter of its binding nature, ICJ case law is binding on the litigating parties to the dispute. It is not binding on parties not involved in the dispute that gave rise to the case law, and only constitutes a subsidiary means of legal analysis in this sense.

Second, however, ICJ case law is influential despite its formal legal basis as a subsidiary means of legal analysis. Philip Allott reminds us that a distinctive trait of our brain is its proclivity to detect patterns.⁸¹ Therefore, in terms of framing legal problems, the lawyer's brain selects (and excludes) materials, arranges the relevant parts onto legal rules, and draws a legal conclusion.⁸² If this conclusion is widely accepted by those who operate in the discipline, it is recognised as good international lawyering.⁸³ As Crawford explains: "I know good lawyering when I see it, including good international lawyering, and I could give an account of why it is good that others (including my opponents) could understand and even accept."⁸⁴

⁷⁸ For the position by the ICJ case law that acquiescence means a lack of direct or outright protest, see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16 at para 22; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 at paras 27-28. See further Julian Arato, "Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations" (2013) 38 *Yale JIL* 289 at 323-327.

⁷⁹ Chapter Two, Section III, Part 3.

⁸⁰ See n3 at 300 and 310. On the ICJ's signal role in consolidating the law of international organisations, see James Crawford's comments, "Interview with ASIL Members Recently (Re)Elected to the ICJ", available at <<https://www.asil.org/blogs/interview-asil-members-recently-reelected-icj>>.

⁸¹ Philip Allott, "Language, Method and the Nature of International Law" (1971) 45 *BYIL* 79 at 102-104 and 134.

⁸² *Ibid* at 104.

⁸³ James Crawford, "The Problems of Legitimacy-Speak" (2004) 98 *Proceedings of the ASIL Annual Meeting* 261 at 272.

⁸⁴ *Ibid*.

Thus our reliance on ICJ's case law is, as Alvarez observes, a "self-fulfilling phenomenon".⁸⁵ Because the Court's judicial output is publicly available, we expect international lawyering to engage with the reasoning in ICJ's case law, despite its technical basis as non-binding instruments or "soft law".

Pertinently, through its case law on international organisations, the Court did not just supply vital clarifications to UN functions its early years. The ICJ's reliance on its own case law on international organisations created rules at general international law, which lead other legal actors (tribunals, States, and international civil servants, for instance) to perceive international organisations as a separate legal persons, from the member States which created them.⁸⁶

Accordingly, the ICJ is not just a "principal judicial organ"⁸⁷ but one of the UN's "principal organs".⁸⁸ In the specific sense of the core proposition that regional law is shaped by general international law, the UN has performed a signal role as a venue in creating influential general rules at international law which shape the corollaries of legal personality, namely the law relating to the acquiescence of member States to the acts of organs,⁸⁹ and the international responsibility of that international organisation.⁹⁰

2) What is an International Organisation?

The part furthers the core proposition by explaining the influence of general rules at international law, which shaped the development of an international organisation's separate legal personality. In 1865, the International Commission of the Cape Spartel was established.⁹¹ An outcome of a treaty between the Sultan of Morocco and Christian States, the Commission was created to facilitate freedom of navigation along the Moroccan coast.⁹² At first, it began with low institutionalisation.⁹³ As the

⁸⁵ See n6 at 289.

⁸⁶ See generally n6 at 320; see further Section III, Part 3.

⁸⁷ See Article 92, UN Charter and Article 1, ICJ Statute (n1).

⁸⁸ See Article 7, UN Charter.

⁸⁹ Georg Nolte, "Third Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties" (7 April 2015), UN Doc A/CN.4/683, para 80 at 30.

⁹⁰ I.e., ILC, "Draft Articles on the Responsibility of International Organizations" (2011) UN Doc A/66/10 ("ARIO"): for discussion, see Section III, Part 4 below.

⁹¹ For a stimulating account, see David Bederman, "The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel" (1996) 36 *Vanderbilt JIL* 275.

⁹² Convention Concerning the Administration and Upholding of the Lighthouse at Cape Spartel (adopted 31 May 1865) 14 Stat. 679 and 18 Stat. pt.2, at 525, reprinted in 1 Malloy's 1217.

⁹³ See n91 at 330-333.

Commission's duties to run the lighthouse at Cape Spartel grew, the legal status of this lighthouse also became a matter of serious concern.⁹⁴

There were doubts if organs of international organisations could make law, including the essential capacity to enter into contracts to buy goods.⁹⁵ Questions arose as to whether States intended to delegate power onto international organisations.⁹⁶ The legal powers of the Commission's organs had to be determined through interpretation,⁹⁷ on grounds of its already enjoying and exercising functions which were necessary to its effective running.⁹⁸

Put another way, the characteristics which define an international organisation are neither exhaustive nor onerous. This is why, in 2011, the ILC defined an international organisation as follows: "...an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities."⁹⁹

The ILC emphasised that this definition was not intended for "all purposes". It was one definition of an international organisation's "common characteristics" that was aligned to ARIO's purposes.¹⁰⁰ The ILC also rejected an older definition of international organisations, in the 1969 and 1986 Vienna Conventions, by dropping the "intergovernmental" from its definition in ARIO. As Jose Alvarez notes, this loose definition absorbs the proliferation of "collectivities", usually with a technical focus which includes hybrid governmental and private actors.¹⁰¹

In short, then, general international law does not set "stringent" rules to ascertain separate legal personality, which in turn implicates deeper issues as to how (and to what extent) an international organisation's organs act separately from its member

⁹⁴ Ibid at 286 (footnotes 41 and 44, in particular, contain invaluable primary materials of research undertaken by Bederman on despatches between high ranking United States representatives). For academic comments, see Giuseppe Marchegiano, "The Juristic Character of the International Commission of the Cape Spartel Lighthouse" (1931) 25 *AJIL* 339.

⁹⁵ n91 at 331.

⁹⁶ Ibid at 340.

⁹⁷ Giuseppe Marchegiano, the Legal Adviser of the International Zone of the Tangier, drafted a legal opinion regarding the legal status of the Cape Spartel: for an account, see Graham H. Stuart, *The International City of Tangier* (1st ed) (California: Stanford University Press, 1931) at 42; see also n91 at 330.

⁹⁸ On the ICJ case law on this point, see Section III, Part 3 below.

⁹⁹ Article 2(a), ARIO (n90); see also Michael Wood, "Second Report on Identification of Customary International Law" (22 May 2014) UN Doc A/CN.4/672 at para 18: an international organisation means "intergovernmental organisation", which the Special Rapporteur claimed is a "more general and broader definition" for the purposes of identifying customary international law.

¹⁰⁰ See ARIO, n90.

¹⁰¹ See n6 at 370.

States express consent in law-making. These issues directly flow from the ICJ's case law, which we next consider to illustrate the core proposition that regional law is shaped by general international law.

3) The ICJ Case Law on an International Organisation's Objective Legal Personality at General International Law.

The *Reparation* case decisively shaped the law of international organisations¹⁰² regarding the contemporary issues of international law-making by (and through) international organisations, which I address below. Unsurprisingly, law-making of this nature has produced an emerging subject: an international organisation's responsibility.¹⁰³

In *Reparation*, the Court was asked to determine whether the UN had legal capacity to bring claims against "injuries" for it or for third parties.¹⁰⁴ It held in the affirmative that the UN must have legal personality to carry out the functions which the member States intended.¹⁰⁵ The ICJ recognised the UN has "special tasks" to perform.¹⁰⁶ It has duties and rights in relation to the maintenance of international peace and security.

Controversially, it reasoned that the functions that member States intended of the UN, as a "supreme type" of international organisation, can be specified in implied from the constituent instruments or through practice within the UN.¹⁰⁷ The Court took a functional approach, holding that an international organisation's powers could arise from a necessary implication.¹⁰⁸ In short, an international organisation must be deemed to have those powers it needs in order to function effectively.¹⁰⁹

The Court's reasoning affirmed the role of State consent in international legal obligations. In qualitative terms, though, it affirmed consent and "something more".¹¹⁰ The functions, duties, and rights enjoyed by an international organisation such as the

¹⁰² *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174 ("*Reparation*").

¹⁰³ See ARIIO, n90.

¹⁰⁴ As Bederman notes (n91 at 368, footnote 524), the ICJ did not mention in its judgment that the "injury" was in fact the assassination of a UN envoy.

¹⁰⁵ See *Reparation*, n102 at 179.

¹⁰⁶ See *Reparation*, n102 at 178.

¹⁰⁷ See *Reparation*, n102 at 182. Cf Dissenting Opinion of Judge Hackworth (*Reparation*, n102 at 199), now overtaken by the established law on international legal personality: "The results of this liberality of judicial construction transcend, by far, anything to be found in the Charter of the United Nations, as well as any known purpose entertained by the drafters of the Charter..."

¹⁰⁸ See *Reparation*, n102 at 182.

¹⁰⁹ For a critical (and long) analysis, see Jan Klabbers, "The EJIL Foreword: The Transformation of International Organizations Law" (2015) 26 EJIL 9.

¹¹⁰ See Chapter Two, Section II, Part 1.

UN can be traced back to what was consented to by member States in the UN Charter. But the Charter, a treaty, may adapt to the “requirements of international life”.¹¹¹ Its functions are given effectiveness because it cannot always be based entirely on the whims – or pure consent - of its member States.¹¹²

This argument of “necessary implication”¹¹³ is not new. In the *ILO Advisory case* (1926),¹¹⁴ the Permanent Court of International Justice (PCIJ) decided that, after considering the purposes of the International Labour Organisation (ILO), the constituent treaty gave the ILO the “competence” to legislate for specific wage earners.¹¹⁵ In the *European Commission Blue Danube case* (1927),¹¹⁶ the PCIJ again endorsed this approach to the implied powers of an international organisation. When member States create an entity at law, the latter is allowed to exercise its functions without restrictions, subject to the constituent instrument.¹¹⁷

The vital issue of consent, by member States as to how an international organisations’ organs were able to act, were implicitly addressed by the Court in a series of cases.¹¹⁸ As a UN organ, its approach created a standard vocabulary and method of legal argument at general international law, which applied to all international organisations.¹¹⁹ In *Certain Expenses*, the ICJ held that the practice of member States and the organs are interrelated. Thus they form the general practice of that international organisation.¹²⁰ The practice of organs, the Court reasoned, can serve as proxies for State consent.¹²¹

In *Namibia*, the ICJ said that organ practice is probative for interpretation of subsequent practice under Article 31,¹²² although it is at odds with the plain textual meaning of the Charter.¹²³ In the *Wall case*,¹²⁴ the Court again attached weight to the

¹¹¹ See *Reparation*, n102 at 178.

¹¹² See n23 at 16; Martti Koskenniemi, *From Apology to Utopia (The Structure of International Legal Argument)* (reissue with new epilogue) (Cambridge: CUP, 2005) at 310 (footnote 14).

¹¹³ See *Reparation*, n102 at 182.

¹¹⁴ *Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer* 1926 PCIJ (ser. B) No. 13, at 7 (“*ILO Advisory Case*”).

¹¹⁵ *Ibid*; also cited by the ICJ in *Reparation*, n102 at 182-183.

¹¹⁶ *The Jurisdiction of the European Commission of the Danube between Galatz and Braila* (1927) PCIJ (Series B) No. 14 (Dec. 8).

¹¹⁷ *Ibid* at 63-64.

¹¹⁸ *Certain Expenses of the United Nations* [1962] ICJ Rep 151 (“*Certain Expenses Case*”); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 (“*Wall Case*”).

¹¹⁹ See n80.

¹²⁰ *Certain Expenses case*, n118 at 157-165.

¹²¹ *Certain Expenses case*, n118 at 175-179.

¹²² See n20.

¹²³ See n102 at 320-321.

¹²⁴ *Wall Case*, n118 at paras 27-29.

general practice of the UN: the textual language in Article 12, UN Charter seems to prohibit the General Assembly from addressing an issue, once the Security Council acts on it.¹²⁵ However, the Court held that UN member States had acquiesced to the General Assembly's practice of dealing with an issue together with the Security Council.¹²⁶

This survey of the Court's case law underscores an important point. It was an international organisation, i.e., the UN, through the ICJ as one of its principal organs, which served as a venue for creating rules at general international law which are potentially applicable to all international organisations.¹²⁷ Despite the valid qualifications that only States (not international organisations) have plenary competences at international law, these days we take for granted the legal construct of separate legal personality. These cases affirm the rule in *Reparation* as to an international organisation's separate legal personality. Indeed, we readily assume an international organisation's legal personality because it is the corollaries (such as the international responsibility of an international organisation), now broadly part of the law of international organisations, which are more controversial.

Thus this part advanced the core proposition, i.e., regional law is determined by general international law, by showing how the general international law of separate legal personality was created by an international organisation (i.e., the UN, through the ICJ) itself. Once created, this rule of separate legal personality strengthens the force of general international law concerning international organisations, with consequences for the making of regional law by international organisations. The next part elaborates on this point.

4) Separate Actions and International Responsibility as Corollaries of Separate Legal Personality

The "common ends" (i.e., the shared goals) of an international organisation, as broadly agreed by member States, must be made effective through interpretation.¹²⁸ However, this raises (rebuttable) presumptions about the member States'

¹²⁵ See n71.

¹²⁶ *Wall* case, n118 at para 27; also see n64 at para 80.

¹²⁷ *Legality of Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 78 at 25; see further n29 at 2: "Forms of State practice include, but are not limited to...conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference...".

¹²⁸ See Article 1(4), UN Charter: "To be a centre for harmonizing the actions of nations in the attainment of these common ends"; also see above discussion of *Reparation* case in Section III, Part 3.

acquiescence to the conduct of the organs within that international organisation.¹²⁹ One explanation of acquiescence's validity at law, as a corollary of an international organisation's legal personality, is the notion that the organ's actions are separate from those of the member States.¹³⁰ Therefore, this part furthers the core proposition by illustrating how international organisations can create regional law, which are enabled by developments of the rules at general international law. I examine this point in terms of the double function of State representatives who act within international organisations.

Within an international organisation, the representative¹³¹ of a member State acts and speaks, in a formal capacity, for her State: the more high-ranking the representative, then it is reasonable to attach more weight to the potential legal consequences and opposability, which arise against her State at international law.¹³² Dual conduct occurs simultaneously. For example, the representatives who sit in an ASEAN organ perform a dual role.¹³³ On the one hand, they are jointly acting as an ASEAN organ within the overall functions of ASEAN.¹³⁴ On the other hand, they are also individually acting as representatives of their respective States, with the express aim of advancing national interests.

However, the conduct of these representatives, for ASEAN States or as ASEAN member States, can still be evaluated as acquiescence to an ASEAN organ's actions.¹³⁵ As I argued earlier, ASEAN organs did not endorse changes to non-intervention through "flexible engagement".¹³⁶ This proposition, i.e., that "flexible engagement" is not an ASEAN act because it was never articulated by an ASEAN

¹²⁹ See Section III, Part 1.

¹³⁰ Michael Wood and Omri Sender, "State Practice", MPEPIL (2017) at para 19: "Although the term generally used is 'State practice', the concept may also cover the acts of other international legal persons (Subjects of International Law), including international organizations such as the United Nations (UN) and the European Union."

¹³¹ International organisations do employ natural persons as technocrat-level employees and not as State representatives, but this is not the focus of my study. Under Article 2(d) ARIO, these employees will likely constitute the "agents" whose act or omission can be attributed to the international organisation in question, on the basis that they constitute any persons who are charged by the international organisation to carry out its functions: see ARIO, n90 at paras 23-26.

¹³² Generally Vaughan Lowe, *International Law* (Oxford: OUP, 2007) at 42-46; Thomas Grant, "Doctrines (Monroe, Hallstein, Brezhnev, Stimson)" in MPEPIL (2014) at para 1. For one example, see my discussion of "flexible engagement" in Chapter One, Section V.

¹³³ For examples, see my case studies in Chapters Four to Five.

¹³⁴ For a general discussion of the formal distinction despite this dual conduct, see n31 at para 71: "...in principle the practice of international organizations, as separate international legal persons, should not be assimilated to that of the States themselves (of "representatives of Members, that is to say, of persons delegated by their respective Governments, from whom they receive instructions and whose responsibility they engage")."

¹³⁵ See the actions of the ASEAN organs in the Myanmar case study, Chapter Five. Generally see n64 at paras 49-50.

¹³⁶ See Chapter One, Section V.

organ, is supported by the weight of ICJ case law on international organisations since *Reparation*.

Another corollary of an international organisation's separate legal personality is the ILC's progressive development of rules on the international responsibility of international organisations,¹³⁷ conducted through its organs. The ILC's work, then, has reinforced the separateness of an international organ's actions from its member States.¹³⁸ This is plausible only because of its heavy reliance on the ICJ's body of case law on international organisations. Accordingly, Article 6(1), ARIO states: "The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization."

The organic link between an organ and the international organisation is reinforced in Article 8, ARIO as follows: "The conduct of an organ or agent of an international organization *shall be considered an act of that organization* under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, *even if* the conduct exceeds the authority of that organ or agent or contravenes instructions."¹³⁹

Thus, despite the apparent artificiality of separating the conduct of representatives who often act as agents of organs,¹⁴⁰ the actions of international organisations (including law-making acts) can create legal consequences, which are distinct from its member States.¹⁴¹ Importantly, this part has furthered the core proposition's position as to the influence of general international law (on regional law) by demonstrating the general rules which have emerged, as a consequence of an international organisation's separate legal personality.

¹³⁷ See Article 1 of "Articles on Responsibility of States for Internationally Wrongful Acts" (12 December 2001) UN Doc A/RES/56/83 ("ARS") and Article 3 of ARIO (n90), respectively: by "acts", therefore, I refer to actions or omissions in accordance with Article 2, ARS and Article 4, ARIO.

¹³⁸ I.e., See ARIO, n90; also see n31 at paras 71-72.

¹³⁹ Emphasis supplied. "Article 8 has to be read in the context of the other provisions relating to attribution, especially Article 6. It is to be understood that, in accordance with article 6, organs and agents are persons and entities exercising functions of the organization": n90 at para 2.

¹⁴⁰ Generally Ana Sofia Barros and Cedric Ryngaert, "The Position of Member States in (Autonomous) Institutional Decision-Making (Implications for the Establishment of Responsibility)" (2014) 11 *International Organizations Law Review* 53 at 60; Richard Collins and Nigel White, "International Organizations and the Idea of Autonomy: Introduction and Overview", in *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (R. Collins and N. White eds) (Abingdon: Routledge, 2011) at 121.

¹⁴¹ See the ILC's acknowledgement of the *Reparation* case in its ARIO commentaries: n90 at 17.

Pertinently, in relation to ASEAN's regional law-making, this study will focus on the formal statements by ASEAN organs as "official" acts regarding non-intervention's content with an ASEAN character.¹⁴² As already explained in Chapter One, this approach is a foil to the canonical treatment of non-intervention in the International Relations literature, which links its salience to the "ASEAN Way", without differentiations between acts of ASEAN States from ASEAN member States.¹⁴³

IV. How International Organisations Make Regional Law

1) Regional Custom: A Building Block of Regional Law

This section develops the core proposition that general international law permits the identification and evaluation of international organisations as separate legal persons, which are capable of making regional law. The purpose of this section, then, is to advance the core proposition by showing how general rules of international law permit and influence international organisations to make regional custom, which is distinctive to a specific area.

In the last section, I explored how international organisations, at general international law, act as *venues* to create general rules such as separate legal personality, the separate acts of international organisations' organs, and their international responsibility. I also explained how this rule-setting in a multilateral context of an international organisation creates *outcomes*, in the form of non-binding instruments, i.e., soft law, at general international law.

Having explained how influential general rules of international law arose with respect to international organisations, this section builds on the two elements of venue and outcome by focussing on its manifestations in regional law making. International organisations, including ASEAN, can (and do) make regional law, on grounds of geography or a community of values which is shared by a group of States. I will show how general international law, through law-making efforts by the ICJ and ILC, enabled regional law to exist at all. However, regional law is evanescent. It is subject to persistent claims of universality, on grounds of global cooperation.¹⁴⁴

Turning first to the ICJ, it started to develop regional law, in the particular form of regional custom in the *Asylum* (1950) case: "(Colombia) has relied on an alleged

¹⁴² Generally see n61 at paras 17-20, and also n31 at 17 and 30.

¹⁴³ Especially Chapter One, Sections IV-VI.

¹⁴⁴ Generally Mathias Forteau, "Regional International Law" (2006) MPEPIL; Christoph Schreuer, "Regionalism v Universalism" (1995) 6 EJIL 477.

*regional or local custom peculiar to Latin-American States...*The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State."¹⁴⁵ Therefore, Colombia's argument that a regional custom existed failed because the ICJ ruled that the practice was neither constant nor uniform.¹⁴⁶ In the *Rights of American Nationals in Morocco* (1952),¹⁴⁷ the Court again used the term "local custom" by approving its dictum in *Asylum* that the "establishment of local custom" must be based on constant and uniform usage.

By 1960, in the *Rights of Passage* case,¹⁴⁸ the ICJ widened the notion of "local custom" to custom which is particular between States.¹⁴⁹ In other words, it is not just geographical contiguity which defines regional custom. The particularity of local custom can include attitudes between States, not enjoined by geographical contiguity, which are accepted as law: "With regard to Portugal's claim of a right of passage as formulated by it on the basis of local custom, it is objected on behalf of India that no local custom could be established between only two States. It is difficult to see why the number of States between which a local custom may be established on the basis of long practice must necessarily be larger than two. The Court sees no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States."¹⁵⁰

In 1986, the Court restated that custom can be regional in terms of geographical contiguity. In the *Nicaragua* case, it concluded: "...the Court finds that in customary international law, whether of a general kind or *that particular to the inter-American legal system*, there is no rule permitting the exercise of collective self-defence in the

¹⁴⁵ *Colombian-Peruvian Asylum Case* (Merits) [1950] ICJ Rep 266 at 276 ("*Asylum Case*") (emphasis supplied).

¹⁴⁶ *Ibid* at 277.

¹⁴⁷ *Case Concerning Rights of Nationals of the United States of America in Morocco* (Merits) [1952] ICJ Rep 176 at 200.

¹⁴⁸ *Case concerning Right of Passage over Indian Territory* (Merits) [1960] ICJ Rep 6 ("*Rights of Passage Case*") at 39.

¹⁴⁹ *Ibid* at 23 and 39.

¹⁵⁰ *Ibid* at 39).

absence of a request by the State which regards itself as the victim of an armed attack.”¹⁵¹

In the *Frontier Dispute* case (1986),¹⁵² the Court again validated custom’s regional character with respect to *uti possiditis*: “The fact that the new African States have respected the administrative boundaries and frontiers established by the colonial powers must be seen not as a mere practice contributing to the gradual emergence of a principle of customary international law, limited in its impact to the African continent as it had previously been to Spanish America, but as the application in Africa of a rule of general scope.”¹⁵³

More recently, in the *Navigational and Related Rights* case (2009),¹⁵⁴ the ICJ merely assumed without elucidation that regional custom can exist at general international law: “The Court does not consider that it is required to take a position in this case on whether and to what extent there exists, in customary international law, a régime applicable to navigation on “international rivers”, either of universal scope or of a *regional nature* covering the geographical area in which the San Juan is situated.”¹⁵⁵

This survey of case law, since the *Asylum* case, suggests that, although the Court has affirmed that regional law as custom can exist at international law, it declined to explain the meaning of regional or local custom. Both types of custom point to a broader phenomenon of “particular custom”, which only binds certain States.¹⁵⁶ Relatedly, Maurice Mendelson tells us that the “local” in particular customs meant a “particular area of the earth’s surface”.¹⁵⁷ As I shortly argue, an “area of the earth’s surface” is not always self-evident as a fact. In relation to “Southeast Asia” as a region, it was – it is – an assertion which was universalised through general international law.

The recent *Navigational and Related Rights* case follows this established trend of assertions that regional law, based on geography, can exist. Hence, on the matter on subsistence fishing between the riparian communities of Costa Rica and Nicaragua,

¹⁵¹ See n41 at para 199.

¹⁵² *Frontier Dispute (Burkina Faso/Republic of Mali)* (Judgment) [1986] ICJ Rep 554 (“*Frontier Dispute*”).

¹⁵³ *Ibid* at para 21.

¹⁵⁴ *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* [2009] ICJ Rep 213 (“*Navigational and Related Rights*”).

¹⁵⁵ *Ibid* at para 34. Generally see Luigi Crema, “The “Right Mix” and “Ambiguities” in Particular Customs: A Few Remarks on the *Navigational and Related Rights* Case” in *International Courts and the Development: Essays in Honour of Tullio Treves* (Nerina Boschiero et al eds) (The Hague: TMC Asser Press, 2013) at 65-75.

¹⁵⁶ See further the ILC’s discussion on particular customs, n32 at para 80.

¹⁵⁷ Maurice Mendelson, *The Formation of Customary International Law: Collected Courses of the Hague Academy of International Law* (Volume 272) (Leiden/Boston: Brill Nijhoff, 1998) at 215.

the Court decided that, somewhat obliquely, regional custom which is particular to both States obtained: “Subsistence fishing has *without doubt occurred over a very long period*...the Parties agree that the practice of subsistence fishing is long established. They disagree however whether the practice has become binding on Nicaragua...For the Court, the failure of Nicaragua to deny the existence of a right arising from the practice which had *continued undisturbed and unquestioned over a very long period, is particularly significant*. The Court accordingly concludes that Costa Rica has a customary right.”¹⁵⁸

2) The ILC Universalises the ICJ’s Case Law

This part develops the core proposition by showing how even regional custom (a specific type of regional law) as created by international organisations, between particular States, would still be influenced by general international law, in terms of its legal grounding on which to create regional custom. To this extent, the ILC’s Draft Conclusion 16 says this about regional custom: “A rule of particular customary international law, *whether regional, local or other*, is a rule of customary international law that applies only among a limited number of States.”¹⁵⁹

In other words, particular custom is the exception to the general rule on custom: the latter is universal and binding, if the dual elements of state practice and *opinio juris* are satisfied. The ILC had relied on the ICJ’s case law¹⁶⁰ to affirm a legal view that particular custom covers a “certain geographical area” (regional custom) or those constituting a “community of interests” (local custom), the latter not being limited to geography.¹⁶¹ This clarifies and builds on the thinness of legal reasoning in the Court’s case law, and is a powerful reminder of how international organisations (through its organs) advance general international law.

In terms of legal sources under Article 38, the ICJ’s case law is obviously not binding. As indicated already, the Asian-African Legal Consultative Organization (AALCO)¹⁶²

¹⁵⁸ Para 141, *Navigational and Related Rights* case (n154).

¹⁵⁹ See (n36).

¹⁶⁰ See: *Asylum Case* (n145); *Rights of Passage* (n148); *Nicaragua* (n41); *Frontier Dispute* (n152); *Navigational and Related Rights* (n154) cases.

¹⁶¹ *Rights of Passage Case*, n148 at 39.

¹⁶² Sienho Yee, “Report on the ILC Project on “Identification of Customary International Law”” (2015) 14 *Chinese Journal of International Law* 375 (“AALCO Report”). This report was written for the Informal Expert Group on Customary International Law of the Asian-African Legal Consultative Organization (AALCO).

criticised this elevation, of the ICJ's jurisprudence to a "high pedestal"¹⁶³ of "primary materials",¹⁶⁴ as "worrisome".¹⁶⁵ The ILC Special Rapporteur responded:

I do think this may be based on a misunderstanding. It is important to distinguish two separate matters:
- First, the materials that need to be looked at in order to ascertain the methodology for identifying rules of customary international law.
- Second, the materials (evidence) needed to be examined in order to determine whether a rule of customary international law exists.¹⁶⁶

In the Special Rapporteur's telling, the ILC's work falls under the first matter of being "materials" being used to ascertain "methodology" in identifying custom. The AALCO's rejoinder rightly noted: "the consequences of such a distinction between methodology and particular rules of law should not merely be asserted, but need to be proved."¹⁶⁷

A "methodology" is a system of methods which are used in a certain field.¹⁶⁸ In this purported field of identifying rules of custom, i.e., secondary rules, the "methodology" presumably means the *method*, an application of a conceptual apparatus (i.e., the ILC's draft conclusions) to the practical problems of identifying custom in international legal practice.¹⁶⁹ For these reasons, the Special Rapporteur is correct to apply, as a so-called "methodology", i.e., those posited rules by States, which count as conclusive evidence for *determining* custom.

The Special Rapporteur barely made a persuasive case, even if one accepts (for the sake of an argument) his position that States' consent to regional custom is prioritised as a "rule".¹⁷⁰ In aid of his position, the Special Rapporteur confined himself to two examples of practice in relation to European States, namely the views of Belgium (customary rule to prosecute or extradite persons who had committed crimes of humanity) and that of Switzerland (non-refoulement as a regional customary law in Europe).¹⁷¹

¹⁶³ Ibid, para 31 at 383.

¹⁶⁴ Yee, para 31 at 383 (n162).

¹⁶⁵ Yee, para 31 at 383 (n162).

¹⁶⁶ Michael Wood, "The Present Position within the ILC on the Topic 'Identification of Customary International Law': in Partial Response to Sienho Yee, Report on the ILC Project on 'Identification of Customary International Law'" (2016) 15 *Chinese Journal of International Law* (2016) 3, para 9 at 5. The AALCO Report is acknowledged in Michael Wood, "Fourth Report on Identification of Customary International Law" (8 March 2016) UN Doc A/CN.4/695 at para 4.

¹⁶⁷ Sienho Yee, "A Reply to Sir Michael Wood's Response to AALCO IEG's Work and My Report on the ILC Project on Identification of Customary International Law" (2016) 15 *Chinese Journal of International Law* 33, para 5 at 35.

¹⁶⁸ Wood did not define "methodology" in his "Partial Response to Sienho Yee" (n166, para 9 at 5).

¹⁶⁹ Generally, Steven Ratner and Anne-Marie Slaughter, "Appraising the Methods of International Law: A Prospectus for Readers" (1999) 93 *AJIL* 291.

¹⁷⁰ See n166, para 9.

¹⁷¹ See n64, para 80 (footnote 190) at 55.

To conclude: the ILC's existence is the permanent outcome of the multilateral actions of another principal UN organ, the General Assembly.¹⁷² That its work serves more as a "methodology" (guidance) and not as evidence of determining custom is not the point.¹⁷³ When the Special Rapporteur and the ILC speak, through the UN as a venue and in the draft conclusions, its authority can potentially create legal effects. This authority was used to deflect the AALCO's regional concerns with subtle claims that universalism exists, at all levels: "The work of the ILC is nothing if it is not collective. The Special Rapporteur is a servant of the Commission, whose proposals are often more in the nature of "kite-flying" than anything else. They are launched, and then blown hither and thither by members of the Commission (and by States), and they emerge the better for the collective consideration."¹⁷⁴

V. How Regional Law is made for Southeast Asia

1) Introduction

This section develops the study's core proposition as to how the distinctive regional law (of non-intervention) is influenced by general international law, which is presented in two broad ways. First, in this section, we will explore the roles of powerful external actors who "create" a region of Southeast Asia through the use of treaties over a period of time. The presence and active roles of external powers in influencing the regional law-making of ASEAN will be a constant feature, as demonstrated in the following and concluding chapters.

At the outset of this chapter, I stressed two elements of venue and outcome which involve international organisations. I have also discussed how international organisations can make general and regional international law. This final section concentrates these discussions with particular reference to "Southeast Asia". This approach is important because Southeast Asia is, I argue, an area which exists largely because general international law permits its characterisation as a region.

Second, therefore, because general international law allows us to characterise this area as a region in legal terms, so a form of regional law based on geography and values can be created for States in Southeast Asia. After decolonisation, rules at

¹⁷² See UNGA Resolutions 174 (II) (21 November 1947); 485 (V) (12 December 1950); 984 (X) (3 December 1955); 985 (X) (3 December 1955); 36/39 (18 November 1981); generally see n3 at 171.

¹⁷³ See also n166, para 9 at 5.

¹⁷⁴ See n166, para 11 at 5.

general international law applied to all States including the Third World States, an automatic result of international relations as determined by the former colonial rulers. Thus ASEAN became a venue to advance the regional law-making of non-intervention, which in turn shapes a region of Southeast Asia.

2) “Southeast Asia” is a Necessary Invention

This part furthers the core proposition by explaining how the region of “Southeast Asia” had to be created through the conduct of powerful external actors that influenced the general rules of international law, which in turn gradually shaped the “regionality” of Southeast Asia. In this respect, then, words are not just copies of things but contain a basic power to define reality.¹⁷⁵ This is true for “Southeast Asia”: this area is partly made “real”, a region, because of the rules at general international law. In terms of geographical contiguity, “Southeast Asia” is “real” enough: we can point to a defined area of “Southeast Asia” on a map. The ASEAN Charter validates this reality, as a criterion of admission by sovereign States, to ASEAN. It says that membership is based on: “Location in the recognised geographical region of Southeast Asia.”¹⁷⁶

However, the fact of geographical contiguity does not inevitably yield the conclusion that “Southeast Asia” is real. Indeed, Donald Emmerson tells us that there are at least twelve variations to the English spelling of “Southeast Asia”:¹⁷⁷ “Southeast Asia”;¹⁷⁸ “South East Asia”; “South-East Asia”;¹⁷⁹ “South-east Asia”; “southeast Asia”; “south-east Asia”; “Southeastern Asia”; “South Eastern Asia”; “South-Eastern Asia”; “South-eastern Asia”; “southeastern Asia”; (xii) “south-eastern Asia”.

¹⁷⁵ Shimizu Hajime, “Southeast Asia as a Regional Concept in Modern Japan” in *Locating Southeast Asia: Geographies of Knowledge and Politics of Space* (Paul Kratoska, Remco Raben & Henk Schulte Nordholt, eds) (Singapore: Singapore University Press, 2006) 82 at 84.

¹⁷⁶ Article 6(2)(a), Charter of the Association of Southeast Asian Nations (adopted 20 November 2007, entered into force 15 December 2008) 2624 UNTS 223 (“ASEAN Charter”).

¹⁷⁷ Donald K Emmerson, “Southeast Asia”: What’s in a Name?” (1984) 15 *Journal of Southeast Asian Studies* 1 at 6 (footnote 6). For a fascinating account of how the United States rejected the British habit of using hyphens on grounds of administrative inefficiency, see Russell H. Fifield, “Southeast Asian Studies: Origins, Development, Future” (1976) 7 *Journal of Southeast Asian Studies* 151.

¹⁷⁸ By 1976, this term was used throughout the Treaty of Amity and Cooperation in Southeast Asia (concluded 24 February 1976) 1025 UNTS 297 (“TAC”). The term “Southeast Asia” (without hyphen) is definitely used in the ASEAN Charter (n176).

¹⁷⁹ See first operative paragraph of the Declaration Constituting an Agreement Establishing the Association of South-East Asian Nations (signed 8 August 1967) 1331 UNTS 235 (“Bangkok Declaration”): the establishment of an Association for Regional Cooperation among the countries of *South-East Asia* to be known as the Association of *South-East Asian* Nations (ASEAN)” (emphasis supplied). In 1983, this declaration was registered under Article 102 of the UN Charter: see (1983) 1331 UNTS 235. Also see a recent use of this term by the ICJ: n182 at para 16, at 637.

Therefore, as late as 1965, the *London Times* thought that “South-east Asia” was a cartographic “upstart”.¹⁸⁰ Even in 2008, the ICJ in the *Pedra Branca* case¹⁸¹ seemed unable to make up its mind.¹⁸² The Court referred to this area as “southeast Asia”,¹⁸³ “south-east Asia”¹⁸⁴ and “South East Asian”.¹⁸⁵

The creation of an Association of *Southeast*¹⁸⁶ Asian Nations, i.e., ASEAN, indicated some agreement between member States as to the existence of a region capable of sharing common values.¹⁸⁷ This point is manifest in the membership of Myanmar, Cambodia, Lao, and Vietnam, whose admission confirmed their agreement that they “belonged” to Southeast Asia.¹⁸⁸ In other words, common values are defined in geographical terms, relative to an area in which ten sovereign States are located.

As a legal person, ASEAN can conduct external relations with other States and international organisations.¹⁸⁹ Article 41(3) of the ASEAN Charter states: “ASEAN shall be the *primary driving force* in regional arrangements that it initiates and maintain its centrality in regional cooperation and community building.”¹⁹⁰

What is “external” and “regional” to ASEAN must be assessed against a contingent reality. It is – it can be - a “primary driving force” subject to the Great Powers¹⁹¹ tacit agreement who act as powerful external powers. This point is apparent in the ongoing defining of Southeast Asia’s common values with the Great Powers, advanced through ASEAN as a venue. Prominent examples include: the ASEAN + 3 (Japan,

¹⁸⁰ See its editorial “In the Wrong Bundle”, *The Times*, 22 February 1965, at 11.

¹⁸¹ *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, (Judgment) [2008] ICJ Rep 12 (“*Pedra Branca Case*”).

¹⁸² Also see the ICJ’s references to this area in *Sovereignty over Pulau Litigan and Pulau Sipadan (Indonesia / Malaysia)* (Judgment) (2002) ICJ Rep 625: “Southeast Asia” (para 2) and “South-East Asia” (para 16) at 630 and 637 respectively.

¹⁸³ *Ibid*, para 52 at 33.

¹⁸⁴ *Ibid*, para 21 at 25.

¹⁸⁵ *Ibid*, para 137 at 56: the Court used it in an adjectival sense (i.e., “South East Asian” region) but note the rendering of this label with capital letters and separate words without hyphen.

¹⁸⁶ I.e., no hyphen, no capital “E” in the word “East” is used in the TAC (n178) and the ASEAN Charter (n176). See also the spelling and use of “Southeast Asia” in the Bangkok Declaration (n181) (“South East Asia”) and external perceptions, such as the ICJ in its judgments (n182): see Table 2 below.

¹⁸⁷ Andrew Harding, “Global Doctrine and Local Knowledge: Law in South East Asia” (2002) 51 ICLQ 35 at 48 (footnote 45).

¹⁸⁸ As a matter of law, this is attested to by their accession to the TAC before admission. Laos: accession (29 June 1992), admission (23 July 1997); Vietnam: accession (22 July 1992), admission (28 July 1995); Cambodia: accession (23 January 1995), admission (13 April 1999); Myanmar: accession (27 July 1995), admission (23 July 1997).

¹⁸⁹ Article 41, ASEAN Charter (n176).

¹⁹⁰ Emphasis supplied. For similar language, see Articles 1(15) and 2(m), ASEAN Charter (n176).

¹⁹¹ By “great powers”, I refer to States which are assigned special status at diplomatic fora, especially under Article 23, UN Charter: the United States, UK, China, France and Russia are permanent members of the Security Council whose “primary responsibility” (under Article 24) is to maintain international peace and security; generally see Jörg Kammerhofer, “Superpowers and Great Powers”, MPEPIL (2009).

China and South Korea) Process;¹⁹² East Asia Summit (ASEAN + 3, India, Australia and New Zealand);¹⁹³ and ASEAN Regional Forum (ARF);¹⁹⁴

However, the Great Powers, especially the United States and UK, were long involved in this area even before ASEAN was created (see Diagram A). It is their previous involvement that set general rules of international law, on which ASEAN derives its regionality as an international organisation for States in an area of Southeast Asia. The following part elaborates on this point with examples.

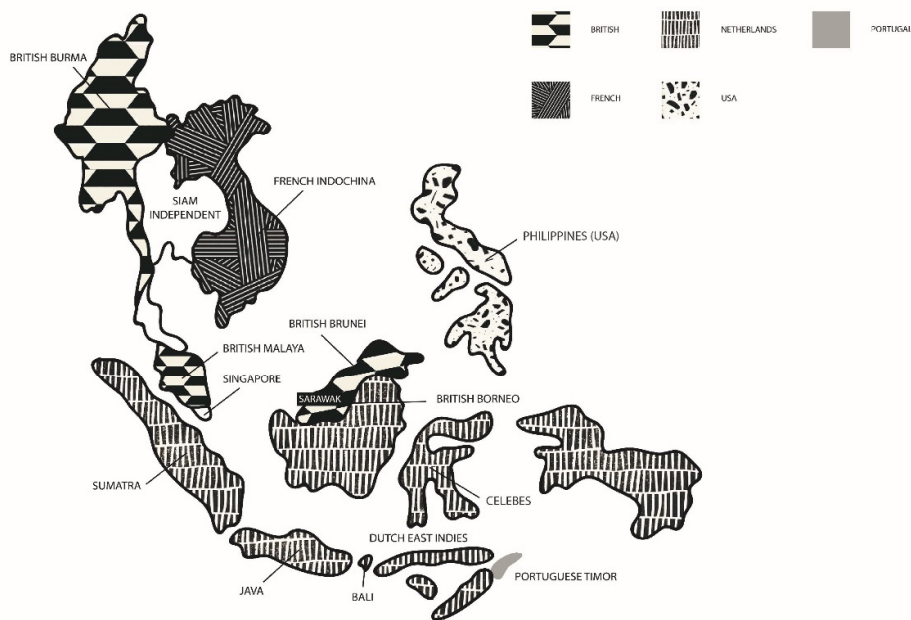


Diagram A

¹⁹² This is a dialogue process between ASEAN member States and Japan, China and the Republic of Korea: see “Joint Statement on East Asia Cooperation” (28 November 1999); affirmed in “Kuala Lumpur Declaration on the ASEAN Plus Three Summit Kuala Lumpur” (12 December 2005), available at <<http://asean.org/asean/external-relations/asean-3/>>.

¹⁹³ Another (but larger) dialogue process, which was first convened in 2005, see “Kuala Lumpur Declaration on the East Asia Summit Kuala Lumpur” (14 December 2005) available at <<http://asean.org/asean/external-relations/east-asia-summit-eas/>>.

¹⁹⁴ The ARF is an annual forum to discuss political and security matters. It met for the first time in 1994: see “Chairman’s statement of First ARF”, available at <<http://aseanregionalforum.asean.org/library/arf-chairmans-statements-and-reports.html?id=132>>. Current ARF members are: Australia, Bangladesh, Brunei Darussalam, Cambodia, Canada, China, Democratic People’s Republic of Korea, European Union, India, Indonesia, Japan, Lao PDR, Malaysia, Mongolia, Myanmar, New Zealand, Pakistan, Papua New Guinea, Philippines, Republic of Korea, Russia, Singapore, Sri Lanka, Thailand, Timor-Leste, United States, and Viet Nam.

3) Southeast Asia Collective Defence Treaty (1954 Manila Pact):¹⁹⁵ An Early Attempt to Define Southeast Asia

This part supports the core proposition by instancing one example of how the conduct of powerful external actors, at general international law, would influence the acceptance by the “locals” of Southeast Asia as a reality after decolonisation. To this extent, and led by the United States, the 1954 Manila Pact was a collective defence treaty dedicated to the “containment” of communist China.¹⁹⁶ Its Article V established a “Council” to “provide for consultation with regard to military and any other planning as the situation obtaining in the treaty area may from time to time”. Effectively, then, the Manila Pact was an international organisation, as broadly defined earlier, with some measure of institutionalisation in the Council.

Within a specified “treaty area”, its parties¹⁹⁷ agreed to a system of collective defence against “aggression by means of an armed attack”.¹⁹⁸ Article VIII defines the “treaty area” as follows: “the *general area of Southeast Asia*, including also the entire territories of the *Asian parties*,¹⁹⁹ and the general area of the Southwest Pacific not including the Pacific area north of 21 degrees 30 minutes north latitude.²⁰⁰ The parties may, by unanimous agreement, amend this article to include within the treaty area the territory of any state acceding to this Treaty in accordance with Article VII or otherwise to change the treaty area.”²⁰¹

In treaty form, Article VIII is an extraordinary provision that advanced early ideas of “Southeast Asia”. Apart from the (unhyphenated)²⁰² words, i.e., “Southeast Asia”, the parties in the “treaty area” were a “rump group”.²⁰³ A few did not belong to what is now the “geographically recognised region” of Southeast Asia, as stated in the ASEAN Charter.²⁰⁴ Second, racialisation is apparent. By “Asian parties”,²⁰⁵ this term

¹⁹⁵ Southeast Asia Collective Defence Treaty (adopted 8 September 1954, entered into force 19 February 1955) (1955) 209 UNTS 24 (“Manila Pact”).

¹⁹⁶ With the involvement of the United States in Vietnam from 1964, the Manila Pact (ibid) became unworkable: generally see Ralph Braibanti, “The Southeast Asia Collective Defense Treaty” (1957) 30 *Pacific Affairs* 321.

¹⁹⁷ I.e., Thailand, Philippines, Pakistan, UK, United States, France, Australia and New Zealand.

¹⁹⁸ Article IV, Manila Pact (n195): The “Understanding by the United States” states that “aggression” includes “communist aggression”.

¹⁹⁹ The Manila Pact (n195) does not define “Asian parties” but it presumably means Thailand, Philippines, and Pakistan (emphasis supplied).

²⁰⁰ In other words, the coordinate of “Pacific area north of 21 degrees 30 minutes north latitude”, which refers to Taiwan and Hong Kong, are excluded from the Treaty Area.

²⁰¹ See n195 (emphasis supplied).

²⁰² See Chapter Two, Section V, Part 2.

²⁰³ See n177 at 9.

²⁰⁴ Article 6(2), ASEAN Charter (n176).

²⁰⁵ See Article VIII (n195).

evidently meant the Philippines, Pakistan and Thailand. Presumably, they were “Asian” because they did not resemble the rest. They were “The Other”, the subject of constructive description.²⁰⁶

For political reasons, Cambodia, Lao, and South Vietnam were absorbed into a “general area” of non-communist States.²⁰⁷ Pakistan’s inclusion (1955) and eventual withdrawal (1972) would help to settle the limits of this “general area”. The Philippines, Thailand, Cambodia, Lao, and Vietnam would eventually belong to a “geographically recognised region” of Southeast Asia. Not Australia and New Zealand, in contrast, despite their geographical propinquity to the region.

Because Article VIII included a few “Asian parties” in treaty form, the other “locals” found their natural inclusion into a “general area of Southeast Asia”. For example, given the irredentist claims between the Philippines and Malaysia over Sabah,²⁰⁸ “Southeast Asia” must include Malaysia,²⁰⁹ although it was not a party to the Manila Pact. In turn, “Southeast Asia” must include Singapore because it was a federal State of Malaysia, until its secession as a sovereign State in 1965. Finally, since Australia and New Zealand, as part of the treaty area, were cartographically interposed between Indonesia, it was logical to include Indonesia in “Southeast Asia”.

As I shortly explain, Article VIII, though externally foisted onto this area by the United States,²¹⁰ would nonetheless later shape the “locals” indigenous effort to form ASEAN, a venue which serves to determine further who belonged as ASEAN member States. The Manila Pact’s use of “Southeast Asia” as an expression to describe the region gave substance to the need for maintaining regional peace and security, which was later adapted in the TAC’s purpose of regional cooperation to advance peace,

²⁰⁶ Generally see Edward Said, *Orientalism* (USA: Vintage Books, 1994) at 4-7: Said explains how representation of the Self (Occident) yields “the Other” (Orient), in which the Self is privileged and has the advantage of defining, and reconstructing the passive, silent and weak as the Other. To adapt Said’s point, because general treaty area is arbitrary and the “Asian parties” are so defined by the Western powers because they can.

²⁰⁷ I.e., Protocol to the Southeast Asia Collective Defense Treaty (adopted 8 September 1954) 209 UNTS 36, which provides: “The parties (i.e., Thailand, Philippines, Pakistan, UK, United States, France, Australia and New Zealand) to the Southeast Asia Collective Defense Treaty unanimously designate for the purposes of Article IV (i.e., provision that states an armed attack against any State in the “Treaty area” is an armed attack on all the parties of the Manila Pact) of the Treaty the states of Cambodia”. Simply put: Laos, Cambodia, and South Vietnam were not parties to the Manila Pact but formed the Treaty area under Article VIII (n201).

²⁰⁸ I.e., now the northeastern part of Malaysia; the southwest of the Philippines.

²⁰⁹ Generally Arnold C. Brackman, *Southeast Asia’s Second Front: The Struggle for the Malay Archipelago* (Pall Mall, 1966).

²¹⁰ The United States had conceived the Manila Pact as a Southeast Asian variation of the North Atlantic Treaty Organisation, which supported the Truman Doctrine of creating multilateral anti-communist alliances by China in the area. The Manila Pact’s design was led by George Kennan and John Dulles, generally see John K Franklin, *The Hollow Pact: Pacific Security and the Southeast Asia Treaty Organization* (PhD, Texas Christian University, 2006), available at <<https://repository.tcu.edu/handle/116099117/3914>>.

stability and harmony.²¹¹ Therefore the Manila Pact, an international organisation,²¹² created early ideas of a “region” of “Southeast Asia”, by delimitating States and excluding colonial entities who are located in the area.

4) The ICJ Influences Regional History for “Southeast Asia”: Anglo-Dutch Treaty & the *Pedra Branca* Case.

This part furthers the core proposition by demonstrating how the regionality of Southeast Asia as an area is given substance through general international law, which is especially facilitated by the UN as an international organisation. To appreciate the UN’s role, through the ICJ in the *Pedra Branca* case, in making regional law by rehabilitating the colonial²¹³ history of “Southeast Asia”, it is first useful to sketch some aspects of the Anglo-Dutch Treaty (1824).²¹⁴ In cartographic terms, the putative region “Southeast Asia” is somewhere to the south of China²¹⁵ and east of India. To the British and Dutch in 1824, the region did not exist in a coherent way. This is why the Anglo-Dutch Treaty used the words “East Indies” and “Eastern Seas” interchangeably to refer to this area in general.²¹⁶

The treaty title clearly pronounces it as an agreement only between two States, the United Kingdom and Netherlands,²¹⁷ who had “respective possessions” and

²¹¹ For discussion, see Section VI.

²¹² As explained in Section III, Part 2, an international organisation’s definition is not exhaustive or onerous. The indication that the Manila Pact is an international organisation is attested to in the provision of its organ, in its Article V: “The parties hereby establish a Council, on which each of them shall be represented, to consider matters concerning the implementation of this Treaty. The Council shall provide for consultation with regard to military and any other planning as the situation obtaining in the treaty area may from time to time require. The Council shall be so organized as to be able to meet at any time.”

²¹³ In this study, the word “colonialism” generally means a form of conquest involving alien dominance and subjugation by the European States, who divided inhabited parts of the world in Africa and large parts of Asia among themselves between the 15th and 20th centuries: see Jörn Axel Kämmerer, “Colonialism”, MPEPIL (2008); see also Sally Engle Merry, “Law and Colonialism” (1991) 25 *Law and Society Review* 889.

²¹⁴ I.e., Treaty Between His Britannic Majesty and the King of the Netherlands, Respecting Territory and Commerce in the East Indies (signed 17 March 1824, ratified 8 June 1824) BFSP Vol.11:194 and FO 93/46/17 (“Anglo-Dutch Treaty”).

²¹⁵ For at least two millennia, the Chinese were aware of a maritime area to its southern borders, which was not viewed as a threat to its security. Consequently, Chinese records regarding “Southeast Asia” were laconic and confined to producing notes to facilitate their tributary system in that area. In contrast, at the end of the nineteenth century, the government of the Qing Dynasty (1645-1911) began to see Southeast Asia as “Nanyang” (translated as “southern sea”), a coherent region, because of the naval threat by the colonial powers: generally see Wang Gungwu, “Introduction: Imperial China Looking South” in *Imperial China and Its Southern Neighbours* (Victor H Mair and Liam Kelley eds) (Singapore: ISEAS, 2015) at 1; Wung Gungwu, “Two Perspectives of Southeast Asian Studies: Singapore and China” in *Locating Southeast Asia: Geographies of Knowledge and Politics of Space* (Paul Kratoska, Remco Raben & Henk Schulte Nordholt, eds) (Singapore: NUS Press, 2006) at 60; Shen Jianming, “China’s Sovereignty over the South China Sea Islands: A Historical Perspective” (2012) 1 *Chinese Journal of International Law* 94 at 101-122.

²¹⁶ Articles 2 and 3, Anglo-Dutch Treaty (n214).

²¹⁷ Ibid.

“commerce” they wanted to protect.²¹⁸ The treaty sought to create a “mutually beneficial” political settlement for both parties,²¹⁹ which resulted in their agreement to carve up respective spheres of influence:²²⁰ “(both parties)...admit the subjects of each other to trade in their respective possessions in the Eastern Archipelago,²²¹ and on the continent of India, and in Ceylon...”

Consequently, the lucrative spices located in the Moluccas Islands (now part of Indonesia) exclusively belonged to the Dutch.²²² If the Netherlands were to abandon their monopoly to this particular “possessions”, other States, such as the UK, were to be given commercial access to the spice, on an equal footing.²²³ Only Europeans could potentially benefit from this treaty. A “native Asiatic power”²²⁴ (whatever that means) had no access to international law: it was not on the same “footing”.²²⁵ Southeast Asia, as a region for the “locals”, did not exist.

Against this background to the *Pedra Branca* case, one of the key issues that the ICJ had to decide was whether Singapore or Malaysia had sovereignty over Pedra Branca.²²⁶ An island along the Straits of Singapore, the Pedra Branca is a collection of granite rocks over 8560 square meters.²²⁷ The Horsburgh Lighthouse, still active, sits on the Pedra Branca. To prove sovereign title, Malaysia and Singapore relied on the Anglo Dutch Treaty of 1824 to advance their respective submissions on the issue of sovereign title over Pedra Branca.

²¹⁸ See the Anglo-Dutch Treaty’s preamble (n214): the “East Indies” referred to in the Anglo-Dutch Treaty now covers most of the Indonesian archipelago.

²¹⁹ *Ibid.*

²²⁰ India, Singapore, and Malacca, located along the Malay Peninsula, were recognised as falling under the British sphere of influence: Articles 8, 10 and 12, Anglo Dutch Treaty (n214). On the modern implications arising from these two spheres of influence, see n181 at paras 87 and 89; generally also see Hanspeter Neuhold, “Spheres of Influence” MPEPIL (2009).

²²¹ Today this area covers parts of Indonesia, Malaysia (Borneo) and Brunei.

²²² See Article 7, Anglo-Dutch Treaty, n214.

²²³ *Ibid.*

²²⁴ Anglo-Dutch Treaty (n214).

²²⁵ Article 7, Anglo-Dutch Treaty (n214) provides: “The Molucca Islands, and especially Amboyna, Banda, Ternate and their immediate dependencies, are excepted from the operation of the 1st, 2nd, 3rd and 4th (sic) Articles, until the Netherlands government shall think fit to abandon the monopoly of spices; but if the said government shall, at any time previous to such abandonment of the monopoly, allows the subjects of any power, *other than a native Asiatic power*, to carry on any commercial intercourse with the said islands, the subjects of his Britannic Majesty shall be admitted to such intercourse, upon a footing precisely similar.”

²²⁶ This is Portuguese for “white rock”, but Malaysia referred to it as “Pulau Batu Puteh” (Batu Puteh): see n181, paras 16-18 at 22. For brevity, I use the term “Pedra Branca”.

²²⁷ *Pedra Branca Case*, para 16 at 22 (n181).

The Anglo-Dutch treaty's provenance lies in colonial law,²²⁸ as some form of legal "source".²²⁹ The ICJ, Malaysia, and Singapore were (deliberately) unclear about the Anglo-Dutch treaty's status as a legal source.²³⁰ The question of whether Malaysia or Singapore acquired sovereign title (or "transferred" sovereign title from the British) over the Pedra Branca during this colonial period, starting from the Anglo-Dutch Treaty (1824), was not addressed.²³¹ Instead the approach adopted by Singapore and Malaysia seemed to accept that this treaty had (some) legal basis in framing the issue of sovereign title over Pedra Branca, without explaining why since both States were not parties to the Anglo-Dutch Treaty, to advance their specific goals.

Particularly, Singapore and Malaysia relied on the Anglo-Dutch Treaty's (i.e., a treaty) form as conclusive authority of political realities in this area, at that point in time, to further its arguments in a dispute of the 21st century. Put another way, it was irrelevant to the task of adjudication that both States were not involved as "locals" to the Anglo-Dutch Treaty. The Court was used as a venue, through the voluntary submission by Singapore and Malaysia to its jurisdiction, to validate "history" of this area, in which this treaty offered (some) legal basis for appraisal. Therefore, no irony was intended in Singapore's "factual" approach,²³² which argued: "...the Treaty did not divide up

²²⁸ On unequal treaties, see Matthew Craven, "What Happened to Unequal Treaties? The Continuities of Informal Empire" in *Interrogating the Treaty: Essays in the Contemporary Law of Treaties* (Matthew Craven and Malgosia Fitzmaurice eds) (The Netherlands: Wolf Legal Publishers, 2005) at 43. See also the rejoinder by Anthony Aust, "Unequal Treaties: a Response" in the same publication, at 81–85.

²²⁸ Through the East India Company, the British signed the Crawford Treaty with the "native" rulers in Johor on 2 August 1824. See "Treaty with the Sultan and Tumongong", Reports from Committees (East India Company's Affairs) (Session 6 December 1832-16 August 1832), Volume XIV, (House of Commons) at 503: in this treaty of "friendship and alliance" (i.e., preamble), both rulers cede the "full sovereignty" of Singapore to the British (i.e., Article 2nd); the abrogation is always subject to the consent of the British (i.e., Article 14th).

²²⁹ On this point, see the Declaration of Judge Ranjeva in the *Pedra Branca Case* (n181) at 105: "...it is surreal to speak of the international transfer of title by acquiescence when, according to the rules and practice of the colonial Powers, it was the exercising of colonial territorial title...The exercising of the territorial title by the United Kingdom was not legitimate under international law, but is a *fact of colonial law, which organized the map of the world and apportioned all its areas.*" (emphasis supplied)

²³⁰ See Declaration of Judge Bennouna in the *Pedra Branca Case* (n181) at 130: "This same ambiguity, under cover of intertemporal law, is reflected in the way the structure of non-European States is taken into account in the colonial period, since the Court has accepted their specificity while nevertheless submitting them to the Westphalian criteria of sovereignty."

²³¹ Because there was no express agreement by the "natives" to transfer title, the ICJ deduced the colonial powers' conduct in this area, from 1852-1952, by describing how British control was discreetly but gradually, and through "convergent evolution", settled over time: n181, paras 164-191 and 276. For criticisms of this approach, see Judge Bennouna's Declaration in the *Pedra Branca Case* (n230) at 131-132: "...it is the conduct of Singapore following independence in 1965 after its separation from the Federation of Malaysia, constituted in 1963, and the conduct of that State itself, which will be decisive for determining sovereignty with respect to the islands concerned... for almost 15 years in the case of Pedra Branca...For all that period, we are here dealing with two independent States in control of their own foreign relations... *The legal categories of the colonial period cannot be recycled to make them presentable today as though it were just a matter of words*" (emphasis supplied). Also see the criticisms of the Court's approach in the Joint Dissenting Opinions of Judges Simma and Abraham, n181 at 116.

²³² I.e., from 1847-1851, a lawful possession of Pedra Branca was made by the British Crown, which was then passed to Singapore after its independence in 1965, as a successor to the British colony of Singapore.

the waters of the Singapore Strait between the British and the Dutch or between Sultan Abdul Rahman (under Dutch protection) and Sultan Hussein (under British protection) ... the Treaty left the entire Singapore Strait undivided and open to access by both the British and the Dutch. *This historical truth is confirmed by the negotiating history* which shows that although the Dutch initially proposed a demarcation line within the Singapore Strait, the idea was abandoned for fear that any such demarcation line would invite the jealousy of other powers...Hence, the demarcation line shown in Malaysia's supposedly illustrative map is *entirely speculative and has no historical, geographical or legal basis.*²³³

Significantly, the Court endorsed this "factual" approach on the basis that "the substantive provisions of Articles 8 to 12 which provide for a set of *mutual territorial adjustments*, that the 1824 Anglo-Dutch Treaty was concluded to settle once and for all the disputes that had developed between the United Kingdom and the Netherlands...".²³⁴ Consequently, the ICJ used this exchange of colonial possessions, a "political settlement",²³⁵ as evidence, in treaty form, to support its legal conclusion that two spheres of influence existed. Accordingly, this conclusion allowed the Court to reject Singapore's argument that there was a "legal vacuum" in terms of sovereignty over Pedra Branca at that point in time.²³⁶ "...the Treaty was the *legal reflection of a political settlement* reached between the two colonial Powers, vying for hegemony for many years in this part of the world, to divide the territorial domain of the old Sultanate of Johor into two sultanates to be placed under their respective *spheres of influence*. Thus in this scheme there *was no possibility for any legal vacuum* left for freedom of action to take lawful possession of an island in between these two spheres of influence. This political settlement signified at the same time that the territorial division between the two Sultanates of Johor and of Riau-Lingga *was made definitive by the conclusion of this Anglo-Dutch Treaty.*"²³⁷

Though the ICJ referred to "spheres of influence" in this case, it did not explain what it means. A "sphere of influence" could simply mean an annexed territory.²³⁸ More

²³³ *Counter-Memorial of the Republic of Singapore in the Pedra Branca Case* (25 January 2005), para 3.25 at 30 (emphasis supplied). For Singapore's account of how it funded the National Archives of Singapore and relied on its expertise (spanning over 20,000 research hours and transcription of 650 historical manuscripts) in preparing its memorials, see S Jayakumar & Tommy Thong Bee Koh, *Pedra Branca: The Road to the World Court* (Singapore: NUS Press, 2009) at 59-63.

²³⁴ *Pedra Branca Case*, para 96 at 43 (n181)(emphasis supplied).

²³⁵ *Ibid*, para 95 at 43.

²³⁶ *Pedra Branca Case*, para 95 at 43 (n181).

²³⁷ *Ibid*, para 98 at 43 (emphasis supplied).

²³⁸ See n220 at para 5.

usually, though, it means the exerting of influence by a colonial power (such as the UK) on an entity for which it is totally dependent but also nominally sovereign.²³⁹

What bears emphasis, however, is the Court's reasoning that this "sphere of influence" (whatever it means) is a "legal reflection", manifested in the Anglo-Dutch Treaty. Plainly, it did not "interpret" the Anglo-Dutch treaty, as we would under the law of treaties today. Remarkably and certainly, it used this treaty in some constructive sense to appraise the colonial powers' conduct there over 100 years, from 1852-1952:²⁴⁰ "The Court is of the opinion that the relevant facts... reflect a *convergent evolution* of the positions of the Parties regarding title to Pedra Branca/Pulau Batu Puteh."²⁴¹

As a principal organ of the UN, therefore, the Court became a venue to rehabilitate the colonial history of "Southeast Asia"²⁴² as *the* legal history of "Southeast Asia". This involved the ICJ's selective taking of a position on a moment in colonial history, in relation to who had sovereign control over this area: Regarding the question as to whether "[t]he Sultanate [of Johor] covered all the islands within this large area [of its territory], including all those in the Singapore Straits, such as Pulau Batu Puteh²⁴³ . . .", the Court starts by observing that it is *not disputed* that the Sultanate of Johor, since it came into existence in 1512, *established itself as a sovereign State with a certain territorial domain under its sovereignty in this part of southeast Asia*. Thus already at the beginning of the seventeenth century, Hugo Grotius, commenting on the military conflict between the Sultanate of Johor and Portugal, stated that: "There is in India a kingdom called Johore, which has long been considered a sovereign principality [*supremi principatus*], so that its ruler clearly possessed the authority necessary to conduct a public war [against the Portuguese]." (Hugo Grotius, *De Jure Praedae*, Vol. I Translation, 1950 (Gwladys L. Williams), *Classics of International Law*, p. 314.)²⁴⁴

In taking its position on this area, the Court retrospectively determined issues of geography: there is, it held, a Johor Sultanate which "established itself as a sovereign State with a certain territorial domain under its sovereignty in this part of southeast

²³⁹ See n220 at para 5.

²⁴⁰ *Pedra Branca* case, paras 164-191 (n181).

²⁴¹ *Ibid*, para 277 (emphasis supplied).

²⁴² See Declaration of Judge Bennouna, n181 at 132.

²⁴³ As indicated above (n226), this is Malaysia's name for the Pedra Branca.

²⁴⁴ *Pedra Branca Case*, paras 52-53 (n181) (emphasis supplied).

Asia”.²⁴⁵ However, as Judge Rajeeva observed, the Johor Sultan was a “passive and impotent spectator” in the face of colonial expansion.²⁴⁶ This colonial organisation and apportionment of the area (i.e., of Southeast Asia) can be traced back to the Anglo-Dutch Treaty of 1824,²⁴⁷ some form of legal source, on which the ICJ used to manufacture a moment in the history of Southeast Asia.

These positions of the Court on the area’s (i.e., the putative Southeast Asia) colonial past is necessary to facilitate a final determination as to who had sovereign title to the Pedra Branca (i.e., Singapore). As case law, however, the Court’s determination on the history of Southeast Asia, and the Anglo Dutch Treaty’s legal relevance, is more than “subsidiary means” under Article 38. The ICJ has pronounced on the history, the relations, attitudes of the “locals” with respect to the colonial powers, and the legal fact of Southeast Asia’s existence at a given point in time. While this judgment is not strictly binding (except in relation to Singapore and Malaysia) with respect to ASEAN, the Court’s stature, as well the resources being used to facilitate the Court’s judicial reasoning in *Pedra Branca*, is an influential soft law instrument which exists at general international law, subject to the acquiescence and tacit consent by ASEAN and other international legal persons of the ICJ’s reasoning.

In this respect, it bears stressing the point is not that the ICJ had “wrongly” decided the “history” of Southeast Asia, based on its reading of the Anglo-Dutch treaty. The history of this region had to be interpreted in some constructive sense, in order to resolve a legal dispute between Singapore and Malaysia. Instead, and most importantly in terms of the core proposition’s significance, the *Pedra Branca* judgment’s influence on regional law-making for ASEAN lies in the legal determination of history for the practical purpose of reaching legal outcomes for putative legal disputes, when new cases arise in due course.

VI. How Regional Law is made by the “Locals”: ASEAN and its Progenitors

This final section builds on the core proposition that regional law is influenced by general international law as follows. It shows how, after decolonisation, the newly independent States accepted general international law’s rules as to the creation of Southeast Asia’s regionality. Using these general rules, which allow the identification

²⁴⁵ Ibid.

²⁴⁶ See Declaration of Judge Ranjeva (n181, para 5 at 107). Generally see Barbara Watson Andaya and Leonard Y Andaya, *A History of Early Modern Southeast Asia, 1400-1830* (Cambridge: CUP, 2015), especially at 341-343.

²⁴⁷ Declaration of Judge Ranjeva, *ibid.*

of international legal persons such as ASEAN, the new ASEAN member States gradually accepted that they belong to a region. This is a region that had been created for them during colonisation and by external actors, through the general rules of treaty-making, such as the capacity of States and international organisations (as legal persons) to enter into treaties. Against this context, the distinctive regional law-making capacity of ASEAN organs *qua* ASEAN started on its establishment in 1967.

It bears stressing that although the distinctive regional law-making by ASEAN started in 1967, this idea of Southeast Asia's regionality did not definitively begin only upon ASEAN's establishment in 1967. This point matters because it comports with the core proposition that regional law is influenced by general rules of international law. Put another way, ASEAN was a venue which facilitated the acceptance by the "locals" that Southeast Asia existed as a region, but the idea of "Southeast Asia" had already been created at general international law by powerful external actors.

In this respect, then, I have already explained how the Manila Pact (1954) was one early – and external – effort to organise the region, on grounds of its being "Southeast Asia".²⁴⁸ In fact, since 1943, "South-East Asia" (with the hyphen) was invented by the Allied Powers as a theatre of war, the "South-East Asia Command".²⁴⁹ This war effort was another early effort to cohere a region in geographical terms, even though the intentions were thoroughly expedient.

After decolonisation, the "locals" quickly embraced the term "Southeast Asia", already established in the Manila Pact, possibly because it was efficient to define common goals for the new sovereign States who found themselves geographically related to the area. Hence, in 1961, the Association of Southeast Asia (ASA)²⁵⁰ tersely but expressly used the words "Southeast Asia" to advance social and economic progress,²⁵¹ a "free association" of countries in the same area.²⁵²

²⁴⁸ Chapter Two, Section V, Part 3.

²⁴⁹ At the Quebec Conference of May 1943, a South-East Asia Command (SEAC) was created as a theatre of war: the SEAC's boundaries were based on military expedience, with little evidence of cartographic logic; see generally Louis Mountbatten, *Report to the Combined Chiefs of Staff by the Supreme Allied Commander, South-East Asia, 1943-45* (London: His Majesty's Stationery Office, 1951) ("Mountbatten Report") at A, Paras 1 and 16-17.

²⁵⁰ On 31 July 1961, Thailand, Malaysia and the Philippines established the ASA, a regional grouping that sought to promote economic progress as a foundation for political stability. Generally Vincent K. Pollard, "ASA and ASEAN, 1961–1967: Southeast Asian Regionalism" (1979) 10(3) *Asian Survey* 244.

²⁵¹ Also see Table 1 at the end of this Chapter.

²⁵² See Table 1 at the end of this Chapter.

Similar to the ASA, when ASEAN was established in 1967, it also acted as a venue to embrace the term “Southeast Asia”. Member States can agree on “regional cooperation because they share “mutual interests” and “common problems”: this claim is based on the (non-binding) Bangkok Declaration of 1967.²⁵³ On the Bangkok Declaration, the legal literature tends to characterise it as follows: a “founding instrument”: more of a political declaration than a constitutional treaty; ²⁵⁴ a “simple declaration”²⁵⁵: “primarily a “political document”²⁵⁶ or “political instrument”; ²⁵⁷ the Declaration is not a treaty but rather a political document that aims to promote regional peace and stability and strengthen regional cooperation and mutual assistance on matters of common interest.²⁵⁸

Despite the intention of ASEAN member States to found ASEAN in a non-binding, “political document”, the *form* of the Bangkok Declaration is arguably irrelevant as I shortly explain. The Bangkok Declaration exists on the international plane. It can *still* be assessed for legal consequences, against the rules at general international law.

Whether ASEAN is “strictly speaking a loose association of States without supranational powers” is not the point.²⁵⁹ Something *more than* consent is required in understanding the practice of ASEAN and its constituent instrument of 1967. It is arguable that the practice of ASEAN organs transformed the original intent of ASEAN member States simply to create a “loose *association* of States” (whatever that means at law).²⁶⁰

Just because ASEAN member States intended, in 1967, to create an entity with low institutionalisation did not (necessarily) mean that ASEAN actions were outside the reach of international legality.²⁶¹ The functional approach applies.²⁶² For instance,

²⁵³ See n179.

²⁵⁴ Hao Duy Phan, *A Selective Approach to Establishing a Human Rights Mechanism in Southeast Asia: The Case for a Southeast Asian Court of Human Rights* (Netherlands: Martinus Nijhoff Publishers, 2012) at 102.

²⁵⁵ Stefano Inama and Edmund Sim, *The Foundation of the ASEAN Economic Community: An Institutional and Legal Profile* (Cambridge: CUP, 2015) at 198.

²⁵⁶ *Ibid.*

²⁵⁷ Thio Li-ann and Ingo Venzke, *The Internal Effects of ASEAN External Relations* (Cambridge: CUP, 2016) at 22.

²⁵⁸ Hao Duy Phan, “The Association of Southeast Asian Nations (International Legal Personality and Its Treaty-Making Power)” (2016) 13 *International Organizations Law Review* 273 at 281-282

²⁵⁹ Tan Hsien-Li, *The ASEAN Intergovernmental Commission on Human Rights: Institutionalising Human Rights in Southeast Asia* (Cambridge: CUP, 2011) at 12 (footnote 30).

²⁶⁰ *Ibid.*

²⁶¹ See also Simon Chesterman, *From Community to Compliance? The Evolution of Monitoring Obligations in ASEAN* (Cambridge: CUP, 2015) who said this of extant barriers to ASEAN’s commitment as a “rules-based” organisation (at 8): “The second barrier is ongoing political resistance to binding obligations in general...many ASEAN agreements were never intended to be implemented.” On monitoring powers of ASEAN organs, Chesterman said: “The power of monitors is a largely hypothetical topic within ASEAN” (at 93).

²⁶² See my discussion of the Cape Spartel and ICJ case law in Chapter Two, Section III, Part 2.

consider the basic “machinery” to support ASEAN’s aims which was agreed in the Bangkok Declaration.²⁶³ At international law, the following are “rules of the organisation”²⁶⁴ which give legal status to ASEAN “organs”.²⁶⁵ Operative Paragraph Three of the Bangkok Declaration states:

- (a) Annual Meeting of Foreign Ministers, which shall be by rotation and referred to as ASEAN Ministerial Meeting. Special Meetings of Foreign Ministers may be convened as required.
- (b) A Standing committee, under the chairmanship of the Foreign Minister of the host country or his representative and having as its members the accredited Ambassadors of the other member countries, to carry on the work of the Association in between Meetings of Foreign Ministers.
- (c) Ad-Hoc Committees and Permanent Committees of specialists and officials on specific subjects.
- (d) A National Secretariat in each member country to carry out the work of the Association on behalf of that country and to service the Annual or Special Meetings of Foreign Ministers, the Standing Committee and such other committees as may hereafter be established.²⁶⁶

Since ASEAN’s establishment in 1967, the ASEAN Ministerial Meeting (AMM)²⁶⁷ which comprises the ASEAN foreign ministers is its most durable organ.²⁶⁸ Until the entry into force of the Charter in 2009, it was the principal coordinating organ of all matters within ASEAN.²⁶⁹ Importantly, the ASEAN Standing Committee²⁷⁰ acted as a “gatekeeper” for the AMM by meeting five to six times a year. The ASEAN Standing Committee selects issues for cooperation and agrees on its appropriate implementation, before it reaches the ministerial level for formal approval at the AMM. The ASEAN Standing Committee comprised ambassadors who were accredited in a particular ASEAN member State.²⁷¹ It was chaired by the Foreign Minister whose State assumed the ASEAN Chair, which was assigned by alphabetical rotation.²⁷²

In other words, an evolving practice of ministerial and bureaucratic consultation was cultivated.²⁷³ There is some artificiality in studying the separate acts of ASEAN since

²⁶³ See n179, third operative paragraphs (a)-(d).

²⁶⁴ Article 2(1)(j), Vienna Convention on the Law of Treaties between States or International Organizations or between International Organization (adopted 21 March 1986, not yet in force) 25 ILM 543.

²⁶⁵ For definition of organs, see n90 at para 16: “For the purpose of attribution of conduct, decisions, resolutions and other acts of the organization are relevant, whether they are regarded as binding or not, insofar as they give functions to organs or agents in accordance with the constituent instruments of the organization”.

²⁶⁶ See n179, para 3(a): “The Declaration stated that meetings would be rotated but the rotation in alphabetical order was a result of ASEAN practice and not contained in the Declaration.”

²⁶⁷ Renamed as the ASEAN Coordinating Council, Article 8, ASEAN Charter (n176).

²⁶⁸ Generally see Walter Woon, *The ASEAN Charter: A Commentary* (Singapore: NUS Press, 2016) at 102.

²⁶⁹ “Joint Communique of the Ninth ASEAN Ministerial Meeting” (24-26 June 1976) at para 22.

²⁷⁰ Now replaced by Committee of Permanent Representatives to ASEAN, Article 12, ASEAN Charter (n176).

²⁷¹ In other words, the ambassadors who are accredited to a particular Southeast Asian State (which is also an ASEAN member State) doubled as a representative of the ASEAN Standing Committee. The accreditation of ambassadors to ASEAN, based in Jakarta, took place after the Charter came into force.

²⁷² Generally see Rodolfo C Severino, *Southeast Asia in Search of an ASEAN Community: Insights from the former ASEAN Secretary-General* (Singapore: ISEAS Publishing, 2006) at 22.

²⁷³ Generally Michael Leifer, “Regional Decision-Making and Corporate Foreign Policies” in *Michael Leifer: Selected Works on Southeast Asia* (Chin Kin Wah & Leo Suryadinata, eds) (Singapore: ISEAS, 2005) at 301.

the same people who make decisions within the ASEAN organs are also representatives of their States. I return to this point below.²⁷⁴ It is also true that the diplomatic practice was to avoid legal rules and regulations: there was no ASEAN Secretariat until 1977.²⁷⁵ Since 1974, however, ASEAN established formal relations with the European Economic Community (EEC).²⁷⁶ At general international law, therefore, it was the AMM that agreed joint statements with the EEC, another legal actor,²⁷⁷ on the international plane.²⁷⁸

The Bangkok Declaration formed the basis for the AMM to create a joint ASEAN-EC Commission study group to facilitate diplomatic cooperation with the EEC in 1974,²⁷⁹ even if the goals were modest.²⁸⁰ In 1983, the Bangkok Declaration was registered under Article 102, UN Charter.²⁸¹ As a formal, technical matter, the Bangkok Declaration is not a treaty and thus non-binding.²⁸² However, as explained already with respect to acquiescence and tacit consent concerning soft law instruments, non-registration of an instrument does not mean that it is *not* a treaty. Simply, the fact of registering the Bangkok Declaration is strong evidence about the intentions of ASEAN member States. For these reasons, at general international law, it is misleading to treat the Bangkok Declaration as just a political declaration.²⁸³

Hence, despite the non-binding Bangkok Declaration (1967), ASEAN functioned as a venue to institutionalise the AMM's actions, which can be assessed for legality at general international law. Therefore, the AMM is a permanent entity created in accordance with the Bangkok Declaration and its conduct, as an ASEAN organ, is an

²⁷⁴ See further Chapter Four, Section III, Part 1.

²⁷⁵ 1976 Agreement on the Establishment of the ASEAN Secretariat (signed 24 February 1976), text available at <<http://agreement.asean.org/>>.

²⁷⁶ "Joint Statement of the Informal Meeting of the ASEAN Minister and Vice President and Commissioner of the EC-Commission" (25 September 1974); "Joint Declaration of the ASEAN-EC Ministerial Meeting Brussels" (21 November 1978), available at <<https://cil.nus.edu.sg/category-search/>>.

²⁷⁷ The EEC's external relations were conducted "informally", under the auspices of the European Political Cooperation, see Eileen Denza, *The Intergovernmental Pillars of the European Union* (Oxford: OUP, 2002) at 29-40.

²⁷⁸ See the carefully titled *Cooperation Agreement between the European Economic Community and Indonesia, Malaysia, the Philippines, Singapore and Thailand - Member Countries of the Association of South-East Asian Nations* (adopted 10 June 1980) OJ L144 2. For clarity: my point is that the AMM, as an ASEAN organ, is able to agree common positions through ASEAN as a venue, but ASEAN did not sign this cooperation agreement as a separate legal person.

²⁷⁹ See n276 at para 6 (i.e., Joint Statement of 25 September 1974).

²⁸⁰ See *ibid* at para 7: "...all possible areas where cooperation could be broadened, intensified, diversified giving special considerations to the development needs of the ASEAN countries and bearing in mind the situations in the EEC".

²⁸¹ See further Chapter Four, Section III, Part 1.

²⁸² See my earlier clarifications in Chapter Two, Section III, Part 3.

²⁸³ See also the views in nn254-258.

“established practice”.²⁸⁴ Accordingly, the Bangkok Declaration forms the “rules of the organisation”.²⁸⁵

Two examples of the AMM’s conduct bear mention. First, through the AMM’s involvement, there was a profusion of projects related to food, shipping, aviation, air traffic services and tourism.²⁸⁶ These included intramural projects between ASEAN member States, to be conducted within ASEAN auspices.²⁸⁷ Indeed, there were too many projects.²⁸⁸ In a 1971 joint communique, a bewildered AMM emphasised: “...the value of regional collaboration and reaffirmed their determination to intensify the efforts of their respective Governments in this direction. They agreed therefore on the *urgent need* for the Permanent Committees to work out their respective lists of priority projects which could be implemented as soon as possible.”²⁸⁹

Second, the AMM played a significant role in facilitating the TAC’s (i.e., a treaty) conclusion, in 1976, of a regional code of conduct for intramural relations for States in Southeast Asia. This is regional law-making because it is specific to a geographical area, in which a particular way of conducting friendly relations is a common value.²⁹⁰ To appreciate how far the term “Southeast Asia” had been assimilated by the “locals” from the non-binding Bangkok Declaration (1967) to the TAC (1976), note the wider context by considering the recourse to “Southeast Asia” as a treaty term in the Manila Pact of 1954: “Desiring to establish a firm basis for common action to maintain peace and security in Southeast Asia and the Southwest Pacific...”²⁹¹

²⁸⁴ I.e., a body of practice which forms an integral aspect of that international organisation’s rules: see ILC, “Draft Articles on the Law of Treaties between States and International Organizations or between International Organizations with Commentaries” (1982) *ILC Yearbook Vol II Part Two*, para 25 at 21: “...by referring to “established” practice, the Commission seeks only to rule out uncertain or disputed practice; it is not its wish to freeze practice at a particular moment in an organization’s history.” See further Chapter Four, Section IV, Part 2.

²⁸⁵ I.e., Article 2(1)(j), Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 21 March 1986, not yet in force) (1986) 25 ILM 543.

²⁸⁶ For a classic account, see Hans H Indorf, *ASEAN: Problems and Prospects* (Singapore: ISEAS, 1975) at 21 and 43-44.

²⁸⁷ *Ibid.*

²⁸⁸ See n286 at 43.

²⁸⁹ “Joint Communique of the Fourth ASEAN Ministerial Meeting” (12-13 March 1971), para 5 (emphasis supplied).

²⁹⁰ The TAC’s text (see n178) reflects a long process of deliberations which started with the AMM’s signing, in 1971, of the ASEAN Declaration of a Zone of Peace, Free and Neutrality (ZOPFAN). The AMM would assign the task of producing guidelines for ZOPFAN to the ASEAN Senior Officials (i.e., another ASEAN organ) before the text was sent to the ASEAN Summit (the highest ASEAN organ comprising Heads of Government) for signing in 1976. For an account, see Daniel Seah, “The Treaty of Amity and Cooperation in Southeast Asia: The Issue of Non-Intervention and its Accession by Australia and the USA” (2012) 11 *Chinese Journal of International Law* 785 at 792-794.

²⁹¹ See n195.

Now compare the Manila Pact's use of "Southeast Asia" by powerful external actors, with the TAC's recourse to "Southeast Asia" in 1976 by ASEAN member States. The TAC's common goals for peace and security in the last preambular paragraph are as follows: "Believing in the need for cooperation with all peace-keeping nations, both *within and outside Southeast Asia*, in the in the furtherance of world peace, stability and harmony."²⁹²

The TAC is a code of conduct for intramural relations, agreed in treaty form, which applied to its parties.²⁹³ Therefore, the words "within and outside Southeast Asia" reflect a regional law based on who belongs to "Southeast Asia". In 1976, "Southeast Asia" only included the ASEAN member States of the Philippines, Indonesia, Thailand, Malaysia, and Singapore. Put differently, the region of Southeast Asia only contains ASEAN member States.

Therefore, in 1976, Brunei,²⁹⁴ Cambodia, Myanmar, Laos, and Vietnam did not belong to the region of Southeast Asia because they were not ASEAN member States.²⁹⁵ Over time, however, the TAC was amended thrice.²⁹⁶ Each time, the amending protocols contain this preamble: "Desiring to further enhance cooperation with all peace-loving nations, both *within and outside Southeast Asia* and, *in particular, neighbouring States of the Southeast Asia region*."²⁹⁷

Therefore, the matter of which State belongs to "Southeast Asia" evolves through regional law in the TAC protocols. Through ASEAN, as a venue, a region of "Southeast Asia" is defined in the TAC.²⁹⁸ From the Manila Pact (1954) to the two Bangkok Declarations (ASA, 1961 and ASEAN 1967), then the TAC (1976), and finally the ASEAN Charter (2008), agreements on the geographical limits of "Southeast Asia" were made, as regional law, through international organisations.

²⁹² See n178.

²⁹³ For discussion, see case studies especially in Chapter Four and Five.

²⁹⁴ Acceded on 7 January 1984.

²⁹⁵ It is true that Article 18, TAC states: "This Treaty shall be signed by the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore and the Kingdom of Thailand. It shall be ratified in accordance with the constitutional procedures of each signatory State. *It shall be open for accession by other States in Southeast Asia*" (emphasis supplied). However, this reference to "other States in Southeast Asia" must take into account the realities of international relations in 1976, i.e., the whole "context" in Article 31, Vienna Convention on the Law of Treaties. Cambodia, Laos, and Vietnam were part of Indochina; Myanmar did not associate itself with ASEAN or IndoChina. Therefore, Article 18 was a political aspiration by ASEAN member States to invite the "other States" around Southeast Asia" to join "Southeast Asia" proper.

²⁹⁶ Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia (15 December 1987); Second Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia (25 July 1998); Third Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia (23 July 2010). All Protocols are available at <<http://agreement.asean.org/>>.

²⁹⁷ *Ibid* (emphasis supplied).

²⁹⁸ For discussion of ASEAN organs' involvement in the TAC, see Chapter Four.

Finally, and importantly, this defining of “Southeast Asia” is also based on common values and not just geography. Two examples illustrate this point. First, on 5 July 1989, Papua Guinea acceded to the TAC, long before the newer ASEAN members did (i.e., Cambodia, Myanmar, Lao, and Vietnam). Despite its sharing of an international border with Indonesia in the geographical region of Southeast Asia, Papua New Guinea does not fall within “States in Southeast Asia”, at international law, under the 1998 Protocol’s amendment of Article 18, TAC.²⁹⁹

The second example is manifest in the ASEAN Charter, a constituent instrument. This treaty uses the words “Southeast Asia” not on its own but in the specific language of an *Association of Southeast Asia (ASEAN)*.³⁰⁰ And in this context, under Article 2(2) of the ASEAN Charter, “ASEAN *and* its member States”³⁰¹ agree to one of its cardinal values, by acting in accordance with: “non-interference in the internal affairs of ASEAN Member States.”³⁰²

The words “ASEAN *and* its member States” are significant: ASEAN is a separate legal person, a venue, which can make the law of non-intervention with an ASEAN character. Therefore, the rules of general international law, as discussed early in this chapter, strongly shape and permit the regional law of ASEAN. Exactly how ASEAN, through its organs, act in accordance with non-intervention is a matter of legal evaluation against general international law. This will be examined in two case studies below. However, it is first necessary to investigate non-intervention’s content at general international law, which the next chapter examines.

VII. Conclusion

This chapter advances the study’s core proposition that a distinctive ASEAN regional law (of non-intervention) is influenced by general international law in two ways. First, general international law sets the rules regarding law-making by international organisations, namely their separate legal personality and capacity to make treaties or regional law (such as regional custom) separately from its member States.

²⁹⁹ See n296.

³⁰⁰ See Table 2 at the end of this Chapter.

³⁰¹ See Article 2(2), ASEAN Charter (n178) (emphasis supplied).

³⁰² See Article 2(2)(e), ASEAN Charter (n178).

Second, international organisations also provide a venue to allow soft law to be created, and to coexist alongside the making of treaties and custom. Both points support the core proposition because general international law provides a broad analytical framework to understand and evaluate above how ASEAN organs, through the AMM, made distinctive regional law such as the TAC.

Furthermore, this chapter has noted the role of powerful external actors, over a period of time, in influencing the acceptance of a geographical area which eventually became a (coherent) region of Southeast Asia. This development of a region was strongly influenced by general international law, aided by the actions of various external actors over time, and the result was acquiesced to by the ASEAN member States after decolonisation.

Accordingly, an important piece of this study's core proposition has been laid out: ASEAN is an international organisation, which can make distinctive regional law, because rules of general international law crystallised the region as a reality. Next, the general rules, aided by the active roles of powerful external actors, influenced ASEAN's scope of regional law-making. Therefore, the analytical framework to evaluate ASEAN's regional law-making has been established. This approach matters because it allows us to focus on one type of regional law that is specific to this study: non-intervention. The next chapter builds on the core proposition by exploring what is the content of non-intervention, and how it is determined, as a matter of general international law.

TABLE 1: How the Words “Southeast Asia” were used in ASEAN and non-ASEAN Instruments

	Bangkok Declaration 1961 (ASA)	Bangkok Declaration 1967 (ASEAN)	TAC (1976)
Preambular References to “Southeast Asia”	Desiring to establish a firm foundation for common action to further economic and social progress in <i>Southeast Asia</i> .	Mindful of the existence of mutual interests and common problems among countries of <i>South East Asia</i> and convinced of the need to strengthen further the existing bonds of regional solidarity and cooperation;	Desiring to enhance peace, friendship and mutual cooperation on matters affecting Southeast Asia...
		Desiring to establish a firm foundation for common action to promote regional cooperation in <i>South East Asia</i> in the spirit of equality and partnership and thereby contribute towards peace, progress and prosperity in the region.	
		Considering that the countries of <i>South East Asia</i> share a primary responsibility for strengthening the economic and social stability of the region and ensuring their peaceful and progressive national development, and that they are determined to ensure their stability and security from external interference in any form or manifestation in order to preserve their national identities in accordance with the ideals and aspirations of their peoples.	Believing in the need for cooperation with all peace-loving nations, both within and outside Southeast Asia...

TABLE 1: How the Words “Southeast Asia” were used in ASEAN and non-ASEAN Instruments

<p>Operative Paragraphs: references to “Southeast Asia</p>	<p>The establishment of an association for economic and cultural co-operation among the countries of <i>Southeast Asia</i> to be known as ASA - Association of <i>Southeast Asia</i>.</p>	<p>The establishment of an Association for Regional Cooperation among the countries of <i>South East Asia</i> to be known as the Association of <i>South East Asian Nations</i> (ASEAN).</p>	<p>The High Contracting Parties shall collaborate for the acceleration of the economic growth in the region in order to strengthen the foundation for a prosperous and peaceful community of nations in Southeast Asia. The High Contracting Parties in their efforts to achieve regional prosperity and security, shall endeavour to cooperate in all fields ...which will constitute the foundation for a strong and viable community of nations in Southeast Asia. This treaty... shall be open for accession by other States in Southeast Asia.</p>
	<p>To cooperate in the promotion of <i>Southeast Asia</i> Studies.</p>	<p>To accelerate the economic growth, social progress and cultural development in the region through joint endeavours in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of <i>South East Asian</i> nations.</p>	
	<p>This association is in no way connected with any outside power or power bloc and is directed against no other country, but is essentially free association of countries of <i>Southeast Asia</i> having as its objectives the promotion, through joint endeavour, of the well-being and the economic, social and cultural progress of this region.</p>	<p>To promote <i>South East Asian</i> studies. That the Association is open for participation to all States in the <i>South East Asian Region</i> subscribing to the aforementioned aims, principles and purposes. That the Association represents the collective will of the nations of <i>South East Asia</i> to bind themselves together in friendship and cooperation and, through joint efforts and sacrifices, secure for their peoples and for posterity the blessings of peace, freedom and prosperity.</p>	

TABLE 2: How the Words “Southeast Asia” are used in ASEAN Treaties

	ASEAN Charter (2008)	TAC (1976)	TAC Protocol (1987)	TAC Protocol (1998)	TAC Protocol (2010)
Preambular reference to “Southeast Asia”	WE, THE PEOPLES of the Member States of the Association of Southeast Asian Nations (ASEAN).	Desiring to enhance peace, friendship and mutual cooperation on matters affecting Southeast Asia... Believing in the need for cooperation with all peace-loving nations, both within and outside Southeast Asia...	DESIRING to further enhance cooperation with all peace-loving nations, both within and outside Southeast Asia and, in particular, neighbouring States of the Southeast Asia region; CONSIDERING Paragraph 5 of the preamble of the Treaty of Amity and Cooperation in Southeast Asia... which refers to the need for cooperation with all peace-loving nations, both within and outside Southeast Asia, in the furtherance of world peace, stability and harmony.	DESIRING to ensure that there is appropriate enhancement of cooperation with all peace-loving nations, both within and outside Southeast Asia and, in particular, neighboring States of the Southeast Asia region; CONSIDERING Paragraph 5 of the preamble of the Treaty of Amity in Southeast Asia, which refers to the need for cooperation with all peace-loving nations, both within and outside Southeast Asia, in the furtherance of world peace, stability and harmony.	DESIRING to ensure that there is appropriate enhancement of cooperation with all peace-loving nations, both within and outside Southeast Asia, in particular, neighbouring States of the Southeast Asian region, as well as with regional organisations whose members are only sovereign States. CONSIDERING Paragraph 5 of the preamble of the Treaty of Amity in Southeast Asia, which refers to the need for cooperation with all peace-loving nations, both within and outside Southeast Asia, in the furtherance of world peace, stability and harmony. TAC Protocol (2010)

TABLE 2: How the Words “Southeast Asia” are used in ASEAN Treaties

<p>Reference to “Southeast Asia” in main treaty provisions</p>	<p>To preserve Southeast Asia as a Nuclear Weapon-Free Zone and free of all other weapons of mass destruction;</p> <p>Admission shall be based...location in the recognised geographical region of Southeast Asia;</p> <p>Disputes which do not concern the interpretation or application of any ASEAN instrument shall be resolved peacefully in accordance with the Treaty of Amity and Cooperation in Southeast Asia and its rules of procedure.</p>	<p>The High Contracting Parties shall collaborate for the acceleration of the economic growth in the region in order to strengthen the foundation for a prosperous and peaceful community of nations in Southeast Asia.</p> <p>The High Contracting Parties in their efforts to achieve regional prosperity and security, shall endeavour to cooperate in all fields ...which will constitute the foundation for a strong and viable community of nations in Southeast Asia.</p> <p>This treaty... shall be open for accession by other States in Southeast Asia.</p>	<p>Article 18...shall be open for accession by other States in Southeast Asia.</p> <p>States outside Southeast Asia may also accede to this Treaty by the consent of all the States in Southeast Asia.</p> <p>(The TAC High Council Provision)...shall apply to any of the States outside Southeast Asia which have acceded to the Treaty only in cases where that state is directly involved in the dispute to be settled through the regional processes.</p>	<p>Article 18, Paragraph 3, of the Treaty of Amity shall be amended to read as follows: "States outside Southeast Asia may also accede to this Treaty with the consent of all the States in Southeast Asia.</p>	<p>Article 18, Paragraph 3, of the Treaty of Amity shall be amended to read as follows: "This Treaty shall be open for accession by States outside Southeast Asia and regional organisations whose members are only sovereign States subject to the consent of all the States in Southeast Asia.</p> <p>(The TAC High Council Provision)...shall apply to any of the High Contracting Parties outside Southeast Asia only in cases where that High Contracting Party is directly involved in the dispute to be settled through the regional processes.</p>
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Chapter Three

THE VAGUE CONTENT OF NON-INTERVENTION AT GENERAL INTERNATIONAL LAW: “ORIGINS”, SUBSTANCE, AND FORM

I. Purpose

This Chapter explains and shows the extent of non-intervention’s vague content at general international law.¹ This vagueness is a moving target, a result of shifting legal rules at general international law at any given point in time which require choices to be made, in terms of how it influences regional law making. These choices, it is argued, are increasingly made by organs of international organisations as a law-making venue.

Therefore, this Chapter advances the study’s core proposition that a distinctive regional law of non-intervention is influenced by general international law in two ways. First, it shows how non-intervention at general international law prohibits a potentially wide range of conduct which intervenes against the internal affairs of a State, but the application of non-intervention is always influenced by general international law. Put another way, the low stringency of non-intervention as a legal obligation is reflected in the vagueness of its content, which is determined against the broad background of rules at general international law.

Second, this Chapter demonstrates the strength of this broad background of general international law, in terms of how non-intervention’s vague legal content changes over a period of time. This vagueness reflects dynamic tension in the distinctive regional law-making by ASEAN because, on the one hand, its regional content is possible because of non-intervention’s vagueness at general international law. On the other

¹ The recent scholarship tends to scope the whole field of non-intervention by evaluating its relevance in relation to other areas of international law, for instance: non-intervention and jurisdiction; non-intervention and human rights; non-intervention and diplomatic law; non-intervention and cyber security. For literature, see Rosalyn Higgins, “Intervention and International Law” in *Themes and Theories*, (Oxford, OUP 2012) 272 at 273; Lori Damrosch, “Politics Across Borders: NonIntervention and NonForcible Influence Over Domestic Affairs” (1989) 83 AJIL 1; Eileen Denza, *Diplomatic Law (Commentary on the Vienna Convention on Diplomatic Relations)* (4th ed) (Oxford, OUP, 2016) at 377-382; Paul Behrens, *The Duty of Non-interference and Its Impact on the Diplomatic Message under the Vienna Convention on Diplomatic Relations* (PhD thesis, University College London, 2007) at 82-88; Paul Behrens, *Diplomatic Interference and the Law* (UK and USA: Hart Publishing, 2016); Sean Watts, “Low-Intensity Cyber Operations and the Principle of Non-Intervention” in *Cyber War: Law and Ethics for Virtual Conflicts* (Jens David Ohlin, Kevin Govern, and Claire Finkelstein, eds) (Oxford: OUP, 2015) at 240.

hand, it is precisely because of non-intervention's vagueness that general international law influences (and gradually constrains) the regional content of non-intervention with an ASEAN character, thereby reflecting the dynamic tension in the relationship between regional and general international law.

ASEAN is a "price-taker" of these shifting rules at general international law, even when ASEAN organs are making the regional law of non-intervention.² Non-intervention exists because of a firmly held value in the West that individual States are accorded freedom to make political, economic, and social decisions, by governing its internal affairs.³ Accordingly, friendly relations between States are based on "respect for the equal rights and self-determination of people".⁴ Furthermore, the UN is "based on the principle of sovereign equality of all its Members".⁵

However, a State's right to govern its internal affairs through non-intervention's protection, is subject to rules in the UN Charter that, within the Security Council, only five States⁶ can and do underwrite international peace and security for all other States under UN auspices,⁷ a unique international organisation. This is not to say that the Western-centric value of being entitled to govern a State's "internal affairs" is undesirable for non-Western States in Southeast Asia. But this value is not self-evidently universal, no more than "Southeast Asia" was universally viewed in geographical terms before the Second World War.

Instead this Western-centric value reflects persistent claims of universality, manifested as general international law, which are applicable to all States. As I explain in this Chapter and in the case studies that follow, non-intervention exists alongside competing universal values, such as domestic governance and international trade.⁸ Contradictions arise from these competing values, which also contains legal rules at general international law, because non-intervention is a vague

² See case studies in Chapters Four and Five.

³ For an account of this idea by the likes of Bodin, Locke, Hume, Bentham, and Kant: see Martti Koskenniemi, *From Apology to Utopia (The Structure of International Legal Argument)* (reissue with new epilogue) (Cambridge: CUP, 2005) at 89-94; also see Anne-Marie Slaughter, "International Law in a World of Liberal States" (1995) 6 EJIL 503.

⁴ Article 1(2), Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

⁵ Articles 1(2) and 2(1), UN Charter (ibid); also see Operative Paras (e) and (f) of UNGA, "Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations" (24 October 1970) UNGA Res 2625 (XXV).

⁶ Article 23(1), UN Charter (n4).

⁷ Chapter VII, UN Charter (n4).

⁸ See Chapters Four and Five.

rule of international law. To this extent, vagueness of the law is related to the introductory chapter's discussion as to the scope of a State's internal affairs, of which some types of intervention are protected by the rule of non-intervention at a given point.⁹ As I demonstrate below, because non-intervention protects a potentially wide range of actions (both forcible and non-forcible), it is not legally possible to be precise about the exact conduct which is prohibited by non-intervention.

The vagueness of non-intervention's content is manifested in descriptive and evaluative terms. For example, the expression "domestic jurisdiction" (to which non-intervention potentially applies) is descriptive of a State's internal competences against external interventions. Indeed, as explained below, the Friendly Relations Declaration (1970) describes in more detail the types of interventions in economic, political, and social contexts which are prohibited. Similarly, in the context of the TAC's Article 2 and 10, the expressions "internal affairs" and activities which "constitute a threat to the political and economic stability, sovereignty, or territorial integrity" of a TAC are vague. This is because although the types of activities which are prohibited are already described, the application of this rule turns on an evaluation of what constitutes a "threat".

This short account of non-intervention's vagueness matters because it is general international law that primarily determines which of the myriad forms of conduct on the international plane, including acts with a regional character, are protected by non-intervention at a given point. Timothy Endicott offered three advantages of vagueness in law (i.e., in the area of national laws): the private ordering of desirable conduct, the allocation of power to decision-makers, and fidelity (i.e., the compliance with the underlying reasons for the law).¹⁰ To adapt Endicott's propositions for our purposes, general international law assumes this task through its rules by creating competing, desirable values of international relations (example: domestic governance and human rights protection).

Since there are different (and sometimes competing) desirable values of international relations (i.e., Endicott's private ordering argument), it is general international law which sets the general rules (i.e., Endicott's allocation of decision-makers argument)

⁹ See Chapter One, Section 1, Part 2.

¹⁰ Generally see Timothy Endicott, "The Value of Vagueness" in *Philosophical Foundations of Language in Law* (Andrei Marmor and Scott Soames, eds), (Oxford: OUP, 2011); also see Timothy AO Endicott, *Vagueness in Law*, (Oxford: OUP, 2000).

to determine the content and application of non-intervention at a given point. The justification in favour of vagueness in this sense lies in the universal claims of general international law (Endicott's fidelity argument): at any given point, there are certain rules which reflect the underlying purposes of the whole of public international law (for instance, protection of international peace and security against the spread of the Ebola virus), against which non-intervention (both general and regional rules) is accorded minimal or no legal relevance, through its vagueness in descriptive and evaluative terms. In this respect, the previous chapter examined the ways that international organisations can make general international law and regional law. In this chapter, I show how international organisations particularly contribute to non-intervention's vague content, at various venues, through its law-making at general international law.

The chapter proceeds as follows. First, it examines, as a broad background to this chapter, how the ideas of non-intervention by Vattel and Oppenheim became the "origins" of non-intervention for all States. Second, the diplomatic and treaty practice of the Organisation of American States (OAS) in making the regional law of non-intervention is studied. Third, this chapter turns to the UN General Assembly's practice and explores how non-intervention's universal content emerged here. Finally, the ICJ's case law is discussed to analyse its contribution which has resulted in a current but restrictive content of non-intervention.

II. Background to Non-Intervention's Historical "Origins": Emmer De Vattel's Influence on the ILC

1) Introduction:

The next two sections explore the influence of Emmer de Vattel and Oppenheim on the contemporary content of non-intervention. My goal is to show and explain how non-intervention's content borrows from these European writers' ideas as the "origins", from which non-intervention's contemporary content is determined. In other words, the hagiographic status of these European men at general international law facilitates the borrowing of their ideas to become universal claims for all States, which is facilitated by the descriptive and evaluative vagueness of non-intervention at general international law, and advanced through organs of international organisations.

Accordingly, the next two sections regarding Vattel and Oppenheim advance the core proposition by showing how the works of these two men have been absorbed by

general international law over time, which in turn proves influential in shaping the content of non-intervention today. We first consider Vattel. His ideas on non-intervention still influence non-intervention's legal content.¹¹ Winfield, for example, explained Vattel's relevance in our understanding of non-intervention's content as follows:

Vattel requires careful examination. Not that he formulates any detailed theory of intervention in his *Droit Des Gens*—for the word is used but twice, and, certainly not with the technical meaning now annexed to it—but because there is every reason to believe that some passages scattered throughout the book are the *nidus* of the modern doctrine relative to intervention.¹²

In this respect, and with some tentativeness, Winfield claimed that Section 54 of Book II in Vattel's work contained the “germ of the *modern* rule of non-intervention”, in which Vattel wrote no state has the smallest right to interfere in the government of another.¹³ To appreciate Vattel's influence on non-intervention's content, at general international law, it is useful to sketch some of his main ideas.¹⁴ Generally, Vattel based his theory of the State on the law of nature: the common will of the law of nations is the united views of the citizens.¹⁵ He did not elucidate rules or principles of international law in his work. He did not draw legal conclusions from the attitudes of State conduct, a law-making technique which we regard as State practice today.¹⁶ He connected sovereignty to independence¹⁷ and insisted that the absolute independence of States was most significant.¹⁸ Accordingly, the English translations of Vattel's work which are related to intervention are as follows: no foreign power has a right to interfere in the affairs which are of a “national concern” or to “intermeddle”, save for recourse to good offices; ¹⁹ no nation has a right to interfere in the government of another State

¹¹ For recent citations: see Simon Chesterman, *Just War or Just Peace (Humanitarian Intervention and International Law)* (Oxford: OUP 2003) at 19; Vaughan Lowe, “The Principle of Non-Intervention: Use of Force” in *The United Nations and the Principles of International Law* (Vaughan Lowe and Colin Warbrick eds) (London: Routledge, 1994) 66 at 81.

¹² Percy H. Winfield, “The History of Intervention in International Law” (1922-23) 3 BYIL 130 at 132 (original emphasis).

¹³ *Ibid* at 133: his extensive analyses of three types of intervention (at 139) – internal, punitive and external – are not approximations to a world which is based on sovereign equality, alongside with the role of five permanent members at the Security Council with unequal powers to maintain international peace and security.

¹⁴ I.e., *Droit des gens; ou, Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*, which in English roughly means “The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns”. In this Chapter, I use this version: Thomas Adamo ed, *de Vattel's The Law of Nations* (USA: Woodbine Cottage Publication, 2011) (“*Law of Nations*”).

¹⁵ Charles G Fenwick, “The Authority of Vattel” (1913) 7 *American Political Science Review* 395 at 400.

¹⁶ Generally Michael Wood, “State Practice”, MPEPIL (2014).

¹⁷ Generally Stephane Beaulac, “Emer de Vattel and the Externalization of Sovereignty” (2003) 5 *Journal of the History of International Law* 237.

¹⁸ *Ibid* at 261.

¹⁹ *Law of Nations*, Book I, Chapter III, section 37 (n14): Vattel elaborates non-intervention in this chapter, which discusses the constitution of a State and the rights and duties of a State.

on the grounds that nations have liberty and independence. Each State has a right to be governed as they think proper;²⁰ foreign nations are not to interfere in the internal government of an independent state.²¹

Vattel admitted that exceptions applied. After all, in Vattel's time, there was the forcing of his sovereign, Augustus III, as a ruler onto Poland, by the army of Russia and Saxony.²² Another example was also the "plunder" of Silesia by Prussia.²³ Therefore, to Vattel, the exceptions include, in cases of tyranny, every foreign power has the right to help the oppressed who seek assistance. For support, Vattel cited the help of the Dutch United Provinces against James II of England.²⁴ In cases of a prince who makes an unjust war, "everyone" has the right to help the oppressed. For just wars, neutral nations may interfere as mediators.²⁵

2) How the ILC advances Vattel's Ideas on Non-Intervention

Vattel was a theorist.²⁶ A less generous view is that Vattel's "fondness for abstract reasoning leads him to discuss imaginary situations".²⁷ Be that as it may, the ILC has acted as a venue to rehabilitate Vattel's ideas on non-intervention. In a preliminary study on the legal issues concerning its progressive work on disaster management,²⁸ a topic which is discussed in Chapter Five, the Special Rapporteur, Eduardo Valencia-Ospina, was able to trace the "evolution" of the international legal protection of persons during disasters to Vattel who made the following observations, which was cited with approval by the Special Rapporteur:²⁹ "...when the occasion arises, every Nation should give its aid to further the advancement of other Nations and save them

²⁰ *Law of Nations*, Book II, Chapter IV, section 54 (n14): Vattel elaborates non-intervention in this chapter in the context of a nation's right to security and the effects of sovereignty and independence of a nation.

²¹ *Law of Nations*, Book III, Chapter XVIII, section 296 (n14): Vattel referred to Book II, Chapter IV, Section 54 and discussed Chapter XVIII in the context of the conduct to be observed by foreign nations when a State is embroiled in a civil war.

²² See n12 at 130-134; Ann Van Wynen Thomas & AJ Thomas Jr, *Non-Intervention: The Law and its Import in the Americas* (USA: Southern Methodist University Press, 1956) at 5 ("Thomas's Non-Intervention").

²³ See n12 at 133.

²⁴ *Law of Nations*, Book II, Chapter IV, section 56 (n14).

²⁵ *Law of Nations*, Book II, Chapter III, Section 49 (n14).

²⁶ See n11 at 75: for one recent citation of his work, see the various citations of Vattel's "Law of Nations in the Department of Defense Law of War Manual" (12 June 2015) (Office of General Counsel), available at <<http://www.jag.navy.mil/distrib/instructions/Law-of-War-Manual-June-2015.pdf>>.

²⁷ Charles G Fenwick, "The Authority of Vattel" (1913) 7 *American Political Science Review* 395 at 398.

²⁸ Eighteen draft articles on "The Protection of Persons in the Event of Disasters" were adopted by the ILC and submitted to the General Assembly: see "Protection of Persons in the Event of Disasters" UN GAOR 71st Session Supp No 10 UN Doc A/71/10 at 12 (4 August 2016); UNGA Res 71/141 (19 December 2016).

²⁹ ILC, "Preliminary Report on the Protection of Persons in the Event of Disasters" (5 May 2008) UN Doc A/CN.4/598 at 6.

from disaster and ruin, so far as it can do so without running too great a risk ... if a Nation is suffering from famine, all those who have provisions to spare should assist in its need, without, however, exposing themselves to scarcity...to give assistance in such dire straits is so instinctive an act of humanity that hardly any civilized Nation is to be found which would refuse absolutely to do so.”³⁰

Obviously, Vattel did not consider the giving of assistance during transboundary disasters in the 21st century. The Special Rapporteur advanced the following claims, based on Vattel’s presumed authority: “In determining the role and responsibility of the affected State, mention must be made of the principles of State sovereignty and non-intervention.³¹ The principle of State sovereignty is rooted in the fundamental notion of sovereign equality, a concept that Emerich de Vattel illustrated by noting that nations are “free, independent, and equal,” and that “a dwarf is as much a man as a giant is; a small republic is no less a sovereign State than the most powerful kingdom”. This understanding implies the more specific notions of independence and territorial sovereignty, whereby, within its own territory, a State can exercise its functions to the exclusion of all others. Thus understood, sovereignty is regarded as a fundamental principle in the international order...³²

In other words, the Special Rapporteur co-opted Vattel’s views by affirming sovereignty’s fundamental status for States: an equal right to govern a State’s “internal affairs”, whether these are large or small States. Non-intervention is relevant because it protects against interventions into a State’s “internal affairs”, which belong to its sovereignty. However, a State’s “internal affairs” are also subject to duties at general international law, a reasoning which the Special Rapporteur justified through recourse to another (non-binding) instrument by the ILC: “It is also worth noting that the International Law Commission, in its work on the non-navigational uses of international watercourses,³³ has stated in a general way the relationship between sovereignty and the *duty of cooperation* among States. The Commission considered that the sovereign equality of States informs the manner in which they must *cooperate for common ends*...”³⁴

³⁰ Ibid, para 14 at 6.

³¹ See further Chapter Five, Section VI.

³² ILC, “Third Report on the Protection of Persons in the Event of Disasters” (31 March 2010) UN Doc A/CN.4/629 (“*Third Report on the Protection of Persons in the Event of Disasters*”), para 64-65 at 23-24.

³³ UNGA, “Draft Articles on the Law of the Non-Navigational Uses of International Watercourses” UN GAOR 49th Session Supp No 10 UN Doc A/49/10 (1994); Article 8, Convention on the Law of the Non-Navigational Uses of International Watercourses (adopted 21 May 1997, entered into force 17 August 2014) (1997) 36 ILM 700, UN Doc A/RES/51/229.

³⁴ *Third Report on the Protection of Persons in the Event of Disasters*, para 70 at 25 (n32).

Hence non-intervention role, which reflects a State's sovereignty, has to be considered alongside State's duty of cooperation and legal obligations at general international law. To support his view, the Special Rapporteur cited the separate opinion, which is non-binding, of Judge Alvarez in the *Corfu Channel* case (1949):

Moreover, as some jurists have argued, the concept of sovereignty itself places obligations on States. Already in 1949, Judge Alejandro Álvarez of the International Court of Justice explained that:

By sovereignty, we understand the whole body of rights and attributes which a State possesses in its territory to the exclusion of all other States, and also in its relations with other States. Sovereignty confers rights upon States and imposes obligations on them.³⁵

Observe, therefore, the Special Rapporteur's reasoning which led him to limit non-intervention's content during disasters. First, we are told that even Vattel considered the rendering of help during disasters to be an "instinctive"³⁶ reaction, thereby justifying the ILC's progressive development of international law in this field. Second, there is an acknowledgement of sovereignty's importance, a point which Vattel also validated. Next, although sovereignty is important, the ILC had already expressed, in its work on navigational waterways, the relations between sovereignty and a duty of cooperation at general international law.

Finally, for good measure, the ICJ also confirmed that legal sovereignty comprises a "collection" of rights and obligations.³⁷ At international law, a State is sovereign precisely because it can be bound by legal obligations at general international law. The descriptive and evaluative vagueness of non-intervention, as explained by Vattel must be determined by "decision-makers" at general international law, in this case by UN organs.

III. Background to Non-Intervention's Historical "Origins": Lassa Oppenheim

1) "Dictatorial interference": a vague expression in evaluative terms

This section builds on the previous discussion of Vattel by demonstrating how Oppenheim's works regarding non-intervention were absorbed by and now belong to general international law. This advances the core proposition because it shows how far (and deeply) the rules of general international law shape the current content of

³⁵ *Third Report on the Protection of Persons in the Event of Disasters*, para 75 at 26 (n32); see *The Corfu Channel Case (United Kingdom v Albania)* (Merits) [1949] ICJ Rep 4, as well as the separate opinion of Judge Álvarez at 43.

³⁶ n30.

³⁷ Generally James Crawford, *Brownlie's Principles of Public International Law* (8th ed) (Oxford: OUP, 2012) at 448.

non-intervention. In other words, the regional content of non-intervention can be distinctive because ASEAN organs can make such law, but any regional law-making will be subject to the strong influence of non-intervention's vague content in descriptive and evaluative terms at general international law

Through his expression "dictatorial interference", Oppenheim has arguably contributed to our present understanding of non-intervention's "historic origins", which in turn shapes the contemporary content of non-intervention at general international law. He began his first paragraph on the character and concept of *intervention* (not non-intervention) as follows: "Intervention is dictatorial interference by a State in the affairs of another State for the purpose of maintaining or altering the actual condition of things, *such intervention can take place by right or without a right*, but it always concerns the external independence or the territorial or personal supremacy of the respective State, and the whole matter is therefore of great importance for the position of the States within the Family of Nations. That intervention is as a rule forbidden by the Law of Nations which protects the International Personality of the States, there is no doubt."³⁸

This chapter on intervention appeared in the first edition of Oppenheim's treatise, *International Law*.³⁹ First published in 1905, it was described by one reviewer as the most important English language international law treatise of the twentieth century.⁴⁰ His term "dictatorial interference"⁴¹ would also exert some influence on non-intervention's contemporary content.⁴² Oppenheim used this term eight times in his treatise.⁴³ He was very clear about its meaning: "Intervention is dictatorial interference by a State in the affairs of another State for the purpose of *maintaining or altering the actual condition of things*."⁴⁴

³⁸ Lassa Oppenheim, *International Law, A Treatise (Vol I: Peace)* (London: Longman, Green & Co, 1905) (emphasis supplied) ("*International Law*").

³⁹ *Ibid.*

⁴⁰ Mark W Janis, "The New Oppenheim and its Theory of International Law" (1996) 16 OJLS 330.

⁴¹ Its relevance was retained in the ninth edition. Longman first published the ninth edition as *Oppenheim's International Law. Volume 1: Peace*. (9th ed) (Robert Jennings & Arthur Watts, eds) (London: Longman, 1992). In this study, I use the 2008 version by Oxford University Press: *Oppenheim's International Law, (Volume 1 Peace)*, (Oxford: OUP, 2008): Jennings and Watts used "dictatorial interference" twice at 430 and 449. To stress the continuity in relation to non-intervention, I call this ninth edition the "Jennings and Watts edition".

⁴² See further Section III, Part 2.

⁴³ In the first edition of *International Law* at 49 (n38) (twice); 50; 112; 181; 182 (twice) and 257.

⁴⁴ *International Law* at 181 (n38).

As an adjective, the word “dictatorial” can mean “overbearing”, or “domineering”, or “imperious”, or “inclined to prescribe the actions of others”.⁴⁵ To Oppenheim, a specific act that counts as “intervention” at international law must be very serious. But he resisted an outright explanation of what “dictatorial interference” really meant in legal terms: “...it must be emphasised that intervention proper is always dictatorial interference, not interference pure and simple.”⁴⁶

In other words, “pure and simple” acts do not constitute intervention because they are lawful in Oppenheim’s time. They occur as a matter of legal “right” and Oppenheim specifically instanced good offices,⁴⁷ mediation, intercession, and cooperation do not “imply a *dictatorial* interference”.⁴⁸ In lieu of a legal right, Oppenheim explains a second type of lawful acts that does not form intervention as exceptions: “On the other hand, there is just as little doubt that this rule has exceptions, for there are interventions which take place by right, and there are others which, *although they do not take place by right, are nevertheless admitted by the Law of Nations and are excused in spite of the violation of the Personality of the respective States they involve.*”⁴⁹

Put simply, dictatorial interference’s content, which protects a sovereign State against unlawful intervention, has to be evaluated against legal rules in Oppenheim’s time. However, his treatise contained two perspectives that were specific to the early twentieth century, at that given point in time.⁵⁰ First, it is lawful to act against certain State’s internal affairs to preserve a balance of power in military terms.⁵¹ The powerful States must be kept in check,⁵² because “no rules of law will have any force”.⁵³ There are limits, however, to these legal rules on which to assess dictatorial interference’s content. Since every State must decide on its own “vital interests” based on “self-preservation”, intervention is “*de facto* a matter of policy just like war.”⁵⁴ As an example, Oppenheim instanced the restriction of Cuba’s external independence by

⁴⁵ See the Oxford English Dictionary’s definitions, available at <<http://www.oed.com/>>.

⁴⁶ *International Law* at 181 (n38); see the Jennings and Watts edition at 432 (n41): “Interference pure and simple is not intervention”.

⁴⁷ *International Law* at 182 (n38): “Good offices is the name for such acts of friendly Powers interfering in a conflict between two other States as tend to call negotiations into existence...”.

⁴⁸ *International Law* at 182 (n38) (original emphasis).

⁴⁹ *International Law* at 182 (n38) (emphasis supplied).

⁵⁰ See n38 at 72-76.

⁵¹ *International Law* at 186-187 (n38).

⁵² *International Law* at 185 (n38): “An equilibrium between the members of the Family of Nations is an indispensable condition of the very existence of International Law”.

⁵³ *International Law* at 73 (n38).

⁵⁴ *International Law* at 187 (n38).

the Treaty of Havana (1903) to justify the actions of the United States, against intrusions by the European powers.⁵⁵

Second, Oppenheim's worldview was confined to the Euro-American system.⁵⁶ In an astonishing paragraph, he wrote: "The Law of Nations as a law between States based on the common consent of the members of family *naturally* does not contain, any rules concerning the intercourse with and treatment of such States as are outside that circle. That this intercourse and treatment ought to be regulated by the principles of Christian morality is obvious. But *actually a practice frequently prevails which is not only contrary to Christian morality, but arbitrary and barbarous*. Be that as it may, it is *discretion*, and not International Law, according to which the members of the Family of Nations deal with such States as still remain outside that family."⁵⁷

This second perspective, regarding "dictatorial interference", which is specific to Oppenheim's worldview in the early twentieth century is important. It is, I argue, a matter of choice that Oppenheim's worldview is being rehabilitated today as an authoritative account of non-intervention's "historical origins". Consider the ninth edition of Oppenheim's *International Law* in 1992, which was edited by Arthur Watts and Robert Jennings.⁵⁸ Clearly, this is a different work from Oppenheim's first edition of 1905. Yet on the subject of intervention, the unmistakable echoes of Oppenheim reverberate in the ninth edition. Now framed in a contemporary language of non-intervention, Jennings and Watts say: "It must be emphasised that to constitute intervention the interference must be forcible or dictatorial, or otherwise coercive, in effect depriving the state intervened against of control over the matter in question. Interference pure and simple is not intervention."⁵⁹

Jennings and Watts used "dictatorial interference" in a very different international legal system from that of Oppenheim's world.⁶⁰ Their assimilation of Oppenheim's "dictatorial interference", on non-intervention's content, reflects the diffused inductive tradition of law-making.⁶¹ In other words, they advanced general propositions based

⁵⁵ See Section V, "Cuba's Protectorate Status" of the Roxburgh edition (n57 at 223).

⁵⁶ Benedict Kingsbury, "Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law" (2002) EJIL 401 at 402.

⁵⁷ *International Law* at 34 (n38) (emphasis supplied). This passage was retained until the third edition of 1920 and 1921, which was largely written by Oppenheim before his passing and then edited by Ronald F Roxburgh: see Lassa Oppenheim, *International Law: A Treatise (Volume 1)* (3rd ed) (R. F. Roxburgh ed) (London: Longman, Green & Co, 1920) at 26 ("Roxburgh edition").

⁵⁸ See n41.

⁵⁹ See n41 at 432.

⁶⁰ See n55.

⁶¹ Philip Allott, "Language, Method and the Nature of International Law" (1971) 45 BYIL 79 at 102.

on particular developments: the Cold War had just ended, and the controversial reasoning of the ICJ in *Nicaragua*,⁶² on the customary status of the Friendly Relations Declaration (1970),⁶³ had ebbed. As a matter of State practice, then, the judgment became less controversial and more acceptable.⁶⁴ Therefore, it is arguable that the position by Watts and Jennings relied on the language of “dictatorial interference” created by Oppenheim who had expressed his attitude on the law, as it was in 1905.⁶⁵

Importantly, this rehabilitated use of “dictatorial interference” is not confined to *International Law*, the treatise. For years, this expression was used to advance the specific ends of accomplished writers.⁶⁶ As an expression, “dictatorial interference” has some meaning at general international law. One striking example is the impact of “dictatorial interference” in shaping non-intervention’s content in diplomatic law, advanced through the ILC as a venue, which we examine next.

2) How Oppenheim’s “Dictatorial Interference” shaped Article 41(1), Vienna Convention on Diplomatic Relations (1961 Convention)⁶⁷

This part contributes to the core proposition by showing the adaptability (and influence) of general international law concerning the meaning of “dictatorial interference” and, therefore, the relationship of dynamic tension between the general and regional rules of international law. In this respect, the 1961 Convention is a

⁶² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 14.

⁶³ Chapter Three, Section VII.

⁶⁴ Chapter Three, Section VII.

⁶⁵ *Ibid.*

⁶⁶ The following is a non-exhaustive list: Hans Kelsen, *Principles of International Law* (USA: Lawbook Exchange Ltd, 2004) at 63-64: “the ‘intervention’ prohibited by international law is usually described as dictatorial interference by a state in the affairs of another state”; Thomas’s Non-Intervention at 68 (n22): “a dictatorial interference is then defined as one involving the use of force or threat of such use”; Quincy Wright, “Intervention and Cuba in 1961” (1961) 55 *Proceedings of the ASIL Annual Meeting* 2 at 7: “‘Intervention’ means dictatorial interference in the internal affairs of a state or in relations between other states”; Lori Damrosch, “Politics Across Borders: Non-Intervention and Non-Forcible Influence Over Domestic Affairs” (1989) 83 *AJIL* 1 (“Damrosch”) at 5: “The traditional formulation of intervention as ‘dictatorial interference’ resulting in the ‘subordination of the will’ of one sovereign to that of another is also unsatisfactory, because some subtle techniques of political influence may be as effective as cruder forms of domination...”; Maziar Jamnejad & Michael Wood, “The Principle of Non-intervention” (2009) 22 *Leiden JIL* 345 at 348 and 366 respectively: “According to *Oppenheim*, ‘the interference must be forcible or dictatorial, or otherwise coercive, in effect depriving the state intervened against of control over the matter in question. Interference pure and simple is not intervention’” and “There is no suggestion that participation in domestic politics must in any way be coercive’ or ‘dictatorial’ or seek the replacement of the government.”; Andrew Clapham, *Brierley’s Law of Nations* (7th ed) (Oxford: OUP, 2012) at 451: “...in a more special sense it means dictatorial interference in the domestic and foreign affairs of another state that impairs that state’s independence”; Sean Watts, “Low-Intensity Cyber Operations and the Principle of Non-Intervention” in *Cyber War: Law and Ethics for Virtual Conflicts* (Jens David Ohlin et al, eds) (Oxford: OUP, 2015) 249 at 256: “Twentieth-century commentators observed that non-intervention prohibits only acts that are ‘dictatorial’ by nature or effect”.

⁶⁷ Vienna Convention on Diplomatic Relations (adopted 14 April 1961, entered into force 24 April 1964) 500 UNTS 95.

comprehensive formulation of contemporary diplomatic law.⁶⁸ I focus on one provision, i.e., Article 41(1), which provides for non-intervention in diplomatic law, which states: “Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.”⁶⁹

The current position on Article 41(1) suggests that it applies to the activities or comments of a diplomat who is acting in a *personal* capacity,⁷⁰ not having received any instructions from the sending State. Furthermore, Article 41(1) also appears to contain a diplomat’s “positive” duty to respect a receiving State’s national laws. But that is distinct from a “negative” duty not to interfere in that State’s internal affairs,⁷¹ often through comments regarding the host State’s conduct.

The ambiguity in Article 41(1) was one of the reasons why Special Rapporteur AEF Sandström declined, in 1957, to include non-intervention into the draft article, which eventually became Article 41(1).⁷² Non-intervention appeared in Article 41(1) of the 1961 Convention because of a joint amendment by ILC members Padilla Nervo and Garcia Amador.⁷³ This amendment says: “It is the duty of diplomatic agents to conduct themselves in a manner consistent with the internal order of the receiving State, to comply with those of its laws and regulations from whose application they are not exempted by the present provisions, and, in particular, not to interfere in the domestic or foreign politics of that State.”⁷⁴

Nervo did not use the language of “non-intervention”. He clarified that “intervention” in the context of diplomatic law:⁷⁵ “...carried the connotations given to it by Professor Lauterpacht, namely, *dictatorial interference* in the sense of action amounting to a

⁶⁸ Generally Eileen Denza, *Diplomatic Law (Commentary on the Vienna Convention on Diplomatic Relations)* (4th ed) (Oxford: OUP, 2016) (“Denza’s *Diplomatic Law*”) at 2.

⁶⁹ See n67.

⁷⁰ Denza’s *Diplomatic Law* at 377 (n68).

⁷¹ Denza’s *Diplomatic Law* at 378 (n68).

⁷² See ILC, “The ILC Project on Diplomatic Intercourse and Immunities” (1957) *ILC Yearbook* Vol I, para 67 at 144: “He had decided against including a provision on the delicate question of non-intervention in the domestic and foreign politics of the receiving State, despite the presence of such a provision in the Havana Convention, partly on the ground that it lent itself to misinterpretation, but partly also because diplomatic agents almost invariably intervened only on the instructions of their Governments.”

⁷³ *Ibid*, para 55 at 143.

⁷⁴ “The ILC Project on Diplomatic Intercourse and Immunities”, para 55 at 143 (n72).

⁷⁵ Generally see Paul Behrens, *The Duty of Non-interference and Its Impact on the Diplomatic Message under the Vienna Convention on Diplomatic Relations* (PhD thesis, University College London, 2007) at 82-88; Paul Behrens, *Diplomatic Interference and the Law* (UK and USA: Hart Publishing, 2016).

denial of the independence of the State and implying a peremptory demand for positive conduct or abstention...”⁷⁶

Nervo’s clarification seemed to attribute the meaning of “dictatorial interference” to Hersch Lauterpacht, who had used it in *International Law and Human Rights*.⁷⁷ Nervo went on to say: “Similar definitions (of dictatorial interference), *quoted* by Lauterpacht, had also been formulated previously by Professors Brierly, Oppenheim and Verdross.”⁷⁸

Actually Oppenheim is the first person to use “dictatorial interference” in 1905.⁷⁹ In his Hague Lectures of 1947, Lauterpacht attributed the term to Oppenheim’s *International Law*.⁸⁰ Oppenheim’s influence is so extensive that it is no longer useful to ask by whom “dictatorial interference” was first used, and under what circumstances. In diplomatic law, “dictatorial interference” is now used as a general, valid, and binding definition of intervention.

Nervo regarded “dictatorial interference” as the denial of a State’s independence. Therefore, if that State did not comply with “positive conduct or abstention”, dictatorial interference involves: “...threat to or recourse to compulsion, though not necessarily physical compulsion, in some form.”⁸¹

This is a high threshold. Oppenheim did not use “dictatorial interference” in this way. As explained above, he used “dictatorial interference” with the plain meaning of “maintaining or altering the actual condition of things”.⁸² To Oppenheim, “dictatorial interference” is distinct from “intervention pure and simple”, for which he gave examples.⁸³

Put differently, the expression “dictatorial interference” has to be evaluated and adapted to express specific positions on non-intervention in different contexts. Hence,

⁷⁶ See n72, para 83 at 145-146.

⁷⁷ Hersch Lauterpacht, *International Law and Human Rights* (London, Stevens and Sons Limited, 1950) at 167 and 168.

⁷⁸ Nervo did not provide sources for this claim: but it is likely a reference to James Brierly’s *Law of Nations* and Alfred Verdross’s *Völkerrecht*, which were first published in 1928 and 1937 respectively.

⁷⁹ Chapter Three, Section III, Part 2.

⁸⁰ See Hersch Lauterpacht, “The International Protection of Human Rights” (1947) 70 *Hague Recueils* 5 at 19: he used “dictatorial interference” to mean “action amounting to a denial of the independence of the State” and cited the second edition of Oppenheim’s *International law* (1912).

⁸¹ See n72, para 83 at 145.

⁸² See nn38 and 44.

⁸³ See n46.

in the ninth edition, Jennings and Watts argued that intervention has a “stricter meaning”⁸⁴ at international law: it is “forcible or dictatorial or otherwise coercive”.⁸⁵ By conjoining three elements, the vagueness of non-intervention in this evaluative sense allowed Jennings and Watts to breathe contemporary meaning into the term “dictatorial interference”. Jennings and Watts are supported by the ICJ’s view in *Nicaragua* that coercion forms the “very essence” of prohibited intervention.⁸⁶

Returning to Nervo’s amendment, it triggered a confused debate among the ILC members concerning non-intervention’s scope in diplomatic law.⁸⁷ For our purposes, the key point is that “dictatorial interference” became a frame of reference for the debate among the ILC members. A few construed it broadly and seemed to treat “intervention” as representations that are made by the sending State.⁸⁸ One took a narrow view that only diplomats acting in a private capacity, and not on the instructions of the sending State’s government, were bound by non-intervention.⁸⁹ Another disavowed the whole notion as “absurd” in the context of diplomatic law.⁹⁰ Non-intervention is “unequivocally” covered by Article 2(4) of the UN Charter: it had nothing to do with *simple* meddling in the politics of the receiving State by the person of a diplomatic agent.⁹¹

Garcia Amador also expressed misgivings: Nervo’s definition of “dictatorial interference” would negate the goal of adding non-intervention into diplomatic law.⁹² Kisaburo Yokota’s adaptation of Oppenheim’s authority reflects the latter’s persistent universality in non-intervention: “Mr. Padilla Nervo having defined “intervention” as meaning “dictatorial interference”, it followed that *intervention pure and simple* was permitted to diplomatic agents. He doubted, however, whether any State would accept such a proposition.”⁹³

In 1958, the ILC produced the draft articles of the Diplomatic Intercourse and Immunities.⁹⁴ Its commentary qualified non-intervention in Article 41(1) as follows:⁹⁵

⁸⁴ See n41 at 430.

⁸⁵ See n41 at 432.

⁸⁶ *Nicaragua*, para 205 at 108 (n62).

⁸⁷ Denza’s *Diplomatic Law* at 377 (n68).

⁸⁸ See n72 at 145 and 146.

⁸⁹ Gerald Fitzmaurice understood “dictatorial interference” in a negative way - the Nervo amendment addressed only diplomats who were “meddling” in a private capacity: see n72 at 147.

⁹⁰ See n72, para 36 at 149.

⁹¹ See n72, para 2 at 146.

⁹² See n72 at 158.

⁹³ See n72, para 10 at 146 (emphasis supplied).

⁹⁴ (1959) *ILC Yearbook, Volume II* 89.

⁹⁵ The commentary referred to draft article 40(1) which was renumbered Article 41(1) in the 1961 Convention.

“The making of representations for the purpose of protecting the interests of the diplomatic agent’s country or of its nationals in accordance with international law does not constitute interference in the internal affairs of the receiving State within the meaning of this provision.”⁹⁶

When Nervo tabled his joint amendment in 1957, he said that intervention carried the connotation of “dictatorial interference” – a high threshold.⁹⁷ It is arguable that something of this threshold was retained by the ILC’s commentaries of 1958.⁹⁸ Diplomatic representations, whether made in an official or personal capacity (by its diplomats), are excluded from the “duty” against intervention in Article 41(1).⁹⁹ James Crawford reminds us that: “The danger of editions of classic texts (Brierly and Oppenheim are examples) is that they atrophy by interpolation, become encrusted.”¹⁰⁰

As an expression, “dictatorial interference” is an abiding reference point for non-intervention’s vague content in evaluative terms at general international law.¹⁰¹ There is no atrophy. Through the ILC, a permanent venue which creates general rules of international law, from Vattel to Oppenheim, both writers had something to say about intervention (and sometimes non-intervention) from their respective worldviews. Their relevance, then, to non-intervention’s contemporary content is the result of select choices made by organs of international organisations, which has a universalising effect at general international law at a given point in time.

⁹⁶ See n94 at 104.

⁹⁷ See n81.

⁹⁸ See n94.

⁹⁹ Non-intervention did not greatly concern the diplomats who negotiated the 1961 Convention (n67). Within the context of Article 41(1), they gave more emphasis to the provision on respecting the “national laws and regulations” of the receiving State: n72 at 158-160. Hence Jamnejad and Wood (n66 at 365) noted that, as preparatory materials, these debates do not clarify the intentions of the States who agreed to Article 41(1) of the 1961 Convention.

¹⁰⁰ Crawford’s *Brownlie* at xix (n37).

¹⁰¹For an example, see the Dissenting Opinion of Judge Schwebel in *Nicaragua*, para 98 at 305 (n62): “The essence of that law long has been recognized to prohibit the dictatorial interference by one State in the affairs of the other.” In other words, Judge Schwebel argued that the customary law of non-intervention is narrower and encapsulated by the term “dictatorial interference”. Judge Schwebel used “dictatorial interference” three times in his long dissent (n62, paras 98-99, at 305-306).

IV. Non-Intervention in the Americas

1) Purpose

This section focuses on the regional law of non-intervention in the Americas, mainly advanced through the OAS. As a regional practice, non-intervention's content is expressed negatively as a treaty obligation not to do something. Some limited (and individualistic) right of a Latin American State's freedom to govern itself existed alongside the Monroe Doctrine (1823) of the United States. These contradictions shaped the regional law of non-intervention. As I shortly explain, despite being regional law in treaty form, non-intervention had little practical content when appraised against the Monroe Doctrine.

This regional practice of the Americas matters. Their drafting language and experience with non-intervention would resemble the outcome of UN instruments, which are subsequently adopted by the General Assembly. The vagueness of non-intervention in the Latin American instruments are manifested in descriptive and evaluative terms, which required decision-making by the OAS to determine its meaning at a given point in time. Both qualities of vagueness also facilitate contradictions in the UN era, as reflected in the shifting legal rules at general international law during and after the Cold War. There, non-intervention's content would be significantly determined by the ICJ case law.¹⁰²

Therefore, this section furthers the study's core proposition by explaining the regional content of non-intervention as it applied to the Americas. This approach matters because it facilitates the argument in the next section, which demonstrates how general international law, through the venue of the UN, partially absorbed the regional law of non-intervention generated in the Americas, further attesting to the relationship between general and regional international law.

2) Non-Intervention Reflects Weakness Not Strength in Latin America

This part advances the core proposition by demonstrating the relationship between general and regional international law. In this respect, general international law would adopt some aspects of this unstable regional content of non-intervention, as it applied in the Americas, at the UN after decolonisation. This outcome reflects a dynamic

¹⁰² See Chapter Three, Section VI.

tension in terms of how general rules of international law concerning non-intervention would powerfully shape regional law-making of non-intervention. To this extent, therefore, the language of non-intervention in the regional practice of the OAS is strikingly similar to the UN instruments. Consider this paragraph in the Friendly Relations Declaration (1970):¹⁰³

No State or group of States has the right to intervene, *directly or indirectly*, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and *all other forms of interference* or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.¹⁰⁴

Note the words “directly or indirectly” and “all other forms of interference”. This broad wording is similar to the provision on non-intervention in the Charter of the Organisation of American States (1948).¹⁰⁵ Article 15 of the OAS Charter states:¹⁰⁶

No State or group of States has the right to intervene, *directly or indirectly*, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also *any other form of interference* or attempted threat against the personality of the State or against its political, economic, and cultural elements.¹⁰⁷

With hindsight, scholars have become more inclined to review the Latin American practice as a contribution to non-intervention’s “long and noble textual foundation.”¹⁰⁸ There is a long tradition of regional law on non-intervention, which concerns States confined within the geographical area of Latin America.¹⁰⁹ In the Act of Chapultepec (1945),¹¹⁰ a non-binding instrument, its participants endorsed the position that, since 1890, they have incorporated in “*their international law*” the principle which included:¹¹¹

The condemnation of intervention by one State in the internal or external affairs of another (Seventh International Conference of American States, 1933 and Inter-American Conference for the Maintenance of Peace, 1936).

¹⁰³ UNGA, “Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations” (24 October 1970) UNGA Res 2625 (XXV) (“Friendly Relations Declaration”).

¹⁰⁴ The text of the Friendly Relations Declaration is not numbered: this appears as the first paragraph under the third principle regarding “The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter” (emphasis supplied).

¹⁰⁵ Charter of the Organisation of American States (signed 30 April 1948, entered into force 13 December 1951) 1609 UNTS 48. Article 15 is now renumbered Article 19 in the OAS Charter of 1993, as amended by the Protocol of Managua (10 June 1993).

¹⁰⁶ Unless otherwise stated in this Chapter, I refer throughout to the 1948 version.

¹⁰⁷ Article 15, OAS Charter (n105).

¹⁰⁸ Damrosch at 7 (n66): the United States Library of Congress maintains a treaty database for “United States Treaties and International Agreements: 1776-1949”, available at <<https://www.loc.gov/law/help/us-treaties/bevans.php>>.

¹⁰⁹ Generally see Jose A Cabranes, “Human Rights and Non-Intervention in the Inter-American System” (1967) 65 *Michigan Law Review* 1147.

¹¹⁰ Treaties and Other International Acts Series 1543 (n108).

¹¹¹ See last preambular paragraph (21 February to 8 March 1945): text reproduced in *The Evolution of Our Latin-American Policy: A Documentary Record* (James W Gantenbein, ed) (New York: Columbia University Press, 1950) (“Gantenbein’s Records”) at 816.

The term “non-intervention” appeared for the first time, as an inter-American treaty with the United States as a party,¹¹² in Article 8 of the famous Montevideo Convention (1933):¹¹³ “No state has the right to intervene in the internal or external affairs of another.”¹¹⁴ This was followed by the Inter-American Conference (1936) which agreed the Additional Protocol Relative to Non-intervention, also a treaty, as follows:

The High Contracting Parties declare inadmissible the intervention of any one of them, directly or indirectly, and for whatever reason, in the internal or external affairs of any other of the Parties.¹¹⁵

The treaty language on non-intervention is noteworthy. In 1936, non-intervention was declared “inadmissible”.¹¹⁶ In 1945, non-intervention was “condemned”.¹¹⁷ In 1948, the UN era, Article 15 of the OAS Charter provided no State at international law had a right: “to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.”¹¹⁸

The inconsistent treaty language suggested that non-intervention developed from a position of considerable weakness. As an instrument of foreign policy, the recourse to war was legal until its renunciation through the Kellogg-Briand Pact in 1928.¹¹⁹ In material terms, war implies that both sides are able to resist each other during a full scale engagement. For the Latin American States, they were relatively too weak, too small, and too isolated, to resist the United States.¹²⁰

Interventions by the United States in the Americas, as I shortly illustrate, were used as an intermediary measure, in lieu of war.¹²¹ The Latin American States wanted to enjoy some freedom to govern their own “internal affairs”,¹²² but their freedom was wholly dependent on the willingness of a powerful State (the United States) to respect and enforce the treaty obligations on non-intervention.

¹¹² It was subject to a long reservation by the United States: Treaty Series 923 (n108).

¹¹³ Treaty Series 881 (n108): Convention on the Rights and Duties of States (signed 26 December 1933, entered into force 26 December 1934) 165 LNTS 19. It was subject to a long reservation by the United States.

¹¹⁴ *Ibid.*

¹¹⁵ Treaty Series 923: Additional Protocol Relative to Non-intervention (signed 23 December 1936, entered into force 25 August 1937).

¹¹⁶ *Ibid.*

¹¹⁷ *I.e.*, the Act of Chapultepec (n110).

¹¹⁸ See n105.

¹¹⁹ General Treaty for the Renunciation of War (signed 27 August 1928) 94 LNTS 57.

¹²⁰ Generally see Gaetano Arangio-Ruiz, “The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations” (1972) 137 *Recueil des Cours de l’Académie de Droit* 547 at 549.

¹²¹ See n37 at 745.

¹²² See n109 at 1147-1155.

In marked contrast, to the United States, its starting point is the Monroe Doctrine (1823).¹²³ Its actions were not interventions and non-intervention was irrelevant.¹²⁴

This was the core concern of the Monroe Doctrine:

[W]e should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies or dependencies of any European power we have not interfered and shall not interfere. But with the Governments who have declared their independence and maintained it, and whose independence we have, on great consideration and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power in any other light than as the manifestation of an unfriendly disposition toward the United States.¹²⁵

In short, the actions of the United States in Latin America constituted collective self-defence, as the law then stood (on the understanding of the United States).¹²⁶ The United States wanted to prevent the European States from gaining a foothold in Latin American States, which indirectly threatened United States' interests. Thus the words in the Monroe Doctrine, i.e., "we would not view any interposition" and "controlling", gave it the widest latitude to act in ways, which advanced its interests in the western hemisphere.¹²⁷

The Roosevelt Corollary (1904) enlarged the Monroe Doctrine.¹²⁸ This was a restatement that the United States would not accept any political control by European powers to collect debts from the Latin American States.¹²⁹ European actions in Latin America might lead to occupation. This threatens the security and naval communications of the United States at the strategic Panama Canal.¹³⁰

Therefore, the Monroe Doctrine and Roosevelt Corollary implied that military consequences by the United States might arise: Latin America was its sphere of

¹²³ Generally Thomas Grant, "Doctrines (Monroe, Hallstein, Brezhnev, Stimson)", MPEPIL (2014). *Gantenbein's Records* (n111 at 301-420) has a fine selection of primary materials on the Monroe Doctrine's practice. For a good overview, see Samuel Flagg Bemis, *The Latin American Policy of the United States (An Historical Interpretation)* (USA: Norton Library, 1967).

¹²⁴ On the reservations entered into by the United States regarding the Montevideo Convention, see n133.

¹²⁵ See John Bassett Moore, *A Digest of International Law* (VI)(Washington: Government Printing Office, 1906) at 401.

¹²⁶ Charles G Fenwick, "Intervention: Individual and Collective" (1945) 39 AJIL 645 at 649 (especially footnote 14): The United States acted to prevent the European States from gaining a foothold in Latin American States, which indirectly threatened United States' interests.

¹²⁷ Generally see n123, para 4: the United States adopted a similarly broad approach when it acceded to the TAC: generally see Daniel Seah, "The Treaty of Amity and Cooperation in Southeast Asia: The Issue of Non-Intervention and its Accession by Australia and the USA" (2012) 11 *Chinese Journal of International Law* 785.

¹²⁸ See Nicaragua's memorials in the *Nicaragua* case (n62), *Vol IV, Memorial of Nicaragua (Merits), Pleadings, Oral Arguments, Documents*: "(it was) a justification for intervention by the United States whenever, in its judgment, the standards of "civilization" required it" (para 326 at 87).

¹²⁹ See President Theodore Roosevelt's address to Congress on 6 December 1904, reproduced in *Gantenbein's Records* at 362 (n111).

¹³⁰ Generally Thomas' "Non-Intervention" at 52 (n22).

influence.¹³¹ In its long reservation to the Montevideo Convention (1933),¹³² the United States formally and pointedly expressed its position on non-intervention: “no (i.e., Latin American) government need fear any *intervention* on the part of the United States under the Roosevelt Administration...the United States Government is as much opposed as any other government to *interference* with the freedom, the sovereignty, or other internal affairs or processes of the governments of other nations.”¹³³

From the United States’ perspective, its position did not reflect interventions which are illegal ones.¹³⁴ To the Latin American States, in contrast, they had long viewed the United States’ actions as interventions into its own governing of “internal affairs”, as powerful indications of American imperialism and dollar diplomacy.¹³⁵

Therefore, when we review the regional law of non-intervention in the Americas, the competing values, which shaped its unstable content, bear emphasis: there was the freedom of the Latin American States to govern their “internal affairs”, in treaty form, against the United States’ resolve to protect its security through the Monroe Doctrine and Roosevelt Corollary. Non-intervention’s content in this region shifted from security interests (the Monroe Doctrine and Roosevelt Corollary) to communist concerns, through the OAS as a venue, according to prevailing rules at general international law. This shift is legally possible because the non-intervention content in the legal instruments are descriptively and evaluatively vague, of which the application on a set of facts must be determined by general rules of international law at a given point in time. The next example illustrates this point.

3) Communist Threat in Guatemala (1954)

In 1954, the OAS addressed the matter of communist activities within Guatemala’s political institutions.¹³⁶ Ten OAS members States formally raised this matter before the Council of the OAS.¹³⁷ They requested the convening of a meeting of foreign ministers to discuss the communist developments within Guatemala.

¹³¹ See Theodore Roosevelt’s address of 1904 (n129 at 362): “We would only interfere with them (i.e., Latin American States) only in the last resort, and then only if it became evident that their inability or unwillingness to do justice at home and abroad had violated the rights of the United States or had invited foreign aggression (from the European States) to the detriment of the entire body of American nations”.

¹³² See n113.

¹³³ See n113 (emphasis supplied): note the interchangeable use of “interference” and “intervention” in this reservation.

¹³⁴ See n126 at 649.

¹³⁵ See n22 at 51- 54.

¹³⁶ See n22 at 192-193.

¹³⁷ I.e., Nicaragua, Peru, Cuba, Honduras, Panama, Haiti, Dominican Republic, Brazil, Costa Rica and the United States.

Effectively, this was the triggering of an OAS mechanism to discuss the political developments, an internal affair, of one of its sovereign member States.¹³⁸ Eventually, the OAS foreign ministers adopted the Caracas resolution, i.e., a non-binding instrument, which “condemns”¹³⁹ the “activities of the international communism movement as constituting intervention in American affairs”.¹⁴⁰ Mexico objected to this position.¹⁴¹ It argued that the OAS was involved in “collective intervention” of Guatemala’s internal affairs.¹⁴² In response, the final part of the Caracas resolution affirms that freedom of States to govern their own “internal affairs” on the basis that “this declaration of foreign policy made by the American republics in relation to dangers originating outside this Hemisphere is designed to protect and not to impair the inalienable right of each American state freely to choose its own form of government and economic system and to live its own social and cultural life.”¹⁴³

In other words, the legal rules to evaluate non-intervention’s content have shifted again. No longer is the United States concerned with European interventions in Latin American to collect debts. In 1954, communist activities were framed, at general international law, as an *intervention*,¹⁴⁴ which impaired the free choice of government by OAS member States. A position against anti-communism was a “fact or situation that might endanger the peace of America”.¹⁴⁵ In short, anti-communism is a regional rule of international law on which non-intervention’s descriptively vague content, as expressed in Article 15 of the OAS Charter, is determined.

Accordingly, the OAS did its part to shape non-intervention’s content,¹⁴⁶ by agreeing that the Caracas resolution as one of its institutional “measures and procedures”, on grounds of protecting collective security.¹⁴⁷ This character of vagueness, in the Americas’ regional law of non-intervention, would be amplified when non-intervention was introduced to a larger venue – the UN General Assembly.

¹³⁸ Chapter XI, OAS Charter (n105).

¹³⁹ “Declaration of Solidarity for the Preservation of the Political Integrity of the American States against the Intervention of International Communism”, reproduced in “Official Documents”, (1954) 48 AJIL 123.

¹⁴⁰ *Ibid.*

¹⁴¹ Charles Fenwick, “Has the Spectre of Intervention Been Laid in Latin America?” (1956) 50 AJIL 636 at 638.

¹⁴² *Ibid.*

¹⁴³ See n139 at Part III.

¹⁴⁴ See n140.

¹⁴⁵ Article 25, OAS Charter (n105).

¹⁴⁶ Article 25, OAS Charter (n105).

¹⁴⁷ Article 25, OAS Charter (n105).

V. Non-Intervention's Content at the General Assembly

1) The Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States (1981): A Neglected General Assembly Resolution

This section advances the core proposition by showing the descriptive and evaluative vagueness of non-intervention's content at general international law and, therefore, its influence on the regional content of non-intervention. As I shortly explain, there was hardly any agreement at specific times as to the precise content of non-intervention, although certain key concepts were agreed in broad terms at the UN. The text in these UN instruments would form the core elements of non-intervention at general international law, which would in turn influence regional law-making by ASEAN regarding non-intervention as discussed in the next two chapters.

At general international law, today it is reasonable to make two related claims regarding non-intervention's content. First, it potentially prohibits forcible and non-forcible acts, but this wider prohibition concerning non-forcible acts has likely diminished after the ICJ's case law on point.¹⁴⁸ Second, the textual basis for the first claim as to prohibiting forcible and non-forcible interventions is the Friendly Relations Declaration (1970).¹⁴⁹ Both claims are the signal outcome of the ICJ's law-making in *Nicaragua*,¹⁵⁰ which reflects the influence of general international law's role in giving meaning to the descriptive and evaluative vagueness of non-intervention's content.

However, the Friendly Relations Declaration¹⁵¹ is not the only, or most complete, statement on non-intervention. This section elaborates on the inability of the General Assembly to agree on non-intervention's content in the Friendly Relations Declaration's final text, as a background to the next section.

¹⁴⁸ Chapter Three, Section VI.

¹⁴⁹ For a contrary position, see Arangio-Ruiz at 547-561 (n120): as an Italian delegate and Rapporteur of the Special Committee to the Friendly Relations Declaration, Arangio-Ruiz spoke with authority when he delivered this general course at the Hague Academy of International Law. To this extent, he is an active participant in the law-making of non-intervention's content, by insisting that it is already contained in Article 2(4) of the UN Charter. In this respect, Arangio-Ruiz reminded his readers that non-intervention as broadly embodied in the Latin American practice condemned "forms of resort short of war" (i.e., forcible intervention). Arangio-Ruiz took the view that such "forms of resort short of war" (i.e., forcible intervention) could occur outside Latin America but it was unlikely because "...in the relations between European Powers and within Europe, the threat or use of force by one Power or group of Powers was followed less infrequently by full scale war because the victim was strong enough..." (original emphasis). It seems reasonable to agree with Arangio-Ruiz's view if one also accepts his worldview that international relations after decolonisation are still largely centred on accounts of encounters between Europe and the United States.

¹⁵⁰ See n62.

¹⁵¹ See n62.

In Section VI below, I argue that the ICJ exaggerated non-intervention's legal significance in this instrument by giving the Friendly Relations Declaration prominence in *Nicaragua*, which shaped the present view that non-intervention is broader than Article 2(4) of the UN Charter. My goal is to illustrate the unstable content of non-intervention, which is perpetuated by UN organs (i.e., ICJ) whose actions continually shift the rules at general international law to evaluate non-intervention' content.

We begin with two General Assembly Resolutions 2131 (1965)¹⁵² and 36/103 (1981),¹⁵³ which specifically addressed non-intervention. The language in Resolution 2131 was adopted in the Friendly Relations Declaration, a contentious move to which I return.

In contrast, Resolution 36/103 is now a neglected,¹⁵⁴ (non-binding) instrument, which is far more detailed on non-intervention's scope than the Friendly Relations Declaration.¹⁵⁵ It is this neglected resolution which merits some attention, which I discuss first. An old stalking horse of the Soviet Union,¹⁵⁶ "friendly relations" was used at the UN General Assembly to push for peaceful co-existence.¹⁵⁷ The word "peaceful" had a specific meaning during the Cold War. In the words of Nikita Khrushchev in 1961, peaceful co-existence was "a form of intensive, economic, political, and ideological struggle of the proletariat against the aggressive forces of imperialism in the international arena".¹⁵⁸ Therefore, in 1976, the Soviet Union laboured at the General Assembly to forge agreement on the inadmissibility of interference, which would advance "friendly relations". Eventually, through Resolution

¹⁵² UNGA Res 2131 (21 December 1965) UN Doc A/Res/20/2131.

¹⁵³ UNGA Res 36/103 (9 December 1981) UN Doc A/Res/36/103.

¹⁵⁴ For a rare example of its use, see a statement by the Hong Kong Secretary for Constitutional and Mainland Affairs, Raymond Tam, in 2014: the UK Foreign Affairs Committee announced its intention to send a British delegation to visit Hong Kong in December 2014. From September to December 2014, Hong Kong experienced the so called "Occupy Central Movement". These were acts of civil disobedience against Chinese Standing Committee of the National Peoples' Congress, who had limited the electoral processes of electing the Hong Kong Chief Executive. China was clear that if the British delegation were to visit Hong Kong, they would be denied entry. Tam said: "The United Kingdom has no sovereignty, jurisdiction or right of supervision over Hong Kong, and there is no such thing as (sic) 'moral obligation.'" Citing General Assembly Resolution 36/103, Tam added: "Non-interference in each other's internal affairs is a basic norm of international relations and fundamental principle of international law". *Hong Kong Government News*, "LCQ5: The Joint Declaration on the Question of Hong Kong", Press Release, 17 December 2014.

¹⁵⁵ For more discussion, see n170.

¹⁵⁶ George Winthrop Haight, "Principles of International Law Concerning Friendly Relations and Co-operation Among States" (1966-67)1 *International Lawyer* 96.

¹⁵⁷ Generally, Ivo Lapenna, "The Legal Aspects and Political Significance of the Soviet Concept of Co-Existence" (1963) 12 ICLQ 737; Bernardo A. Ramundo, *Peaceful Coexistence, International Law in the Building of Communism* (USA: Johns Hopkins Press, 1967).

¹⁵⁸ See Leon Lipson, "Peaceful Co-existence" (1964) *Law & Contemporary Problems* 875.

31/91 (1976),¹⁵⁹ the General Assembly agreed to consider adopting a declaration on non-intervention every year, from 1977-1980.¹⁶⁰

The outcome is (although now neglected) Resolution 36/103: the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States (1981).¹⁶¹ It contains “rights and duties”.¹⁶² To contemporary ears, there is even a paragraph on the “right and duty” of every State to “combat the dissemination of false and distorted news”,¹⁶³ which loosely parallels current concerns in the 21st century with respect to “fake news”.¹⁶⁴

The voting outcome for Resolution 36/103 appeared significant enough because a majority of UN member States voted in favour.¹⁶⁵ But the law-making effect¹⁶⁶ of General Assembly resolutions is neither decided by numbers,¹⁶⁷ nor determined by majoritarian fiat at the General Assembly.¹⁶⁸ If that were true, the New International Economic Order would have prevailed, in terms of advancing the concerns of developing States.¹⁶⁹

I discussed Resolution 36/103 because, despite (and probably because of) its fuller content on non-intervention, its reception by the Great Powers was similar to the Friendly Relations Declaration. Despite the vote by the UK and United States against Resolution 36/103, the Great Powers did not oppose its adoption by other UN member States at the General Assembly.¹⁷⁰ However, the Great Powers’ ambivalent attitude ensured that no one would take both resolutions seriously. Yet, after ICJ’s actions in *Nicaragua*,¹⁷¹ the Friendly Relations Declaration became the “most

¹⁵⁹ UNGA Res 31/91 (14 December 1976) UN Doc A/31/91.

¹⁶⁰ See: A/32/153 (19 December 1977); A/33/74 (15 December 1978); A/34/101 (14 December 1979); A/35/159 (12 December 1980).

¹⁶¹ See n153.

¹⁶² See n153, Parts I-III. Generally see n66 at 355.

¹⁶³ See n153, Part III(d).

¹⁶⁴ For example, see “Outlaw or Ignore? How Asia is Fighting ‘Fake News’”, *BBC News* (4 April 2018), available at <<http://www.bbc.com/news/world-asia-43637744>>.

¹⁶⁵ Adopted by 100 votes with 22 against and 6 abstentions: except the Soviet Union and China, France, the United States and UK (as permanent members of the Security Council) voted against: (1981) UNYB at 149.

¹⁶⁶ On the early scepticism of the binding quality of General Assembly resolutions, see Prosper Weil’s famous piece, “Towards Relative Normativity in International Law” (1983) 77 AJIL 413.

¹⁶⁷ On the General Assembly, generally see Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford: OUP, 2007) at 116-119.

¹⁶⁸ Generally see n66 at 355.

¹⁶⁹ UNGA Res 3201(S-VI) (1 May 1974) UN Doc A/Res/3201.

¹⁷⁰ In the context of customary international law, the “specially affected” States are important: *North Sea Continental Shelf* [1969] ICJ Rep 3, para 73 at 42.

¹⁷¹ Nor is it necessarily more conclusive that the sixth committee had some involvement in this resolution.

important” UN resolution on non-intervention,¹⁷² a fate which sharply deviated from Resolution 36/103.¹⁷³

2) The twists and turns of non-intervention in the Friendly Relations Declaration

This part contributes to the core proposition by illustrating the extent of descriptive vagueness regarding non-intervention’s content and, importantly, how this vagueness would later be used by international organisations (i.e., the UN organ, through the ICJ) to influence non-intervention’s content as a general rule of international law, with consequences for its influence on regional law. In this respect, therefore, the Friendly Relations Declaration was a political declaration to the (non-communist) Great Powers, particularly the United States and UK (as I shortly explain below).¹⁷⁴ It was not intended to be binding. In the UN Charter, the Great Powers already accepted some prohibition, in treaty form, in their use of force.¹⁷⁵ There was, therefore, no great enthusiasm for the Friendly Relations Declaration, certainly not in relation to the non-intervention provisions. They disagreed that non-intervention prohibited less serious situations that did not involve the use of force.¹⁷⁶ This is why they insisted that non-intervention was already contained in Article 2(7) of the UN Charter.¹⁷⁷ Otherwise, the legality of their actions is evaluated against their particular role¹⁷⁸ in maintaining international peace and security.¹⁷⁹

In contrast, post decolonisation, the developing States used the General Assembly as a venue to demand freedom to govern their own “internal affairs”,¹⁸⁰ an exercise

¹⁷² See n66 at 353.

¹⁷³ For extemporaneous accounts of the scepticisms on the declaration in general and the non-intervention provisions, see Arangio-Ruiz (n120); Haight (n156).

¹⁷⁴ For an account in 1971 of how the North-South, communist, and non-communist States strongly disagreed with each other during the negotiations on non-intervention, see Nicholas Onuf, “The Principle of Non-intervention, the United Nations, and the International System” (1971) 25 *International Organization* 209.

¹⁷⁵ As a discrete area of law now, generally see Christine Gray, “The ICJ and the Use of Force” in *The Development of International Law by the International Court of Justice* (Tams and Sloan eds) (Oxford: OUP, 2013) at 237-261; Christine Gray, *International Law and the Use of Force* (3rd ed) (Oxford: OUP, 2008).

¹⁷⁶ See statement by the United States Representative in 1964 to the Special Committee, UN Doc A/AC.119/SR.32. Also the United States, UK, Australia, Canada, France, Italy tabled a draft statement stressing the close connection between the use or threat of force to the non-intervention principle, UN Doc A/AC.125/L13 (1966).

¹⁷⁷ See n176.

¹⁷⁸ I.e., the requirement for the permanent members to grant a concurring vote for any decision made at the Security Council, Article 27(3), UN Charter (n4).

¹⁷⁹ Generally see n167 at 109-115.

¹⁸⁰ Generally Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: CUP, 2005) at 204. On developing States at international law, see Moshe Hirsch, “Developing Countries” *MPEPIL* (2007).

of external self-determination at general international law,¹⁸¹ in terms of broader prohibitions on non-intervention which did not just involve the use of force. Against this background, the Great Powers behaved, as powerful States do, by shaping non-intervention's content in their image. In 1963, a UN Special Committee, not the ILC, was formed in 1965 to work on the Friendly Relations Declaration.¹⁸² The Great Powers did not intend this declaration to become overly "legalistic",¹⁸³ a point which the ICJ disregarded in *Nicaragua*. The Sixth Committee was also involved in reviewing the Special Committee's work.¹⁸⁴

On non-intervention, the developing States and Western States (led by the Great Powers) were stalemated. The Latin American and Asian-African groupings tried to produce compromise texts. As the Special Committee's work faltered, the First (political and security) Committee was working on Resolution 2131 (1965),¹⁸⁵ also on non-intervention, and evidently without reference to each other's labour.¹⁸⁶ When Resolution 2131 was adopted, on 21 December 1965, two features in its preambles reflected diplomatic success for the developing States.¹⁸⁷

First, there was reference to the right of self-determination in the colonial sense.¹⁸⁸ The freedom to organise its internal and external affairs (from intervention) flows from this legal right.¹⁸⁹ Second, there was acknowledgement of previous practice on non-intervention in Latin America and Bandung, by developing States.¹⁹⁰ Returning to the

¹⁸¹ For an example of how the ICJ struggled with this issue, see *International Status of South-West Africa, Advisory Opinion*, [1950] I.C.J. Rep. 128; *South-West Africa—Voting Procedure, Advisory Opinion* of 7 June 1955, [1955] I.C.J. Rep. 67; *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections*, Judgment of 21 December 1962, [1962] I.C.J. Rep. 319; *South West Africa, Second Phase, Judgment*, [1966] I.C.J. Rep. 6; and *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*, [1971] I.C.J. Rep. 16. For a recent perspective, see Victor Kattan, "Decolonizing the International Court of Justice: The Experience of Judge Sir Muhammad Zafrulla Khan in the *South West Africa* Cases" (2015) 5 *Asian Journal of International Law* 310.

¹⁸² UNGA, "Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States" (16 December 1963) UNGA Res 1966 (XVIII).

¹⁸³ See n174 at 216.

¹⁸⁴ See UNGA Res 2103 (XX) (20 December 1965) UN Doc A/Res/20/2103, Operative Para 4(a).

¹⁸⁵ See n152.

¹⁸⁶ See n174 at 216.

¹⁸⁷ Resolution 2131 was adopted at the plenary session of the General Assembly by a vote of 109 to none (the UK abstained): see n174 at 11.

¹⁸⁸ Operative Para 6: "All States shall respect the right of self-determination and independence of peoples and nations, to be freely exercised without any foreign pressure, and with absolute respect for human rights and fundamental freedoms. Consequently, all States shall contribute to the complete elimination of racial discrimination and colonialism in all its forms and manifestations."

¹⁸⁹ Preambular para: "Mindful that violation of the principle of non-intervention poses a threat to the independence, freedom and normal political, economic, social and cultural development of countries, particularly those which have freed themselves from colonialism, and can pose a serious threat to the maintenance of peace".

¹⁹⁰ Preambular para: "Reaffirming the principle of non-intervention, proclaimed in the charters of the Organization of American States, the League of Arab States and the Organization of African Unity

Friendly Relations Declaration, then, this is the reason why the Latin American and Asian-African groupings wanted to build on their earlier success in agreeing a broader content for non-intervention, as reflected in Resolution 2131 (1965).¹⁹¹

Naturally, no good will existed on both sides in the end.¹⁹² The mood was so acrimonious that, from 1966-1970, the Special Committee¹⁹³ avoided substantive discussions on non-intervention.¹⁹⁴ Apparently, the delegates even considered deleting reference to non-intervention from the Friendly Relations Declaration altogether.¹⁹⁵ Eventually, the final text of the Friendly Relations Declaration adopted four operative paragraphs on non-intervention,¹⁹⁶ roughly based on the earlier Resolution 2131 (1965).¹⁹⁷

This descriptive vagueness as to non-intervention's content allowed the Great Powers, particularly the UK and United States, to articulate its position as universal ones. As I explain in Chapter Four, it is precisely this descriptive vagueness of the four operative paragraphs at general international law which allowed a regional law of non-intervention of higher stringency, during the Kampuchean conflict, to be made by ASEAN.

For now, we revert to the context of the Friendly Relations Declaration's acrimonious negotiations. It was not disinterestedness for all States when a British delegate famously qualified the non-intervention as follows: "In considering the scope of 'intervention', it should be recognized that in an interdependent world, it is *inevitable* and *desirable* that States will be concerned with and will seek to influence the actions and policies of other States, and that the objective of international law is not to prevent such activity but rather to ensure that it is compatible with the sovereign equality of States and self-determination of their peoples. . ."¹⁹⁸

and affirmed at the conferences held at Montevideo, Buenos Aires, Chapultepec and Bogotá, as well as in the decisions of the Asian-African Conference at Bandung...".

¹⁹¹ See n191 at 727-728.

¹⁹² See n191 at 729.

¹⁹³ See n184.

¹⁹⁴ See n120 at 560-561.

¹⁹⁵ See n191 at 729.

¹⁹⁶ There is no evident link in the title (duty not to intervene in matters within domestic jurisdiction of a State) with the operative paragraphs: see n120, para 67 at 554.

¹⁹⁷ Operative paragraphs one, two, three and five of Resolution 2131 (n152) were adapted into paragraphs one to four of the Friendly Relations Declaration's duty not to interfere in matters within the domestic jurisdiction of any State (n103).

¹⁹⁸ UN Doc A/AC125/SR114 (1970) (emphasis supplied).

In terms of “influencing” the external affairs of another States, what was “inevitable” and “desirable” to the UK must be appraised from its specific legal and material standpoint in 1970. For similar reasons, the United States expressed its position on the legal status of General Assembly resolutions as follows: “It is not necessary to address the legal nature, if any, of such resolutions *qua* General Assembly resolutions to reach the conclusion that none of them evidences some “general and customary international law” independent of the substantive and procedural norms established by the Charter of the United Nations”.¹⁹⁹ On the Friendly Relations Declaration, the United States pointedly said that “declaration is, by its own terms, not declaratory of “general and customary” international law independent of the provisions of the Charter, but rather reaffirms and elaborates the legal principles embodied in the Charter.”²⁰⁰

This survey of the contrasting positions, by the Great Powers and the developing States who respectively adopted narrow and expansive positions concerning non-intervention’s content, serves to underscore a manifest failure of agreement on non-intervention’s content in the Friendly Relations Declaration, at a given point in time. The content in this declaration, therefore, was drafted in descriptively vague terms because there was neither agreement on its core meaning²⁰¹ nor whether the form, as a General Assembly resolution, could be assessed as a general rule of international law. Put differently, the developing States (i.e., the Latin American and Asian-African groupings) wanted a broader content of non-intervention which also prohibited non-forcible acts, whereas the Western States (such as the United States and UK) wanted to restrict it to the use of force.

Today, however, Friendly Relations Declaration is the “most important” statement on non-intervention²⁰² because *Nicaragua* permits the indulgence of rehabilitating that acrimonious practice, from 1965-1970, as part of international lawyering. In deciding *Nicaragua* the way that it did, the ICJ was a decisive venue in determining current rules of non-intervention’s content.

¹⁹⁹ *Counter-Memorial of the United States of America (Jurisdiction and Admissibility), Pleadings, Oral Arguments, Documents*, para 305 at 93 for the *Nicaragua* case (n62).

²⁰⁰ *Ibid*, para 308.

²⁰¹ I.e., as confined to the rule against the use or threat to use force, or something more than that.

²⁰² See n66 at 353.

VI. Nicaragua: The ICJ Makes the Contemporary Law of Non-Intervention

1) Introduction

The previous discussion explained how, as a matter of general international law, texts in UN instruments prescribed elements of non-intervention's content, even in the absence of broad agreement regarding its precise content. The strength of general international law in determining the descriptively and evaluatively vagueness of non-intervention is further developed in this section. Therefore, this section advances the core proposition by showing the powerful influence of the general international law of non-intervention in shaping regional law, after the ICJ's signal law-making through case law.

In *Nicaragua* the ICJ confronted nearly all the pressing issues of the international legal order in its day.²⁰³ This case is one of the most complex and intractable instance of serial litigation before the Court.²⁰⁴ To state the facts briefly: the contras, as opponents of the Sandinista government of Nicaragua, in 1981, started a guerrilla insurgency movement from bases in neighbouring States. The contras were funded and assisted, covertly and overtly, by the United States government. CIA personnel, in particular, had assisted in the mining of Nicaraguan harbours.

Nicaragua claimed that the United States support of the contras was an unlawful use of force against it, as well as unlawful intervention in its internal affairs. El Salvador, Honduras and Costa Rica in turn claimed that Nicaraguan forces had engaged in military activities and assisted rebels on their territory.

The litigation phases were also complex. During the jurisdiction and admissibility stage in 1984, the United States argued that the ICJ had no jurisdiction to hear Nicaragua's application because of the so-called Contadora process, which was then ongoing and aimed to resolve the dispute. The United States then argued that, with respect to the merits, it was acting in collective self-defence, at the request of the

²⁰³ It addressed a range of substantive issues in the Cold War context: sources of law, reservations, how customary international is made, the relation between treaties and custom, non-intervention, armed conflict, state responsibility, international humanitarian law, and the rule against the use of force. Generally see Cristina Hoss, Santiago Villalpando & Sandesh Sivakumaran, "*Nicaragua: 25 Years Later*" (2012) 25 *Leiden JIL* 131 at 132.

²⁰⁴ The complex facts of *Nicaragua* are summarised by James Crawford, from which I adapt in Part (1): "Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America)", MPEIL (2006).

three neighbouring States. The United States lost. The case proceeded to the merits phase without the participation of the United States.

In 1985, the US withdrew its acceptance of jurisdiction under the optional clause, largely as a result of disagreement with the Court's handling of the case. In 1990, Nicaragua's bilateral relations with the United States only improved when the Chamorra government assumed power after elections. The contras were disarmed. The compensation owed by the United States to Nicaragua was suspended.²⁰⁵

Against this complex situation that confronted the ICJ, this section draws attention to its role in creating non-intervention's content.²⁰⁶ It bears explanation how the Court used non-binding instruments, especially the Friendly Relations Declaration, to argue that coerciveness is important to non-intervention's content.²⁰⁷ I argue that, because of *Nicaragua*, a restrictive rule now exists at general international law against which we must consider, when determining non-intervention's content in a given situation.

2) The Contemporary Law of Non-Intervention Emerged the Day after *Nicaragua*

This part furthers the core proposition by showing how the general rule of international law regarding non-intervention gradually emerged, which would shape the regional content of non-intervention. In an elegant account, James Crawford and Thomas

²⁰⁵ "Nicaragua may revive \$17 billion claim against U.S" (21 July 2011), available at <<http://edition.cnn.com/2011/WORLD/americas/07/20/nicaragua.us.claim/>>.

²⁰⁶ The literature on other aspects of this case is extensive. For recent analyses, generally see: Lori Damrosch, "The Impact of the Nicaragua Case on the Court and Its Role: Harmful, Helpful, or in Between?" (2012) 25 *Leiden JIL* 135; Paul Reichler, "The Impact of the Nicaragua Case on Matters of Evidence and Fact-Finding" (2012) 25 *Leiden JIL* 149; Marcelo Kohen, "The Principle of Non-Intervention 25 Years after the Nicaragua Judgment" (2012) 25 *Leiden JIL* 157; S Oda 'Reservations in the Declarations of Acceptance of the Optional Clause and the Period of Validity of Those Declarations: The Effect of the Shultz Letter' (1989) 59 *BYIL* 1; A Chayes 'Nicaragua, the United States and the World Court' (1985) 85 *ColumLRev* 1445; MJ Glennon, "Nicaragua v. United States: Constitutionality of US Modification of ICJ Jurisdiction" (1985) 79 *AJIL* 682; J Sztucki, "Intervention under Article 63 of the ICJ Statute in the Phase of Preliminary Proceedings: The "Salvadorean Incident"" (1985) *AJIL* 1005; K Hight, "Evidence, the Court and the Nicaragua Case" (1987) 81 *AJIL* 1; PW Kahn, "From Nuremberg to the Hague: The United States Position in Nicaragua v. United States" (1987) 12 *YaleJIntlL* 1; HG Maier (ed), 'Appraisals of the ICJ' Decision: Nicaragua v. United States (Merits)' (1987) 81 *AJIL* 77; PM Norton, 'The Nicaragua Case: Political Questions before the International Court of Justice' (1987) 27 *VaJIntlL* 459; W Czaplinski, 'Sources of International Law in the Nicaragua Case' (1989) 38 *ICLQ* 151; MH Mendelson, 'The Nicaragua Case and Customary International Law' (1989) 26 *Coexistence* 85.

²⁰⁷ Generally James R Crawford, "Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America)", MPEPIL (2006).

Viles explained how, on any given day, one cannot precisely determine what all of international law is.²⁰⁸ This determination is clearer the day after.²⁰⁹

...by reference to the processes of the legal system which enable one to tell, more or less, what the law was at a given time... 'A legal system exists at any given moment if this moment is part of a period in which it exists'. In a way, it is the movement of the system across time (the continuing attitude of the actors to it across time) which comes first. Its content at a given time is its product.²¹⁰

The above remarks by Crawford and Viles, with due adjustment to our case, are material to our identifying non-intervention's content now: it started, on that given day, when the ICJ delivered its judgment in *Nicaragua*. Their reference to the "processes of the legal system",²¹¹ I argue, includes law-making acts by a UN organ, i.e., the ICJ in our case.

From the day after *Nicaragua* was decided, this case formed the definitive parameters of non-intervention.²¹² Its availability,²¹³ as ICJ case law, is not a subsidiary means for determining the law of non-intervention. It has exerted a signal influence on legal actors (tribunals and scholars), and international legal persons (States and international organisations) who determined non-intervention's content through their reliance on, and reaction to, *Nicaragua*.

Therefore, *Nicaragua* represents a fresh point in which the descriptive vagueness of non-intervention's content, in the Friendly Relations Declaration, is being determined as a universal rule by general international law, which is less stringent as a legal obligation. The following parts explain how this universal rule contributes to the restrictive content of non-intervention, as well as its influence as general international law to the regional content of non-intervention.

²⁰⁸ Generally see James Crawford with Thomas Viles, "International Law on a Given Day" *Völkerrecht Zwischen Normativen Anspruch und Politischer Realität. Festschrift für Karl Zemanek Zum Geburtstag* (Berlin: Duncker & Humblot, 1994) 45.

²⁰⁹ Crawford and Viles wrote in the context of the Truman Proclamation's role in stating the subjective element of customary international law (ibid).

²¹⁰ Crawford and Viles, (n208) at 68.

²¹¹ Ibid.

²¹² For reactions after *Nicaragua* was decided in 1986, generally see Abraham Chayes, "Nicaragua, the United States, and the World Court" (1985) 85 *Columbia Law Review* 1445; Fernando Teson, "Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)" (1987) 81 *AJIL* 173; Anthony D'Amato, "Trashing customary international law" (1987) 81 *AJIL* 101.

²¹³ Jose E Alvarez, *The Impact of International Organizations on International Law* (Leiden/Boston: Brill Nijhoff, 2017) at 363.

3) Non-Intervention as Customary International Law: the Fiction of Subjective Legal Belief

This part supports the core proposition by showing the dynamic tension between the development of a general rule concerning non-intervention, and its influence on restricting the development of a regional content of non-intervention. To this extent, it bears repeating that non-intervention had no meaningful content in the Friendly Relations Declaration, despite its being adopted by consensus at the General Assembly. This is because the four operative paragraphs were descriptively vague and contained a potentially wide range of interventions, which could be prohibited by non-intervention at general international law. This vagueness in descriptive terms reflected the absence of an adequate legal belief that, among participating States in 1970, the non-intervention provisions are broader than the rule prohibiting the use of force.²¹⁴

The ICJ's reliance on the Friendly Relations Declaration to identify a customary rule of non-intervention, which it claimed prohibited both forcible and non-forcible acts, was an extrapolative act.²¹⁵ The result is that the vexed matter of ascertaining non-intervention's content before *Nicaragua* no longer matters.

This is because the ICJ, in *Nicaragua*, held that non-intervention is "part and parcel" of customary international law,²¹⁶ although it admitted that "trespass" of non-intervention is "not infrequent".²¹⁷ That means it is frequently breached. Strikingly, the subjective element of non-intervention's customary status is, the Court asserts, backed by "substantial and established practice".²¹⁸

Here the Court's reasoning as to non-intervention's content becomes, at best, unclear. It used non-binding instruments, especially the Friendly Relations Declaration, to support its claim of a subjective belief that the provisions on non-

²¹⁴ As late as 1984, in relation to non-intervention, it is not reasonable to conclude from the academic literature that the Friendly Relations Declaration must be taken into account. For instance, Rosalyn Higgins (n1 at 272) still argued non-intervention of that period's "political corner" did not apply to financial or other support of rebel groups especially in resistance against a colonial or alien government. Higgins also observed that, abstractly, many States thought it "entirely acceptable" to bring "various pressures to bear" on the internal and external affairs of another State. Now contrast Higgins's view with the ICJ's ruling in *Nicaragua* (n62, para 241 at 124) that it was "clearly established" the financial support and training of the United States to the contras in Nicaragua constituted unlawful intervention in the internal affairs of a State.

²¹⁵ See n11 at 49.

²¹⁶ See n62, para 202 at 106.

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*

intervention are binding. For good measure, it also referenced the “multiplicity of declarations”,²¹⁹ mainly the Latin American practice and Helsinki Final Act.²²⁰ The Court’s goal was to prove that non-intervention is accepted by many States, including the United States.²²¹

This was a brave exercise,²²² but the Court had to focus on customary international law. Before *Nicaragua*, acceptance by the United States of the Court’s compulsory jurisdiction was subject to the Vandenberg reservation (1946).²²³ The United States must agree to the Court’s jurisdiction before the latter can rule on “disputes arising under a multilateral treaty”,²²⁴ including the UN Charter.

However, Nicaragua’s government relied on the UN Charter to advance a number of propositions. One of them was the customary rule prohibiting the use of force.²²⁵ The United States argued that the customary law prohibiting the use of force was based on the UN Charter - a treaty.²²⁶ The customary and treaty law prohibiting the use of force are related. Because of its Vandenberg reservation,²²⁷ the United States argued, Nicaragua’s argument must fail.²²⁸

Against this background, the Court reasoned that the United States was bound by custom after all.²²⁹ It claimed that States, including the United States and Nicaragua, believed that they acted under the belief of a binding legal obligation,²³⁰ the subjective element of custom.²³¹ Importantly, this proposition was deduced, by the Court, with “all due caution” from General Assembly resolutions.²³²

²¹⁹ See n62, para 205 at 107.

²²⁰ Helsinki Final Act of the Conference on Security and Co-operation in Europe (adopted 1 August 1975) (1975) 14 ILM 1292. Generally see Arie Bloed and Pieter Van Dijk, “Human Rights and Non-Intervention” in *Essays on Human Rights in the Helsinki Process* (A. Bloed & P. van Dijk eds) (Dordrecht: Martinus Nijhoff, 1985) at 57.

²²¹ See n62, paras 203-205 at 106-107.

²²² For a strong response in general, see D’Amato (n212).

²²³ Declaration Recognizing as Compulsory the Jurisdiction of the Court, in Conformity with Article 36, Paragraph 2, of the Statute of the International Court of Justice (14 August 1946) (1946-1947) 1 UNTS 9 (“Vandenberg Reservation”); see Para 42, *Nicaragua* judgment (n62 at 31).

²²⁴ Vandenberg Reservation, *ibid*.

²²⁵ *Memorial of Nicaragua (Merits)* (n128, para 356 at 94); *Vol 1, Memorial of Nicaragua (Question of Jurisdiction and Admissibility)* (n128, para 262 at 429).

²²⁶ *Counter-Memorial of the United States of America (Jurisdiction and Admissibility), Pleadings, Oral Arguments, Documents*, para 300 at 91.

²²⁷ See n223.

²²⁸ See *ibid* at para 319.

²²⁹ See n62, paras 179 and 181 at 96.

²³⁰ *Ibid*, para 184 at 97: “The Court notes that there is in fact evidence, to be examined below, of a considerable degree of agreement between the Parties as to the content of the customary international law relating to the non-use of force and non-intervention.”

²³¹ *Ibid*, paras 183-185 at 97.

²³² *Ibid*, para 188 at 98.

In other words, it invented the “bindingness” of non-intervention based on past patterns of State practice.²³³ It is also here that the Court made a signal move of endorsing the Friendly Relations Declaration, as proof of an “attitude” by States, regarding the subjective element on the customary law which prohibits the use of force.²³⁴ However, it did not explain how the Friendly Relations Declaration, a non-binding instrument, could reflect legal belief of its binding quality for non-intervention.

It could not do so for two reasons. First, as explained above,²³⁵ there was the acrimony as to non-intervention’s content in the Friendly Relations Declaration. Second, because of this acrimony, it is hard to argue for the Court to elaborate on its assertion of an “attitude” by States in the non-binding Friendly Relations Declaration that it could reflect a legal belief as to the binding quality of non-intervention’s content. The Court simply asserted that the Friendly Relations Declaration did not just “reiterate” obligations in the UN Charter:²³⁶ it represented an “acceptance of the validity of a rule or set of rules declared by the resolution by themselves”.²³⁷

To determine non-intervention’s content now, against general international law at this given point, we must have regard for the *applicable* law - *Nicaragua*.²³⁸ Time has erased the “undue caution”²³⁹ that ICJ warned about in using the Friendly Relations Declaration.²⁴⁰ Most importantly, the specific (Cold War) context of the Court’s reasoning on non-intervention is being universalised as general international law today.

Given the competing claims of universal values (i.e., on the day after *Nicaragua* was decided), for instance in international cooperation of disaster management,²⁴¹ the practical outcome is to restrict any State’s right to govern its “internal affairs” with a

²³³ See n61 at 102.

²³⁴ See n62, para 188 at 100: “it would therefore seem apparent that the attitude referred to expresses an *opinio juris* respecting such rule (or set of rules), to be thenceforth treated separately from the provisions, especially those of an institutional kind, to which it is subject on the treaty-law plane of the Charter”.

²³⁵ Chapter Three, Section V, Part 2.

²³⁶ *Ibid.*

²³⁷ *Ibid.*

²³⁸ See n62.

²³⁹ See n62, para 188.

²⁴⁰ See n103.

²⁴¹ See Chapter Five.

significant whittling down of non-intervention's content.²⁴² For a case with specific facts that applied to the United States and Nicaragua during a particular moment of the Cold War, this principal UN organ played a part in shaping non-intervention's descriptively vague content at general international law. This next part illustrates this argument by arguing how the potentially wide range of acts which are prohibited by non-intervention are weakened through the requirement of coercion, which we consider next.

4) Coercion as the "Essence" of Prohibited Intervention.

This part furthers the core proposition by showing the influence of general international law, in terms of how its descriptively vague content regarding non-intervention, shapes the basis on which a regional law of non-intervention might be determined and assessed. To this extent, in *Nicaragua*, the Court's reasoning on non-intervention is inseparable from the rule that prohibits the use of force.²⁴³ A range of allegations, some forcible and others non-forcible, were levelled by Nicaragua against the United States.²⁴⁴ These allegations form a continuum of forcible and non-forcible acts by the United States. From 1981-1984, there was credible evidence that the United States provided funds to the paramilitaries in Nicaragua.²⁴⁵

In plain language, then, some of these acts by the United States were "interventions" because the political objective was to change outcomes in Nicaragua. However, "intervention" and "non-intervention" are legal words that acquire meaning, when assessed against general international law at a given point. Thus when the United States justified its actions in the language of international law, it argued that they were acting in collective self-defence against an armed attack by Nicaragua.²⁴⁶ Nicaragua,

²⁴² After the judgment in 1986, Thomas Franck observed that *Nicaragua* "brims with important procedural and substantive implications for the future of (international) law": Thomas Franck, "Appraisals of the ICJ's Decision. *Nicaragua vs United State (Merits)*" (1987) 81 AJIL 116.

²⁴³ Contrast this with the formal view of Nicaragua in its memorials to the ICJ: "...it cannot be said that the principle of non-intervention has no autonomous role to play as a basis of claim." See *Vol IV, Memorial of Nicaragua (Merits), Pleadings, Oral Arguments, Documents*, para 462 at 120.

²⁴⁴ The Court had to rule on claims that the United States financed and supported the *contras*; that it attacked Nicaraguan naval posts, boats, laid mines in Nicaragua's territorial waters, and illegally flew over Nicaraguan air space: in the ICJ's voting record of these allegations, see n62 at 146-150.

²⁴⁵ See n62, paras 95-98 at 55-58 for the Court's elaboration of the United States Congress's reactions. In n62, para 99 at 58, the ICJ concluded: "United States Government was providing funds for military and paramilitary activities by the *contras* in Nicaragua".

²⁴⁶ At the jurisdictional phase, the counter-memorial of the United States (n226, para 454 at 140) struck a strident tone: "The precise language of Article 51 leaves no room for a judicial determination to terminate a resort to armed force in the midst of on-going armed conflict, which necessarily involves the exercise of the inherent right of self-defense by one or more of the parties to the conflict. The evaluation of claims concerning the exercise of the "inherent right" of individual or collective self-defense is the necessary concomitant of the evaluation of claims that a particular resort to armed force constitutes a "threat to the peace, breach of the peace or act of aggression".

it was alleged, supplied arms to insurgents in El Salvador, Costa Rica and Guatemala, thereby destabilising the regional peace and security.²⁴⁷

The Court rejected the United States' defence of collective self-defence, in the absence of a request by the States who considered themselves as victims of an armed attack.²⁴⁸ As I shortly elaborate, the Court moved on to determine the legality, at general international law, of those actions by the United States, which necessarily occurred on a continuum of forcible and non-forcible acts. Since it could not use the treaty prohibition, i.e., Article 2(4), UN Charter, the ICJ explained why it used the customary basis to support its argument that the United States was still bound by the rule, which prohibited the use of force.

On a customary basis, the Court laboured to find legal excuses for the use of force by the United States.²⁴⁹ The ICJ wanted to determine whether the United States were justified in taking counter-measures against Nicaragua's conduct.²⁵⁰ Finally, at last, it is here that non-intervention becomes relevant:²⁵¹

"...the Court must enquire whether there is any justification for the activities in question, to be found not in the right of collective self-defence against an armed attack, but in the right to take counter-measures in response to conduct of Nicaragua which is not alleged to constitute an armed attack. *It will examine this point in connection with an analysis of the principle of non-intervention in customary international law*".

Put simply, the Court examined non-intervention "*in connection*" to determining justifications to the use of force by the United States.²⁵² A majority of the Court found against the use of force for attacking Nicaraguan naval bases and patrol boats.²⁵³ They also ruled that non-intervention was violated because the United States supported and financed the contras.²⁵⁴ For laying mines in Nicaragua's territorial

²⁴⁷ See the United States counter-memorial (n226 at 56) for an explanation that Nicaragua was an "aggressor" in the region. The ICJ took note of this in (n62, para 126 at 70).

²⁴⁸ By twelve votes to three at 146; also see n62, para 199 at 105.

²⁴⁹ See n62, para 201 at 106: "it should enquire whether customary international law, applicable to the present dispute, may contain other rules which may exclude the unlawfulness of such activities."

²⁵⁰ *Ibid.*

²⁵¹ Despite the extensive literature on Nicaragua (n206), there is comparatively scant literature which directly discusses non-intervention, perhaps because it shares an undefined continuum with the use of force. For two examples that analyse non-intervention, see Kohen (n206) and Lori Damrosch, "Politics Across Borders: NonIntervention and NonForcible Influence Over Domestic Affairs" (1989) 83 AJIL 1.

²⁵² See n62, para 201 at 106 (emphasis supplied). The Court ruled against the United States by twelve votes to three on the matter of breaching non-intervention (n62 at 146).

²⁵³ By twelve votes to three (n62 at 146).

²⁵⁴ By twelve votes to three (n62 at 146).

waters, the United States breached the customary rule against using force *and* non-intervention.²⁵⁵

By saying that it only sought to “define” what “appears to be relevant to the resolution of the dispute”,²⁵⁶ the Court was not repeating a banal point that its reasoning only applied to the litigants, at the merits phase. At this point, the United States flatly refused to participate.²⁵⁷ Therefore, on this particular day, the Court was a venue for the creation of non-intervention's content, whose ramifications as a law-making act emerged the day after its judgment. This point is evident in the Court's innovative conclusion that coercion was the “very essence” of non-intervention.²⁵⁸ In a canonical passage, it stated that “A prohibited intervention must accordingly be one *bearing on matters* in which State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economical, social and cultural system, and the formulation of foreign policy.”²⁵⁹

The expression “bearing on matters” was immediately followed by this sentence, which said: “Intervention is wrongful when it uses *methods* of coercion in regard to such choices, which must remain free ones.”²⁶⁰ In other words, “methods” of coercion appear to be a factor in determining prohibited interventions “bearing on matters”, which impinge on a State's free choices. Then the Court went on to say this about coercion:²⁶¹ “The element of coercion, which defines, and indeed forms the *very essence* of prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State.”²⁶²

²⁵⁵ By twelve to three, the Court held that: “The United States of America has acted, against the Republic of Nicaragua, in breach of its obligations under customary international law not to use force against another State, not to intervene in its affairs, not to violate its sovereignty and not to interrupt peaceful maritime commerce.”

²⁵⁶ See n62, para 205 at 108.

²⁵⁷ See n62, para 27 at 23. Also see “United States: Statement on the US Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice” (1985) 24 ILM 246: “The conflict in Central America, therefore, is not a narrow legal dispute; it is an inherently political problem that is not appropriate for judicial resolution”.

²⁵⁸ See n62, para 205 at 108: “The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State.”

²⁵⁹ *Ibid* (emphasis supplied).

²⁶⁰ *Ibid* (emphasis supplied).

²⁶¹ The Oxford English Dictionary (n45) defines it as: “To constrain or restrain (a voluntary or moral agent) by the application of superior force, or by authority resting on force; to constrain to compliance or obedience by forcible means; ‘to keep in order by force’.”

²⁶² See n62, para 205 at 108.

The support of the contras by the United States was held, by the Court, to be a coercive act against the sovereign State of Nicaragua. Particularly, the ICJ decided that the financial support, training, supply of weapons, intelligence and logistical assistance a “clear breach of the principle of non-intervention”.²⁶³ It was coercive because the United States aimed to change Nicaragua’s government policies. Nicaragua was deprived of free choices. The Court did not decide whether these coercive acts were intended to be far-reaching enough to suggest that the United States wanted to force a change of government in Nicaragua.²⁶⁴

In *Nicaragua*, it is clear why coercion formed part of the Court’s reasoning on non-intervention. It is noteworthy that the ICJ did not directly refer, to the Friendly Relations Declaration²⁶⁵ or Helsinki Final Act,²⁶⁶ to support its claim that coercion is the “very essence” of intervention. Instead it said that the assistance by the United States to the contras was prohibited by the Friendly Relations Declaration, on the basis that they “involve the threat or use of force”.²⁶⁷ The Court added that “These forms of action are therefore wrongful in the light of both the principle of non-use of force, *and that* of non-intervention.”²⁶⁸

In short, the Court was preoccupied with the rule that prohibited the use of force. The wrongfulness of this act, by the United States, allowed non-intervention to be concomitantly assessed, based on the Friendly Relations Declaration’s descriptively vague provisions on the range of potential interventions, on a continuum of forcible and non-forcible acts. Furthermore, the ICJ cited the Helsinki Final Act²⁶⁹ as evidence that the United States accepted the customary status of non-intervention, which has “universal application”.²⁷⁰

²⁶³ See n62, para 242 at 224.

²⁶⁴ *Ibid.*

²⁶⁵ The words “coerce” and “coercion” appear only twice in the text of the Friendly Relations Declaration (n103). First, in the preamble: “Recalling the duty of States to refrain in their international relations from military, political, economic or any other form of *coercion* aimed against the political independence or territorial integrity of any State.” Second, in the second paragraph devoted to “duty not to intervene in matters within the domestic jurisdiction of any State”: “No State may use or encourage the use of economic political or any other type of measures to *coerce* another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.” (emphasis supplied).

²⁶⁶ See n220, para 3 at Part VII, “Non-Intervention in Internal Affairs”, of its “Declaration on Principles Guiding Relations between Participating States”: “They will likewise in all circumstances refrain from any other act of military, or of political, economic or other *coercion* designed to subordinate to their own interest the exercise by another participating State of the rights inherent in its sovereignty and thus to secure advantages of any kind.” (emphasis supplied).

²⁶⁷ See n62, para 205 at 108.

²⁶⁸ See n62, para 205 at 108.

²⁶⁹ See n220.

²⁷⁰ See n62, para 204 at 107.

VII. Non-Intervention's Content after *Nicaragua*.

1) Purpose

This section continues to advance the core proposition of this study by highlighting the ICJ's role in bolstering the powerful influence of the general international law of non-intervention. In 2005, nearly twenty years after *Nicaragua* was decided, the subject of non-intervention again reached the Court. In laconic terms, the ICJ ruled that Uganda had breached non-intervention. If *Nicaragua* is the "given day"²⁷¹ that the contemporary law of non-intervention is made, then the *DRC v Congo* case represents the settled law on the "day after".

This final section elaborates on the ICJ's decisive role in shaping non-intervention's contemporary content which is confined to the requirement of coercion. The universalising character of this requirement, now part of general international law, is determined against the factual background of the use of force. Put another way, unless the factual matrix involves a civil strife, and certain actions are coercive along the lines of *Nicaragua* and *DRC v Congo*,²⁷² it would be difficult to argue that non-intervention applies. This marks, I argue, a considerable departure from those early efforts at the General Assembly, after decolonisation, and during the Cold War, to broaden non-intervention's content beyond the rule which prohibits the use and threat of force.

2) Non-Intervention in *DRC v Congo*²⁷³

I focus on one submission by the DRC: that Uganda engaged in military and paramilitary activities against it.²⁷⁴ The DRC argued that Uganda occupied DRC's territory and actively extended military,²⁷⁵ logistic, economic, and financial support to irregular forces within the DRC.²⁷⁶ Consequently, the DRC argued that the following principles of conventional and customary law were violated: the *principle* of non-use of force in international relations, including the prohibition of aggression; the *obligation*

²⁷¹ See n208.

²⁷² *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Merits) [2005] ICJ Rep 168.

²⁷³ *Ibid*, generally see James Thuo Gathii, "Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)" (2007) 101 *AJIL* 142.

²⁷⁴ The memorials by the DRC are in French: the English version is reproduced by the ICJ in *DRC v Congo* (n272, para 24 at 184).

²⁷⁵ The DRC had argued that Uganda was internationally responsible for the actions of the paramilitary group (MLC) within the DRC. As in *Nicaragua*, the argument of attributing actions by a paramilitary group to another State failed. The ICJ ruled there was no credible evidence to prove that MLC was created or controlled by Uganda: see *DRC v Congo*, n272, para 160 at 226.

²⁷⁶ For an account, see *DRC v Congo* (n272, paras 29-41 at 191-196).

to settle international disputes exclusively by peaceful means so as to ensure that international peace and security, as well as justice, are not placed in jeopardy; respect for the sovereignty of States and the rights of peoples to self-determination, and hence to choose their own political and economic system freely and without outside interference; the *principle* of non-interference in matters within the domestic jurisdiction of States, which includes refraining from extending any assistance to the parties to a civil war operating on the territory of another State.²⁷⁷

In its judgment, the ICJ concluded in vague terms that Uganda had “violated certain obligations of international law”,²⁷⁸ including a breach by Uganda of the rule which prohibited the use of force.²⁷⁹

It is this finding that opened the gap for non-intervention to apply in the context of civil strife. For a start, the Court held that the Friendly Relations Declaration²⁸⁰ is “declaratory” of custom.²⁸¹ Approvingly, it cited two provisions:

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.²⁸²

No State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.²⁸³

In terms of determining the subjective belief of the Friendly Relations Declaration, as custom, the Court conspicuously dropped its approach of “all due caution” in *Nicaragua*.²⁸⁴ The Court’s focus as to these two provisions concerned civil strife, which applied to the situation between the DRC and Uganda. In this respect, the First Paragraph,²⁸⁵ as cited by the Court, belongs to the first principle in the Friendly Relations Declaration: this proscribes the *threat or use of force*.²⁸⁶

²⁷⁷ See *DRC v Congo* (n271, para 25 at 18, 186, and 188 respectively) (emphasis supplied).

²⁷⁸ *DRC v Congo*, (n272, para 161 at 226).

²⁷⁹ By sixteen votes to one, the ICJ held that Uganda: “...by occupying Ituri and by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the DRC, violated the *principle* of non-use of force in international relations and the *principle* of non-intervention” (n272 at 280). Note the undisciplined use of “principle” to describe a rule prohibiting the use of force and non-intervention (emphasis supplied).

²⁸⁰ See n272.

²⁸¹ See n 273, para 162 at 226.

²⁸² To facilitate the discussion, I call this the “First Paragraph”.

²⁸³ I call this the “Second Paragraph”.

²⁸⁴ See n272, para 188 at 99.

²⁸⁵ See n282.

²⁸⁶ I.e., the ninth paragraph of this principle which states: “The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations.”

Only the Second Paragraph,²⁸⁷ which the Court cited, belonged to the third principle of the Friendly Relations Declaration, concerning the duty not to intervene in matters within the domestic jurisdiction of any State”.²⁸⁸ In short, a fine line separates the forcible and non-forcible acts of Uganda on a continuum, as the Court’s determination on non-intervention in *DRC v Congo* shows: “...the Court made it *clear* that the principle of non-intervention prohibits a State “to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State” (I.C.J. Reports 1986, p. 108, para. 206).”²⁸⁹

Actually, in 1986, the ICJ did not say this in *Nicaragua*: paragraph 206 of the 1986 judgment was not “clear” at all.²⁹⁰ In paragraph 206, the Court asked if there is any subjective belief as custom, which allows a State to intervene in another State’s civil strife. In a quasi-Socratic fashion, Paragraph 206 in *Nicaragua* in fact states: “However, before reaching a conclusion on the nature of prohibited intervention, the Court must be satisfied that State practice justifies it. There have been in recent years a number of instances of foreign intervention for the benefit of forces opposed to the government of another State. The Court is not here concerned with the process of decolonization; this question is not in issue in the present case. It has to consider whether there might be indications of a practice illustrative of belief in a kind of general right for States to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State, whose cause appeared particularly worthy by reason of the political and moral values with which it was identified. For such a general right to come into existence would involve a fundamental modification of the customary law principle of non-intervention.”²⁹¹

The Court answered its own question in paragraph 209 (of *Nicaragua*) this way: “The Court therefore finds that no such general right of intervention, in support of an opposition within another State, exists in contemporary international law. The Court concludes that acts constituting a breach of the customary principle of non-intervention will also, if they directly or indirectly involve the use of force, constitute a

²⁸⁷ See n284. Also see n62, para 192: ICJ addressed non-intervention incidentally in the context of finding customary law in the Friendly Relations Declaration.

²⁸⁸ I.e., second paragraph: “The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter.”

²⁸⁹ *Nicaragua* (n62)(original emphasis).

²⁹⁰ I.e., *DRC v Congo*: n272, para 164 at 227.

²⁹¹ See n272 at 108.

breach of the principle of non-use of force in international relations.²⁹² Therefore, returning to the *DRC v Congo* case: the DRC alleged that Uganda secured towns, airports in the DRC, and aided the “parallel activity of those engaged in civil war”.²⁹³ These allegations involve acts which involve obvious use of force but also contained less serious ones. There is a continuum. Hence in its *DRC v Congo* judgment, the Court approved paragraph 209 of *Nicaragua* and concluded that “...it has been presented with probative evidence as to military intervention. The Court further affirms that acts which breach the principle of non-intervention “will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations” (ibid., pp. 109-110, para. 209).”²⁹⁴

The words “coercion” and “coerce” did not appear in *DRC v Congo* case. But its importance is evident. Article 2(4) of the UN Charter (a treaty rule), sovereignty, and territorial integrity (principles), were merged with non-intervention. Pay attention to the Court’s compound analysis of non-intervention as “interference in the internal affairs of the DRC”: “In relation to the first of the DRC’s final submissions, the Court accordingly concludes that Uganda has violated the sovereignty and also the territorial integrity of the DRC. Uganda’s actions equally constituted *an interference* in the internal affairs of the DRC and in the civil war there raging. The unlawful *military intervention* by Uganda was of such a magnitude and duration that the Court considers it to be a grave violation of the *prohibition on the use of force* expressed in Article 2, paragraph 4, of the Charter.”²⁹⁵

However, as explained already, before *Nicaragua* was decided by the ICJ, non-intervention’s content *appeared* to contain both forcible and non-forcible prohibitions, especially in the now neglected Resolution 36/103 (1981). In *Nicaragua*,²⁹⁶ the Court used the Friendly Relations Declaration²⁹⁷ to establish non-intervention’s customary status. The facts in *Nicaragua* enabled the law-making of non-intervention to capture a range of forcible and non-forcible acts, which occurred on a continuum.²⁹⁸

²⁹² See n62at 108.

²⁹³ See n272, para 163, at 227.

²⁹⁴ See n272, para 164 at 227.

²⁹⁵ See n272, para 165 at 227 (emphasis supplied).

²⁹⁶ See n62.

²⁹⁷ See n62 at 103.

²⁹⁸ See Chapter Three, Section VI.

When the subject of non-intervention again came before the ICJ in 2005, the Court's approach on non-intervention's content was more relaxed in *DRC v Congo*.²⁹⁹ It was less defensive about its legal basis. *Nicaragua* already took care of that. The outcome is the unstable effect on non-intervention's content. Before *Nicaragua* was decided, it was still plausible, as part of general international law, to consider other General Assembly resolutions which elaborated non-intervention's content in considerable detail.³⁰⁰

That changed after *Nicaragua*. In terms of authoritative rules, at general international law, prohibiting direct or indirect intervention in a State's internal affairs, our attention is now firmly directed at the Friendly Relations Declaration. The ICJ claimed, in *Nicaragua*, that this declaration is legally significant because it was adopted by consensus. If this consensus on non-intervention were significant, which I argued above that it was not, it is a direct result of the ICJ's law-making in *Nicaragua*.

To conclude this section, it is useful to consider the implications of the ICJ's two major case law for the prospects of non-intervention's content, including its status as a rule of customary international law in the 21st century. A recent example, in the form of Security Council Resolution 2249 (2015),³⁰¹ suggests that non-forcible prohibitions are unlikely to be protected by non-intervention. Acting under its Chapter VII powers, the Security Council condemned the "horrifying terrorist acts" which were perpetrated by the Islamic State of Iraq and the Levant (ISIL).³⁰² Sponsored by France,³⁰³ this resolution "unequivocally" denounced the attacks by ISIL, throughout 2015, in Tunisia, Turkey, over Sinai, Lebanon, and, of course, in France.³⁰⁴ It called on "Member States that have the capacity to do so to take all necessary measures", consistent with international law, against ISIL.³⁰⁵

It is reasonable to say that the most capable and willing are likely the permanent members of the Security Council. They are able or willing because they are Great

²⁹⁹ See n272.

³⁰⁰ See Chapter Three, Section V.

³⁰¹ UNSC Res 2249 (20 November 2015) UN Doc S/Res/2249.

³⁰² *Ibid*, operative paragraph one.

³⁰³ See the statement by the President of the UN Security Council during a meeting related to "Threats to international peace and security caused by terrorist acts" (20 November 2015) UN Doc S/PV.7565.

³⁰⁴ A series of coordinated terrorist attacks occurred in Paris on 13 November 2015: Security Council Resolution 2249 (n301) was adopted on 20 November 2015.

³⁰⁵ See n301 at operative paragraph 5.

Powers.³⁰⁶ Or they act simply because their own security interests were directly undermined by ISIL. It is fair to conclude that, a range of the contested acts³⁰⁷ by the United States in the *Nicaragua* case, would be reprised by able and willing States against ISIL, with suitable adaptations for the 21st century.³⁰⁸

If the Security Council were to exercise its Chapter VII powers, these actions would not be “coercive” at international law.³⁰⁹ They are “necessary measures”³¹⁰ to maintain international peace and security. Since consent to the UN Charter is an exception to non-intervention, so non-intervention’s content is being modified and whittled down.³¹¹ This is because UN member States have already given consent in advance to the Security Council to take certain types of actions. Finally, because the Security Council actions are in accordance with Chapter VII powers and not legally coercive, so the customary rule of non-intervention arguably fails because it would be hard to argue that coerciveness is established, since it is the essence of prohibited intervention

VIII. Conclusion

This chapter has examined the content and extent of non-intervention over a period of time. Recall that, in Chapter Two, we examined how international organisations can (and do) create regional law, a result of the influence being exerted by general international law. By building on that argument in Chapter Two, this chapter has furthered the core proposition because it shows the powerful influence of general international law regarding non-intervention, which is largely shaped by international organisations. Importantly, this chapter has also argued that non-intervention’s content is a moving target, because of its descriptive and evaluative vagueness, from which choices must be made to articulate first what the general international law is,

³⁰⁶ See n301: in another canonical passage, the ICJ stated, “intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself”: *Corfu Channel Case (United Kingdom v Albania)* (Merits) [1949] ICJ Rep 4 at 35. There is no question that Great Powers play an inevitable role in administering “international justice” (whatever that means). The key question is whether the Court would decide differently, had the UK acted within the Security Council’s competences.

³⁰⁷ See Section VI, especially Parts 3 and 4.

³⁰⁸ See n62, para 205 at 108.

³⁰⁹ I.e., the actions against ISIL are obviously intended to be “constraining”, through “force”, and therefore “coercive” (n301). See also n66 at 348: “...the essence of intervention is coercion...Coercion also goes to the core of the mischief that the non-intervention principle seeks to address.”

³¹⁰ See n301, operative paragraph 5.

³¹¹ See further Article 2(7), UN Charter.

at any given point, and usually through the venue of an international organisation, before rules emerge to determine non-intervention's content.

A common theme, therefore, permeates all the sections in this chapter: the vagueness of non-intervention's content. Despite the tenuous (even non-existent) connection to our modern international system of sovereign States, the ideas of European writers on non-intervention were borrowed and adapted by UN organs. We tend to view the Latin American practice, especially its contribution to non-intervention's "long and noble textual foundation,"³¹² as a precursor to the non-binding General Assembly resolutions at the UN. However, non-intervention during this period was practically devoid of content, when appraised against the Monroe Doctrine.

At the UN General Assembly, there was no agreement, in the Friendly Relations Declaration, whether non-intervention's content includes wider prohibitions, beyond the threat or use of force. This situation would change the day after *Nicaragua* was decided by the ICJ. From now, the general rule of international law for determining non-intervention's content is to establish coercion as a requirement. Given the many competing values of global cooperation, I argued, the ICJ has constrained non-intervention's contemporary content.

At every stage in the above examples, select choices were made to give meaning to non-intervention at particular points in time, which are advanced as persistent claims of universality, manifested as general international law, usually conducted the venue of international organisations. In this respect, I conclude this chapter with the views of Jennings and Watts in the ninth edition of Oppenheim's *International Law* to demonstrate the ramifications of the ICJ's role on non-intervention, the day after *Nicaragua* was decided.

Jennings and Watts heavily relied on *Nicaragua* to support their determination of "State practice" on non-intervention.³¹³ They wrote that intervention has a "stricter meaning" at international law.³¹⁴ Notice that it is "intervention" (not non-intervention) which has a stricter meaning. To Jennings and Watts, intervention must be "forcible

³¹² See n206 at 7.

³¹³ For an impressive array of footnotes too numerous to repeat here, see n41 at 451.

³¹⁴ Section 129, n41 at 431.

or dictatorial, or otherwise coercive”:³¹⁵ “Interference pure and simple is not intervention”.³¹⁶ Therefore, non-intervention’s content is determined negatively: if an act is not assessed to be coercive, it is reasonable to conclude that non-intervention does not apply. However, Jennings and Watts resisted an outright dismissal. Indeed, as a judge in the *Nicaragua* case, Jennings unequivocally affirmed non-intervention as an “autonomous principle of customary law”.³¹⁷ Thus in a nicely dense sentence, Jennings and Watts said in the ninth edition of Oppenheim’s *International Law*: “...the practice of states does not yet permit the conclusion that intervention in strictly limited cases and in a manner not inconsistent with the Charter of the United Nations is necessarily excluded.”³¹⁸

This is hardly a positivist statement³¹⁹ that one might reasonably expect from the practitioner’s guide,³²⁰ which Oppenheim’s *International Law* had become.³²¹ In one review of their ninth edition, it was observed that the “absence of a critical perspective” is the “mark” of a practitioner’s guide.³²² This might be taken to mean that both authors knew the nuances of international law, but there was just no need to agonise over them in the real world. Yet the drawing of attention to absent critical perspectives is important. Jennings and Watts made inductive determinations, through select choices of Oppenheim’s early ideas, to advance general propositions which are (apparently) helpful to practitioners.

Non-intervention’s content continues to be torn between the (dwindling) right of a State to govern its “internal affairs”, and interventions in “strictly limited cases” which are “not inconsistent” with the UN Charter. Presumably, these latter interventions promote some universal goals of cooperation, whose rules can be appraised against general international law. It is general international law that creates the vagueness of non-intervention’s content, permits its potential application to a range of interventions, as well as asserts its role in shaping, through international organisations, the content

³¹⁵ Section 129, n41 at 432.

³¹⁶ Section 129, n41 at 432.

³¹⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits* [1986] ICJ Reports 14; see Dissenting Opinion of Judge Sir Robert Jennings at 524.

³¹⁸ Section 131, n41 at 439: on the implications for “humanitarian intervention”, generally see Vaughan Lowe and Antonios Tzanakopoulos, *Humanitarian Intervention* (2011) MPEPIL; Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford: OUP, 2001).

³¹⁹ For this view, generally see n40 at 336.

³²⁰ See their preface: “That is its status as a practitioner’s book, rather than as an academic treatise, and in its attempt to provide a helpful meaning for an inquiry into particular problems”.

³²¹ See n38.

³²² Colin Warbrick, “Review of Oppenheim’s *International Law*. Volume 1: Peace” (1993) 42 ICLQ 449 at 449-450.

regional non-intervention. The rest of this study illustrates these propositions with two case studies.

Chapter Four

NON-INTERVENTION DURING THE KAMPUCHEAN CONFLICT

I. Purpose

This chapter illustrates the core proposition that the distinctive regional law of non-intervention made by ASEAN is influenced by powerful external actors who aid the making of general international law. To this extent, it is useful to recapitulate how the previous chapters have advanced the core proposition so far.

In Chapter One, we explored how the International Relations literature (“IR literature”) had extensively studied non-intervention with respect to ASEAN in specific ways, namely through its link to a diplomatic practice called the “ASEAN Way”. As explained already, it is not easy to determine the legal content of non-intervention in the IR literature. Most importantly, the IR literature’s approach did not distinguish acts by ASEAN States (which had acted individually as sovereign States) from the acts of ASEAN member States within ASEAN’s auspices, acting as a separate legal person.

Therefore, the problem with the IR literature’s approach is that it is difficult to determine the legal content of non-intervention which is properly made by ASEAN, as a separate legal person. Be that as it may, the legal scholarship which addresses ASEAN has assimilated the IR literature’s conclusions regarding non-intervention.

Chapter Two, therefore, first showed how specific rules of general international law shape and enable the law-making powers of international organisations (especially as to its separate legal personality). Second, it is also general international law which provides an analytical framework to identify and assess the regional quality of an international organisation’s law-making, in terms of it serving as a venue and outcome for law-making.

Chapter Two concluded with a discussion of how both broad strands of general international law enabled the evaluation of ASEAN’s regional law-making, through its organs (i.e., the AMM) and in treaty form (i.e., the TAC). The distinctiveness of ASEAN’s regional law-making is its capacity to make regional laws, as a separate legal person. This, then, is the meaning of regional law made by ASEAN as being “distinctive”: it is distinctive because general international law influences and permits ASEAN to act separately from its ASEAN member States, which created the international organisation. Accordingly, this chapter developed the core proposition

with an analytical framework to explain the relationship between general and regional international law.

Chapter Three furthered the core proposition by demonstrating how powerful general international law is with respect to the content of non-intervention. Despite non-intervention's unstable content, general international law has proved adaptable and influential. The content of non-intervention, as contained in the texts which were agreed at the UN, formed the basis for the ICJ to reinforce and expand the general rules regarding non-intervention through its law-making in the *Nicaragua* case.¹

Against this background, this Chapter explores through a case study the arguments which were raised in the previous chapters. It uses the conflict in Kampuchea (1978-1991)² to demonstrate how a distinctive regional law, as to non-intervention, emerged and was created after the end of this conflict.

Furthermore, the roles of the United States and Soviet Union, as powerful external actors, also influenced the general international law regarding non-intervention during this long conflict. The proxy wars between these external powers meant that the general international law as to non-intervention, on the basis of regional peace and security, allowed ASEAN to advance the regional content of non-intervention: this included a prohibition against intervention in Kampuchea's internal affairs (which was not an ASEAN member State) by installing another government in lieu of the Khmer Rouge government.

In the early years following its creation as an international organisation in 1967, it was widely acknowledged that ASEAN was not "institutionalised"³ and had little recourse to law,⁴ including international law.⁵ Hence, against this context, the Kampuchean conflict is a foundational moment for the political coming of age of "ASEAN".⁶

¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 14.

² The international relations literature is numerous. For a selection, see Bilson Kurus, "Understanding ASEAN: Benefits and Raison D'être" (1933) 33(8) *Asian Survey* 819; Kishore Mahbubani, "The Kampuchean Problem: A Southeast Asian Perception", *Foreign Affairs*, Vol 62, No 6 (1983/1984 Winter) 407; Lau, Teik Soon "ASEAN and the Cambodian Problem" (1982) 22(6) *Asian Survey* 548.

³ Generally, Paul J Davidson, "The ASEAN Way and the Role of Law in ASEAN Economic Cooperation" (2004) 8 *Singapore Yearbook of International Law* 165 at 168.

⁴ Generally Tommy Koh, 'ASEAN at Forty: Perception and Reality' in *Regional Outlook: Southeast Asia 2008–2009* (Singapore: ISEAS Publishing, 2008) at 8; Walter Woon, *The ASEAN Charter: A Commentary* (Singapore: NUS Press, 2016) at 40-48.

⁵ Pieter Jan Kuijper, James H. Mathis, Natalie Y. Morris-Sharma, *From Treaty-Making to Treaty-Breaking: Models for ASEAN External Trade Agreements* (Cambridge: CUP, 2015) at 6-7.

⁶ Generally, Chan Heng Chee, "Southeast Asia 1976: The Handling of Contradictions," (1977) *Southeast Asian Affairs* at 3; "The Interests and Role of ASEAN in the Indochina Conflict", International Conference on Indochina and Problems of Security and Stability in Southeast Asia, Chulalongkorn University, Bangkok, 19-21 June 1981.

However, the use of “ASEAN” as a term during the Kampuchean conflict has to be treated with care:⁷ the IR literature rarely makes distinctions between acts by ASEAN States, from acts by ASEAN as a separate legal person. As explained already, just because ASEAN enjoyed low institutionalisation, with minimal recourse by its member States to (international) law, did not mean that ASEAN’s actions cannot be assessed for legality at general international law. Particularly, in relation to its conduct of external relations, the AMM already started to agree common positions in written form during these early years of low institutionalisation.

For example, after Vietnam’s reunification in 1973,⁸ the AMM met to discuss its implications for the region of Southeast Asia. Obviously, the political dimensions of a communist “threat” are evident. However, in legal terms, it is the Bangkok Declaration’s aim of promoting “regional peace”, which justifies the AMM’s common position in 1973 of suggesting an enlarged Southeast Asia that includes Vietnam: “it was desirable to expand the membership of ASEAN at the opportune time to cover all the countries in Southeast Asia...”⁹

Therefore, this study’s core proposition is illustrated through the conduct of ASEAN organs such as the AMM, during the Kampuchean conflict, which made for the first time a distinctive regional law of non-intervention with an ASEAN character. This regional quality of non-intervention’s content includes a fairly precise rule that arose from ASEAN’s first sustained effort to address an issue, which concerned the peace and security concerning the whole area of Southeast Asia. Hence, as a regional rule, non-intervention’s content reflected a shared value by ASEAN member States of opposing the overthrowing of the Khmer Rouge government, through Vietnam’s illegal use of force and occupation in Kampuchea. The ASEAN character, i.e., the regional content, of non-intervention draws from the influence of general rules of international law.

This chapter proceeds as follows. I begin with an overview of the Kampuchean conflict. Next, I explore the murky area of how ASEAN, through the AMM and ASEAN

⁷ See my earlier discussion on works by, for example, Acharya, Haack and Jones, in Chapter One, Sections II-III.

⁸ The Agreement on Ending the War and Restoring Peace in Vietnam, 27 January 1973, (1973) 12 ILM 49.

⁹ Joint Press Statement of the ASEAN Foreign Ministers Meeting to Assess the Agreement on Ending the War and Restoring Peace in Vietnam and To Consider Its Implications for Southeast Asia, 15 February 1973, text is available at <<https://cil.nus.edu.sg/category/all/>>.

Standing Committee as ASEAN organs,¹⁰ acted as a separate legal person at general international law, from ASEAN member States. Finally, I examine the making of a distinct regional law of non-intervention, with an ASEAN character, which emerged from the long Kampuchean conflict and was facilitated through the venue of ASEAN.

II. Kampuchean Conflict: A Brief Background¹¹

This section begins with a brief account of the political context that preceded the long Kampuchean conflict. The evidently bilateral nature of the antagonisms between Vietnam and Kampuchea, and the non-ASEAN membership status of both States bear emphasis. ASEAN acted, and created distinctive regional law, which applied to the region's peace and security that included even Kampuchea and Vietnam. Therefore, this section supports the core proposition by drawing attention to the strength of the rules of general international law, which enable ASEAN to frame the acts of Vietnam (then not an ASEAN member State) in Kampuchea as a danger to the regional peace and security of Southeast Asia.

The Communist Party of Kampuchea (Khmer Rouge) defeated General Lon Nol's government and took control of Phnom Penh on 17 April 1975. The Khmer Rouge government renamed Cambodia as Democratic Kampuchea (DK).¹² A xenophobic regime, the Khmer Rouge perpetrated state-sponsored killing and egregious violations of human rights. Over 1 million of Cambodia's population (out of 7.3 million in April 1975) perished.¹³

Vietnam invaded DK in December 1978 for at least two reasons. First, its government took the view Indochina had to be consolidated into one strategic unit.¹⁴ For this reason, Vietnam had already subjected Laos to a relationship of military and political dependency, through a Treaty of Friendship and Cooperation in 1975.¹⁵

¹⁰ The ILC considers that an organ is "any person or entity which has that status according to the rules of the organization": see Para 21, *Articles on the Responsibility of International Organizations, with commentaries* (ARIO), UN Doc. A/66/10 (2011) at 12.

¹¹ Generally Thu-huong Nguyen-vo, *Khmer-Viet Relations and the Third Indochina Conflict* (USA & UK: Mcfarland & Company, 1992).

¹² The Khmer Rouge government under Pol Pot was recognised by many Third World States, including Thailand and Indonesia: see Colin Warbrick, "Kampuchea: Representation and Recognition" (1981) 30 ICLQ 234.

¹³ See Steven R Ratner, "The Cambodian Agreements" (1993) 87 *AJIL* 1 at p 2. Also see generally William Shawcross, *SideShow: Kissinger, Nixon and the Destruction of Cambodia*, (London: Hogarth, 1986) and David P Chandler, *A History of Cambodia* (4th ed), (Boulder: Westview, 2007)

¹⁴ Ralf Emmers, *Cooperative Security and the Balance of Power in ASEAN and the ARF* (London & New York: RoutledgeCurzon, 2003) at 91.

¹⁵ *Ibid.*

Second, the DK made sustained territorial incursions into Vietnam. This resulted in deaths and destruction of arable land and harvests.¹⁶ Historical rivalry between Vietnam and Cambodia was persistent. The Cambodians had not forgotten their historical claim to the delta regions in southern Vietnam.¹⁷

On 25 December 1978, Vietnam entered Kampuchea. By 9 January 1979, Phnom Penh fell to the Vietnamese. With Vietnam's considerable support, Heng Samrin formed a new Cambodian government.¹⁸ The State was renamed the People's Republic of Kampuchea (PRK). The Khmer Rouge was driven into the rural areas, near the Thai-Cambodian borders.¹⁹ This Khmer Rouge rump became the Government of Democratic Kampuchea (GDK).²⁰

III. The Regional Law-Making by ASEAN Organs: Common Positions that involve the Geographical Region of Southeast Asia

1) Separate Actions of ASEAN Organs as Corollaries of Separate Legal Personality: A Murky Area

This section contributes to the core proposition by demonstrating how, at various points, ASEAN organs make regional law particularly as to non-intervention. Most importantly, the identification and evaluation of ASEAN's regional law-making as to non-intervention is based on the rules of general international law regarding non-intervention.

It is useful to begin with a caveat regarding the legal personality of an international organisation, including ASEAN. It is part of international lawyering, a legal technique, to say that acts of an international organisation (through its organs) are separate from its member States. Obviously, there is some artificiality in this exercise because the same people who make decisions in that organ²¹ are also representatives of their States.²²

¹⁶ Jürgen Haacke, *ASEAN's Diplomatic and Security Culture (Origins, Development and Prospects)*, (London & New York: Routledge, 2005) at 81; Shawcross, n13 at 117-118 and 120.

¹⁷ I.e., Vietnam's (as Annam) annexation of Kampuchea Krom for rice and cultivatable land in the seventeenth and eighteenth centuries: generally see Werner Draguhn, "The Indochina Conflict and the Positions of the Countries Involved", *Contemporary Southeast Asia*, Vol 5, No 1 (June 1983) 95.

¹⁸ Vietnam's role is further attested to by its subsequent decision to replace Heng Samrin with Hun Sen in January 1985.

¹⁹ Ratner, n13 at 3.

²⁰ Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (1998), (Oxford: OUP, 2004, reprinted) at 121-122.

²¹ Chapter Two, Section VI.

²² Ibid.

Recent attempts,²³ however, to study ASEAN as a legal person, i.e., the legal effects of “genuine” ASEAN acts, have produced mixed results. For example, in a careful study of ASEAN’s external agreements, Marise Cremona *et al* noted that ASEAN organs have a habit of concluding treaties with the expression “collectively ASEAN”.²⁴ The ASEAN organs have conducted external relations regarding areas including, for example, agreements in transport²⁵ and free trade.²⁶ In fact, it is the *ASEAN States*²⁷ who concluded these instruments and ASEAN is not intended to be a party. The legal effects for ASEAN as a legal person are (deliberately) unclear.

Marise Cremona *et al* rightly concluded that there are few genuine ASEAN external agreements.²⁸ The authors tentatively urged a shift away from “*formal* categories of legal personality, contracting-party status, and responsibility for wrongful acts”.²⁹ Instead they suggest “indicators of collectivity”,³⁰ on the basis that:

ASEAN can be discerned as a collectivity which can take on a central and proactive role nonetheless.³¹

The purpose of this brief survey is to stress the point that international lawyers have expertise in explaining the “*formal* categories”:³² analytical clarity in the use of “*formal* categories” is a core part of our discipline.³³ The legal rules - personality, separate actions of the organs from member States, international responsibility, for instance – permit us to study the ASEAN character of non-intervention’s content.

A fine line does separate the acts of ASEAN States³⁴ from that of ASEAN member States.³⁵ This is a murky area. But we must try, concertedly, to identify ASEAN actions and assess them as regional practice, based on extant rules which exist at general

²³ See Simon Chesterman, *From Community to Compliance? The Evolution of Monitoring Obligations in ASEAN* (Cambridge: CUP, 2015); Marise Cremona, David Kleimann, Joris Larik, Rena Lee & Pascal Vennesson, *ASEAN’s External Agreements: Law, Practice and the Quest for Collective Action* (Cambridge: CUP, 2015); Stefano Inama and Edmund Sim, *The Foundation of the ASEAN Economic Community: An Institutional and Legal Profile* (Cambridge: CUP, 2015).

²⁴ Cremona et al, *ibid*, at 108-109 and 120-130.

²⁵ Air Transport Agreement between the Member States of the Association of Southeast Asian Nations and the Government of the People’s Republic of China (signed 12 November 2010): see Cremona et al’s Appendix 6 (ASEAN External Economic Instruments) (n23).

²⁶ Framework for Comprehensive Economic Partnership between the Association of Southeast Asian Nations and Japan (signed 8 October 2003).

²⁷ I.e., individual States in their sovereign, independent capacities, in Southeast Asia and are also ASEAN member States.

²⁸ See n23 at 120.

²⁹ See n23 at 121 (emphasis supplied).

³⁰ See n23 at 120.

³¹ See n23 at 121.

³² See n23 at 121.

³³ Generally Daniel Bethlehem, “The Secret Life of International Law” (2012) 1 *Cambridge JICL* (1) 23 at 25.

³⁴ I.e., acting in their individual, sovereign capacities: Chapter One, Section I.

³⁵ I.e., acting based on the rights and obligations *inter se*, under the ASEAN Charter.

international law.³⁶ The next example shows how ASEAN actions by its organs, the Standing Committee and the AMM, count as regional practice because their actions, through statements, concerned a specific geographical area of Southeast Asia.

2) ASEAN Standing Committee and AMM: Creating ASEAN Practice & the Acquiescence of ASEAN Member States

This part advances the core proposition by showing how rules of general international law facilitate the view that ASEAN is able to conduct external relations on the international plane, a practice which attests to the regional law-making of non-intervention. In this sense, ASEAN actions during the long Kampuchean conflict are fairly consistent. Through the AMM and ASEAN Standing Committee, these organs acted in accordance with their status in the Bangkok Declaration:³⁷ They acted as organs with functions to carry out ASEAN's objectives of maintaining regional peace and security.³⁸ Consequently, these acts form the "established practice"³⁹ of ASEAN, which had been acquiesced to by its member States.⁴⁰ The established practice of an international organisation refers to a consistent practice of its organs which is acquiesced to by its member States. I return to this point below.⁴¹

In ASEAN's case, during the Kampuchean conflict, its member States' acquiescence to how the AMM and ASEAN Standing Committee could issue statements marked the start of these organs' implied powers⁴² to act for regional peace and security

³⁶ When the separate acts of ASEAN States and ASEAN member States are not differentiated, the legal conclusions can be idiosyncratic: for an example, see Helen Quane, "The Significance of an Evolving Relationship: ASEAN States and the Global Human Rights Mechanisms" (2015) 15 *Human Rights Law Review* 283.

³⁷ 1967 Bangkok Declaration (signed 8 August 1967) (1983) 1331 UNTS 235; see further Chapter Two, Section III.

³⁸ To carry out the "aims and purposes" of the Bangkok Declaration (*ibid*), see its third declaration which creates: "(a) [An] Annual Meeting of Foreign Ministers, which shall be by rotation and referred to as ASEAN Ministerial Meeting. Special Meetings of Foreign Ministers may be convened as required.

(b) A (i.e., an ASEAN) Standing Committee, under the chairmanship of the Foreign Minister of the host country or his representative and having as its members the accredited Ambassadors of the other member countries, to carry on the work of the Association In between Meetings of Foreign Ministers."

³⁹ Article 2(j), Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986 ("1986 Vienna Convention").

⁴⁰ See Georg Nolte, "Third Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties" (7 April 2015) UN Doc A/CN.4/683, para 82 at 30: "...it is clear that "established practice of the organization" encompasses a qualified form of practice by organs, one which has generally been accepted by the members of the organization, albeit sometimes tacitly."

⁴¹ Chapter Four, Section IV, Part 2.

⁴² These are implied powers for at least two reasons. First, the Bangkok Declaration contains very sparse textual language to support an arguable case that the AMM and ASEAN Standing Committee have express powers to act with respect to the maintenance of regional peace and security. Second, in practice, ASEAN member States routinely insist that the competences of ASEAN organs exist only if they expressly agree to it. The making of statements by both organs are not expressly contained in the sparse textual language of the Bangkok declaration. For a general account of how ASEAN organs work from a political perspective, see Rodolfo C Severino, *Southeast Asia in Search of an ASEAN Community*:

issues, thereby attesting to ASEAN's separate legal personality. Accordingly, this part develops the core proposition by explaining how ASEAN (through the ASEAN organs) serve as a venue to create regional soft law instruments, through their interactive recourse to rules at general international law (UN Charter). In this respect, on 9 January 1979, the Chair of the ASEAN Standing Committee⁴³ issued its first statement on the Kampuchean conflict:

The *ASEAN member countries* strongly regret the escalation and expansion of the armed conflict now taking place between the two Indochinese states. The ASEAN countries have expressed their great concern over the implications of this development and its impact on peace, security, and stability in Southeast Asia.

The *ASEAN member countries* have again reaffirmed that peace and stability are very essential for the national development of each country in the Southeast Asian region.

In accordance with the principles of the U.N. Charter and the Bandung Declaration, and bearing fully in mind the pledges made by states in Southeast Asia, they appeal to all countries in the region to firmly respect the freedom, sovereignty, national integrity, and political system of the respective countries, to restrain themselves from the use of force or threats of the use of force in the implementation of bilateral relations, to *refrain from interference in the internal affairs of the respective countries*, and dissociate themselves from engagement in subversive activities either directly or indirectly against one another, and to resolve all existing differences between these countries through peaceful means by way of negotiations in a spirit of equality, mutual understanding, and mutual respect.

The *ASEAN member countries* are convinced that in the interest of peace, stability, and development in Southeast Asia, the countries concerned should fully honour those principles and pledges.⁴⁴

Indonesia, as Chair of the ASEAN Standing Committee, circulated this 9 January statement to the UN for the AMM.⁴⁵ As I explain below, throughout this conflict, ASEAN organs would continue to circulate statements to the UN on the international plane. It is, I argue, the Kampuchean conflict from which an ASEAN practice gradually emerged that the ASEAN organs could act on the international plane, with the acquiescence of ASEAN member States.

It is true that the 9 January statement's cautious wording, i.e., its reference to "ASEAN member countries", and not the ASEAN Foreign Ministers (i.e., the AMM), suggests that ASEAN member States did not acquiesce to giving the ASEAN organs any role, *qua* ASEAN as a separate legal person. Put simply, the 9 January statement merely reported the positions of ASEAN member States. However, we must compare this cautious statement of 9 January, with an earlier development which also affected the geographical region of Southeast Asia – the annexation of East Timor by Indonesia

Insights from the Former ASEAN Secretary-General (Singapore: ISEAS Publishing, 2006) at 1-40 and 85-160.

⁴³ I.e., Third declaration (para b) of Bangkok Declaration (n37): this committee comprised ambassadors who were accredited in a particular ASEAN member State, under the Chairmanship of the Foreign Minister of an ASEAN member State.

⁴⁴ "Statement by the Chairman of the ASEAN Standing Committee on the Vietnam-Kampuchea Conflict" (9 January 1979) UN Doc S/13014.

⁴⁵ See (1979) *UNYB* 272.

in 1975.⁴⁶ To this extent, the AMM did address the matter of East Timor, *qua* ASEAN, whose 1976 joint communique bear reproduction:

The Meeting exchanged views on a variety of matters of common concern, including recent developments in the region and in Asia. In this connection, the Meeting *heard with appreciation* the explanation given by the Foreign Minister of Indonesia on the question of East Timor that recent developments in East Timor correspond with the provisions of, the United Nations Security Council Resolutions No. 384 of 22 December 1975, and No. 389 of 22 April 1976.

Considering the expressed readiness of both Indonesia and the Provisional Government of East Timor to cooperate with the United Nations in the implementation of the above-mentioned Resolutions, the Meeting called on the United Nations to take cognizance of these assurances. In view of developments in that territory, the Meeting urged the Special Envoy of the UN Secretary-General, Mr. Vittorio Winspeare Guicciardi, to complete his mission as entrusted to him by the said Resolutions.

The Meeting reaffirmed the view that *the future of East Timor remains, in the final analysis, in the hands of the people of East Timor.*

The Meeting expressed the view that the solution of the East Timor question would contribute positively to the maintenance of peace and stability in the Southeast Asian region.⁴⁷

Effectively, therefore, ASEAN did not want to play any role in the resolution of the East Timor matter. The “solution” in this joint communique was left to the UN and, more importantly, left to time to yield a political fact, with some parallels to Vietnam’s actions during the Kampuchean conflict. There was no common position by ASEAN organs regarding East Timor. This is because the ASEAN member States lacked a consensus regarding Indonesia’s actions in East Timor.⁴⁸

In this respect, Singapore abstained from voting on both resolutions, a reflection of its specific misgivings, against Indonesia, as a tiny sovereign State in Southeast Asia.⁴⁹ In contrast, Indonesia, Thailand, the Philippines, and Malaysia voted against the strongly worded General Assembly resolutions 3485 (1975) and 31/53 (1976) that denounced Indonesia.⁵⁰ For example, the Philippines clearly spoke in its individual, sovereign capacity as follows: “*My Government* strongly affirms its support for the principles of the historic Asian-African Conference held at Bandung in 1955, hosted by Indonesia....the emerging newly independent countries of the third world enunciated a number of precepts which were to form the foundation of a non-aligned movement. Among those precepts was the declaration of non-interference in the affairs of others and, implicitly, the acceptance of the idea that consideration should

⁴⁶ For an Indonesian perspective by its former foreign minister, see Ali Alatas, *The Pebble in the Shoe: The Diplomatic Struggle for East Timor* (Jakarta: Aksara Karunia, 2006).

⁴⁷ “Joint Communique of the Ninth ASEAN Ministerial Meeting Manila” (24-26 June 1976), para 82 (emphasis supplied).

⁴⁸ For an account of the positions by various ASEAN States (i.e., in their sovereign capacities and not as ASEAN member States which engage the ASEAN organs), see Lee Jones, *ASEAN, Sovereignty and Intervention in Southeast Asia* (UK: Palgrave Macmillan, 2012) at 67-73.

⁴⁹ *Ibid.*

⁵⁰ In 1976, there were only five ASEAN member States (Malaysia, Thailand, the Philippines, Indonesia and Singapore): for the voting record, see (1975) 29 *UNYB* at 865; (1976) 30 *UNYB* 753-754.

be given to regional interests in the solution of questions which are primarily regional in nature. The acceptance of that principle by the international community as a whole has promoted peace and security...and has greatly facilitated the work of the United Nations itself".⁵¹

Similarly, the Malaysian delegate spoke at the UN for Malaysia (not ASEAN): "As East Timor had become part of the sovereign territory of Indonesia, *his delegation* (Malaysia) saw no justification whatsoever for any discussion on the matter. Such a discussion should only be interpreted as an interference in the internal affairs of the country (Indonesia) and would not serve the interests of the people of East Timor."⁵² At the General Assembly, no statements (not even cautiously worded ones) were issued by the Chair of the ASEAN Standing Committee or AMM. The ASEAN States spoke, broadly in support of Indonesia, but expressly in their individual capacities as sovereign States in Southeast Asia.⁵³ None of the statements that were expressed in these individual capacities were circulated to the UN as ASEAN documents.

This account of the broader background of ASEAN's (in)action regarding East Timor matters. The reason is because it is arguable that, in contrast, the ASEAN organs' practice during the Kampuchean conflict marked a signal beginning of ASEAN's conduct of external relations, with other legal actors on the international plane. There is some basis at general international law to distinguish proper acts by ASEAN organs *qua* ASEAN, from those of ASEAN States who were acting in their individual, sovereign capacities.

To this extent, the Chair of the ASEAN Standing Committee would sometimes speak for the AMM. On other occasions during this (i.e., Kampuchean) conflict, the AMM would speak directly on the international plane during.⁵⁴ The ASEAN practice was evolving, but it would gradually become an established practice of ASEAN,⁵⁵ an

⁵¹ UN Security Council Meeting (14 April 1976) UN Doc S/PV.1909 at para 54, text available in Heike Kreiger, *East Timor and International Community: Basic Materials* (Cambridge: CUP 1997) at 105.

⁵² UNGA, "UN General Assembly Meeting (Fourth Committee)" (8 November 1979) UN Doc A/C.4/34/SR.16 at para 36, text available in Kreiger, *ibid*, at 143.

⁵³ See Kreiger (n50) for a record of the various statements by the permanent representatives of Indonesia (UN Security Council Meeting (15 December 1975) UN Doc S/PV.1864 at 63), the Philippines (UN Security Council Meeting (14 April 1976) UN Doc S/PV.1909, at 105), Thailand (UN General Assembly Meeting (Fourth Committee) (25 October 1979) UN Doc A/C.4/34/SR.17 at 147), and Singapore (UN General Assembly Meeting (Fourth Committee), UN Doc A/C.4/34/SR.15 (24 October 1979) and UN Doc A/C.4/37/SR.13 (15 November 1982) at 142 and 153, respectively) which were clearly expressed in their individual capacities as UN member States (and not ASEAN member States).

⁵⁴ The ASEAN Chair issued this statement and dropped the words "ASEAN member countries" in its communique (see n44), thereby indicating acquiescence to this form of conduct by the Standing Committee and AMM.

⁵⁵ See n40.

acquiescence by ASEAN member States to the roles of the ASEAN organs in matters regarding regional peace and security.

In this respect, on 12 January 1979, it was the AMM which issued a statement:

Determined to demonstrate the solidarity and cohesiveness of ASEAN in the face of the current threat to peace and stability in the Southeast Asia region, and recalling the Vietnamese pledge to ASEAN member countries to scrupulously respect each other's independence sovereignty and territorial integrity, and to cooperate in the maintenance and strengthening of peace and stability in the region, the Foreign Ministers of the ASEAN Member Countries met in Bangkok on 12 - 13 January 1979 and agreed on the following:

1. The *ASEAN Foreign Ministers* reaffirmed the Statement issued in Jakarta on 9 January 1979 by the Minister for Foreign Affairs of Indonesia as Chairman of the ASEAN Standing Committee on the Escalation of the Armed Conflict between Vietnam and Kampuchea.
2. The *ASEAN Foreign Ministers* strongly deplored the armed intervention against the independence, sovereignty and territorial integrity of Kampuchea.
3. The *ASEAN Foreign Ministers* affirmed the right of the Kampuchean people to determine their future by themselves free from interference or influence from outside powers in the exercise of their rights of self-determination.
4. Towards this end, the *ASEAN Foreign Ministers* called for the immediate and total withdrawal of the foreign forces from Kampuchean territory.
5. The *ASEAN Foreign Ministers* welcomed the decision of the United Nations Security Council to consider without delay the situation in Indochina, and strongly urged the Council to take the necessary and appropriate measures to restore peace, security and stability in the area.⁵⁶

This "current threat to peace and security in the Southeast Asian region" was again repeated on 20 February 1979. This round, it was the Chair of the ASEAN Standing Committee which said that "The *ASEAN countries* are gravely concerned over the rapid deterioration of the situation in *this region* since the ASEAN Foreign Ministers meeting in Bangkok on 12 and 13 January 1979. The conflicts and tension in and around this region have gradually escalated into the use of arms and the expansion of trouble-plagued areas. The *ASEAN countries* reiterate their firm commitment to the principles of peaceful coexistence, the U.N. Charter and international law. The *ASEAN countries* urgently appeal to the conflicting countries to stop all hostile activities against each other, and call for the withdrawal of all foreign troops from the *areas of conflict in Indochina to avoid the deterioration of peace and stability in Southeast Asia*. The *ASEAN countries* also appeal to the countries outside this region to exert utmost restraint and to refrain from any action which might lead to the escalation of violence and the spreading of conflict".⁵⁷

Note, again, the term "ASEAN countries" in the above statement, which suggests that ASEAN did not act as a separate legal person but merely reported the common

⁵⁶ "ASEAN Foreign Ministers' Joint Statement of Special Meeting on Vietnam's Action in Kampuchea" UN Doc S/13025, (1970) *UNYB* 196.

⁵⁷ "Statement by Chairman of the ASEAN Standing Committee" UN Doc S/13106, (1979) *UNYB* at 283 and 296.

positions of all the ASEAN States.⁵⁸ Significantly, though, these common positions were agreed, expressed through the AMM or ASEAN Standing Committee, and circulated as UN documents by ASEAN.⁵⁹ In contrast to the East Timor practice by ASEAN States, this ASEAN Chair's statement of 20 February 1979 suggests that they are not discrete statements of ASEAN States (i.e., "ASEAN countries"). This is because, if they were discrete statements, it would be issued separately, individually, and not be circulated as UN documents through ASEAN organs.

Put simply, ASEAN member States acquiesced to an established practice of allowing both ASEAN organs, the ASEAN Standing Committee and AMM, to act in ways which accord with their functions in the Bangkok Declaration. It is true that this is a difficult legal argument to advance because the texts of these early ASEAN materials were almost entirely drafted by non-lawyers. However, unless we are prepared to concede that the entirety of ASEAN's early actions is not subject to international law or legal analyses, then we must treat the ambiguities in these ASEAN texts as a necessary part of international lawyering in international politics.⁶⁰ As alluded to in Chapter One, the reading of ASEAN texts required some appreciation of the "invisible" conduct of political decisions, which were not made public, but likely culminated in the text of (for example) an ASEAN treaty or ASEAN communiqué.⁶¹

Three examples of such political decisions support this argument. First, it is widely accepted that the AMM played a key diplomatic role⁶² in forming the Coalition Government of Democratic Kampuchea (CGDK),⁶³ to facilitate international support

⁵⁸ See draft Security Council Resolution S/13162 (13 March 1971) whose language is based on the ASEAN Standing Committee's statement of 20 February 1979 (ibid). But this draft resolution clearly bears the title, without reference to ASEAN, "Indonesia, Malaysia, Philippines, Singapore and Thailand: Draft Resolution" (1979) *UNYB* 283-284. This draft resolution was vetoed by the Soviet Union and Czechoslovakia. Another example is the ASEAN Letter to the UN Secretary-General (17 August 1979) (see n82). Effectively, the five permanent representatives issued the letter as the ASEAN Standing Committee, but see the wording which conflates acts of ASEAN States and ASEAN member States: "On instructions from *our Governments* - the member States of the Association of South-East Asian Nations (ASEAN)" (emphasis supplied).

⁵⁹ nn56-57.

⁶⁰ Generally see Daniel Bethlehem, "The Secret Life of International Law" (2012) 1 *Cambridge JICL* (Issue 1) 23.

⁶¹ Chapter One, Section I, Part 2.

⁶² UNGA, "The Situation in Kampuchea" (21 October 1981) UN Doc A/RES/36/5, preambular para: "Noting the joint statement issued in Singapore on 4 September 1981 by Prince Norodom Sihanouk, Mr. Son Sann and Mr. Khieu Samphan concerning their agreement, in principle to form a coalition". For Heng Samrin government's denunciation of the AMM's role, its official news agency said: "ASEAN's effort to hammer out a new government composed of traitors and criminals having neither popular support nor territory, is an open and undeniable act of interference in the internal affairs of the People's Republic of Kampuchea", reproduced in "Coalition of Three Kampuchean Resistance Forces" (1982) 3 *Contemporary Southeast Asia* 406 at 409.

⁶³ The CGDK, which comprised a broader coalition of Cambodian leaders beyond the widely reviled Khmer Rouge government, ensured the international support for the seating of the Khmer Rouge delegate at the UN (see n112): see "Declaration of the Formation of the Coalition Government of

against Vietnam's actions.⁶⁴ For political reasons, the AMM played down its involvement and deferred to the leadership of the United States, Soviet Union, and China.⁶⁵ Hence the AMM Joint Communiqué (1982) only referred to its "continued support for the efforts towards the formation of a Kampuchean coalition government".⁶⁶

Second, the AMM and EEC issued joint statements on Vietnam's illegal acts in Kampuchea.⁶⁷ This included approval of the CGDK.⁶⁸ All these statements are non-binding, but they were expressly circulated as UN documents.⁶⁹ The ASEAN organs wanted their content to be published on the international plane.

Third, again through the AMM, ASEAN facilitated talks between the CGDK and Vietnam to create conditions for a comprehensive settlement.⁷⁰ The reality was that the AMM primarily acted through the Indonesian Foreign Minister, who was "ASEAN's interlocutor" between Vietnam and the CGDK.⁷¹ Therefore, although the practice of ASEAN organs in this area is not always easy to parse, but one must try to identify those acts with an ASEAN character from acts of individual ASEAN States. This is because regional law-making by ASEAN, as this study's core proposition states, is shaped by and based on the rules of general international law.

In its totality, therefore, the actions of the AMM and ASEAN Standing Committee suggest that an established practice of ASEAN organs emerged during the Kampuchean conflict. In other words, ASEAN member States have acquiesced to the capacity of ASEAN organs to make formal statements, as part of ASEAN's conduct of external relations during the Kampuchean conflict. This point is supported by

Democratic Kampuchea", reproduced in "Documentation" (1982) 3 *Contemporary Southeast Asia* 410; also see the discussion in Part 3.

⁶⁴ The CGDK comprised Prince Norodom Sihanouk (formal leader of the coalition), Son Sann (former prime minister who led the Khmer People's National Liberal Front (KPNLF); Khieu Samphan (representative of the Khmer Rouge); the General Assembly acknowledged the CGDK in UNGA Res 36/5 (21 October 1981) UN Doc A/RES/36/5.

⁶⁵ Generally see the report in "Coalition of Three Kampuchean Resistance Forces" (n62), which was prepared by "Monitoring Digest", a (now defunct) entity of the Singapore Government's Public Relations Office.

⁶⁶ "Joint Communiqué of the Fifteenth ASEAN Ministerial Meeting" (14-16 June 1982), para 22.

⁶⁷ "Joint Statement on Political Issues the Foreign Ministers of ASEAN Member States and Member States of the European Community" (8 March 1980); "Communiqué of the Meeting of Foreign Ministers of State Members of the European Community and of the Association of South-East Asia Nations" (1-14 October 1981); "Joint Declaration of the 4th ASEAN-EC Ministerial Meeting" (25 March 1983).

⁶⁸ "Joint Declaration of the 4th ASEAN-EC Ministerial Meeting" (25 March 1983), paras 9-10.

⁶⁹ UN Docs A/35/129, (1980) UNYB 326, 330 and 333; A/36/605 (19 October 1981); A/38/168 (27 April 1983).

⁷⁰ "Joint Communiqué of the Eighteenth ASEAN Ministerial Meeting Kuala Lumpur" (9 July 1985), paras 29 and 38-42; circulated by the Standing Committee as UN Doc A/40/492-S/17365, (1985) UNYB 232.

⁷¹ "Joint Press Release of the Informal ASEAN Foreign Ministers Meeting Bangkok" (16 August 1987) at para 1; circulated by Standing Committee as UN Doc A/42/478-S/19051 & Corr. 1 A/42/500-S/19067, (1987) UNYB 202 and 209.

ASEAN's consistent practice of circulating its organs' statements on the situation in Kampuchea, which condemned Vietnam's actions, as UN documents from 1980-1988.⁷²

Finally, it is not a coincidence that, by 2 September 1983, the Bangkok Declaration (which provides for the functions of the ASEAN organs, such as the AMM and ASEAN Standing Committee) was registered under Article 102, UN Charter,⁷³ which indicates an intention at international law that this instrument can be binding against other legal persons. ASEAN member States had acquiesced to the way that the AMM and ASEAN Standing Committee had acted since the Kampuchean conflict began.⁷⁴ This acquiescence affirms the ASEAN organs' role of performing specific goals in the Bangkok Declaration, which seeks to "promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region and adherence to the principles of the United Nations Charter".⁷⁵

Indeed, this acquiescence by ASEAN member States to the ASEAN organs' role, in maintaining regional peace and security, had become sufficiently established that, by 2001, they agreed in treaty form that the TAC High Council⁷⁶ would be chaired by the

⁷² From 1979-1989, the AMM's annual Joint Communique contained a section on the "Situation in Kampuchea". In 1980-1988, these sections were circulated as UN documents by an ASEAN Member State who chairs the ASEAN Standing Committee ("ASC Chair"): see 13th AMM Joint Communique, 17-18 June 1980 (paras 14-26) as UN Doc A/35/328 (Philippines, ASC Chair); 14th AMM Joint Communique, 17-18 June 1981 (paras 18-34) as UN Doc A/36/337, S/14562 (Philippines, ASC Chair); 15th AMM Joint Communique, 14-16 June 1982 (paras 14-24) as UN Doc A/37/324, S/15268 (Thailand, ASC Chair); 16th AMM Joint Communique, 24-25 June 1983 (paras 12-25) as UN Doc A/38/302, S/15875 (Indonesia, ASC Chair); 17th AMM Joint Communique, 9-10 July 1984 (paras 18-33) as UN Doc E/1984/138 and E/1984/139 (Indonesia, ASC Chair); 18th AMM Joint Communique, 9 July 1985 (paras 28-43) as UN Doc A/40/492, S/17365 (Philippines, ASC Chair); 19th AMM Joint Communique, 23-28 June 1986 (paras 15-29) as UN Doc A/41/452, S/18215 (Singapore, ASC Chair); 20th AMM Joint Communique, 15-16 June 1987 (paras 18-27) as UN Doc A/42/477, S/19048 (Thailand, ASC Chair); 21st AMM Joint Communique, 4-5 July 1988 (paras 7-14) as UN Doc A/43/510, S/20091 (Brunei, ASC Chair).

⁷³ Article 102, UN Charter states:

1) Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

2) No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.

⁷⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16 at 22; generally *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 at 149-150; Nolte's *Third Report*, n40 at 29-32.

⁷⁵ Second Declaration (Paragraph 2) of the Bangkok Declaration (n37).

⁷⁶ Article 14, Treaty of Amity and Cooperation in Southeast Asia (adopted 24 February 1976) 1025 UNTS 15063 states: "To settle disputes through regional processes, the High Contracting Parties shall constitute, as a continuing body, a High Council comprising a Representative at ministerial level from each of the High Contracting Parties to take cognizance of the existence of disputes or situations likely to disturb regional peace and harmony."

ASEAN Standing Committee.⁷⁷ The TAC High Council, which comprises all the TAC parties, has a role in resolving disputes or differences (particularly political ones) in a peaceful way.⁷⁸ Observe that ASEAN, an international organisation, is itself not a party to the TAC.⁷⁹ Instead the TAC High Council, an ASEAN organ, is involved but under the chairmanship of the ASEAN Standing Committee. This underscores the significance that ASEAN member States attach to the ASEAN Standing Committee's well-established role since the Kampuchean conflict.⁸⁰

To conclude: the Kampuchean conflict allowed ASEAN to become a venue in which the statements of its organs, which involve common concerns of the geographical area of Southeast Asia, can be evaluated for legality at general international law. It is this capacity of ASEAN organs to create regional law that arose here, i.e., concerning a geographical area of Southeast Asia, and its practice would contribute to a distinctively regional content of non-intervention, which we consider next.

IV. Regional Law-Making by ASEAN Organs: Recognition of the CGDK as an Established Practice and Common Cause of ASEAN⁸¹

1) The Credentials Issue

In the section above, I discussed the emergence of an established practice of ASEAN organs, in which their conduct of external relations at general international law was acquiesced to by ASEAN member States. This section builds on this discussion by examining the ASEAN organs' practice, particularly in their recognition of the Khmer

⁷⁷ Rule 5, Rules of Procedure of the High Council of the Treaty of Amity and Cooperation in Southeast Asia (23 July 2001) states: "There shall be a Chairperson of the High Council. Subject to Rule 21, the Chairperson shall be:

a. The Representative of the High Contracting Party which, for the time being, holds the Chair of the Standing Committee of the Association of Southeast Asian Nations (ASEAN); or

b. Such other Representative of a High Contracting Party which is a state in Southeast Asia as may be decided on by the High Council in accordance with these Rules.

⁷⁸ See nn76-77; see further Article 15, TAC (n76) which states: "In the event no solution is reached through direct negotiations, the High Council shall take cognizance of the dispute or the situation and shall recommend to the parties in dispute appropriate means of settlement such as good offices, mediation, inquiry or conciliation. The High Council may however offer its good offices, or upon agreement of the parties in dispute, constitute itself into a committee of mediation, inquiry or conciliation. When deemed necessary, the High Council shall recommend appropriate measures for the prevention of a deterioration of the dispute or the situation" and the processes of initiating dispute settlement under the High Council in the 2001 Rules of Procedure.

⁷⁹ Third Protocol amending the Treaty of Amity and Cooperation in Southeast Asia (23 July 2010), which allows "regional organisations" to accede.

⁸⁰ Rule 5(a), n76: the Standing Committee is now defunct since the ASEAN Charter's entry into force on 15 December 2008. The cognate body in Rule 5(a) should be the Committee of Permanent Representatives (Article 12, ASEAN Charter).

⁸¹ ASEAN acts at the General Assembly was just *one* reaction against Vietnam's de facto occupation of Kampuchea from 1979-1990. For a broad view from the perspectives of the United States, China, and Soviet Union, see Michael Yahuda, *The International Politics of the Asia Pacific: Third and Revised Edition* (Oxford: Routledge, 2011) at 62-85.

Rouge government (and later the CGDK) which is partially justified by non-intervention at general international law.

This section, therefore, advances the core proposition by examining a particular instance of ASEAN practice (and therefore regional law-making) regarding the link between non-intervention and recognition, both of which are assessed against and derive its legal basis from the general rules of international law. Additionally, this section explains the relationship between general and regional international law, by showing how powerful external actors, the United States and the Soviet Union, particularly influence (and permit) a fairly broad content regarding non-intervention, as generated by ASEAN organs within ASEAN and at the UN General Assembly.

In pressing for the recognition of the CGDK, I argue that ASEAN organs made a regional law of non-intervention with an ASEAN character. Put another way, ASEAN's position was that the recognition of Heng Samrin's effective government violated non-intervention, at general and especially regional international law, because Vietnam's occupation of Kampuchea threatened the regional peace and security of Southeast Asia in its entirety. This is because Vietnam's actions subsequently engaged the Great Powers (China, Soviet Union, and the United States) to become involved in conducting international relations with Southeast Asia, as powerful external actors, during the Cold War.

Accordingly, though Kampuchea was not an ASEAN member State during this period, ASEAN, through the AMM, maintained a common position that Vietnam's actions in Kampuchea affected the regional peace and security in Southeast Asia.⁸² The AMM's common positions are significant because its member States did not share the same threat perceptions against Vietnam during this long conflict. Indonesia and the Philippines, in particular, were less affected because of its distance from the Indochinese States of Vietnam and Kampuchea. In contrast, Vietnam had provided rhetorical support to increasingly violent communist insurgencies in Thailand and Malaysia.⁸³

In other words, the AMM's common positions, during this long conflict, reflected an agreement by all ASEAN member States concerning the common cause which pertained to the regional peace and security of Southeast Asia. The member States'

⁸² See "Letter dated 17 August 1979 from the representatives of Indonesia, Malaysia, the Philippines, Singapore and Thailand to the United Nations addressed to the Secretary-General" (17 August 1979) UN Doc A/34/191.

⁸³ Generally Shee Poon-Kim, "A Decade of ASEAN, 1967-1977" (1977) 17(8) *Asian Survey* 753; Russell H Fifield, "ASEAN: Image and Reality" (1979) 19(12) *Asian Survey* 1199.

willingness to allow the AMM to express these common causes, through circulated UN documents, reflected their acquiescence to the AMM's role in expressing these common causes at general international law. It is against this context that, through ASEAN and the UN as venues, non-intervention acquired content with an ASEAN character.

In other words, the regional quality of ASEAN's law-making as to non-intervention is an assessment which is based on the general rules of international law. Particularly, it is general international law which enables an assessment that the ASEAN organs' conduct was an established practice accepted as law (i.e., the *opinio juris*). On this basis, the ASEAN organs' conduct, during this period, contributes to the development of a regional customary rule of non-intervention. The rule of non-intervention is contained in treaty form, in Articles 2(c) and 10 of the TAC, but it is the ASEAN organs' conduct (i.e., a code of conduct) that gives rise to an established practice which is accepted in law. Therefore, the regional law-making of non-intervention by ASEAN organs can be assessed and understood in terms of customary rule formation and treaty interpretation: this approach matters to the core proposition because it underscores, again, the strong influence of general rules in creating a regional law (i.e., the ASEAN character) of non-intervention. The regional law of non-intervention is normative because the general rules, which develop the regional variety of non-intervention, crystallise the reality of Southeast Asia as a coherent geographical area with common causes. However, general international law also has the ability to constrain the scope of this distinctive regional law-making, as demonstrated in Chapter Five.

As indicated already, with Vietnam's assistance, the government of Heng Samrin was a political fact by January 1979, under the newly named PRK. However, in every General Assembly resolution on "the Situation in Kampuchea"⁸⁴ from 1979-1989, its last preambular paragraph applies non-intervention as follows: "Reaffirming the need for all States to adhere strictly to the principles of the Charter of the United Nations, which call for respect for the national independence, sovereignty and territorial integrity of all States, *non-intervention in the internal affairs of States*, non-recourse to the threat or use of force, and peaceful settlement of dispute".⁸⁵

⁸⁴ In 1979, this item was included in the General Assembly's agenda for the first time by the five permanent representatives of ASEAN Member States: see n82.

⁸⁵ UNGA Resolutions 34/22 (1979); 35/6 (1980); 36/5 (1981); 37/6 (1982); 38/3 (1983); 39/5 (1984); 40/7 (1985); 41/6 (1986); 42/3 (1987); 43/19 (1988); 44/22 (1989). Emphasis supplied.

Alongside these General Assembly resolutions, the AMM persistently denounced through its ASEAN joint communiqués Vietnam's continued military occupation in Kampuchea as a violation of international law, including "non-interference in the internal affairs of a sovereign state", and as posing a "grave threat to peace and security in Southeast Asia, thus endangering international peace and security".⁸⁶ Therefore, this part explains how ASEAN's action regarding the credentials issue, despite the effectiveness of Heng Samrin's government over Kampuchea's territorial boundaries, developed non-intervention's content as a distinct regional law whose content is influenced by general international law.

The matter of who represented Kampuchea arose before the UN credentials committee. Credentials matters are considered by the Credentials Committee ("Committee"). This is usually a formality as the Committee examines the submitted documents⁸⁷ from a member State under Rules 28-29.⁸⁸ In short, it is generally a technical process in which the Committee approves a delegate as his government's representative. However, when there are rival submissions of credentials from the same State, like the DK and PRK in Cambodia, the Committee must make a decision unguided by Rules 27-29.⁸⁹ It is in this sense that issues concerning the "representativeness", i.e., the qualitative aspects of a State's government arises.⁹⁰

Seating the Democratic Kampuchea's representative (i.e., Khmer Rouge government) at the UN was an important diplomatic goal for ASEAN, which has been

⁸⁶ Paras 5 and 19, "Joint Communiqué Of The Tenth ASEAN Ministerial Meeting Singapore" (5-8 July 1977); Para 21, "Joint Communiqué Of The Twelfth ASEAN Ministerial Meeting Bali" (28-30 June 1979); Para 16, "Joint Communiqué Of The Thirteenth ASEAN Ministerial Meeting Kuala Lumpur" (25-26 June 1980); Para 30, "Joint Communiqué Of The Fourteenth ASEAN Ministerial Meeting Manila" (17-18 June 1981); Para 20, "Joint Communiqué Of The Fifteenth ASEAN Ministerial Meeting Singapore" (14-16 June 1982); Para 12 "Joint Communiqué Of The Seventeenth ASEAN Ministerial Meeting Jakarta" (9-10 July 1984); Para 15, "Joint Communiqué Of The Nineteenth ASEAN Ministerial Meeting Manila" (23-28 June 1986); Para 18, "Joint Communiqué Of The Twentieth ASEAN Ministerial Meeting Singapore" (15-16 June 1987); Para 7, "Joint Communiqué of the 21st ASEAN Ministerial Meeting Bangkok Thailand" (4 – 5 July 1988); Para 13, "Joint Communiqué Of The 22nd ASEAN Ministerial Meeting Bandar Seri Begawan" (3 – 4 July 1989), all available at <<http://asean.org/asean-political-security-community/asean-foreign-ministers-meeting-amm/joint-communiques/>>.

⁸⁷ Rule 27 of the General Assembly Rules of Procedure ("The Rules") provides that credentials of representatives and names of members of a delegation shall be submitted to the Secretary-General: see UN Doc A/520/Rev.15 (1985).

⁸⁸ Rule 28 generally states that the Committee shall examine the credentials and report to the General Assembly without delay. Rule 29 states that any representative to whose admission a Member has made objection shall be seated provisionally with the same rights as other representatives until the Committee has reported and the general Assembly has made a decision: *ibid*.

⁸⁹ But the first operative paragraph of the UN General Assembly Resolution 396(V) (1950) vaguely states that, in this situation, "the question should be considered in the light of the Purposes and Principles of the Charter and the circumstances of each case."

⁹⁰ Generally see Matthew Griffith, "Accrediting Democracies: Does the Credentials Committee of the United Nations Promote Democracy Through its Accreditation Process, and Should It?" (2000) 32 *International Law and Politics* 725 at 733.

discussed elsewhere.⁹¹ For our purposes, I focus on the AMM's use of non-intervention, in 1981, to support their recognition of the Khmer Rouge government, which states: "The Foreign Ministers also reaffirmed that they continue to recognize the Government of Democratic Kampuchea and to extend their support for its continued representation at the United Nations. They stressed that the grounds for their support for the credentials of Democratic Kampuchea were based on the fundamental principles that foreign intervention must be opposed and that any change in the recognition of Democratic Kampuchea's credentials would be tantamount to condoning Vietnamese military invasion and occupation of Kampuchea. They saw absolutely no justification for other States to overthrow the legitimate government of another State as such action violated the *internationally recognized* principles governing interstate relations as enshrined in the United Nations Charter. The Foreign Ministers, therefore, called upon member states of the United Nations to up-hold the *principle of non-intervention* and to support the continued recognition and representation of Democratic Kampuchea at the United Nations".⁹²

One year later, in 1982, the AMM said that "the Foreign Ministers reaffirmed their continued recognition of Democratic Kampuchea and their support for its representation at the United Nations. They emphasized that the grounds for their support for the credentials of Democratic Kampuchea were based on the *fundamental principles* of respect for the sovereignty, independence and territorial integrity of States, *non-interference in the internal affairs of States* and non-use of force in international relations. The Foreign Ministers, therefore, called upon member States of the United Nations to uphold these principles and to support the continued representation of Democratic Kampuchea in the United Nations".⁹³

In both joint communiqués, the AMM referred to "internationally recognized"⁹⁴ and "fundamental principles" contained in the UN Charter, a treaty.⁹⁵ The non-binding instruments, i.e., General Assembly resolutions and AMM joint communiqués, were

⁹¹ Generally see Ang Cheng Guan, *Singapore, ASEAN and the Cambodian Conflict, 1978-1991* (Singapore: NUS Press, 2013); S Rajaratnam: *The Prophetic and the Political* (Chan Heng Chee and Obaid Ul Haq, eds.) (2nd ed), (Singapore: ISEAS Publishing, 2007) at 416-427; Michael Leifer, *Singapore's Foreign Policy: Coping with Vulnerability* (London: Routledge, 2000) at 85.

⁹² Para 30, "Joint Communiqué Of The Fourteenth ASEAN Ministerial Meeting" (17-18 June 1981) available at <<http://asean.org/asean-political-security-community/asean-foreign-ministers-meeting-amm/joint-communicues/>> (emphasis supplied).

⁹³ Para 20, "Joint Communiqué Of The Fifteenth ASEAN Ministerial Meeting" (14-16 June 1982); see further all the AMM Joint Communiqués which were circulated by the Chair of the Standing Committee as UN documents (n72)(emphasis supplied).

⁹⁴ See n92.

⁹⁵ See n93; see further Articles 1 and 2, UN Charter ("Purposes and Principles").

used together with the rights and obligations in the UN Charter to advance two arguments regarding non-intervention's content.⁹⁶

First, to seat the Democratic Kampuchean delegate at the UN is to recognise the Khmer Rouge government, partially regrouped as the CGDK.⁹⁷ Second, and conversely, to recognise the effective government of Heng Samrin would violate the non-intervention and was thus inconsistent with the "fundamental principles" of the UN Charter. Hence the recourse by the AMM, in using treaty (i.e., UN Charter) and non-binding instruments (ASEAN joint communiqués of 1981-1982) to make non-intervention's content, was interactive and facilitated through the venue of the UN, especially at the credentials committee. It bears emphasis that this practice of the AMM is not just regional in character because it contains a geographical scope, but that this regional law-making are acts of ASEAN organs, *qua* ASEAN as an international legal person. This position is shaped by the rules of general international law, such as those pertaining to separate legal personality and non-intervention, facilitate the regional law-making.

Accordingly, ASEAN had developed non-intervention's regional content with an ASEAN character, in terms of how States are entitled at law to govern their own "internal affairs", even for governments like the Khmer Rouge. As I explain below, this development would become a fairly precise rule of non-intervention's content, as a code of conduct in the TAC, which assured newer member States like Myanmar to seek admission to ASEAN in the 1990s.

Returning to the Kampuchean conflict, at this given point there were divergent views on communism during the Cold War and how States might respond,⁹⁸ whether in favour of or against it.⁹⁹ The Cold War, in other words, made it harder at general international law to assess whether it was legally relevant that the Khmer Rouge government had a murderous past, regarding its continued representation at the UN.¹⁰⁰ Nonetheless, general rules at general international law not to recognise the

⁹⁶ I.e., last preambular paragraphs of the General Assembly Resolutions: see n85.

⁹⁷ See nn63-64.

⁹⁸ Lucy Keller, "UNTAC in Cambodia – from Occupation, Civil War and Genocide to Peace" (2005) 9 *Max Planck Yearbook of United Nations Law* 127 at 136-137.

⁹⁹ See discussion above on communist threat in Guatemala, Chapter Three, Section IV, Part 3.

¹⁰⁰ See Chapter Four, Sections VI-VII for the AMM communiqués and General Assembly resolutions, especially nn85, 92-93, 112. See also "Statement of the Conference of Foreign Ministers of Laos, Kampuchea, and Vietnam" (18 July 1980) which referred to the "genocidal Pol Pot regime" and "sacred right to self-defence of the Kampuchean wipe out the Pol Pot clique", reproduced in "Documentation", (1980) 2 *Contemporary Southeast Asia* 281 at 285.

results of an unlawful intervention did exist.¹⁰¹ Therefore, the AMM's position that Heng Samrin's effective government is the result of Vietnam's illegal actions at international law, and the seating of Heng Samrin delegate at the UN would implicitly condone Vietnam's actions,¹⁰² is shaped and justified by the general rules of international law that exist.

Therefore, a proposal by the credentials committee to leave the Cambodian seat vacant, which would avoid "taking sides" between the DK and PRK,¹⁰³ was rejected by the General Assembly.¹⁰⁴ Although it would be simpler to treat the seating of a UN delegate as primarily a technical issue of presenting the proper credentials, the General Assembly consistently accepted the credentials of DK (i.e., with the Khmer Rouge's involvement), and not the effective PRK government under Heng Samrin which was supported by Vietnam.¹⁰⁵ Here ASEAN member States lobbied hard against the vacant seat option because,¹⁰⁶ in diplomatic and political terms, it would indicate an inconclusive condemnation of Vietnam's actions in Kampuchea, of which Heng Samrin's effective government had already become a political fact.

I have already mentioned that evaluating State practice of ASEAN organs is a murky area, which is manifest in ASEAN's role regarding the credential issue at the UN. To adapt Grant's views, politics is to be found somewhere in the background of all formal statements.¹⁰⁷ Hence despite the widely recognised role of ASEAN diplomacy in lobbying for the acceptance of DK's credentials,¹⁰⁸ the UN materials concerning the credentials matter do not contain express statements by the ASEAN organs. Instead

¹⁰¹ For example: the occupations of Northern Cyprus by Turkey and of East Timor by Indonesia (1976). For the UN Security Council's reactions against the illegality of Indonesia's actions, see UNSC Resolutions 384 (1975) and 389 (1976). For reactions by the General Assembly and Security Council against Turkey, see its resolutions GA Res 3212 (1974) and UNSC Res 541 (1983) and 550 (1984), respectively. An exception of sort, on grounds of self-determination, was India's actions in East Bengal which resulted in its independence from Pakistan (1971). For a discussion on East Timor, Bangladesh, and Cyprus, generally see James Crawford, *The Creation of States in International Law* (2nd ed) (Oxford: OUP, 2007) at 98-101, 140-142, and 143-144 respectively.

¹⁰² See n92.

¹⁰³ UN Doc A/34/L.3 (1979).

¹⁰⁴ 76 in favour of rejection; 39 against; 23 abstained. See UN Doc A/34/PV.4 (1979).

¹⁰⁵ See UN Doc A/35/PV.35 (1980); UN Doc A/36/PV.3 (1981); UN Doc A/37/PV.45 (1982); UN Doc A/38/PV.34 (1983); UN Doc A/39/PV.32 (1984); UN Doc A/40/PV.37 (1985); UN Doc A/41/PV.45 (1986); UN Doc A/42/PV.36 (1987); UN Doc A/43/PV.33 (1988) and UN Doc A/44/PV.32 (1989).

¹⁰⁶ Generally see Timothy Carney, "Kampuchea in 1981: Fragile Stalemate" (1982) 22(1) *Asian Survey* 78; "Lesson for Singapore's Foreign Policy: the Cambodian Conflict" (Speech by Former Singapore Deputy Prime Minister), <https://www.mfa.gov.sg/content/mfa/overseasmission/phnom_penh/press_statements_speeches/embassy_news_press_releases/2011/201112/press_201112_06.html>.

¹⁰⁷ Thomas Grant, "Doctrines (Monroe, Hallstein, Brezhnev, Stimson)" [2014] *MPEPIL* 697 at para 31:

¹⁰⁸ For an account from a Singaporean perspective, see *S Rajaratnam on Singapore (From Ideas to Reality)* (Kwa Chong Guan, ed) (Singapore: World Scientific, 2006) at xiii and xv; S Dhanabalan, "Scenes from the Cambodian Drama" in *The Little Red Dot: Reflections by Singapore's Diplomats* (Tommy Koh, Chang Li Lin, eds) (Singapore: World Scientific; Institute of Policy Studies, 2005) 41; Leifer's *Singapore's Foreign Policy*, n91 at 86-87.

it was the United States and China, which insisted and succeeded in prevailing on the credentials committee to adhere to its “procedural” mandate of accepting DK’s credentials, in accordance with its rule of procedure.¹⁰⁹

It bears stressing that, ordinarily, it is already not easy to determine “pure” separate acts of international organisation’s organs, but in ASEAN’s case, the deeply political context of the proxy war between the Soviet Union, United States, and China complicate analysis in legal terms. Nevertheless, attempting a legal analysis of this nature is still preferable to adapting the conclusions of the International Relations literature on non-intervention during the Kampuchean conflict, which do not separate acts of ASEAN States from those of ASEAN member States, and of ASEAN organs acting *qua* ASEAN.

Against this context, therefore, we must evaluate the separate acts of ASEAN through the conduct of ASEAN organs in the AMM joint communiques of 1981-1982,¹¹⁰ which uphold non-intervention because it prohibits the overthrowing of “legitimate”¹¹¹ governments (which includes unpopular ones like the Khmer Rouge). Non-intervention would be violated if the PRK delegate (i.e., Heng Samrin’s government, sponsored by Vietnam) were seated, or if the Cambodian seat were left vacant (because that would implicitly approve Vietnam’s actions). Considered in its totality, as an early ASEAN practice, the AMM achieved some success in creating a regional rule of non-intervention, as attested to by the seating of the DK delegate to represent the Khmer Rouge government at the UN.¹¹²

Furthermore, this regional rule of non-intervention as created by ASEAN organs, i.e., especially against the overthrowing of legitimate governments, received some approval at general international law. When bilateral relations warmed between the United States and Soviet Union in 1988 and the Cold War started to thaw,¹¹³ it became possible to resolve the Kampuchean conflict. This was initially conducted at the General Assembly, in which the second operative paragraph of Resolution 43/19 (1988) states:

Reiterates its conviction that the withdrawal of all foreign forces from Kampuchea under effective international supervision and control, the creation of an interim administering authority, the promotion of national reconciliation among all Kampuchians under the leadership of Samdech Norodom Sihanouk,

¹⁰⁹ Generally see Griffith, n90.

¹¹⁰ nn92-93.

¹¹¹ See the AMM’s Joint Communiqué (1981)(n92).

¹¹² See A/35/PV.35 (1980); A/36/PV.3 (1981); A/37/PV.45 (1982); A/38/PV.34 (1983); A/39/PV.32 (1984); A/40/PV.37 (1985); A/41/PV.45 (1986); A/42/PV.36 (1987); A/43/PV.33 (1988); A/44/PV.32 (1989).

¹¹³ See n14 at 93.

the non-return to the universally condemned policies and practices of a recent past, the *restoration and preservation of the independence, sovereignty, territorial integrity and neutral and non-aligned status of Kampuchea*, the reaffirmation of the right of the Kampuchean people to *determine their own destiny and the commitment by all States to non-interference and non-intervention in the internal affairs of Kampuchea*, with effective guarantees, are the principal components of any just and lasting resolution of the Kampuchean problem.¹¹⁴

In other words, at this point, another extant rule of general international law exists to shape non-intervention's content – internal self-determination. In a post-conflict Kampuchea, then, Vietnam would withdraw forces and Kampuchea (now Cambodia) would be neutralised, non-aligned, administered through a power-sharing entity,¹¹⁵ and subject to some form of international supervision under the UN.¹¹⁶ Kampucheans would be given some choice, through the UN as a venue, to vote for a government leadership.¹¹⁷ Here non-intervention's content still included and protected the right of a State to govern its "internal affairs", although the nature of its government is subject to international supervision.¹¹⁸ As explained in Chapter Three, the descriptive and evaluative vagueness of non-intervention, at general international law (including the non-intervention provisions in the Friendly Relations Declaration), affirms non-intervention's content as a moving target, whose content is assessed relative to general rules of international at a given point in time. It is also especially the descriptive vagueness of non-intervention at general international law that enables the regional law-making of non-intervention by ASEAN organs to include non-overthrowing of a legitimate government (despite the Khmer Rouge's involvement) during this period.

To summarise: I have examined two instances of the ASEAN organs' practice. First, I discussed the early practice of the AMM and ASEAN Standing Committee in using joint communiqués to form common positions in conducting their external relations, an established practice concerning the ASEAN organs' role in maintaining regional peace, which was acquiesced to ASEAN member States. Second, I explored the ASEAN organs' role and statements regarding the credentials issue, after Vietnam's occupation became a political fact. In both instances, the ASEAN organs were acting

¹¹⁴ UNGA Res 43/19 (3 November 1988) UN Doc A/Res/43/19 (emphasis supplied).

¹¹⁵ I.e., the Supreme National Council: a quadripartite coalition government under Prince Sihanouk, see n13 at 6-8 and 10.

¹¹⁶ I.e., the Agreement on a Comprehensive Political Settlement of the Cambodia Conflict (adopted 23 October 1991) (1992) 31 ILM 180 at 183.

¹¹⁷ See n116.

¹¹⁸ The ousting of the first Prime Minister Norodom Ranariddh by Second Prime Minister Hun Sen (the current Prime Minister) in the 1990s, and the political turmoil which arose, delayed Cambodia's admission to ASEAN: generally see Sorpong Peou, "Cambodia in 1997: Back to Square One?" (1998) 38(1) *Asian Survey* 69; Kay Moller, "Cambodia and Burma: The ASEAN Way Ends Here" (1998) 38(12) *Asian Survey* 1087.

qua ASEAN, an international organisation. They were making regional law, in relation to their respective functions as organs in the Bangkok Declaration, and also in creating non-intervention's content with an ASEAN character as to the prohibition against overthrowing legitimate governments like the Khmer Rouge. Specifically, with respect to the common positions about Vietnam's actions in Kampuchea and the credentials issue, the established practice of ASEAN organs is undertaken with a sense of legal obligation concerning what non-intervention and recognition are at general international law, which are accepted as law (i.e., *opinio juris*). It is regional law because it contains common causes that involve the regional peace and security of Southeast Asia. On this basis, it contributes to the coherence of Southeast Asia as a geographical region. Moreover, as explained in Chapter Three, the descriptive and evaluative vagueness of non-intervention's content at general international law allows this legal assessment that ASEAN organs can act during the Kampuchean conflict out of legal obligation as to non-intervention. However, the precise content of non-intervention is determined against general international law, at that given point, and the stringency of non-intervention's obligation is quite low.

Accordingly, it is important to stress the relationship of this regional law with general international law. It is general international law that provides the relevant legal construct (i.e., ASEAN's separate legal personality) and its legal rules (regional law regarding shared values and geographical association) to give substance to the regional content of non-intervention with an ASEAN character. Importantly, this regional law-making is advanced through and affirmed within ASEAN as a venue. This relationship between regional and general international law, as well as its development of the core proposition, is elaborated on in the final part below, in terms of the TAC's provisions on non-intervention.

2) Regional Law of Non-Intervention: A Code of Conduct that is determined by General International Law

This part advances the study's core proposition by showing how the body of ASEAN practice during the Kampuchean conflict, already examined above as the established practice of ASEAN regarding non-intervention's content, which eventually emerged as a code of conduct in the intramural relations between and with ASEAN member States in Southeast Asia. General international law shapes this view because, after the Kampuchean conflict, ASEAN served as a venue to affirm the relevance of this regional law of non-intervention with an ASEAN character. Particularly, the general rule of interpreting treaties at international law, in Article 31 of the 1969 Vienna

Convention, is examined here.¹¹⁹ To advance this core proposition, first we consider two provisions on non-intervention in the TAC. Under “Purpose and Principles,” Article 2, TAC states:

In their relations with one another, the High Contracting Parties shall be guided by the following fundamental principles:

- a. Mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations;
- b. The right of every State to lead its national existence free from external interference, subversion or coercion;
- c. Non-interference in the internal affairs of one another;
- d. Renunciation of the threat or use of force.¹²⁰

Although Article 2(c), TAC, is unclear in content, it is clear that TAC parties agree non-intervention applies in the broad context of their conducting intramural “relations with one another” (under Article 2, TAC). Article 10 gives context to this broad context, in which non-intervention applies: “Each High Contracting Party shall not in any manner or form participate in any activity which shall constitute a threat to the political and economic stability, sovereignty, or territorial integrity of another High Contracting Party”.¹²¹

Recall that this broad context of the TAC can be traced back to ZOPFAN,¹²² an unsuccessful attempt to neutralise Southeast Asia from the involvement of the United States, China, and Soviet Union.¹²³ As a political compromise, ZOPFAN produced fourteen guidelines on the code of conduct between States in Southeast Asia (and not just confined to ASEAN member States), of which six were adopted in Article 2, TAC.¹²⁴

During the Kampuchean conflict, the sustained actions of ASEAN organs against Vietnam and Heng Samrin’s effective government is a body of practice which gave meaning to the text of Articles 2(c) and 10, TAC. In other words, the TAC’s broad context necessitates the taking into account of the ASEAN organs’ practice during the Kampuchean conflict, an established practice¹²⁵ of ASEAN, which can be

¹¹⁹ Articles 31 and 32, Vienna Convention on the Law of Treaties (adopted 23 May 1969) 1155 UNTS 331.

¹²⁰ See n76.

¹²¹ See n387.

¹²² The text is reproduced in Heiner Hanggi, *ASEAN and the ZOPFAN Concept* (ISEAS, 1991) at 59-60 (Appendix 3).

¹²³ Generally see Kei Koga, “The Process of ASEAN’s Institutional Consolidation in 1968-1976: Theoretical Implications for Changes of Third-World Security Oriented Institution”, *S. Rajaratnam School of International Studies Working Paper* (No. 234), February 2012.

¹²⁴ See further Daniel Seah, “The Treaty of Amity and Cooperation in Southeast Asia: The Issue of Non-Intervention and its Accession by Australia and the USA” (2012) 11 *Chinese Journal of International Law* 785 at 792-799.

¹²⁵ See further Chapter Two, Section VI.

interpreted against the rules of subsequent practice of a treaty (i.e., in relation to the TAC), in accordance with the customary rules of treaty law.

Before we consider this argument, it is useful to recapitulate the ASEAN organs' common position on non-intervention as follows: strict adherence to non-intervention as a principle of the UN Charter in conducting international relations, breach of which was impermissible during the Kampuchean conflict;¹²⁶ although Article 2(7), UN Charter addresses non-intervention in a vertical sense (intervention by the UN in matters internal to a State),¹²⁷ the Friendly Relations Declaration include vertical non-intervention and also horizontal non-intervention (by one State in another's internal affairs);¹²⁸ ASEAN's push to seat the Democratic Kampuchean representative at the UN;¹²⁹ because the use of force by Vietnam was illegal, the political fact of Heng Samrin's government was also illegal;¹³⁰ its role as part of a comprehensive settlement in a post conflict Kampuchea, which include neutralisation and a power-sharing coalition.¹³¹

Vietnam's actions in Kampuchea, the invasion and continued involvement in the Heng Samrin government,¹³² threaten the regional peace and security of ASEAN member States in Southeast Asia. The Cold War was ongoing. The United States, China, and the Soviet Union were drawn into this conflict between Vietnam and Kampuchea, a proxy war between great powers which implicated Southeast Asia's peace and security as a non-communist zone.¹³³

It is this Cold War context that facilitated non-intervention's relevance and shaped its content. Obviously, this bipolar world, in which the United States' ideologies contrasted with that of the Soviet Union and China, shaped the legal rules at general international law. It was possible to "take sides", on ideological grounds, for (or against) Vietnam's actions in Kampuchea. Despite the political fact of Heng Samrin's effective government, the Cold War context allowed UN member States to agree

¹²⁶ See n85.

¹²⁷ Also see Article 2(7), UN Charter for treaty language on non-intervention and this article's obsolescence in UN practice, generally see Kawser Ahmed, "The Domestic Jurisdiction Clause in the Un Charter: A Historical View" (2006) 10 *Singapore Yearbook of International Law* 175; see further Chapter Three, Section V.

¹²⁸ Generally James Crawford, *Brownlie's Principles of Public International Law* (8th ed) (Oxford: OUP, 2012) at 448.

¹²⁹ See n112.

¹³⁰ See nn92-93.

¹³¹ See n115.

¹³² Chapter Four, Section II.

¹³³ Generally Daniel Seah, *Foreign Policy and International Law in Singapore*, Master of Jurisprudence thesis (unpublished), University of Birmingham (2008), at 178.

resolutions, through the General Assembly,¹³⁴ to repeat the illegality of Vietnam's continued involvement in Kampuchea from 1979-1989.

Before a détente in bilateral relations between the United States and Soviet Union, there was no realistic prospect, during the Cold War, of counting on the Security Council to resolve the Kampuchean conflict.¹³⁵ This situation allowed the ASEAN organs, at the General Assembly and within ASEAN, to press the argument regarding the continued illegality of Vietnam's actions at general international law, which directly affected Southeast Asia's peace and security. This is because Vietnam's actions in Kampuchea were supported by the Soviet Union, in military, material, and ideological terms.¹³⁶ In other words, ASEAN member States were conducting their intramural relations in accordance with their obligations in Articles 2(c) and 10, TAC with respect for non-intervention, and without threatening the political, economic or social integrity of each TAC party.

More importantly, this body of practice that was conducted through the ASEAN organs during the Kampuchean conflict constituted the acts of ASEAN, i.e., arguably a subsequent practice¹³⁷ in the application of Articles 2(c) and 10, TAC.¹³⁸ In other words, this body of practice has an ASEAN character: its legal effects (and content) must be assessed against rules of general international law, especially the general rule of interpreting treaties as contained in the 1969 Vienna Convention, which has customary status.¹³⁹

¹³⁴ I.e., UNGA Resolutions 34/22 (1979); 35/6 (1980); 36/5 (1981); 37/6 (1982); 38/3 (1983); 39/5 (1984); 40/7 (1985); 41/6 (1986); 42/3 (1987); 43/19 (1988); 44/22 (1989), n85.

¹³⁵ For example, see the draft UNSC resolution which called on all parties to cease hostilities and for the Security Council to remain "seized of the question", S/13162, 13 March 1979.

¹³⁶ The Soviet support of Vietnam goes back to French-Indochina war which led to Vietnam's unification and independence; the Soviet Union had given Vietnam at least US\$365 in aid: generally see Deven Ogden, "Soviet Third World Policy Dilemmas and Settlement of the Cambodian Conflict" (1992) 10 *Journal of Political and International Studies* 67 at 70; Tai Sung An, "Turmoil in Indochina: The Vietnam-Cambodia Conflict" (1978) 5 *Asian Affairs* 245.

¹³⁷ I.e., Article 31(3)(b), Vienna Convention on the Law of Treaties (adopted 23 May 1969) 1155 UNTS 331; see further Chapter Two, Section III.

¹³⁸ See ILC, "Subsequent Agreements and Subsequent Practice in relation to Interpretation of Treaties" (3 June 2014) UN Doc A/CN.4/L.833, Draft Conclusion 6: "Texts and titles of draft conclusions 6 to 10 provisionally adopted by the Drafting Committee on 27 and 28 May and on 2 and 3 June 2014".

¹³⁹ See Draft Conclusion 1, and the text of Draft Conclusions 1–5 provisionally adopted by the Drafting Committee at the sixty-fifth session of the International Law Commission, ILC, "Subsequent Agreements and Subsequent Practice in relation to Interpretation of Treaties" (24 May 2013) UN Doc A/CN.4/L.813: "Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth, respectively, the general rule of interpretation and the rule on supplementary means of interpretation. These rules also apply as customary international law."

Subsequent practice has a “relational character”:¹⁴⁰ it must present “objective evidence” of a party’s understanding with respect to a treaty.¹⁴¹ In other words, different types of practice can be related to each other, if they collectively present evidence (based on the ILC’s non-binding rules) as subsequent practice as to the application of treaty provisions.

Furthermore, what counts as subsequent practice can be construed broadly or narrowly. Starting with the narrow view, in accordance with Article 31(3)(b), Vienna Convention: after a treaty’s conclusion, it is legally relevant to consider the conduct of all the parties which establishes an agreement regarding the interpretation of that treaty’s terms.¹⁴² In contrast, the broader view is that “other subsequent practice” not confined to Article 31(3)(b), Vienna Convention can be considered to interpret the “object and purpose” of the treaty on point.¹⁴³ Significantly, the ILC had concluded that subsequent practice, whether construed broadly or narrowly, can take a “variety of forms”.¹⁴⁴

In this respect, the ILC explored the “established practice” and “general practice” of international organisations. It did not conclude that both terms have distinct legal meanings. Rather, the ILC seems to approve of “established practice”, based on its earlier work on the 1986 Vienna Convention, as an open category of conduct of the organs of an international organisation, so long as it is largely contained in its constituent instrument and acquiesced to by its member States.

As for “general practice”, the ILC referred to this as the combination of the practice of the organs of international organisations and that of its member States (i.e., when its representatives express positions as a member States for its government). In this sense, the ILC suggested that subsequent practice, whether through the pathways of “established practice” or “general practice”, can be used as an interpretative aid to clarifying the terms of a treaty.¹⁴⁵ For these reasons and for brevity, throughout this

¹⁴⁰ “First Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties” (19 March 2013) UN Doc A/CN.4/683 (“Nolte Report”), para 111 at 43.

¹⁴¹ See n139, Draft Conclusion 4: “Text of draft conclusions 1–5 provisionally adopted by the Drafting Committee at the sixty-fifth session of the International Law Commission”.

¹⁴² I.e., Article 31(3)(b), 1969 Vienna Convention (n119) provides that: “There shall be taken into account, together with the context: ... Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation...”

¹⁴³ Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (21 March 1986); also see Nolte Report (n140), para 111 at 107;

¹⁴⁴ See Draft Conclusion 6 (n138): this variety of forms would include AMM Joint Communiqués and General Assembly Resolutions.

¹⁴⁵ Draft Conclusion 7 (n138).

study, I use the expression “established practice” to include both the established and general practice of an international organisation.

Moreover, in evaluating subsequent practice, the weight which we attach to this “variety of forms” depends on its specificity and repetition.¹⁴⁶ In a decentralised international system, it would be hard to expect different legal tribunals to offer consistent guidance on matters of treaty interpretation. The ILC’s *laissez-faire* approach, then, is a practical suggestion to use international organisations’ practice, as another pathway.

This survey of the legal rules at general international law, which shape the meaning of subsequent practice in interpreting treaties, influences our evaluation of ASEAN’s regional practice: the meaning of treaty terms (i.e., the non-intervention provisions in Articles 2(c) and 10, TAC) evolve over time because of the ASEAN organs’ conduct during the Kampuchean conflict.¹⁴⁷ Therefore, for instance, the ILC’s guidance on repetition is relevant to the actions of ASEAN organs during the Kampuchean conflict. Its repeated invocation of non-intervention at the AMM¹⁴⁸ and General Assembly¹⁴⁹ underscored the regional rule of non-intervention.

Put differently: if the ASEAN organs did not take a position against Vietnam (despite its not being a party to the TAC during the Kampuchean conflict), this omission to act¹⁵⁰ would be contrary to the obligations of ASEAN member states, under Article 10, TAC, to conduct intramural relations in a manner which did not threaten their “political and economic stability, sovereignty, or territorial integrity”. Hence although Vietnam was not an ASEAN member State, during the Kampuchean conflict, its actions in Kampuchea directly implicated Southeast Asia, which implicated ASEAN’s regional peace and security because external powers such as the United States and USSR became involved in Southeast Asia’s international relations. To this extent, Vietnam’s actions had a direct geographical link to ASEAN and its member States’ shared values, in regional terms, to apply non-intervention in favour of the Khmer Rouge’s government in Kampuchea.

¹⁴⁶ Draft Conclusion 8 (n138).

¹⁴⁷ Draft Conclusion 3 (n139).

¹⁴⁸ See its Joint Communiqués (n86).

¹⁴⁹ See the UNGA resolutions (n85).

¹⁵⁰ See my discussion regarding the issuing of common positions immediately after the Kampuchean conflict started and the credentials issues in Chapter Four, Sections III-IV.

This shared value has a regional, hence ASEAN, character but it is largely grounded in the universal (and Western) value that, at general international law, individual States have a legal right to govern its “internal affairs”, which includes the widely reviled Khmer Rouge government of Kampuchea. Governance of a State’s internal politics is an internal matter. The ASEAN organ’s iteration of non-intervention during the Kampuchean conflict had the regional law-making effect of proposing an interpretation of non-intervention’s content, which supported the legal right of a government to govern largely on its own terms.

The practice of ASEAN organs supports this argument in five ways. First, when the Kampuchean conflict ended, it is significant that the ASEAN Summit,¹⁵¹ as ASEAN’s supreme organ, and not the AMM, pointedly and consistently approved the TAC as a “code of conduct”¹⁵² for intramural relations in Southeast Asia.¹⁵³

A “code of conduct” usually (but not always) expresses a non-binding commitment.¹⁵⁴ Second, however, in relation to the TAC, the expression “code of conduct” is a binding and rather precise rule as to the content of non-intervention, as a subsequent practice regarding the interpretation of Articles 2(c) and (especially) 10, TAC. As explained earlier, Article 10, TAC proscribes activities that threaten a party’s “political and economic stability, sovereignty, or territorial integrity”.

Third, Vietnam’s occupation of Kampuchea, its removal of the Khmer Rouge government, and installation of Heng Samrin’s effective government, constituted a threat within the terms of Article 10, TAC. Displaced Kampuchean who were located alongside the Thai-Kampuchean border threatened Thailand’s borders and, more general, the regional security of all ASEAN States. This is because it raised issues concerning which ASEAN member States should receive the displaced

¹⁵¹ See Statements by Chair of ASEAN Summit: 10th Summit (29 November 2004), para 14; 11th Summit (12 December 2005), para 38; 12th Summit (13 January 2007), para 22; 16th Summit (9 April 2010), para 18; 17th Summit (28 October 2010), para 11; 18th Summit (7–8 May 2011), para 10; 19th Summit (17 November 2011), para 9; 20th Summit (3–4 April 2012), para 22 (exceptionally, it approved the TAC as “a key instrument governing inter-state relations to contribute to peace and security in the region”); 21st Summit (18 November 2012), para 11; 22nd Summit (25 April 2013), para 22; 23rd Summit (9 October 2013), para 8; 24th Summit (11 May 2014), para 6; 25th Summit (12 November 2014), para 6 (exceptionally, it approved the TAC’s “norms and principles”); 26 Summit (27 April 2015), para 10; 27th Summit (21 November 2015), para 17; 28th and 29th Summit (6-7 September 2016), para 18, 30th Summit (29 April 2017); para 23, 31st Summit (13 November 2017).

¹⁵² n123.

¹⁵³ See further the operative paragraph in the “ASEAN Foreign Ministers’ Statement on the Occasion of the 40th Anniversary of the Treaty of Amity and Cooperation in Southeast Asia (TAC)” (24 July 2016): (the AMM) “appreciate the importance of the TAC as one of the *key codes of conduct* in the ASEAN-centred regional architecture” (emphasis supplied).

¹⁵⁴ See n152 at 790-793.

Kampuchians, with deeper implications for the political and social fabric of the receiving State.¹⁵⁵ Moreover, in the Cold War context, China, the Soviet Union, and United States became involved in the internal affairs of ASEAN States.¹⁵⁶

Fourth, since 1987, towards the end of the Kampuchean conflict, the TAC was amended to encourage “neighbouring States of the Southeast Asian region” to accede to this treaty: Vietnam, Kampuchea and Lao.¹⁵⁷ Both developments affirm, in legal terms, the argument that the Kampuchean conflict was one which directly affected Southeast Asia as a whole region, even though Vietnam and Cambodia were (then) not a TAC party.

Fifth, before their admission as ASEAN member States in the 1990s, Cambodia, Myanmar, Lao, and Vietnam, as “neighbouring States” in Southeast Asia, had to accept this code of conduct, through accession to the TAC,¹⁵⁸ Finally, in 1992, the ASEAN Summit, as an organ, sponsored¹⁵⁹ a General Assembly resolution¹⁶⁰ to ensure broad acknowledgement that, at general international law, the TAC is consistent with the UN Charter.¹⁶¹

In the light of this body of practice by the ASEAN organs during the Kampuchean practice, a code of conduct as affirmed by the ASEAN Summit and AMM reflects a fairly precise but certainly binding rule in Articles 2(c) and 10, TAC. This rule as to non-intervention’s content with an ASEAN character, in particular, contains the prohibition against the overthrowing of legitimate governments, which partly forms the TAC’s code of conduct. Accordingly, a TAC party is legally entitled to govern its

¹⁵⁵ Generally see Justus M. van der Kroef, “Refugees and Rebels: Dimensions of the Thai-Kampuchean Border Conflict” (1983) 10 *Asian Affairs*, 19.

¹⁵⁶ For instance, China waged a border incursion alongside the Sino-Vietnam borders on 17 February 1979 and gave diplomatic support to the Khmer Rouge at the UN; the Soviet Union supported Vietnam in military and financial terms; the United States provided financial support to Thailand, as the State most directly affected by Vietnam’s invasion of Kampuchea in 1979: generally see Seah, *Foreign Policy and International Law in Singapore* (n133) at 178-180.

¹⁵⁷ 1987 Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia (adopted 15 December 1987).

¹⁵⁸ The practice appears to have evolved after Brunei’s admission to ASEAN as the sixth member State on 7 January 1984. Thereafter, Laos: accession (29 June 1992), admission (23 July 1997); Vietnam: accession (22 July 1992), admission (28 July 1995); Cambodia: accession (23 January 1995), admission (13 April 1999); Myanmar: accession (27 July 1995), admission 23 July 1997; Timor-Leste: accession 13 January 2007, admission to ASEAN is pending.

¹⁵⁹ Para 3(b), “Singapore Declaration of 1992” (28 January 1992): this instrument was circulated as UN Doc A/47/80 (1992) UNYB 147 (30 January 1992).

¹⁶⁰ UNGA Resolution 47/53 (9 December 1992) UN Doc A/Res/47/53 (B).

¹⁶¹ Ibid: “the purpose of the Treaty (TAC) (is) in accordance with the purpose of the Charter of the United Nations including...non-interference in the internal affairs of all nations...”.

“internal affairs” largely on its own terms, despite the Khmer Rouge government’s murderous history. The Khmer Rouge, then, was one stark instance.

Put another way, to overthrow a legitimate government, on grounds of moral repugnance (however that is defined at law) against it, is an activity which threatens the economic, political, and territorial integrity of a TAC party. Despite not being a TAC party during the Kampuchean conflict, its actions in Kampuchea affected the regional peace and security of Southeast Asia,¹⁶² by involving external powers such as the United States, USSR, and China, who participated in the international relations of Southeast Asia. For these reasons, over time, the specific activity of making comments against a TAC party, whose domestic governance did not conform to practices of democratic governance at general international law, perhaps formed part of this code of conduct, a development which was acknowledged in Australia’s accession to the TAC.¹⁶³

Hence, the expression “code of conduct” has become a subsequent practice in the application of conducting intramural relations, in accordance with the TAC. This code of conduct contains fairly precise regional rules on non-intervention, while remaining vague enough to absorb other prohibitions in due course, were significant in persuading Myanmar, Cambodia, and especially Vietnam to seek admission as member States of ASEAN. Their accession, as a pre-condition to ASEAN membership, attests to the binding status and their acceptance of the code of conduct, as contained in the TAC.

The binding status of the TAC as a code of conduct is evident in the accession practice of Australia and the United States.¹⁶⁴ The interpretative declarations by both States confirm that non-intervention’s content with an ASEAN character contains fairly precise rules, which must be limited for good measure, upon accession. The accession practice of Australia and the United States also suggests that the code of conduct,¹⁶⁵ as a form of subsequent practice in the regional application of Articles 2(c)

¹⁶² See the third preambular paragraph in the TAC concerning cooperation and peace “on matters affecting Southeast Asia...”.

¹⁶³ I shortly discuss this point below.

¹⁶⁴ See n152 at 800-815.

¹⁶⁵ See also “Joint Letter by US Senate Committee on Foreign Relations” (10 July 2009), reproduced in (2009) 103 *AJIL* 741 at 742–743; “United Kingdom Explanatory Memorandum” (2007) Cm. 7196.

¹⁶⁵ 106 NIA [2005] ATNIA 14. The NIA is a primary instrument that provides details to Parliament about the Australian Government’s rationale to enter into a treaty. It contains an analysis of the TAC provisions and obligations that bind Australia on accession.

and 10, TAC, can be binding and be evaluated against general rules of international law.

Turning first to Australia, its legal position as expressed in its interpretative declaration specifically addressed non-intervention, as defined in Article 2(c), TAC. Its National Interest Analysis (NIA) said that non-intervention under Article 2(c), TAC did not affect Australia's rights and obligations under the UN Charter.¹⁶⁶ Since non-intervention is not expressly contained in the UN Charter, Australia invoked the UN's purposes, namely the protection of human rights and fundamental freedoms.¹⁶⁷ Non-intervention on this view does not apply to the engagement and comments by Australia on issues of "international interest" concerning a TAC party.

To the United States, non-intervention did not apply at all. On its accession to the TAC, it said: "the United States' accession to the TAC does not affect the United States' rights and obligations under other bilateral or multilateral agreements, and, *noting Article 10*, does not limit actions taken by the United States that it considers necessary to address a threat to its national interests".¹⁶⁸

The sweeping rejection by the US of Article 10 with one word – "noting" – reflected the more specific position of the US Senate, when it gave its advice and consent to the accession of the TAC on the international plane: "...the TAC does not limit the authority of the US government—either the executive branch or the Congress—to take actions that it considers necessary in pursuit of US national interests in the region or with respect to any individual nation."

In response to the interpretative declarations of Australia and the United States,¹⁶⁹ the Chair of the ASEAN Summit (i.e., ASEAN Chair) tellingly said:¹⁷⁰ "(they are) expressed on a non-prejudice basis to the integrity and the object and purpose of the Treaty of Amity and Cooperation in Southeast Asia".¹⁷¹

¹⁶⁶ 106 NIA [2005] ATNIA 14. The NIA is a primary instrument that provides details to Parliament about the Australian Government's rationale to enter into a treaty. It contains an analysis of the TAC provisions and obligations that bind Australia on accession.

¹⁶⁷ See n152 at 805.

¹⁶⁸ "Diplomatic Note of 15 July 2009 by Secretary Hillary Clinton to the ASEAN Chair", reproduced in Congressional Research Service, US Accession to Association of Southeast Asian Nations' Treaty of Amity and Cooperation (26 October 2009) R40583.

¹⁶⁹ See n164.

¹⁷⁰ Article 7(3), ASEAN Charter: The Summit is to be held twice annually and to be hosted by the member State holding the ASEAN Chairmanship.

¹⁷¹ In July 2009, the Chair of the ASEAN Coordinating Council (former AMM), Kasit Piromya, apparently replied to the United States of America Secretary of State, access available at <https://wikileaks.org/plusd/cables/09STATE73798_a.html> (accessed 1 May 2018).

Therefore, despite the legal positions of Australia and USA towards non-intervention's content, their interpretative declarations were still "without prejudice" to the code of conduct as it applied to non-intervention as agreed by all ASEAN member States. From the core proposition's standpoint, the accession practice of Australia and the United States attests to an important point concerning the dynamic tension in the relationship between general and regional international law. Australia and the United States, through their interpretative declarations as to non-intervention, acknowledged the regional (i.e., ASEAN character) content of non-intervention in Articles 2(c) and 10, TAC, as a regional code of conduct.

Importantly, this acknowledgement is manifested in their accession practice by "forcing" the ASEAN character of the TAC's non-intervention content back to the general rules of international law, which diminished the stringency of non-intervention. Thus Australia's invocation of human rights and fundamental freedoms, and the United States' broad language of noting the TAC's Article 10, are assessments of non-intervention's content at general international law, by taking advantage of its descriptive and evaluative vagueness.

Likewise, the ASEAN's Chair's response to the Australian and United States' interpretative declarations on a "non-prejudice basis" to the objectives of the TAC is an (likely unsuccessful) attempt to emphasise the regional content of non-intervention, as a code of conduct with a higher stringency in terms of its obligations between TAC parties *inter se*. However, the regional law of non-intervention with an ASEAN character must still be located and defined in relation to the general rules of international law. As Australia and the United States have indicated, these general rules will include considerations of human rights, fundamental freedoms, as well as matters which involve the participation of Great Powers in maintaining international peace and security.

V. Conclusion

At the outset of this chapter, I explained that the International Relations (IR) literature had correctly studied the Kampuchean conflict as a foundational moment, although in assessing its significance for "ASEAN", the IR literature did not always differentiate its actions as a legal person from its member States. This chapter used one case study, i.e., ASEAN's actions during the long Kampuchean conflict, to demonstrate the

study's core proposition that a distinctive regional law regarding non-intervention emerged and was made by ASEAN organs. Discerning the content of this law, and its regional scope, require recourse to general international law standards. Accordingly, this chapter illustrated the core proposition in two broad ways.

First, and in a significant way for the first time, ASEAN organs served as a venue to advance a distinct regional law of non-intervention. Because of their sustained practice during the Kampuchean conflict, the AMM and ASEAN Standing committee confirmed their functions as ASEAN organs, effectively an established practice, in accordance with its founding instrument, i.e., the Bangkok Declaration 1967.

Second, it is general international law which provides the rules to appraise the functions of ASEAN organs as an established practice. More importantly for this study, general international law permits the framing of the ASEAN organs' practice, in making non-intervention's content as a distinct regional law, on grounds of its practice being consistently connected to a geographical area or shared values in this area of Southeast Asia.

General international law, i.e., the rules of treaty law in Article 31 of the Vienna Convention, also allows us to embrace longitudinal perspectives on the relationship between the TAC's provisions on non-intervention. The TAC was signed in 1976 before the Kampuchean conflict. But the ASEAN organs' subsequent practice, during the Kampuchean conflict from 1979-1990, formed the application of the TAC provisions concerning non-intervention.

Non-intervention's regional content emerged, after the Kampuchean conflict, as a code of conduct which applies to all TAC parties' intramural relations in Southeast Asia. As explained already, this code of conduct includes a prohibition against the overthrowing of legitimate governments. Practically, of course, as a code of conduct, its exact meaning in relation to non-intervention's content is left unclear.¹⁷²

However, the prospects of its legal consequences were taken seriously enough by the treaty practice of Australia and the United States, when they acceded to the TAC. The interpretative declarations of these two TAC parties demonstrate the strength and influence of general international law on regional law. Non-intervention's content,

¹⁷² See further Chapters Five and Six.

then, is circumscribed by these general rules “out there”, typically on grounds of functional concerns,¹⁷³ such as human rights protection and democratic governance (whatever this means),¹⁷⁴ which necessitate international cooperation. It follows that the regional code of conduct, in the TAC, has to change, in a manner which is consistent with the rules of general international law. The next chapter explains how it happens.

¹⁷³ ILC, “Fragmentation of international law: difficulties arising from the diversification and expansion of international law (Report of the study group on the fragmentation of international law, finalized by Martti Koskenniemi)” (13 April 2006) UN Doc A/CN.4/L.682, para 204 at 105.

¹⁷⁴ See Chapter Five.

“International community” is a construct that we use to sound good. It’s something we use when we want to make somebody else feel bad ~ Bilahari Kausikan, former Ambassador-at-Large (Singapore).¹

Chapter Five

NON-INTERVENTION, “DEMOCRATIC” GOVERNANCE, AND HUMAN RIGHTS: MYANMAR

I. Purpose

This chapter illustrates the core proposition with a second case study of ASEAN practice. It shows instances of distinctive regional law-making by ASEAN organs as to non-intervention, with respect to one ASEAN member State – Myanmar. It argues that, while the ASEAN organs make this distinctive form of regional non-intervention, other general rules of international law are gradually influencing and constraining the contours and regional content of non-intervention with an ASEAN character.

Throughout this study, I have discussed various rules that occur at general international law. I have explained the separate legal personality of international organisations (including ASEAN) and its corollaries, namely the separate acts of its organs, and the international responsibilities which might arise.² Additionally, I examined the possibility of regional law, based on geographical links or shared values, at international law which is the result of rules permitting its limited existence alongside general international law.³

Particularly, in relation to non-intervention’s content, I reviewed the present rule of coercion as an element for applying non-intervention.⁴ Pertinently, this rule was formed against the background of the Cold War and communism, both developments which profoundly shaped general international law at a given point in time. Therefore, in the regional law of non-intervention with an ASEAN character, non-intervention was applied by ASEAN organs against Vietnam’s actions in Kampuchea, despite the removal of a murderous Khmer Rouge government.⁵ Accordingly, the actions of ASEAN organs created a fairly precise regional rule regarding non-intervention: the right to govern its “internal affairs”, including murderous regimes such as the Khmer Rouge government. As explained in Chapter Four, this regional rule of non-

¹ See his IPS-Nathan Lectures 2016, *Dealing with an Ambiguous World* (Singapore: World Scientific Publishing, 2017) at 53.

² Chapter Two, Section III.

³ Chapter Two, Section IV.

⁴ Chapter Three, Section VI.

⁵ Chapter Four.

intervention, a code of conduct in managing intra-mural relations between TAC parties, is a subsequent practice in the application of the TAC provisions on non-intervention.

The key argument in this chapter is that ASEAN's regional practice in relation to Myanmar suggests that its regional rule of non-intervention, i.e., the right of a State to govern its "internal affairs", has waned. The vagueness of non-intervention had to be descriptively assessed and evaluated against rules against general international law, at a given point in time. ASEAN's regional law-making of non-intervention is demonstrated through the acts of ASEAN organs towards Myanmar. As ASEAN's conduct of external relations, with other legal persons, to maintain regional peace and security has grown, so its regional law of non-intervention has changed too. In this respect, I focus on the practice of ASEAN organs' in two areas, democratic governance and disaster management, which have become linked to human rights law. The content of non-intervention, particularly its regional quality (i.e., ASEAN character), is created by ASEAN when its other law-making acts in treaty form, as well as emerging rules at general international law, are considered. The code of conduct, which emerged as a subsequent practice in the application of Articles 2 (c) and 10, TAC, concerning non-intervention must be reappraised in the light of new common causes for ASEAN's conduct of external relations as an international organisation. The law-making acts of ASEAN contains a regional quality, i.e., carries an ASEAN character, because of the common causes concerning disaster management and towards Myanmar. As explained in Chapter Two, the geographical "fact" of Southeast Asia is defined and affirmed by these common causes, which aids its regionality. The case study in this chapter, then, advances the core proposition by showing the extent in which regional non-intervention has to change because of the encroaching influence of general rules at international law.

This chapter proceeds as follows. First, it starts with a background to Myanmar's admission as an ASEAN member States and the relevance of the TAC, as a code of conduct, to Myanmar and ASEAN. Second, I examine the Depayin incident of 2003 in Myanmar,⁶ which resulted in the house arrest of Aung Sang Su Kyi. Third, I explore a series of internal developments within Myanmar which led to its government's forfeiture of the ASEAN Chairmanship in 2005.⁷ Fourth, I analyse the ASEAN organ's

⁶ Chapter Five, Section III.

⁷ The ASEAN Summit includes the Heads of State / Government of ASEAN member States; it is the "supreme policy-making body": the Summit meetings are held twice annually and hosted by an ASEAN

statement of “revulsion” regarding Myanmar’s internal affairs during the “safron revolution” in 2007. Fifth, I assess the ASEAN organs’ practice during Cyclone Nargis in 2008 and explain the relevance of the ASEAN Agreement on Disaster Management and Emergency Response (“AADMER”),⁸ as a paradigmatic regional law of giving technical assistance, without express reference to human rights law, during disasters.

These sections demonstrate the distinctive regional character of law-making by ASEAN organs, which shapes non-intervention’s content with an ASEAN character. In other words, they are acts that addressed common goals and values of a specific geographical area.⁹ Against this broad context, I discuss, in the final section, the potential impact of the ILC’s work on disaster management and explore its prospects as general rules of international law in constraining the regional rule of non-intervention by ASEAN organs.

II. Myanmar’s Admission as Member State of ASEAN (1997)

This section briefly introduces the background to Myanmar’s admission as an ASEAN member State. It supports the core proposition by drawing attention to the purpose of a distinctive regional law of non-intervention in admitting new ASEAN members, in the form of a code of conduct concerning intramural relations in Southeast Asia, which was made by ASEAN organs during the long Kampuchean conflict. This reference to the regional content of non-intervention matters. As ASEAN increases its conduct of external relations with other States, the general rules of international law, which shape cooperation conducted under external relations, are influencing the current content of regional rules regarding non-intervention.

Upon taking power in 1988, the State Law and Order Restoration Council (SLORC) in Myanmar were pragmatic about ASEAN membership.¹⁰ The Myanmar government was wary of foreign interventions,¹¹ after its previous experiences with the UK,¹²

member State who is the ASEAN Chair, see Articles 7(1), 7(2)(a) and 7(3)(a), ASEAN Charter respectively.

⁸ ASEAN Agreement on Disaster Management and Emergency Response (adopted 26 July 2005, entered into force 24 December 2009), available <<http://agreement.asean.org/>>.

⁹ On the meaning of non-intervention’s content with an ASEAN character, see Chapter One, Section I.

¹⁰ Renamed the State Peace and Development Council (SPDC) in 1998 (dissolved in 2011).

¹¹ Generally Andrew Selth, “Even Paranoids Have Enemies: Cyclone Nargis and Myanmar’s Fears of Invasion” (2008) 30 *Contemporary Southeast Asia* 379.

¹² Generally Douglas Peers, “Anglo-Burmese Wars (1823–1826, 1852–1853, 1885–1886)” (2011) *The Encyclopedia of War*.

Japan,¹³ and China.¹⁴ Myanmar was reassured by the TAC's "code of conduct", by which ASEAN member States regulated intramural relations in Southeast Asia.¹⁵ It saw itself as an effective government authority¹⁶ in defending the ceasefire with armed ethnic groups across Myanmar.¹⁷

On Myanmar's admission as a member State in 1997,¹⁸ its Prime Minister said at the ASEAN Summit (1998) that "we remain confident that the solidarity of our Association can be further consolidated by reaffirming our basic fundamentals and the code of conduct as laid down in the Treaty of Amity and Cooperation. The guiding principles of respect for sovereignty and non-interference in the internal affairs of one another remain valid today as they were enunciated".¹⁹ To ASEAN, Myanmar's admission was vital to consolidating the TAC's aims of maintaining regional peace and security in Southeast Asia.²⁰ The AMM's joint communique said that "a firm foundation for common action to promote regional cooperation in Southeast Asia is being accomplished. The Foreign Ministers affirmed their commitment to heighten collaboration with Laos and Myanmar to facilitate the integration of both these countries into the mainstream of ASEAN activities."²¹

III. The Waning of Non-Intervention's Content with an ASEAN Character

1) Depayin Incident (2003)

This section contributes to the core proposition by discussing three developments in Myanmar, in which ASEAN organs were actively involved and thus participated in making a distinctive regional law as to non-intervention. These developments show attempts by ASEAN organs to retain by affirming the distinctive regional content of

¹³ Jürgen Haacke, *Myanmar's Foreign Policy: Domestic Influences and International Implications* (Oxford: Routledge, 2006) at 61-83.

¹⁴ *Ibid* at 25-41.

¹⁵ See further Chapter Five, Section III.

¹⁶ I.e., Article 1(c), Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) (1933) 165 LNTS 19.

¹⁷ Also see statement by Singapore's Representative at a UN Security Council meeting on Myanmar (S/PV.5753) on 5 October 2007 at 19: "...we have to be pragmatic. The military is a key institution in Myanmar that cannot be wished away. Any peaceful solution to the crisis will have to involve all parties, including the military. If the military is not part of the solution, there will be no solution."

¹⁸ I.e., 23 July 1997.

¹⁹ "Opening Remark by HE Senior General Than Shwe, Prime Minister of Myanmar" (15 December 1998), at the Sixth ASEAN Summit, available at <<http://asean.org/asean/asean-structure/asean-summit/>>.

²⁰ Treaty of Amity and Cooperation in Southeast Asia (adopted 24 February 1976) (1976) 1025 UNTS 15063; on the TAC, see n15.

²¹ Para 2, "Joint Communique of the 30th ASEAN Ministerial Meeting" (24-25 July 1997).

non-intervention, while being increasingly subject to the strong influence of general rules of international law. In particular, this section also instances the role of a powerful external actor, the United States, in contributing to the strength of general international law, through its conduct of external relations with ASEAN.

ASEAN's actions are distinctly regional because its organs, in this case, acted with respect to Myanmar (a member State). But the regional character, and its distinctiveness, of non-intervention cannot be sustainably isolated from general international law because the issues which engaged non-intervention are of a global (hence general) nature. It is, therefore, arguable that there is a dynamic tension between the influence of general international law on the distinctive regional law-making of non-intervention by ASEAN (organs).

On 30 May 2003, a convoy which carried Aung San Suu Kyi and her supporters was apparently attacked by a government sponsored mob.²² This occurred at Depayin, the Northwest of Myanmar. It was alleged that more than 70 persons were killed by the mob.²³ Aung Sang Suu Kyi was subsequently placed under house arrest by the Myanmar government. Consequently, in June 2003, the AMM said that “we discussed the recent political developments in Myanmar, particularly the incident of 30 May 2003...we urged Myanmar to resume its efforts of national reconciliation and dialogue among all parties concerned leading to a peaceful transition to democracy. We welcomed the assurances given by Myanmar that the measures taken following the *incident* were temporary and looked forward to the early lifting of restrictions placed on Daw Aung San Suu Kyi and the NLD members”.²⁴

It is legally significant that the AMM singled out this “incident”. If there were no consensus within an ASEAN organ at this senior level, no statement would be made in the joint communique.²⁵ Therefore, the statements of ASEAN organs, especially at the Summit and AMM levels, reflect a considerable degree of agreement on specific

²² Generally, Jürgen Haacke, “The Myanmar Imbroglio and ASEAN: Heading towards the 2010 elections” (2010) 86 *International Affairs* 153 at 156.

²³ For this claim, see “Written statement submitted by the Asian Legal Resource Centre (ALRC), a non-governmental organization in general consultative status to the Philippines’s Committee of Human Rights”, available at <alrc.asia/wp-content/uploads/2004/03/ALRC-11b-Depayin_Myanmar.rtf>.

²⁴ See Para 18, “Joint Communiqué of the 36th ASEAN Ministerial Meeting Phnom Penh” (16-17 June 2003) (emphasis supplied).

²⁵ In contrast, for the first time in 2012, the AMM did not issue a Joint Communiqué at its 45th Meeting because there was no consensus on developments in the South China Sea. The importance of the joint communique was attested to by a subsequent statement of the AMM on 20th July 2012, “ASEAN’s Six-Point Principles on the South China Sea”, which are “consistent with” the TAC and ASEAN Charter.

issues.²⁶ The statements of these organs are separate from its member States and constitute ASEAN practice,²⁷ as I elaborate shortly, from which legal conclusions can be drawn.

Returning to the June statement (2003), the AMM indicated that a desirable outcome of Myanmar's political transition should contain some form of "democracy".²⁸ Pertinently, the AMM stated that its discussion of the Depayin incident with Myanmar, as an ASEAN member States, was "without prejudice to the cardinal principle of non-interference".²⁹ Subject to some qualifications that I shortly indicate,³⁰ it is arguable that non-intervention's content regarding the right of a state to govern its "internal affairs", and against the overthrowing of governments, still applies as the TAC's code of conduct.³¹

Consequently, Myanmar responded with a "seven step" roadmap that would result in a "disciplined flourishing democracy", which would involve some form of participation in an election.³² At the highest level, through the ASEAN Summit, ASEAN reacted cautiously to Myanmar's plans, as an international organisation:

²⁶ In contrast, after the *South China Sea Arbitration* award (PCA Case No 2013-19) was handed down on 12 July 2016, the AMM expressly mentioned the subject of the South China Sea: however, the PCA's award was conspicuously omitted because ASEAN member States did not agree on its inclusion, see Paras 110 and 174-181, "Joint Communiqué of the 49th ASEAN Foreign Ministers Meeting" (24 July 2016). For good measure, the Foreign Ministers significantly repeated their "common position" on the South China issue in a separate statement: see Para 4, "Joint Statement of the Foreign Ministers of ASEAN Member States on the Maintenance of Peace, Security, and Stability in the Region" (July 2016).

²⁷For another example, see Para 2, "Full Text of Ambassador Stanley Loh's (i.e., Singapore's ambassador to China) Letter to *Global Times* (China) Editor-In-Chief Hu Xijin, in response to an article by *Global Times*, dated 21 September 2016": "...the proposal to update the Southeast Asia paragraphs in the NAM (i.e., Non-Aligned Movement) Final Document was not done at the last minute *nor by any single ASEAN country*. There was a *common and united ASEAN position*. It was a consensus position of all ten ASEAN members, *based on agreed language from the Joint Communiqué of the 49th ASEAN Foreign Ministers Meeting*. As the current ASEAN Chair, Laos conveyed the group's common position through a formal letter to the former-NAM Chair Iran in July 2016" (emphasis supplied), available at <https://www.mfa.gov.sg/content/mfa/media_centre/press_room/pr/2016/201609/full-text-of-ambassador-stanley-loh-s-letter-to-global-times-edi.html>.

²⁸ See further Para 50, "Chairman's Statement of the 16th ASEAN Summit "Towards the Asean Community: from Vision to Action"" (9 April 2010): "We underscored the importance of national reconciliation in Myanmar and the holding of the general election in a free, fair, and inclusive manner, thus contributing to Myanmar's stability and development."

²⁹ See n24, para 15.

³⁰ See the ASEAN Summit's Press Statement, 2003 (n33).

³¹ See n24, para 27.

³² See "Speech by H.E General Khin Nyunt, Prime Minister of the Union of Myanmar on the Developments and Progressive Changes in Myanmar Naing-ngan" (30 August 2003) (Myanmar Information Committee, Information Sheet No C-2746). The seven steps are as follows:

- (1) Reconvening of the National Convention that has been adjourned since 1996.
- (2) After the successful holding of the National Convention, step by step implementation of the process necessary for the emergence of a genuine and disciplined democratic system.
- (3) Drafting of a new constitution in accordance with basic principles and detailed basic principles laid down by the National Convention.
- (4) Adoption of the constitution through national referendum.

The Leaders welcomed the recent positive developments in Myanmar and the Government's pledge to bring about a transition to democracy through dialogue and reconciliation. The roadmap as outlined by the Prime Minister of Myanmar that would involve all strata of Myanmar society is a *pragmatic approach and deserves understanding and support*. The Leaders also agree that sanctions are not helpful in promoting peace and stability essential for democracy to take root.³³

Its (non-binding) statement on democratic developments in Myanmar can be assessed against international legal rules.³⁴ The reason is because although there is no right to democratic governance at general international law,³⁵ there is some legal basis to political participation,³⁶ election monitoring,³⁷ and broad notions of democracy in the recognition of States.³⁸

For our purposes regarding democratic governance, most of these general rules are contained in the (non-binding) Vienna Declaration on human rights in 1993.³⁹ The AMM's response to the Vienna Declaration (1993) was to affirm its commitment to this declaration.⁴⁰ It accepted the right of (internal) self-determination to advance the people's freedom to "full participation in all aspects of their lives",⁴¹ including a right to determine their "political, economic, social and cultural systems".⁴² Moreover, in terms of legal implications that arise for the Depayin incident of 2003, the AMM already affirmed in the Vienna Declaration that protecting human rights through

(5) Holding of free and fair elections for Pyithu Hluttaws (Legislative bodies) according to the new constitution.

(6) Convening of Hluttaws attended by Hluttaw members in accordance with the new constitution.

(7) Building a modern, developed and democratic nation by the state leaders elected by the Hluttaw; and the government and other central organs formed by the Hluttaw.

³³ "Press Statement by the Chairperson of the 9th ASEAN Summit and the 7th ASEAN + 3 Summit Bali" (7 October 2003), at para 25.

³⁴ "Vienna Declaration and Programme of Action" (25 June 1993) UN Doc 17/Conf 157/24, paras 8-9.

³⁵ Generally Thomas Franck, "Emerging Right to Democratic Governance" (1992) 86 AJIL 4; Susan Marks, "What has Become of the Emerging Right to Democratic Governance?" (2011) 22 EJIL 507. Cf Franck's more restrained piece, by the late 1990s, in "Dr. Pangloss Meets the Grinch: A Pessimistic Comment on Harold Koh's Optimism" (1998–1999) 35 *Houston LR* 683 at 698: "...it may be a fallacy that democracies are more amenable than authoritarian societies to penetration by international rules and legal culture".

³⁶ See the European Union's restrictive measure (i.e., sanctions) in Recital (3), Council Decision 2010/232/CFSP (26 April 2010) against Myanmar: "...the absence of substantive progress towards an inclusive democratisation process, notwithstanding the promulgation of a new electoral law and the announcement of the Government of Burma/Myanmar of multi-party elections to be held in 2010." In Council Regulation (EC) No 194/2008, Feb. 25, 2008, 2008 O.J. (L 66/1), EU member states may not act contrary to the restrictive measures which are "... incompatible with the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, which are common to the Member States."

³⁷ Gregory H Fox, "Election Monitoring: The International Legal Setting" 19 *Wisconsin International Law Journal* (2000–2001), 295; Judith Kelley, "Assessing the Complex Evolution of Norms: The Rise of International Election Monitoring" (2008) 62 *International Organization*, 221–55.

³⁸ "Declaration of Guidelines on the Recognition of New States in Eastern Europe and in the Former Soviet Union", text in (1993) 4 EJIL 72; Colin Warbrick, "Recognition of States" (1992) 41 ICLQ 473.

³⁹ UN Doc A/CONF.157/23 (25 June 1993).

⁴⁰ Para 16, "Joint Communique of the 26th ASEAN Ministerial Meeting" (23-24 July 1993).

⁴¹ Para 8, *ibid*.

⁴² Para 8, n34.

ASEAN as a venue is subject to “respect” for “non-interference in the internal affairs of States”.⁴³

In 1993, this common position of the AMM reiterated the salience of Articles 2(c) and 10, TAC, as a code of conduct, borne out of the Kampuchean conflict. By 2003, however, the ASEAN Summit agreed that intramural relations *inter se* must be conducted on a “higher plane”,⁴⁴ which expressly included the promotion of a “just, democratic and harmonious environment”.⁴⁵ This, then, is the legal background of evolving rules at general and regional international law, on which we must appraise the ASEAN organs’ statements in response to Myanmar, after the Depayin incident in 2003.

Accordingly, non-intervention’s content did not just change. It has waned. This point is evident when we contrast the AMM’s practice against Vietnam’s continued military occupation in Kampuchea: no mention of democracy was made by the AMM because the qualitative aspects of the Khmer Rouge’s internal governance were legally immaterial. In contrast, when the AMM made its statement in 2003 concerning the Depayin incident, which was “without prejudice” to non-intervention, the implications were apparent. As a code of conduct, non-intervention’s vague content in evaluative terms has to be determined by emerging rules at general international law. The next part illustrates this argument, with respect to the legal obligations of Myanmar as an ASEAN member State.

2) Myanmar’s Forfeiture of the ASEAN Chair (2005)

In 2004, the AMM concluded that Myanmar’s “roadmap”⁴⁶ was unsatisfactory with reference to the AMM’s joint communique of 2003:⁴⁷

We recalled and emphasized the *continued relevance* of the Joint Communique of the 36th AMM and the Chairman’s Press Statement of the 9th ASEAN Summit. In this regard, we underlined the need for the involvement of all strata of Myanmar society in the on-going National Convention. We encouraged *all concerned parties* in Myanmar to continue their efforts to effect a *smooth transition to democracy*.⁴⁸

⁴³ Para 17, “Joint Communique of the 26th ASEAN Ministerial Meeting” (23-24 July 1993).

⁴⁴ Para 1, “ASEAN Security Community”, in *Declaration of ASEAN Concord II* (ASEAN Summit, 7 October 2003).

⁴⁵ *Ibid.*

⁴⁶ See n32.

⁴⁷ See n24.

⁴⁸ Para 15, “Joint Communique of the 37th ASEAN Ministerial Meeting” (29-30 June 2004) (emphasis supplied).

The words “all concerned parties in Myanmar” referred to the necessity of involving Aung Sang Suu Kyi and the National League for Democracy (NLD) in the push towards democracy. These statements, agreed at a senior level, have probative value in determining the application of the TAC’s provisions (i.e., Articles 2(c) and 10) on non-intervention. Whereas Article 2(c) TAC is a general provision that prohibits intervention in the conduct of intramural relations, the TAC’s Article 10 is more specific. Article 10, TAC, prohibits intervention that threatens the political, economic, and social aspects of a TAC party.

In other words, the extant – and fairly precise – regional rule against overthrowing governments still applies, however repulsive in moral terms, but this is changing, in terms of the qualitative (i.e., democratic) changes that such governments must make. This part, therefore, develops the core proposition by examining the evolving rules at general international law, which influences (and encroaches onto) the regional content of non-intervention. This point is evident in the AMM’s 2004 statement, which noted Myanmar’s fledgling (but still inadequate) attempt to democratise, and its implications for Myanmar’s putative assumption of the ASEAN’s chairmanship in 2005.⁴⁹

For instance, since the Depayin incident (2003), the United States enacted national laws whose goal is manifest in its title: the Burmese Freedom and Democracy Act (BFDA).⁵⁰ The BFDA clearly required intervention in Myanmar’s internal affairs: the act imposed sanctions against the military government,⁵¹ aimed at the strengthening of “Burma’s democratic forces”,⁵² recognised the NLD as a “legitimate representative” of the Burmese people.⁵³ Relatedly, the United States also banned Myanmar imports and export of financial services into Myanmar.⁵⁴ The sanctions are subject to Myanmar satisfying specific conditions, which are established in the BFDA.⁵⁵ The following BFDA conditions are relevant at general international law: the Myanmar government must make “substantial and measureable progress to end violations of

⁴⁹ Third Declaration(a) of the 1967 Bangkok Declaration (1983) 1331 UNTS 235 provides for an annual AMM based on rotation: it was Myanmar’s turn.

⁵⁰ 117 *STAT* 864 (28 July 2003).

⁵¹ I.e., SPDC (see n10).

⁵² See Preamble and Section 3(b), n50.

⁵³ Section 2(14), n50.

⁵⁴ I.e., Executive Order 13310, “Blocking Property of the Government of Burma and Prohibiting Certain Transactions” (23 July 2003).

⁵⁵ Generally, the sanctions were ineffective because Myanmar had alternative trading partners, see Ardeth Maung Thawngmung & Paul Sarno, “Myanmar Impasses: Alternatives to Isolation and Engagement?” (2006) 14 *Asian Journal of Political Science* 40.

internationally recognised human rights”;⁵⁶ the Myanmar government must implement a democratic government that includes freedom of speech, the press, and of association.⁵⁷

Against this clear position of the United States’ national law, the unilateral statements by its high ranking representatives on the international plane are legally material. For example, Colin Powell, as Secretary of State, said that he would “press the case” with ASEAN to exert more pressure on “thugs” (i.e., Myanmar government) who have refused to restore democracy.⁵⁸ Furthermore, at the Security Council in 2007, the United States advanced a powerful claim of universality as follows: “This is an issue for the entire international community. The United States has done its part to back up its words with actions that will serve to ratchet up pressure on the regime...Burma’s neighbours have a special role and responsibility. We also urge ASEAN and its member States to build on their efforts to increase pressure on the Burmese regime”.⁵⁹

It is against this important context with implications for ASEAN’s conduct of external relations with the United States that, on 11 April 2005, Myanmar’s chairmanship was discussed by the AMM, as expressed by the ASEAN Chair, then held by Singapore’s foreign minister:

ASEAN (AMM) ministers expressed their frank views on the issue. We re-affirmed that ASEAN cannot interfere in the domestic affairs of Myanmar...On ASEAN’s part, there is great reluctance to take away Myanmar’s Chairmanship as this will set a bad precedent. However, ASEAN is in danger of being dragged into Myanmar’s internal politics because of the Chairmanship issue which in turn could complicate Myanmar’s internal political situation. It would be best to decouple the 2 (sic) issues.

The Myanmar Foreign Minister listened carefully and said that he would convey these views back to Yangon. We realise that this is a tough decision for Myanmar to make...

I am not unhopeful. During PM Lee’s recent visit to Myanmar, he had met with the top Myanmar leadership. They had expressed to PM Lee that Myanmar was not a “selfish” country and would take into account ASEAN’s views and consider ASEAN’s interests.⁶⁰

⁵⁶ Section 3(3)(a), n50.

⁵⁷ Section 3(3)(b), n50. Also see the Security Council draft resolution which was sponsored by the United States and UK (UN Doc S/2007/14, 12 January 2007): Operative Para 6 states “Calls on the Government of Myanmar to begin without delay a substantive political dialogue, which would lead to a genuine democratic transition, to include all political stakeholders...”.

⁵⁸ Colin Powell, “It’s Time to Turn the Table on Burma’s Thugs”, *Wall Street Journal*, 12 June 2003: notably, this op-ed piece is archived on the website of the US Department of State, available at <<http://2001-2009.state.gov/secretary/former/powell/remarks/2003/21466.htm>>.

⁵⁹ “Statement by the United States representative at Security Council Meeting” (5 October 2007) UN Doc S/PV.5753, at 12.

⁶⁰ “Remarks to the media by Singapore Foreign Minister George Yeo following the AMM retreat” (11 April 2005), access available at <https://www.mfa.gov.sg/content/mfa/overseasmission/manila/press_statements_speeches/press_releases/2005/200504/remarks_to_the_mediaby singaporeforeignministergeorgeyeofollowing.html>.

Myanmar did forgo its chairmanship, to which the AMM replied as follows:⁶¹

We have been informed by our colleague, Foreign Minister U Nyan Win of Myanmar that the Government of Myanmar had decided to relinquish its turn to be the Chair of ASEAN in 2006 because it would want to focus its attention on the ongoing national reconciliation and democratisation process... We also express our sincere appreciation to the Government of Myanmar for not allowing its national preoccupation to affect ASEAN's solidarity and cohesiveness. The Government of Myanmar has shown its commitment to the well-being of ASEAN and its goal of advancing the interest of all Member Countries...⁶²

A year later, in 2006, the AMM again addressed Myanmar's democratisation process and concluded:

We expressed concern on the pace of the national reconciliation process and hope to see tangible progress that would lead to peaceful transition to democracy in the near future. We reiterated our calls for the early release of those placed under detention and for effective dialogue with all parties concerned. We expressed our support for the *constructive role taken by the Chairman of the 39th ASEAN Standing Committee* and further discussed the *outcome of his visit to Myanmar* on 23-24 March 2006.⁶³

The nature of ASEAN actions, as an organ, in this 2006 statement bears emphasis. This is because the AMM, in fact, agreed a common position on the release of Aung San Suu Kyi from her house arrest, expressed through the Chair of the AMM.⁶⁴ Finally, the ASEAN Summit justified ASEAN had to act this way towards a member State because "we agreed on the need to preserve ASEAN's credibility as an effective regional organization by demonstrating a capacity to manage important issues within the region".⁶⁵

Though the obligations of the ASEAN Charter were not yet in force, Myanmar had already acceded to, on its admission as an ASEAN member State on 23 July 1997, "all ASEAN Declarations, Treaties (i.e., including the TAC) and Agreements".⁶⁶ The AMM particularly "noted" Myanmar's accession to the TAC two years before its admission.⁶⁷

Returning to the AMM's 2006 statement, therefore, ASEAN "credibility as an effective regional organization" was being undermined by Myanmar for failing to adhere to the fundamental aim of maintaining regional peace and security in the TAC and Bangkok

⁶¹ Its first chairmanship would be a decade later in 2016.

⁶² "Statement by the ASEAN Foreign Ministers Vientiane" (26 July 2005).

⁶³ Para 79, "Joint Communiqué of the 39th ASEAN Ministerial Meeting" (25 July 2006). Emphasis supplied.

⁶⁴ Ibid, paras 79-80.

⁶⁵ "Chairperson's Statement of the 12th ASEAN Summit H.E. the President Gloria Macapagal-Arroyo: "One Caring and Sharing Community"" (13 January 2007).

⁶⁶ See second preambular paragraph of the 1997 Declaration on the Admission of the Union of Myanmar into the Association of Southeast Asian Nations, available at <<https://cil.nus.edu.sg/database/single-database/?id=55>>.

⁶⁷ Ibid.

Declaration (1967),⁶⁸ to which Myanmar had agreed in 1997. The reason is because the United States had become involved in shaping how ASEAN should conduct its external relations because of Myanmar's lack of democratisation and protection of human rights,⁶⁹ of which both can be appraised in legal terms at general international law.

As an example, observe the unilateral but public statements which were made by senior members of the United States government, although the United States did not formally express a public position to ASEAN within the venue of international organisations. The Secretary of State Colin Powell said that "we also speak out frequently and strongly in favor of the National League of Democracy, and against the SPDC. I will press the case in Cambodia next week when I meet with the leaders of Southeast Asia, despite their traditional reticence to confront a member and neighbor of their association, known as Asean".⁷⁰

Since ASEAN now conducts external relations with other international legal persons, this common cause of being a "primary driving force"⁷¹ in the regional peace and security of Southeast Asia suggests that the legal space that is left to determine non-intervention's regional content with an ASEAN character, then, has diminished in terms of its stringency as an obligation, as the next part shows.

3) The AMM Expresses "Revulsion" Against Myanmar

This part builds on the core proposition by demonstrating the changes to the regional content as to non-intervention, under the influence of general international law, with respect to democratic governance. In August 2007, mass protests across Myanmar erupted. This was a reaction to the sudden removal of fuel subsidies that affected the cost of living.⁷² Because of the government's aggressive response, the "saffron revolution" (led by monks) erupted briefly.⁷³ There were reports of automatic weapons being used against the demonstrators.⁷⁴ A military presence encircled the

⁶⁸ I.e., Second Declaration (2) to promote regional peace and security through respect for the UN Charter, n49.

⁶⁹ See statements by Secretaries of State Colin Powell in *Wall Street Journal*, "Get Tough on Rangoon", 12 June 2003, reproduced in Congressional Record Volume 149, Number 86, available at <<https://www.gpo.gov/fdsys/pkg/CREC-2003-06-12/html/CREC-2003-06-12-pt1-PgS7823-2.htm>>.

⁷⁰ Ibid.

⁷¹ See discussion in Part (3) below.

⁷² "Burma Leaders Double Fuel Prices", *BBC News* (15 August 2007), available at <<http://news.bbc.co.uk/2/hi/asia-pacific/6947251.stm>>.

⁷³ Haacke, n22 at 151 and 156.

⁷⁴ "Statement by ASEAN Chair, Singapore's Minister for Foreign Affairs George Yeo in New York, 27 September 2007."

monasteries and streets across cities.⁷⁵ Hence, on 27 September 2007, the AMM agreed a remarkable statement in its joint communique which said that it “expressed their revulsion to Myanmar Foreign Minister Nyan Win over reports that the demonstrations in Myanmar are being suppressed by violent force and that there has been a number of fatalities”.⁷⁶ Alluding once more to the consequences of Myanmar’s ASEAN membership, the AMM added that “the developments in Myanmar had a serious impact on the reputation and credibility of ASEAN.”⁷⁷

Since the Cold War ended, ASEAN had long claimed its role as a “primary driving force” of regional peace and security.⁷⁸ By 2003, the ASEAN Summit approved closer cooperation by member States through an ASEAN Political and Security Community. Its purpose is to be “open and outward looking” in its engagement of dialogue partners.⁷⁹ The ASEAN Charter codified these goals of conducting external relations in treaty form.⁸⁰

It is against this background that ASEAN’s statements in 2006⁸¹ and 2007⁸² can be read as acts of regional law-making regarding non-intervention’s content, which involve States from a geographical area who share common causes in maintaining its regional peace and security. Accordingly, because the domestic governance of Myanmar, an ASEAN member State, appears to fall below the general rules of international law, i.e., by denying Aung San Suu Kyi her political participation in elections, this affects ASEAN’s effective conduct of external relations with other legal persons, especially the United States. As a Great Power, the tacit acknowledgment by the United States of ASEAN’s “centrality” in the regional peace and security of Southeast Asia is indispensable. This is evidenced by the United States’ accession to the TAC, which signified its endorsement of ASEAN’s role in creating a code of conduct in Southeast Asia.⁸³

⁷⁵ See n59 at p 13.

⁷⁶ See n74.

⁷⁷ See n74.

⁷⁸ Para 4, “ASEAN Regional Forum (ARF), A Concept Paper” (1995): the ARF is an annual multilateral dialogue of 27 members between ASEAN member States and other States, access available at <<https://2001-2009.state.gov/t/pm/rls/fs/12052.htm>>.

⁷⁹ Para 9, Declaration of ASEAN Concorde II (7 October 2003), available at <http://asean.org/?static_post=declaration-of-asean-concord-ii-bali-concord-ii>.

⁸⁰ Articles 1(15), 2(m), and 41(3) of the ASEAN Charter.

⁸¹ I.e., “Joint Communique of the 39th ASEAN Ministerial Meeting” (25 July 2006)(n63).

⁸² I.e., “Statement by ASEAN Chair, Singapore’s Minister for Foreign Affairs George Yeo in New York, 27 September 2007” (n74).

⁸³ See Chapter Four, Section IV, Part 2.

Compared with the ASEAN organs' practice with respect to the murderous past of the Khmer Rouge government during the Kampuchean conflict, it would appear that the content of non-intervention in a regional context had waned by this point. Previously, non-intervention's content concerned the prioritisation of condemnation and non-recognition of Vietnam's occupation, even if that meant the support of a murderous regime as the Kampuchean government. In other words, the vague content of non-intervention, both descriptively and evaluatively, must be reappraised in the light of ASEAN's new common causes (which engage the general rules of international law) in contrast to the Kampuchean conflict. This part, therefore, supports the core proposition by showing the dynamic tension in the relationship between general and regional international law, and how regional non-intervention gradually loses its fairly precise rule to govern its "internal affairs".

To conclude this part, three points bear stressing. First, from the Depayin incident, to Myanmar's forfeiture of its ASEAN chairmanship, and finally the AMM's expression of "revulsion", the ASEAN organs were acting in a separate capacity at international law from its member States. Second, then, ASEAN member States had agreed and acquiesced to the capacity of ASEAN organs at senior levels to act this way. Third, therefore, the statements by the ASEAN organs in relation to Myanmar are regional law-making and form an established practice,⁸⁴ in relation to non-intervention's content in Articles 2(c) and 10, TAC. In this respect, the ASEAN organs' established practice against Myanmar points to changes (i.e., diminutions) in non-intervention's content as a code of conduct between member States.⁸⁵ The next section develops this proposition by examining ASEAN's practice during cyclone Nargis.

IV. Cyclone Nargis: The Regional Character of & Law-Making by ASEAN Organs

1) Purpose

This section furthers the core proposition by analysing the distinctly regional acts of ASEAN organs, with respect to its regional disaster management. It highlights specific developments, i.e., the regional acts of various ASEAN organs, accorded significance by general international law. In short, the general rules of international law (on treaties

⁸⁴ I.e., a body of practice which forms an integral aspect of that international organisation's rules: see Para 25, ILC, "Draft articles on the law of treaties between States and international organizations or between international organizations with commentaries" (1982) Vol II, *ILC Yearbook Part Two* at 21; endorsed by ICJ in para 22, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (Advisory Opinion) [1971] ICJ Rep 16.

⁸⁵ See further Chapter Four, Section III.

and international responsibility) permit our identification of these specific developments as distinctively regional acts. The regional content of non-intervention is embodied in these specific developments, rules which were designed to reserve control and direction exclusively to member States', as part of their "internal affairs".

This section, therefore, shows how ASEAN organs act separately from ASEAN member States, in creating a regional law of non-intervention under the TAC. The State practice of this period is qualitatively different from the Kampuchean practice, which I argue marks a change in ASEAN's practice regarding non-intervention. I start with an overview of Cyclone Nargis's immediate effects on Myanmar that necessitated some kind of regional response from ASEAN. Next, I explore the practice of the ASEAN Emergency Rapid Assessment Team (ERAT) and Tripartite Core Group (TCG), organs which performed functions for ASEAN during Cyclone Nargis in 2008. Non-intervention's content, I argue, is determined through an evaluation of ASEAN's regional practice, an accretion of established practice in relation to Myanmar, against ASEAN treaties and general international law.

2) Cyclone Nargis's Background

The powerful cyclone Nargis struck and devastated Myanmar on the night of 2 May 2008. By July, the dead and missing were estimated to be 140,000 people.⁸⁶ At least 2.4 million people were affected by this tragedy.⁸⁷ The Myanmar government responded the next morning,⁸⁸ but the scale of the devastation overwhelmed its resources.⁸⁹ It determined that external assistance would be supplied bilaterally. Assistance was only to be channelled, through the government, to the victims.⁹⁰

The pertinent rules of general international law bear emphasis. The ASEAN Charter was signed on 20th November 2007.⁹¹ It would enter into force on 15 December 2008, after the cyclone struck on 2 May 2008. All member States, including Myanmar, are obliged at law not to act in ways which defeat the object and purpose of the Charter,

⁸⁶ For the death toll, see "Post Nargis Joint Assessment (Report by Myanmar Government, ASEAN and UN)" (July 2008) (2008) *UNYB* 422, 883 and 1037.

⁸⁷ For a formal account by the ASEAN Secretariat, see *Compassion in Action: The Story of the ASEAN-Led Coordination in Myanmar* (Jakarta: ASEAN Secretariat, 2010) ("Compassion Report") at 11.

⁸⁸ Para 1, "ASEAN Emergency Rapid Assessment Team Mission Report" (9-18 May 2008), available at <<http://www.asean.org/uploads/archive/21558.pdf>>.

⁸⁹ *Ibid.*

⁹⁰ See *Compassion Report*, n87 at 22.

⁹¹ This treaty entered into force on 15 December 2008, after Cyclone Nargis. For an early view of this treaty, see Daniel Seah, "The ASEAN Charter" (2009) 58 *ICLQ* 197.

in accordance with the customary rule⁹² in Article 18, 1969 Vienna Convention.⁹³ ASEAN's actions from 2 May 2008 and the consequences for non-intervention's content, therefore, can be appraised against the legal backdrop of the ASEAN Charter being about to come into force.

3) The ASEAN Emergency Rapid Assessment Team (ERAT)

This part advances the core proposition by showing how ASEAN's law-making actions during Cyclone Nargis, with respect to Myanmar, are intrusive acts which undercut non-intervention's regional content when we assess them against general rules of international law. In this respect, Southeast Asia is a disaster prone region and forms 40 percent of the world's total natural disasters in the last decade.⁹⁴ After the devastating earthquake and tsunami in the Indian Ocean on 26 December 2004,⁹⁵ ASEAN member States agreed the ASEAN Agreement on Disaster Management and Emergency Response ("AADMER").⁹⁶ A technical, operational, and regulatory agreement,⁹⁷ the AADMER was inspired by the Hyogo Declaration (2005)⁹⁸ and prioritises⁹⁹ disaster risk reduction,¹⁰⁰ through "effective mechanisms" to reduce loss of life and early warning.¹⁰¹

Put simply, the AADMER adopts the established cycles of disaster management starting from mitigation,¹⁰² preparedness,¹⁰³ and finally response.¹⁰⁴ Therefore, the treaty's objective is to provide "effective mechanisms" to address these cycles of disaster management.¹⁰⁵ The operational (and practical) emphasis of the AADMER bears emphasis because it must now be evaluated alongside the ILC's recent work,

⁹² *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7 at 38. See also Para 14, Anthony Aust, "Vienna Convention on the Law of Treaties (1969)", (2006) MPEPIL.

⁹³ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

⁹⁴ Debby Guha-Sapir, Femke Vos, Regina Below, and Sylvain Ponsérre, *Annual Disaster Statistical Review 2011 (The Numbers and Trends)* at 29, available at <https://cred.be/sites/default/files/2012.07.05.ADSR_2011.pdf>.

⁹⁵ See Hyogo Declaration, n98.

⁹⁶ I.e., ASEAN Agreement on Disaster Management and Emergency Response (n8).

⁹⁷ I.e., ASEAN Agreement on Disaster Management and Emergency Response (n8): see Para 21, "Chairman's Statement of the 11th ASEAN Summit" (12 December 2005); Paras 35 and 36, "Joint Communique of the 38th ASEAN Ministerial Meeting" (26 July 2005).

⁹⁸ "Hyogo Declaration and Hyogo Framework for Action 2005-2015" (18-22 January 2005) UN Doc A/CONF.206/6.

⁹⁹ Parts II and III, AADMER (n8).

¹⁰⁰ Article 6(2), AADMER (n8).

¹⁰¹ Article 2, Part IIs and III, AADMER (n8).

¹⁰² Article 6, AADMER (n8).

¹⁰³ Articles 7-9, AADMER (n8).

¹⁰⁴ Articles 10-16, AADMER (n8).

¹⁰⁵ Article 2, AADMER (n8).

which as I explain below is an (unwelcome) candidate for progressive development of international rules regarding disaster management. Accordingly, the overarching principles of the AADMER are as follows: respect for the treaty parties' "sovereignty, territorial integrity and national unity" in accordance with the TAC;¹⁰⁶ affected State who requests assistance has "overall direction, control, co-ordination and supervision".¹⁰⁷

The AADMER does not use the language of "duties", a term which the ILC had introduced into its work on disaster management, which I discuss below.¹⁰⁸ Instead the AADMER clearly uses the term "general obligations"¹⁰⁹ which are binding but expressly confined to the following: cooperation during the three cycles of disaster management, which includes agreeing to standby arrangements for disaster relief and emergency response; immediate response by the affected State to a disaster within its territories; parties of AADMER are to respond promptly to a request for assistance from an affected State.

In other words, because the AADMER is an agreement in treaty form between ASEAN member States regarding these areas of cooperation, disaster management is not just a sovereign matter for an ASEAN member States. Disaster management is not exclusively an "internal" matter for an affected ASEAN member State, in relation how it treats its victims during a disaster situation.

Be that as it may, the words "human rights" also did not appear in the text of the AADMER. Indeed, Article 3(1) of AADMER alludes to the code of conduct, i.e., non-intervention, and affirms the TAC's relevance, as follows: "the sovereignty, territorial integrity and national unity of the Parties shall be respected, in accordance with the Charter of the United Nations and the Treaty of Amity and Cooperation in Southeast Asia, in the implementation of this Agreement."

As I explain in the next section, the AADMER's content in this respect must now be evaluated against general rules of international law on human rights. For now, and returning to the matter of cyclone Nargis, I draw attention to the actions of the ASEAN organs. First, the ASEAN Secretariat was quick to offer assistance after the cyclone struck Myanmar. On 9 May 2008, the ASEAN Secretary-General wrote to relevant

¹⁰⁶ Article 3(1), AADMER (n8).

¹⁰⁷ Article 3(2), AADMER (n8).

¹⁰⁸ See Chapter Five, Section V.

¹⁰⁹ See Article 4, AADMER (n8).

Myanmar ministers requesting “quick admission of the ASEAN relief and rescue teams to assist in Myanmar’s ongoing relief efforts”.¹¹⁰ He conveyed a similar message by inviting Myanmar’s head of mission in Jakarta to the ASEAN Secretariat.¹¹¹

That same day, the Myanmar Government apparently requested that the ASEAN Secretary-General send an ERAT to assess the nature of the damage inside Myanmar.¹¹² With some subtlety, the Secretary-General said that “we have worked 24/7 to raise a level of trust and to allow our rapid assessment team in. We are trying to get around a lot of suspicion and sensitivities and mistrust.”¹¹³

Only the ERAT was allowed access to the severely afflicted Delta region in Myanmar from 9-18 May 2009.¹¹⁴ Although the ERAT’s establishment was not fully operational when the cyclone struck, ERAT had only participated in simulations¹¹⁵ and, in this context, it comprised firefighting and medical teams, as well as experts on hazardous materials from Brunei, Cambodia, Malaysia, the Philippines, and Singapore.

Practically, ERAT basis as part of AADMER’s “regional standby arrangements”¹¹⁶ was contained in a non-binding document called “Regional Standby Arrangements and Coordination of Joint Disaster Relief and Emergency Response Operations.”¹¹⁷ In short, the legal basis for ASEAN’s preparedness for disasters, i.e., its regional “standby arrangements”, is rooted in Article 8(2) of the AADMER.¹¹⁸ Hence it was

¹¹⁰ ASEAN Secretariat Press Release, “ASEAN Stands Ready to Help the Affected Population in Myanmar in Response to Cyclone Nargis”, available at <<http://reliefweb.int/report/myanmar/asean-stands-ready-help-affected-population-myanmar-response-cyclone-nargis>>.

¹¹¹ *Ibid.*

¹¹² *Media Release ASEAN forms Emergency Rapid Assessment Team for Myanmar*, ASEAN Secretariat, 13 May 2008: “The team is being assembled by the ASEAN Secretariat in coordination with the ASEAN Committee on Disaster Management (ACDM) and the Government of Myanmar”, available at <http://asean.org/media-release-asean-forms-emergency-rapid-assessment-team-for-myanmar/> (emphasis supplied)

¹¹³ ASEAN Secretariat Media Release, “ASEAN to lead International Coalition of Mercy for Myanmar, Secretary General of ASEAN Surin Pitsuwan to meet World Bank President Robert Zoellick in Washington DC” (13 May 2008), access available at <<http://asean.org/media-release-asean-to-lead-international-coalition-of-mercy-for-myanmar-secretary-general-of-asean-surin-pitsuwan-to-meet-world-bank-president-robert-zoellick-in-washington-dc/>>.

¹¹⁴ See n87 at 35.

¹¹⁵ Announcement by the ASEAN Committee on Disaster Management (ACDM), “ASEAN’s Regional Emergency Response and Humanitarian Assistance Capacities Put to the Test in Simulated Typhoon Disaster Scenario” (22 August 2008).

¹¹⁶ Article 8(2)(a), AADMER (n8).

¹¹⁷ Para 27, “Standard Operating Procedure for Regional Standby Arrangements and Coordination of Joint Disaster Relief and Emergency Response Operations” (March 2008).

¹¹⁸ Articles 8(2), AADMER (n8): “The Parties shall, as appropriate, prepare Standard Operating Procedures for regional co-operation and national action required under this Agreement including the following: a. regional standby arrangements for disaster relief and emergency response...”

against this background that, when cyclone Nargis struck and the Myanmar government requested an assessment team from ASEAN, ERAT had already existed.

Pertinently, the ASEAN organs acknowledged the ERAT's functions during a disaster,¹¹⁹ through the ASEAN Committee on Disaster Management ("Committee")¹²⁰ and the AMM.¹²¹ Particularly, the Committee's competence to produce the standard operating procedures is based on the AADMER, which justifies the ERAT's actions on grounds of facilitating an effective joint response during a disaster.¹²²

Legal rules, though being progressively developed, at general international law also form a basis to evaluate the legality of the ERAT. Under Article 6(1), ARIO, the conduct of an organ or agent, in the performance of a function can be considered an act of that international organisation.¹²³ In this respect, the ASEAN Secretariat recognised the ERAT as including "experts with specific knowledge in coordination and liaison, water and sanitation, health, logistics and food".¹²⁴

Therefore, there is arguably an organic link between ASEAN and the acts of ERAT members. ERAT members were acting as "agents"¹²⁵ who performed ASEAN acts on the international plane.¹²⁶ An agent is any person or entity, other than an organ, which helps an international organisation to carry out its functions.¹²⁷ Through

¹¹⁹ "11th Meeting of the ASEAN Committee on Disaster Management" (March 2008).

¹²⁰ Under Annex 1 of the ASEAN Charter, this Committee is an ASEAN Sectorial Ministerial Body, which in turn is provided for in Article 10 of the Charter.

¹²¹ Para 34, "Joint Communiqué of the 41st ASEAN Ministerial Meeting" (21 July 2008): "We also looked forward to the operationalisation of the ASEAN Standby arrangements and Standard Operating Procedures..."

¹²² Article 8(2), AADMER: "The Parties shall, as appropriate, prepare Standard Operating Procedures for regional co-operation and national action required under this Agreement including the following: (a) regional standby arrangements for disaster relief and emergency response..."

¹²³ See Chapter Two, Section III, Part 4.

¹²⁴ See n113.

¹²⁵ See ICJ in *Reparation for Injuries Suffered in the Service of the United Nations* [1949] ICJ Rep 174 at 177: the word 'agent' (is used) in the most liberal sense, ...any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions – in short, any person through whom it acts."; Article 2(d), "Draft Articles on the Responsibility of International Organizations, with Commentaries" (2011) UN Doc A/66/10 ("ARIO"): "...agent of an international organization" means an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts."

¹²⁶ Article 2(d), ARIO. For clarity, I am *not* referring to the distinct issue of an international organisation acting as an agent for a member State. In this specific and rare sense, the consent of the State (as principal) must be unequivocal: see Dan Sarooshi, *International Organization and Their Exercise of Sovereign Powers* (Oxford: Oxford University Press, 2007), especially Chapter 4. See also *Reparation*, n125 at 177.

¹²⁷ Article 6(1), ARIO (see n125): see further Para 2, "ASEAN Emergency Rapid Assessment Team Mission Report" (9-18 May 2008) ("ERAT Report") at 1: "In line with the provisions under the AADMER (i.e., ASEAN Treaty, n7), the ACDM (i.e., Committee, n120) organised, constituted and deployed for the first time its ASEAN Emergency Rapid Assessment Team (ERAT) with representatives from Brunei Darussalam, Malaysia, Philippines, Singapore and the ASEAN Secretariat." (emphasis supplied). These

adoption of conduct by ERAT, ASEAN organs, namely the ASEAN Summit,¹²⁸ Secretary-General,¹²⁹ and Committee¹³⁰ have also endorsed the ERAT's actions and functions in non-binding instruments.¹³¹ Instructively, after Cyclone Nargis, technical reports which involved ERAT's participation were prepared based on the AADMER,¹³² a development which was acknowledged by the AMM in its joint communiqués.¹³³ ASEAN, therefore, served as a venue to permit more intrusive acts which undercut non-intervention's content in the months after Cyclone Nargis, as the next part explains.

4) The ASEAN Foreign Ministers' Meeting of 19 May 2008¹³⁴

This part supports the core proposition by showing the dynamic tension between regional and general international law, and how the general rules strongly influence changes to extant regional law regarding non-intervention. After the devastation of Cyclone Nargis, there was an urgent need to coordinate humanitarian issues. There

words raise issues of effective control that concerns the international responsibility of ASEAN: this matter is beyond the scope of this chapter.

¹²⁸ Paras 5 and 9, "ASEAN Declaration on Enhancing Cooperation in Disaster Management" (9 October 2013). See also Operative Para Six, "ASEAN Declaration on ONE ASEAN, ONE RESPONSE: ASEAN Responding to Disasters as One in The Region and Outside The Region" (6 September 2016) (n8): the ASEAN Summit "endorse" the ERAT as an "official resource of ASEAN" under the ASEAN Treaty.

¹²⁹ See n113.

¹³⁰ On 27 August 2008, a disaster simulation exercise was conducted by the ASEAN Coordinating Centre for Humanitarian Assistance (Article 20, ASEAN Treaty) with a codename called ARDEX-08. See "Announcement by the ASEAN Committee on Disaster Management" (22 August 2008): "ARDEX-08 will draw on lessons learnt from the mobilisation of the ASEAN-ERAT after Cyclone Nargis in Myanmar and the Post-Nargis Joint Assessment. The deployment of ASEAN-ERAT to Myanmar, under the ASEAN Standby Arrangements and Standard Operating Procedure (SASOP) for disaster emergency response operations, was the first-ever experience for ASEAN."

¹³¹ In contrast, for an academic view that discusses the legal relevance of "personal intimations and emotional fervour" of specific actors during Cyclone Nargis: see Karin Loevy, "The Legal Politics of Jurisdiction: Understanding ASEAN's Role in Myanmar's Disaster, Cyclone Nargis" (2008) 5 *Asian Journal of International Law* 55 at 81-82. See also: "ACDM Joint Statement on the Occasion of the 4th Ministerial Conference for Disaster Risk Reduction" (25-28 October 2010) at para 6; "Chairman's Statement of the Second Meeting of the Conference of Parties to the ASEAN Agreement on Disaster Management and Emergency Response" (30 May 2013) at para 3; "Chairman's Statement of the Third Second Meeting of the Conference of Parties to the ASEAN Agreement on Disaster Management and Emergency Response and Second ASEAN Ministerial Meeting on Disaster Management" (16 October 2014); "Chairman's Statement of the Fourth Meeting of the Conference of Parties to the ASEAN Agreement on Disaster Management and Emergency Response and Third ASEAN Ministerial Meeting on Disaster Management" (16 December 2015) at para 3.

¹³² See "ASEAN Agreement on Disaster Management and Emergency Response (AADMER) (Work Programme for 2010 – 2015)" at 48 and 119; "Strategy and Priorities for AADMER Programme Phase 2 (2013-2015)" at 7 and 39; "AADMER Work Programme (2016-2020)" at 107 and 123.

¹³³ For high-level acknowledgement of the work programmes (ibid), see Para 42, "Joint Communiqué of the 43rd ASEAN Foreign Ministers Meeting" (19-20 July 2010); Para 43, "Joint Communiqué of the 46th ASEAN Foreign Ministers Meeting" (29-30 June 2013); Para 70, "Joint Communiqué of the 49th ASEAN Foreign Ministers Meeting" (24 July 2016).

¹³⁴ Note: after the ASEAN Charter's entry into force on 15 December 2008, the longstanding organ, ASEAN Ministerial Meeting (AMM), was renamed the "ASEAN Coordinating Council" (Article 8). Consequently, its communiqués were renamed "ASEAN Foreign Ministers' Meeting" and not "ASEAN Ministerial Meeting". As this Chapter progresses, I will adopt this change in nomenclature to reflect the actual wording of the primary materials. However, it bears stressing that the AMM and ASEAN Foreign Ministers' Meeting are the same organ. The Charter's text is available at <<http://asean.org/asean/asean-charter/>>.

were problems related to clean water, shelter, and well-being of the Myanmar populace.¹³⁵ Furthermore, as explained already, recall that ASEAN's conduct of external relations had already faced challenges because of Myanmar's domestic governance. Myanmar's slow reception of international assistance in the aftermath of the cyclone further tested ASEAN's claims of playing a central role in maintaining regional peace and security,¹³⁶ which included humanitarian assistance.¹³⁷ It is against this context that the ASEAN Foreign Ministers met for a special session on 19 May 2008:

The Foreign Ministers *have agreed* to establish an ASEAN-led coordinating mechanism...this mechanism will facilitate the effective distribution and utilisation of assistance from the international community, including the expeditious and effective deployment of relief workers, especially health and medical personnel. International assistance to Myanmar, given through ASEAN, *should not be politicised*. On that basis, Myanmar will accept international assistance.

To this end, the Ministers *agreed* to establish a Task Force, to be headed by ASEAN Secretary-General Surin Pitsuwan, which will work closely with the UN as well as a central coordinating body to be set up by Myanmar, to realise this ASEAN-led mechanism. The meeting *agreed* that this ASEAN-led approach was the best way forward.¹³⁸

On 21 July 2008, the ASEAN Chair added that "ASEAN's response to Cyclone Nargis demonstrated ASEAN's unity, and showed that ASEAN member countries recognised the responsibilities and obligations of membership."¹³⁹ Both statements of 19 and 20 May 2008 can be appraised against Articles 2(c) and 10, TAC (1976), a code of conduct for intramural relations, and the AADMER (2006). Because Myanmar had already ratified the AADMER on 7 November 2006 before cyclone Nargis,¹⁴⁰ it was obliged not to undermine the object and purpose of the AADMER, which is consistent with the general rules of international law.¹⁴¹ Hence specific actions, by ASEAN organs, inside Myanmar's sovereign territory are legally permitted without threatening its political stability.¹⁴² This is why, on 19 May 2008, the ASEAN Foreign

¹³⁵ See Paras 3-9, ERAT Report (n127).

¹³⁶ Article 41, ASEAN Charter.

¹³⁷ For diplomatic reaction by various States against Myanmar, see Daniel Seah, "The Treaty of Amity and Cooperation in Southeast Asia: The Issue of Non-Intervention and its Accession by Australia and the USA" (2012) 11 *Chinese Journal of International Law* 785 at 816-817.

¹³⁸ "Chairman's Statement of the Special ASEAN Foreign Ministers Meeting" (19 May 2008) (emphasis supplied).

¹³⁹ Para 3, "Joint Communiqué of the 41st ASEAN Ministerial Meeting" (21 July 2008).

¹⁴⁰ See Instrument of Ratification by the Myanmar Government, available at <<http://agreement.asean.org/media/download/20140119170137.pdf>>.

¹⁴¹ Articles 4(a), AADMER states: the parties shall "cooperate in developing and implementing measures" related to "standby arrangements for disaster relief and emergency response." Article 4(b), AADMER states that: parties shall "immediately respond to a disaster occurring within their territory. When the said disaster is likely to cause possible impacts on other Member States, respond promptly to a request for relevant information sought by a Member State or States that are or may be affected by such disasters, with a view to minimising the consequences". For the obligation at law not to defeat the AADMER before its entry into force, see Article 18, 1969 Vienna Convention (n93).

¹⁴² Articles 2 and 10, TAC.

Ministers Meeting agreed as an organ to create an “ASEAN-led mechanism” to allow access into Myanmar for relief purposes.¹⁴³

In short, non-intervention’s content has changed. This point is evident when we consider the obligations of membership on Myanmar,¹⁴⁴ a member State,¹⁴⁵ to ensure that ASEAN can conduct its external relations, according to the ASEAN Charter, as a “primary driving force in regional *arrangements* that it initiates and maintains its centrality in regional cooperation”.¹⁴⁶ What was protected by non-intervention during the Kampuchean conflict (i.e., disregard for the type of government that the Khmer Rouge were) no longer obtains in the 21st century, as a code of conduct, with respect to Myanmar.

Indeed, to this extent, ASEAN, through the ASEAN Chair in 2009, sponsored a General Assembly resolution on cooperation between the UN and ASEAN, and expressly drew attention to the acts of ASEAN organs during cyclone Nargis.¹⁴⁷ When assessed against general international law, i.e., the ICJ’s claims in *Nicaragua* that coercion is a condition of applying non-intervention,¹⁴⁸ it is therefore arguable that the acts by ASEAN organs inside Myanmar are legally permissible. Non-intervention did not apply because the acts of ASEAN organs are not legally coercive. The law-making acts of ASEAN organs regarding non-intervention’s content are evident in their creation of a unique “ASEAN-led” mechanism, the Tripartite Core Group (TCG), to which we turn.

¹⁴³ See n138.

¹⁴⁴ I.e., Article 5(2), ASEAN Charter states: “Member States shall take all necessary measures to effectively implement the provisions of this Charter and to comply with all obligations of membership”. Article 6(2)(d) states that members are admitted to ASEAN because they have the “ability and willingness to carry out the obligations of membership”.

¹⁴⁵ Under “Purposes”, Article 2(1) states: “*ASEAN and its Member States* reaffirm and adhere to the fundamental principles contained in the declarations, agreements, conventions, concords, treaties and other instruments of ASEAN” (emphasis supplied).

¹⁴⁶ Article 41(3), ASEAN Charter: Through the ASEAN Chair, ASEAN sponsored the UNGA Resolution 63/35 (UNGA, “Cooperation between the United Nations and the Association of Southeast Asian Nations” (27 January 2009) UN Doc A/Res/63/35) to draw attention to the acts of ASEAN organs during Cyclone Nargis; also see “Statement on A/Res/63/35 by the ASEAN Chair (Thailand) at General Assembly Meeting” (26 November 2008) UN Doc A/63/PV.60 at 14. Emphasis supplied.

¹⁴⁷ Article 41(3), ASEAN Charter: through the ASEAN Chair, ASEAN sponsored General Assembly Resolution (A/Res/63/35), “Cooperation between the United Nations and the Association of Southeast Asian Nations” (27 January 2009) to draw attention to the acts of ASEAN organs during Cyclone Nargis; also see statement on A/Res/63/35 by the ASEAN Chair (Thailand) at General Assembly Meeting, A/63/PV.60 (26 November 2008) at 14.

¹⁴⁸ See Chapter Three, Part VI, Part 4. For a recent commentary, see Alexandra Hofer and Luca Ferro, “Sanctioning Qatar: Coercive interference in the State’s *domaine réservé*?” (30 June 2017), available at <<https://www.ejiltalk.org/sanctioning-qatar-coercive-interference-in-the-states-domaine-reserve/>>.

5) The TCG as a Regional and “ASEAN-led” Mechanism

This part advances the core proposition by demonstrating how general international law gives a basis for identifying separate acts of ASEAN organs *qua* ASEAN, which in turn shapes the regional content of ASEAN’s disaster management with consequences for the regional content of non-intervention with an ASEAN character. In this respect, we consider the TCG which was an innovative mechanism.¹⁴⁹ It was established as an outcome of the Foreign Ministers Meeting of 19 May 2008,¹⁵⁰ in which Myanmar agreed to accept international assistance through an “ASEAN-led mechanism”. The TCG was based in Yangon and contained nine members.¹⁵¹ It expressed its functions with respect to international assistance within Myanmar as “an ASEAN-led mechanism to facilitate *trust*, confidence and cooperation between Myanmar and the international community in the urgent humanitarian relief and recovery work after Cyclone Nargis hit Myanmar”.¹⁵²

The TCG was chaired by the Myanmar government, which contained three representatives.¹⁵³ It retained primary role in control and coordination of the international assistance. The UN had three representatives.¹⁵⁴ The remaining three members were representatives from the ASEAN Committee of Permanent Representative (i.e., ambassadorial rank) and ASEAN Secretariat.¹⁵⁵ On 21 July 2008, the ASEAN Chair endorsed the TCG as follows: “While not perfect, the ASEAN-led tripartite process bridged the *gap of trust* between the Myanmar authorities and the international community to facilitate the flow of emergency aid to the disaster victims. Only the international community had the capacity to address the effects of

¹⁴⁹ Generally see the Compassion Report, n87 at 39.

¹⁵⁰ *Ibid.*

¹⁵¹ See Para 2, “First Press Release of the Tripartite Core Group” (24 June 2008) and “Second Press Release of the Tripartite Core Group: Further Inroad to Relief and Early Recovery for Victims of Cyclone Nargis” (21 July 2008). The weight of both statements are evident because it was produced in the “Post-Nargis Joint Assessment” (July 2008), a joint report of the Myanmar Government, ASEAN and UN (see the report’s Annex 20 at 178-180), available at <<http://www.asean.org/wp-content/uploads/images/archive/21765.pdf>> (“PONJA Report”).

¹⁵² Para 1, PONJA Report (n151)(emphasis supplied).

¹⁵³ A senior member of Myanmar’ Government, Deputy Foreign Minister Kyaw Thu, was appointed: see ASEAN Secretariat’s “Media Release Myanmar Deputy Foreign Minister to Lead Coordinating Core Group in Yangon” (28 May 2008), available at <<http://asean.org/category/asean-statement-communicues/>>.

¹⁵⁴ Para 2, PONJA Report (n151).

¹⁵⁵ I.e., Article 6(1), ARIO (n125). Also see definition of an agent who need not be permanently employed or be given an official status in nn125-127: ASEAN was represented by the Ambassador Robert Chua from the Committee of Permanent Representatives (Article 12, ASEAN Charter) Dr Puji Pujiono, a secondee at the ASEAN Secretariat who worked for the UN Development Programme officer; and Adelina Kamal of the ASEAN Secretariat. See PONJA Report (ibid).

Cyclone Nargis, and ASEAN welcomed Myanmar's willingness to continue with the tripartite cooperation".¹⁵⁶

The AMM's statement was instructive in terms of defining ASEAN's role in the relief effort. It served as a venue to facilitate delivery of aid from a range of non-State actors. At some risk of simplification, the TCG broadly existed to assure the Myanmar government that any politicisation of relief by other actors in relation to democratisation would be "deflected" by ASEAN.¹⁵⁷

Particularly, the ASEAN Foreign Ministers Meeting explicitly stated that an "ASEAN-led mechanism" was part of the "responsibilities and obligations of membership".¹⁵⁸ Put another way, the TCG's conduct is in accordance with the specific functions being given to it, which are accordingly acts of ASEAN on the international plane. For these reasons, under Article 6(1) ARIO, the three ASEAN representatives in the TCG were effectively agents for ASEAN.¹⁵⁹

The role of ASEAN, through the TCG in this case, was to serve as a venue on which we appraise non-intervention's character with an ASEAN character. One example of this is apparent in the TCG's practice of issuing visas in 2008. In its first press release, the TCG said that "visas for UN and foreign aid workers would be given and their access to cyclone-affected areas would be allowed. Requests for visas, visa

¹⁵⁶ Para 3, Joint Communiqué (n139): for further acknowledgement of the TCG by the ASEAN Summit and UN General Assembly, see Para 15, "Chairman's Statement of the 14th ASEAN Summit: ASEAN Charter for ASEAN Peoples" (28 February - 1 March 2009); see also Operative Para 6, UNGA Resolution 63/35 (n146).

¹⁵⁷ Generally see *Charting a New Course: ASEAN-UN Post-Nargis Partnership* (Jakarta: ASEAN Secretariat, 2008) at 18.

¹⁵⁸ See Joint Communiqué (n139). I do not address the argument that (in lieu of non-intervention) collective countermeasures arise against Myanmar on the basis that it (i.e., Myanmar) breached primary obligations. There are three reasons against examining this argument. First, to the extent that primary obligations exist, these are arguably based on the AADMER and ASEAN Charter. However, as explained already, only AADMER was in force and the specific argument as to Myanmar's (primary) obligation of ASEAN membership in the Charter was not yet in force, which is inconsistent with the technical requirement of identifying a primary obligation. Also, even if this requirement were relaxed (on the basis that Myanmar cannot act inconsistently with the objectives of the ASEAN Charter), there is little evidence in the ASEAN practice (the AMM Ministerial Meetings) that Myanmar had, as a matter of law, breached the primary obligation. Third, and importantly, the ASEAN Charter (its constituent instrument) does not appear to contain express provisions to allow collective countermeasures to be taken. Under the ASEAN Charter's Chapter VII provision on decision-making, consultation and consensus form a "basic principle" of decision-making in ASEAN. Furthermore, if there is a "serious breach" of the Charter's (primary) obligation, which involve compliance with all ASEAN treaties including the AADMER, the matter must be referred to the ASEAN Summit, which only refers to its competence under Article 7(d) to "address emergency situations in ASEAN by taking appropriate action". The reality is that, at the level of the ASEAN Summit, consultation will prevail, generally see Walter Woon, *The ASEAN Charter: A Commentary* (Singapore: NUS Press, 2016)

¹⁵⁹ See further Chapter Two, Section III.

extensions and permits to travel are now channeled through the TCG for rapid facilitation".¹⁶⁰

Articles 2 and 10, TAC protect a State's "sovereignty". This is a "catch-all" term to underscore a State's legal internal competence to govern generally on its own terms, which is independent of another State's particular consent.¹⁶¹ Hence the issuing of visas by the Myanmar government for non-citizens, to enter Myanmar's territory, is a paradigmatic exercise of (sovereign) competence.

In this respect, it is reasonable to conclude that this competence is delegated by the Myanmar Ministry of Foreign Affairs to the TCG. Before cyclone Nargis, under the Myanmar government's settled practice, an assisting actor¹⁶² had to request visas from a line ministry, with whom it had signed a MOU.¹⁶³ The line ministry would process and submit the applications to the Foreign Affairs Policy Committee, which makes the final decision.¹⁶⁴

However, from 9-30 June 2008, the TCG took over this function. It issued 249 visa-related documents to a range of assisting actors.¹⁶⁵ This expedited the assisting actors' access to the severely affected Delta area.¹⁶⁶ From the standpoint of general international law, the TCG's legal competence to issue visas is arguably grounded in treaty form under Article 14(b), AADMER, which states a receiving party (Myanmar) shall "facilitate the entry into, stay in and departure from its territory of personnel and of equipment, facilities and materials involved or used in the assistance."¹⁶⁷

Under Article 16(2), AADMER,¹⁶⁸ it was agreed that the ASEAN Coordinating Centre for Humanitarian Assistance (AHA Centre) would play a supporting role.¹⁶⁹ Instead the TCG assumed its competences, an outcome of the ASEAN Foreign Ministers'

¹⁶⁰ See PONJA Report (n151).

¹⁶¹ James Crawford, *Brownlie's Principles of Public International Law* (8th ed) (Oxford: OUP, 2012) at 448.

¹⁶² I.e., an international non-governmental organisation.

¹⁶³ For an account apparently expressed by Bishow Parajuli, then the UN Resident Coordinator in Myanmar, see "Burma: Revised Tripartite Core Group to have No Visa Authority", available at <https://wikileaks.org/plusd/cables/09RANGOON223_a.html> (accessed 1 May 2018).

¹⁶⁴ Ibid.

¹⁶⁵ See Second Press Release, PONJA Report, n151 at 179-180.

¹⁶⁶ Generally see Compassion Report, n87 at 48. See also Lilianne Fan and Hanna B Krebs, "Regional Organisations and Humanitarian Action: The Case of ASEAN (HPG Working Paper)" (September 2014), at 8. Available at <www.odi.org/publications/8904-asean-regional-humanitarian-asia-myanmar-rakhine-nargis-philippines-haiyan-yolanda>.

¹⁶⁷ See n8.

¹⁶⁸ See n8.

¹⁶⁹ I.e., Article 20(1) and Annex, AADMER (n8). See Appendix for a description of its technical functions.

Meeting of 19 May 2008.¹⁷⁰ Because the TCG's practice during Cyclone Nargis was successful, the AHA Centre's functions were elaborated anew, in a new treaty: the AHA Centre Treaty.¹⁷¹ Therefore, this encrusting of functions onto the AHA Centre, after cyclone Nargis, was expressly agreed by ASEAN member States in treaty form.¹⁷² It is arguably a subsequent practice in the application of the AADMER. Particularly, the AHA Centre Treaty is an instance of a subsequent agreement¹⁷³ of the AADMER.¹⁷⁴

Based on the experience of cyclone Nargis, ASEAN organs began to focus on the operational aspects of disaster management: risk assessment, prevention, preparedness and recovery.¹⁷⁵ On 6 September 2016, the ASEAN Summit agreed in a non-binding instrument to "achieve faster response, mobilise greater resources and establish stronger coordination to ensure *ASEAN's collective response*."¹⁷⁶

These are acts by ASEAN organs on the international plane. The law of treaties, the legal rules on agents and organs, permit a legal conclusion that there is a regional character to ASEAN's law-making of disaster management. Common goals that affected the geographical region of Southeast Asia were identified by the ASEAN Foreign Ministers' Meeting in its joint communique of July 2008 as follows: "Recognising *Southeast Asia* as one of the most natural disaster prone regions, we reaffirmed our commitment to intensify our cooperation as well as with other countries and international organisations in the areas of disaster relief and management."¹⁷⁷

Because of the ASEAN organs' consistent actions during cyclone Nargis, the ASEAN Summit confirmed at the highest level that the AADMER reflects a coherent, regional approach that is "the main regional policy backbone and common platform for cooperation for implementation of the One ASEAN, One Response".¹⁷⁸

¹⁷⁰ See n138.

¹⁷¹ Agreement on the Establishment of the ASEAN Co-ordinating Centre for Humanitarian Assistance on Disaster Management (signed 17 November 2011; entered into force 7 April 2014), access available at <<http://agreement.asean.org/>>.

¹⁷² Para 46, "Chairman's Statement of the 21st ASEAN Summit" (18 November 2012); Para 41, "Joint Communique of the 44th ASEAN Foreign Ministers Meeting" (19 July 2011).

¹⁷³ Article 31(3)(a), Vienna Convention (n93).

¹⁷⁴ See n8.

¹⁷⁵ The work programmes of 2010-2015 and 2016-2020 provide detailed, operationally-focused plans (n132), which are endorsed by the ASEAN Summit and Foreign Ministers' Meeting (n133).

¹⁷⁶ First Operative Para, "One ASEAN One Response" 2016 Declaration (n128). Emphasis supplied.

¹⁷⁷ Para 34, Joint Communique (n121). Emphasis supplied.

¹⁷⁸ Operative Para Two, "One ASEAN One Response" 2016 Declaration (n128).

In this respect, since 2002, the ASEAN Chair has sponsored biannual General Assembly resolutions on cooperation between ASEAN and the UN.¹⁷⁹ From 2008, these resolutions included matters related to disaster management.¹⁸⁰ Through these resolutions, ASEAN is committed to a “timely and effectively response” in “global issues of mutual concern”.¹⁸¹ In 2012, the same commitment became an operative paragraph in General Assembly Resolution 67/110.¹⁸² By 2014, General Assembly Resolution 69/110 repeated this commitment but acknowledged the enhanced role of the AHA Centre.¹⁸³

Consequently, the ASEAN practice during cyclone Nargis presents, I argue, indicates that the regional practice regarding non-intervention’s content in the TAC has waned. There remains the prospect that, despite the waning of non-intervention’s regional content based on the TAC, a general custom of non-intervention still applies to ASEAN with a more stringent obligation. I address this prospect in the next section.

Returning, then, to the waning of non-intervention’s content based on the TAC, its diminished stringency, as an obligation, indicates the narrowing of the internal affairs (i.e., the domestic jurisdiction) of an ASEAN member State which is protected by the non-intervention rule. This diminution is a legal assessment based on the evaluative vagueness of non-intervention’s content as a code of conduct, embodied in Articles 2(c) and 10, TAC: because ASEAN intends to conduct external relations on the international plane which involve “global issues of mutual concern” in disaster management,¹⁸⁴ so the general rules at international law shapes the diminution of non-intervention’s regional content. Put simply, in its conduct of external relations with Myanmar, the ASEAN organs created a regional content of non-intervention. This point is demonstrated in the ILC’s recent work, which will likely shape the regional practice of ASEAN and the consequences for non-intervention’s content. We consider this development in the next section.

¹⁷⁹ See: A/RES/57/35 (21 November 2002); A/RES/59/5(22 October 2004); A/RES/61/46 (4 December 2006); A/RES/63/35 (26 November 2008, n146); A/RES/65/235 (22 December 2010); A/RES/67/110 (17 December 2012); A/RES/69/110 (10 December 2014).

¹⁸⁰ I.e., A/Res/63/35 (n146).

¹⁸¹ Preambular paragraph, A/RES/65/35 (2010), *ibid*.

¹⁸² Operative Para 7, n179.

¹⁸³ Operative Para 18, n179.

¹⁸⁴ Global leadership in disaster management is an explicit aim of the ASEAN Ministers for Disaster Management: see Para 5, “Joint Statement of the Association of Southeast Asian Nations for the World Humanitarian Summit” (May 2016); Para 8, “Chairman’s Statement of Fourth Meeting of the COP” (n131).

V. Protecting Persons in the Event of Disasters: The ILC's Liberal-Meliorism.

1) Human Rights Approach

This section builds on the previous section by contributing to the core proposition in two ways. First, it shows how (despite the broadly operational focus of disaster management, as agreed by ASEAN, which encapsulates a regional content of non-intervention) general international law, through human rights law and the progressive functions of the ILC, increasingly influence ASEAN's own disaster management laws. Second, the regional quality is gradually eroded by the general rules of international law. The outcome is that non-intervention's content also changes and weakens.

In 2001, before his appointment to the ILC, Martti Koskenniemi visited the UN agencies in Geneva. He asked his UN interlocutors what the ILC could do for their respective fields.¹⁸⁵ Their reply to Koskenniemi was expressed with characteristic bonhomie but the message was clear: do nothing.¹⁸⁶ The ILC should “keep out of this field, please”.¹⁸⁷ This anecdote has a particular salience in the ILC's work on the protection of persons,¹⁸⁸ which aims to facilitate an “adequate and effective” response to meeting the essential needs of a person.¹⁸⁹ To appreciate how far the ILC had pushed the emerging general rules of disaster management at international law, this part starts by explaining how a rights-based approach pervades its draft articles.

In general, the field of international disaster management has been addressed by “bottom up” approaches.¹⁹⁰ The focus is technical and operational. It includes disaster risk reduction, or early warning systems at the national levels.¹⁹¹ By comparison, the ILC's work shifts the focus of disaster management to a rights-based approach, a point which I explain further below.¹⁹² From the start, the ILC was resolved to produce an outcome that was different. It did not want to duplicate the operational work of

¹⁸⁵ Martti Koskenniemi, “International Legislation Today: Limits and Possibilities” (2005) 23 *Wisconsin Int'l LJ* 61.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ ILC, “Draft articles on the protection of persons in the event of disasters (with commentaries)” *Report of the International Law Commission* (sixty-eighth session, 2016), A/71/10, (Draft Articles”).

¹⁸⁹ Article 2, Draft Articles (*ibid.*) and commentaries at 4-5. In 2016, the ILC adopted the draft articles with commentary and submitted it to the General Assembly for consideration, under Article 23 of the ILC Statute.

¹⁹⁰ By “bottom up”, I mean the approaches are regulatory or operational and lacks a focus on developing “international law in an overarching sense.

¹⁹¹ Generally Claire Clement, “International Disaster Response Laws, Rules, and Principles: A Pragmatic Approach to Strengthening International Disaster Response Mechanisms” in *The International Law of Disaster Relief* (David D Caron et al eds) (Cambridge: CUP, 2014) 67, 78.

¹⁹² See n204 below.

international disaster management and did not want to tweak existing instruments.¹⁹³ It is the ILC's function to codify and progressively develop international law in this area,¹⁹⁴ although its work on disaster management is largely based on progressive development.

Generally, the ILC's work regarding disaster management contains the following elements:¹⁹⁵ concrete guidelines on immunities and protection of relief personnel; human rights guidelines based on "dignity", "humanity", and "neutrality" (whatever these mean); an affected State's "duty" to request assistance; an affected State's consent to receive assistance.

The "duty" and "consent" of an affected State is contained within a potentially wide human rights approach, which I shortly explain. To facilitate this explanation, it is useful to indicate the ILC's approach as to an affected States' duty and consent during disasters.¹⁹⁶ According to the ILC, an affected State: is under a positive, proactive duty to seek external assistance¹⁹⁷ but only for a "calamitous" event;¹⁹⁸ is encouraged to seek external assistance for disaster situations of a lesser magnitude;¹⁹⁹ shall give consent before external assistance can be provided;²⁰⁰ as to protection of persons and provisions of assistance, both matters are "under its (affected State) jurisdiction and control";²⁰¹ shall not withhold consent for external assistance "arbitrarily";²⁰²

¹⁹³ See comments by Mr Gilberto Vergne Saboai, ILC, "Provisional Summary Record of the 3140 Meeting" (4 July 2012) UN Doc A/CN.4/SR.3140 at 13.

¹⁹⁴ See Sean D Murphy, "Protection of Persons in the Event of Disasters and Other Topics: the Sixty-Eighth Session of the International Law Commission" (2016) 110 *AJIL* 718.

¹⁹⁵ Generally see Murphy, *ibid*.

¹⁹⁶ Article 3(b), Draft Articles (n188): "a State in whose territory, or in territory under whose jurisdiction or control, a disaster takes place".

¹⁹⁷ Article 11, Draft Articles (n188): "To the extent that a disaster manifestly exceeds its national response capacity, the affected State *has the duty to seek assistance* from, as appropriate, other States, the United Nations, and other potential assisting actors". For objections by States that this duty exists at international law, see Paras 23 and 28, UN Doc A/C6/66/SR 23 and Paras 70 and 114, UN Doc A/C6/66/SR24 (emphasis supplied).

¹⁹⁸ The ILC claimed that this "high threshold" would exclude other events such as serious political or economic crises (Draft Articles, n188 at 7). The practicality of this threshold must be determined against its elaborate qualifications, in the commentary: for example, it includes "sudden-onset events", "slow-onset events", "frequent small-scale events" (Draft Articles, n188 at 6). Also, if an affected State already took risk reduction measures before a disaster strikes, it "does not *per se* exclude the application of the draft articles" (Draft Articles, n188 at 7) (original emphasis).

¹⁹⁹ Para 10, "UN GAOR Report of the International Law Commission" (2014) UN Doc A/69/10 at 123 ("UNGAOR Report"); also see Draft Articles, n188 at 7: For an affected State that took risk reduction measures before a disaster strikes, it "does not *per se* exclude the application of the draft articles" (Draft Articles, n188 at 7) (original emphasis).

²⁰⁰ Article 13, Draft Articles (n188).

²⁰¹ Article 11(1), Draft Articles (n188).

²⁰² Article 13(2), Draft Articles (n188). The ILC retained this "arbitrary" threshold despite concerns that it is "vague and difficult to define in practice": see ILC, "Provisional Summary Record of 3140th Meeting" (4 July 2012) UN Doc A/CN4/SR 3140 at 12. For mixed reactions from States, see "Comments and observations received from Governments and international organizations" (14 March 2016) UN Doc

“may” place conditions on the provision of external assistance, but “in accordance with the present draft articles”, and taking into account the “identified needs” of persons affected by disasters and the “quality” of the assistance.²⁰³

The ILC’s “two steps forward, one step backwards” approach regarding duties and consent must be understood against its insistence on a human rights approach in disaster management. On the one hand, the ILC clarified that its work is not a specialised human rights instrument. Instead the human rights language in Draft Article 5 reflects the victim’s “broad entitlement” to human rights protection, and serves as a “reminder” to States as to their compliance with human rights obligations during the pre-disaster and disaster phases.²⁰⁴

On the other hand, the ILC tells us that this vagueness is intentional because its enforcement is subject to discretion, the relevant rules in question, and the “limitations” of international human rights law.²⁰⁵ For these reasons, then, the ILC’s commentaries on the core elements of its human rights approach are extraordinary in its potential ambit because “the reference to “human rights” is, accordingly, to the *whole of international human rights law*, including in particular its treatment of derogable and non-derogable rights”.²⁰⁶

A few States endorsed the inclusion of human rights as “principles in informing relief operations”.²⁰⁷ Because the ILC’s work is not a separate human rights instrument, the Red Cross²⁰⁸ pressed for “specific guidance as to what it meant in practice”.²⁰⁹ In this respect, the Commission stated that “the general reference to “human rights” encompasses human rights obligations expressed in relevant international agreements and those in customary international law”.²¹⁰

One example of a human right which the ILC cited was the right to life during a disaster situation.²¹¹ In response, the United States properly clarified that “the

A/CN.4/696, at 43-46. For Australia’s “reservations” that “arbitrariness” is not based at law and cannot be usefully measured during a disaster situation, see 43.

²⁰³ Article 14, Draft Articles (n188).

²⁰⁴ See the Special Rapporteur’s “Eighth Report on the Protection of Persons in the Event of Disasters” (17 March 2016) UN Doc A/CN.4/697, para 121 at 35 (“Eighth Report”).

²⁰⁵ See commentaries to Article 5, Draft Articles (n188).

²⁰⁶ See commentaries to Article 5, Draft Articles (n188)(emphasis supplied).

²⁰⁷ For a summary: see Eighth Report, n204, paras 109-114 at 32-34.

²⁰⁸ I.e., International Federation of Red Cross and Red Crescent Societies.

²⁰⁹ Para 112, Eighth Report, n204 at 33.

²¹⁰ See commentaries to Article 5, Draft Articles (n188).

²¹¹ Commentary to Article 5, Draft Articles (n188 at 13): “A particularly relevant right is the right to life, as recognized in Article 6, Paragraph 1, of the International Covenant on Civil and Political Rights (ICCPR) if a State is refusing to adopt positive measures to prevent or respond to disasters that cause loss of life”. It bears mention that, of the ASEAN States, Singapore, Malaysia, Brunei, and Myanmar did not sign

commentary *incorrectly* refers to the right of life, and specifically to the International Covenant on Civil and Political Rights, article 6, paragraph 1, as an example of a human right applicable in the context of a disaster and in responding to such a disaster. That provision prohibits the arbitrary deprivation of life through State action and requires protection of that right by law. There is *no basis for regarding this provision as the source of any international obligation of a State* to address the threat or jeopardy to life caused by a disaster or calamitous event affecting that State”.²¹²

Furthermore, the ILC also acknowledged the role of “best practices” in “non-binding” instruments.²¹³ According to the ILC, examples of these best practices include the Inter-Agency Standing Committee Operational Guidelines on the Protection of Persons in Situations of Natural Disasters, and the Guiding Principles on Internal Displacement.²¹⁴ It is unclear why and how these two (non-exhaustive) examples came to be determined as “best practices”. Exactly who determines best practices, which triggers the recourse to “best practices” in non-binding instruments, during a disaster situation is also unclear.

Also, under the rubric of “humanitarian principles” in Article 6,²¹⁵ the Special Rapporteur introduced three elements with doubtful legal basis, which included “response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality”.²¹⁶ He concluded that these principles were “originally found in international humanitarian law and in the fundamental principles of the Red Cross, are widely used and accepted in the context of response to disasters”.²¹⁷

In short, “humanity” is affirmed as a “cornerstone” in protecting persons during disasters,²¹⁸ to which Greece replied it was “hardly measurable in legal terms”.²¹⁹ Furthermore, “neutrality” does not bear the legal meaning in an armed conflict context.²²⁰ The ILC claims that “neutrality” indicates the “apolitical nature of disaster

the ICCPR. The other ASEAN States are parties to the ICCPR: Cambodia (26 August 1992); Lao (25 December 2009); Indonesia (23 May 2006); Philippines (23 January 1987); Thailand (29 January 1997); Vietnam (24 December 1982).

²¹² See “Additional comments and observations received from Governments” (28 April 2016) UN Doc A/CN.4/696/Add.1 at 6 (emphasis supplied).

²¹³ See commentaries to Article 5, Draft Articles (n188).

²¹⁴ See commentaries to Article 5, Draft Articles (n188).

²¹⁵ See Draft Articles, n188.

²¹⁶ Article 6, Draft Articles (n188).

²¹⁷ See Eighth Report, para 139 at 40 (n204).

²¹⁸ See commentaries to Article 6, Draft Articles (n188).

²¹⁹ See Eighth Report, para 127 at 37 (n204).

²²⁰ See commentaries to Article 6, Draft Articles (n188).

response”,²²¹ an “operational mechanism to advance the ideal of humanity”.²²² Finally, “impartiality” is a “distributive mechanism”²²³ that is already contained in the IFRC guidelines because (impartiality)²²⁴ “requires that responses to disasters be directed towards full respect to and fulfilment of the needs of those affected by disasters...that gives priority to those who are particularly vulnerable”.²²⁵

Therefore, to adapt the words of an ILC member, the Commission is progressively developing general legal rules regarding disaster management on the international plane, almost out of “thin air”.²²⁶ Most importantly, the putative practicalities of the ILC’s work on disaster management are doubtful. Consider, in this respect, the AADMER’s operational emphasis on preparedness, mitigation, and response. It is unclear how those general rules, progressively developed by the ILC, regarding duties²²⁷ and human rights protection will co-exist alongside the AADMER.²²⁸

VI. The Diminution of Non-Intervention during a Disaster

Having surveyed this rights-based approach taken by the ILC towards the international law regarding disaster relief, we turn to the implications for non-intervention’s content with an ASEAN character. Therefore, this section contributes to the core proposition by suggesting how general international law might potentially exert a powerful influence on ASEAN’s distinctive regional law of non-intervention.

After receiving comments on the legal relevance of non-intervention in disasters management from specific States,²²⁹ the Special Rapporteur stressed that the “overarching principles of sovereignty and non-intervention inform the whole draft”.²³⁰ In the final draft articles of 2016, the commentaries referred to sovereignty and non-

²²¹ Ibid.

²²² See commentary, UN GAOR Report at 104 (n199).

²²³ See commentaries to Article 6, Draft Articles (n188).

²²⁴ I.e., “Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Recovery Assistance” (2007), available at <<http://www.ifrc.org/en/what-we-do/idrl/idrl-guidelines/>>.

²²⁵ Ibid.

²²⁶ Generally see Dire Tladi, “The International Law Commission’s Draft Articles on the Protection of Persons in the Event of Disasters: Codification, Progressive Development or Creation of Law from Thin Air?” (2017) 16 *Chinese Journal of International Law* 425.

²²⁷ On the objections by States to the legal meaning of “duties”, see generally Murphy, n194 at 2-4. For Murphy’s misgivings as an ILC member, see “ILC Provisional Summary Record of 3139th Meeting” (3 July 2012) UN Doc A/CN.4/SR 3139: “it would be better *not to focus unduly* on determining rights and duties and to opt for wording that simply encouraged States to offer and accept the requisite assistance at times of disaster” (emphasis supplied).

²²⁸ The ILC did acknowledge the AADMER during its deliberations: for examples, see its Draft Articles (n188) at 20, 26, 42 (footnote 97), 44, 58 (footnote 197), 59, 64, 67 (footnote 229).

²²⁹ See n261.

²³⁰ Eighth Report, para 139 at 40 (n204).

intervention as “fundamental principles”,²³¹ an assertion which is at variance with the language of the draft articles. This is because the ILC’s entire draft contains one reference to “sovereignty”. It is contained in the fifth preamble.²³² Pertinently, there is no express reference to non-intervention in the draft articles itself. The significance of non-intervention and sovereignty in the ILC’s work must be interpolated, whether as “overarching” or “fundamental” principles.

Moreover, in contrast, consider the words “dignity”,²³³ “humanitarian principles”,²³⁴ and “human rights”²³⁵, which are frequently used. Indeed, the Special Rapporteur’s early treatment of non-intervention, in 2010, offers a more reliable indication of the ILC’s final perspective. In 2010, after giving a brief account of the legal basis which supports non-intervention, the Special Rapporteur concluded that “the correlating principles of sovereignty and non-intervention presuppose a given domestic sphere, or a *domaine réservé*, over which a State may exercise its exclusive authority. This sovereign authority remains central to the concept of statehood, but it is by *no means absolute*. When it comes to the life, health and bodily integrity of the individual person, areas of law such as *international minimum standards*, humanitarian law and human rights law demonstrate that principles such as *sovereignty and non-intervention constitute a starting point for the analysis, not a conclusion*”.²³⁶

The expression “international minimum standards” involves a claim of universal standards that obtain at general international law. As a technical and epistemic venue of the UN, the ILC has the ability to advocate in favour of these universal claims. Consequently, its work on this subject may exert a catalytic effect in evaluating non-intervention’s (irrelevant) content (if any at all) during disasters.²³⁷ This point is

²³¹ See commentaries to Article 9, Draft Articles (n188).

²³² I.e., Fifth preamble, Draft Articles (n188): “*Stressing* the principle of the sovereignty of States and, consequently, reaffirming the primary role of the State affected by a disaster in providing disaster relief assistance” (original emphasis).

²³³ Article 4, Draft Articles (n188): “The inherent dignity of the human person shall be respected and protected in the event of disasters.” Its significance as a “separate autonomous provisions” is clear when the Special Rapporteur described “human dignity” as the ILC’s “signal achievement”: he declined to delete it, merge into other draft articles, or shift it into the preambles: see Eighth Report, para 105 at 31 (n204). For sceptical views on dignity, see Samuel Moyn, “The Secret History of Constitutional Dignity” (2014) 17 *Yale Human Rights & Development Law Journal* 39; Christopher McCrudden, “Human Dignity and Judicial Interpretation of Human Rights” (2008) 19 *EJIL* 650.

²³⁴ Article 6, Draft Articles (n188): “Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable”.

²³⁵ Article 5, Draft Articles (n188): “Persons affected by disasters are entitled to the respect for and protection of their human rights in accordance with international law”.

²³⁶ Para 75, “Third Report on the Protection of Persons in the Event of Disasters” (31 March 2010) UN Doc A/CN.4/629 at 26 (emphasis supplied).

²³⁷ Generally, Fernando Lusa Bordin, “The Authority of Codification Conventions and ILC Draft Articles in International Law” (2014) 63 *ICLQ* 535.

underscored by the statements of various ILC members, who were bemused by non-intervention's relevance.²³⁸

According to one member, if the non-intervention principle were applied in a "classical", "outdated" sense,²³⁹ then the ILC's work on protecting persons during disasters might suffer from a "dissuasive effect".²⁴⁰ Another member said that "the Commission must adopt a set of draft articles that balanced State sovereignty with the international community's interests, on the basis of respect for human rights. Unfortunately, contemporary history showed that not all States responded to natural disasters while taking account of the need to protect human rights".²⁴¹

Pertinently, Myanmar's response during cyclone Nargis was cited as an argument against non-intervention because "one had only to compare the recent response of the Haitian Government with that of the Government of Myanmar a few years earlier...The reaction of Myanmar had been different, even though the situation there could be described as exceptional in many respects. There were many *evil regimes in the world* that might find it inconvenient to allow in international emergency assistance, as that would oblige them to open their borders to observers from the international community".²⁴²

This language of "evil regimes" is not new. During the nineteenth century, there is already some approximation to James Lorimer's "intolerant democracies" during the nineteenth century.²⁴³ Today, the emphasis is on an "international community",²⁴⁴ an amorphous construct²⁴⁵ which (presumably) self-appraises its own non-evilness.²⁴⁶ In

²³⁸ See the comments by Ms Marie Jacobsson, Mr Stephen Vasciannie and Mr Donald McRae in "International Law Commission, Provisional Summary Record of the 3057th Meeting" (4 June 2010) UN Doc A/CN.4/SR.3057, 5-6 and 8 respectively.

²³⁹ See Ms Jacobsson, *ibid.*, 5.

²⁴⁰ See Mr McRae, *ibid.*, 8.

²⁴¹ Comments of Mr John Dugard, "International Law Commission, Provisional Summary Record of the 3056th Meeting" (4 June 2010) UN Doc A/CN.4/SR.3056 at 6.

²⁴² *Ibid.* Emphasis supplied.

²⁴³ See James Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities*, 2 Vols (1883), Vol. 1, at 157 (on "imbecility"); also see Gerry Simpson, "James Lorimer and the Character of Sovereigns: The Institutes as 21st Century Treatise" (2016) 27 EJIL 431 at 444.

²⁴⁴ This expression appeared seven times in the commentaries of the Draft Articles (n188): in the preambles (para 3); Article 2 (para 3); Article 8 (para 5); Article 9 (para 10); Article 10 (para footnote 158); Article 11 (para 4); and Article 12 (para 1).

²⁴⁵ For example, in the context of *jus cogens*, see the reference to an "international community of States" in Article 53 of the Vienna Convention on the Law of Treaties (1969). For sceptical views of "international community", see Michael Wood, "Constitutionalization of International Law: A Sceptical Voice" in *International Law and Power: Perspectives on Legal Order and Justice: Essays in Honour of Colin Warbrick* (Kaiyan Homi Kaikobad and Michael Bohlander eds) (Brill, 2009) 85, 87.

²⁴⁶ See further Martti Koskenniemi, "Race, Hierarchy and International Law: Lorimer's Legal Science" (2016) 27 EJIL 415 at 422.

this respect, recall the language of ineptitude and all necessary measures by France, the United States, and United Kingdom against the Myanmar government during cyclone Nargis in 2008.²⁴⁷ Then there was the language of a responsibility to protect,²⁴⁸ against which the regional law-making of non-intervention had to appraised. To this extent, therefore, the ILC's language of duties and human rights protection in its draft articles will likely form the context for the international community's appraisal of how "evil" or "uncivilised" an affected State is when (if) it falls short of these general rules. There is, therefore, some force in Gerry Simpson's observation that "relations between the civilised and uncivilised are the paradigm case in international society".²⁴⁹

Returning to non-intervention regarding an affected State during disasters, the ILC's position on non-intervention is idiosyncratic.²⁵⁰ It approved non-intervention as a "core principle", but the Special Rapporteur cited Article 2(7), UN Charter as its legal basis, although Article 2(7) is a narrow prohibition which precludes UN's interference within the "domestic jurisdiction" of its member States.²⁵¹

Furthermore, the ILC also referenced the Friendly Relations Declaration²⁵² as one of "numerous international instruments"²⁵³ to support non-intervention's core status. As explained already, non-intervention in the Friendly Relations Declaration is broader and more ambiguous than Article 2(7), UN Charter.²⁵⁴ The two are not the same. Overall, it is not clear what basis non-intervention could be said to be a core principle of the ILC's work.

When the ILC adopted a set of draft articles at its first reading in 2014,²⁵⁵ the words "non-intervention" were not used at all.²⁵⁶ In contrast, the word "sovereignty" was explicitly used in a 2014 draft article:²⁵⁷

Role of the affected State²⁵⁸

²⁴⁷ For discussion, see Seah, "The Treaty of Amity and Cooperation in Southeast Asia", n137 at 817.

²⁴⁸ See further Seah, "The Treaty of Amity and Cooperation in Southeast Asia", n137 at 816-821.

²⁴⁹ Simpson, n243 at 438.

²⁵⁰ UN GAOR Report (2014), paras 1-2 at 117-118 (n199).

²⁵¹ *Ibid.*

²⁵² See further Chapter Three, Sections V-VI.

²⁵³ UN GAOR Report (2014), para 1 at 118 (n199).

²⁵⁴ See n252.

²⁵⁵ *I.e.*, UN GAOR Report (2014), n199.

²⁵⁶ But in the Draft Articles, 2016 (n188), the words "non-intervention" appeared five times in the commentaries at 22 (para 4); 28 (used twice in footnote 158); 33 (para 33); 36 (para 5).

²⁵⁷ *I.e.*, UN GAOR Report (2014), n199.

²⁵⁸ *I.e.*, Draft Article 12(9), 2016 (n188); UN GAOR Report (2014), n199 at 117.

1. The affected State, *by virtue of its sovereignty*, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory.²⁵⁹
2. The affected State has the primary role in the direction, control, coordination and supervision of such relief and assistance.²⁶⁰

In response, Cuba, Indonesia, Russia, and Malaysia urged the ILC to recognise non-intervention in the draft articles.²⁶¹ The Special Rapporteur eventually relented, which I shortly explain.²⁶² First, note this response:

... the Special Rapporteur will not entertain in the present report isolated suggestions for changes to the text of draft articles, made in that general context or in the context of concrete draft articles, when they are intended to revive a largely superseded debate for the purpose of fundamentally altering the Commission's basic approach; or specific suggestions which, by constant repetition, aim at *disproportionally tilting* in only one direction the *delicate balance* achieved throughout the draft between the paramount principles of sovereignty and non-intervention on the one hand and the no-less-vital protection of the individuals affected by a disaster on the other.²⁶³

There is arguably no need for a "delicate balance".²⁶⁴ An affected State and the international assisting actors can share broadly identical goals. Both sides broadly want to ameliorate a victim's condition during a disaster. The ILC's work could focus on strengthening operational supervision or coordination during disasters but it was disinclined to do that, possibly on grounds of its mandate to codify and progressively develop international law.²⁶⁵ Its position *assumes* that sometimes an affected State's interests are necessarily different from the international assisting actors.²⁶⁶

In short, "outsiders" during a disaster self-appraise their non-evilness: the result is that their actions are not prohibited by non-intervention.²⁶⁷ These "outsiders" have the power to evaluate the victims' needs, possibly because an affected State cannot (or would not) do so. It is reasonable to conclude that this is the underlying basis for the

²⁵⁹ See also the dropping of "by virtue of sovereignty" in the renumbered and final Article 10(1), Draft Articles, 2016 (n188): "The affected State has the duty to ensure the protection of persons and provision of disaster relief assistance in its territory, or in territory under its jurisdiction or control".

²⁶⁰ See n258.

²⁶¹ Eighth Report, para 132 at 39 (n204). ASEAN (through its Chair) did not participate in giving comments to the ILC's work on disaster management, and the comments by Malaysia and Indonesia must be treated as comments made in their sovereign, individual capacity. Also Australia's general comments are also notable: "Australia would wish to see a careful balance struck between those elements of the draft articles which may encroach on the core international law principles of State sovereignty and *non-intervention* as against the likelihood that their implementation will effectively assure *tangible and practical benefits* in terms of reducing the risk of, ameliorating the effects of or improving recovery from disasters": n202 (emphasis supplied).

²⁶² See n271.

²⁶³ Eighth Report, para 8 at 14 (n204) (emphasis supplied).

²⁶⁴ See comments of Ms Xue Hanqin, ILC, "Provisional Summary Record of the 3055th Meeting" (1 October 2010) UN Doc A/CN.4/SR.3055 at 23.

²⁶⁵ Article 1(1), Statute of the International Law Commission.

²⁶⁶ For indications of this inclination to do more, see comments of Mr Maurice Kamto, ILC, "Provisional Summary Record of the 3141th Meeting" (23 November 2012) UN Doc A/CN.4/SR.3141 at 9: "As soon as international law needed to be progressively developed to any extent in a given area, the Commission lost its nerve."

²⁶⁷ See nn246-249.

ILC's determination of its choices, as being delicately balanced,²⁶⁸ because priority must be given to a clarity of vision seemingly enjoyed by the "international community". Any other position risks tilting it in a "disproportionate way".²⁶⁹ It is, in other words, the descriptive and evaluative vagueness of non-intervention's content allows its reassessment as to a less stringent obligation, in the light of emerging rules at general international law concerning disaster management.

By defending the "delicate balance" that the ILC had purportedly struck, this effectively articulates a difference between the ILC (only interested in advancing the individuals' welfare during disasters) from others who seem unable to advance the individuals' welfare during disasters. However, probably in response to the comments of various States who asked for some emphasis on non-intervention, the Special Rapporteur did concede a place for non-intervention in the draft articles' fifth preamble in March 2016.²⁷⁰ The proposed wording was as follows: "*stressing* the fundamental principle of the sovereign equality of States and its corollary, the duty not to intervene in matters within the domestic jurisdiction of any State and, consequently, *reaffirming* the primary role of the affected State in the taking of action related to the provision of disaster relief and assistance."²⁷¹

The Special Rapporteur's concession was a brief one. When the ILC Drafting Committee adopted the draft articles on second reading in May 2016, it deleted the only reference to non-intervention. No explanation was offered. The final fifth preamble now states that "*stressing* the principle of the sovereignty of States and, consequently, reaffirming the primary role of the State affected by a disaster in providing disaster relief assistance".²⁷²

Thus only "sovereignty" (not "by virtue of sovereignty") appears in the final version of the ILC's work – in the preamble. Given the twists and turns concerning non-intervention's content in disaster management, it is striking that the Drafting Committee said that the word "sovereignty" provides the "background" for understanding the "entire draft articles",²⁷³ and that its inclusion also "usefully contributes to the balance in the draft articles".²⁷⁴

²⁶⁸ See n263.

²⁶⁹ See n263.

²⁷⁰ See n261.

²⁷¹ Original emphasis.

²⁷² See 2016 Draft Articles (n188).

²⁷³ See "Protection of Persons in the Event of Disasters, Statement of the Chairman of the Drafting Committee" (3 June 2016) at 3.

²⁷⁴ *Ibid.*

This part, therefore, has explained how the ILC made claims as to the existence of universal rules on human rights protection during disasters, which now prospectively stand as candidates to become rules of general international law. Against these putative general rules of international law, apparently to strike a “delicate balance” between an affected State and the victims’ rights, then the stringency as to non-intervention’s obligation has waned.

For instance, during cyclone Nargis, it was complicated enough for ASEAN organs to make and apply its regional laws of disaster management. Although its prospects are unclear,²⁷⁵ this formally non-binding work by the ILC potentially now belongs to the body of general rules against which the regional practice of ASEAN must now be evaluated. The ILC’s work potentially complicates disaster management and diminishes non-intervention’s relevance.

To cite another example, consider the ILC’s range of legal bases for giving human rights law a central role in its articles.²⁷⁶ Of relevance to ASEAN is the ILC’s recommendation that the “best practices”²⁷⁷ of human rights should be used. From an ASEAN standpoint, the ASEAN Human Rights Declaration (ASEAN Declaration, 2012)²⁷⁸ is a regional “best practice” of human rights protection.²⁷⁹ The ASEAN Declaration is not binding. Protection of human rights within this regional framework is subject to two vital qualifications. The different political and cultural backgrounds of all member states must be considered.²⁸⁰ Furthermore, ASEAN member States bear the primary duty to protect human rights and fundamental freedoms.²⁸¹

Whether we regard the ASEAN Declaration as an example of “regionalist challenges” to universal human rights,²⁸² or whether this instrument’s particularism²⁸³ is

²⁷⁵ On 13 December 2016, the General Assembly adopted, without comments, the Draft Articles (n188) and invited States to comment on adopting the ILC’s work as a treaty: see UN Doc A/Res/71/141.

²⁷⁶ See Chapter Five, Section V, Part 1.

²⁷⁷ See n213.

²⁷⁸ Available at <<http://aichr.org/documents/>>.

²⁷⁹ Article 6, ASEAN Declaration (n278).

²⁸⁰ Article 7, ASEAN Declaration (n278).

²⁸¹ *Ibid.*

²⁸² Para 216, “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (Report of the Study Group of the International Law Commission)” UN Doc.A/CN.4/L.682 at 111.

²⁸³ The “particularism” is not new. After the Vienna Declaration and Programme of Action was agreed on 25 June 1993, see Paras 16-17, “Joint Communique of the Twenty-Sixth ASEAN Ministerial Meeting” (23-24 July 1993): “human rights are interrelated and indivisible... They should be addressed in a balanced and integrated manner and protected and promoted with due regard for specific cultural, social, economic and political circumstances. They emphasized that the promotion and protection of human rights should not be politicized.” The wording in Articles 6-9, ASEAN Declaration is similar (n730).

“sinister”²⁸⁴ and not modern”,²⁸⁵ one ramification bears stressing. Some legal determination by the affected State and relevant assisting actors must be made during a disaster situation.

Therefore, it is reasonable to ask whether a legalistic approach that emphasises human rights actually misses the point of providing humanitarian relief. Recall Myanmar’s unwillingness to accept humanitarian aid at the start of cyclone Nargis. Its government wanted to avoid the prospect of external involvement from transforming into internal scrutiny of its political governance.²⁸⁶ Recall, too, the TCG’s role in facilitating international humanitarian relief.²⁸⁷ The Foreign Ministers’ Meeting (19 May 2008) delicately managed the “gap of trust” between the Myanmar government and international assisting actors through an “ASEAN-led coordinating mechanism”:²⁸⁸ the TCG. As explained already, “trust” already has a legal basis which can be evaluated against the obligations of ASEAN membership.²⁸⁹

The ASEAN practice’s focus on operational assistance is centred on helping victims during disasters. It was a classic instance of regional law-making that suits its geographical area and is firmly supported by common goals of Southeast Asia. The most effective assistance is the one that an affected State does not reject. There is no need to involve a “human rights” approach, as did the ILC.

Despite the misgivings as expressed by various States to including human rights into the ILC’s draft articles on disaster management, it is arguably a matter of time before the human rights rules in disaster management, which now exist as candidates for general rules of international law, will have to be taken into account by ASEAN organs. This is because, at the highest level, ASEAN Summit’s position regarding human rights is as follows: “We resolve to consolidate our Community, building upon and deepening the integration process to realise a rules-based, people-oriented, people-centred ASEAN Community, where *our peoples enjoy human rights and fundamental freedoms*, higher quality of life and the benefits of community building,

²⁸⁴ Aaron Xavier Fellmeth, *Paradigms of International Human Rights Law* (USA: OUP, 2016) at 29.

²⁸⁵ See Nicholas Doyle, “The ASEAN Human Rights Declaration and the Implications of Recent Southeast Asian Initiatives in Human Rights Institution-Building and Standard Setting” (2014) 63 ICLQ 67, 84.

²⁸⁶ See n113.

²⁸⁷ See Chapter Five, Section IV, Part 5.

²⁸⁸ See n138.

²⁸⁹ See Chapter Five, Section IV.

reinforcing our sense of togetherness and common identity, guided by the purposes and principles of the ASEAN Charter”.²⁹⁰

General rules created by the ILC might, in due course, have consequences for ASEAN given its broad endorsement of human rights as a means of furthering regional integration. Already, recent non-binding ASEAN instruments acknowledge the dignity²⁹¹ and “basic rights” of persons.²⁹² This account matters because, with respect to the emerging rules of human rights law at general international law and that of ASEAN’s non-binding instruments in disaster management which reference human rights, it affirms again the influence of general international law. Throughout this chapter, I have already explained why (and how), despite the regional making of non-intervention law by ASEAN organs, the content of non-intervention, as assessed in treaty term based on the TAC and against rules of general international law, had waned.

However, despite the waning of non-intervention’s regional content of non-intervention, there remains the prospect that a customary rule at general international law remains, which applies to ASEAN. As explained already in Chapter Three, the law of non-intervention at general international law emerged after the ICJ’s judgment in *Nicaragua*.²⁹³ Although, in technical terms not a source of international law, the court’s judgment is a subsidiary means of identifying binding obligations, and its determination as to the customary basis and conceptual limits of non-intervention’s content are highly influential. Put another way, the ICJ’s determination is evidence that non-intervention at general international law is a customary rule that protects against prohibited interventions, which includes as its “essence”²⁹⁴ the element of coercion. Although there exists a general customary rule of non-intervention, based on *Nicaragua*, the descriptive and evaluative vagueness of non-intervention’s content must be assessed against general international law at a given point in time.

²⁹⁰ Para 4, “ASEAN Community Vision 2025 in Kuala Lumpur Declaration on ASEAN 2025: Forging Ahead Together” (22 November 2015), available at <<http://www.asean.org/storage/2015/12/ASEAN-2025-Forging-Ahead-Together-final.pdf>>.

²⁹¹ “Dignity” is now a core action area of disaster management under ASEAN’s auspices, see “ASEAN Vision 2025 on Disaster Management”: “With dignity, ASEAN will need to further develop and apply its people-centered approach as a main priority”; this instrument was endorsed by the ASEAN Ministers for Disaster Management’s Joint Statement of 2016 (n184).

²⁹² For the first time, the word “rights” appeared in the AADMER Work Programme 2016-2020 (n132) at 82: “As disasters cause severe insecurity to the lives of people, ensuring that *basic rights* of individuals are recognised protected...” (emphasis supplied).

²⁹³ See Chapter Three, Section VI, Part 4.

²⁹⁴ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 14, para 205 at 108.

Furthermore, the acts in question must be coercive to constitute a prohibited intervention, as assessed against general international law at a given point in time, before the non-intervention rule is engaged. This is a high threshold to satisfy. Therefore, in the context of ASEAN's various acts against Myanmar, such as the forfeiture of its ASEAN Chairmanship and acceptance of the TCG during cyclone nargis, for example, these are not regarded by general international law as forming Myanmar's internal affairs (its domestic jurisdiction) anymore. Even if the acts did constitute Myanmar's internal affairs, an assessment which is enabled by the descriptive vagueness of non-intervention's content, its evaluative vagueness must be appraised against ASEAN conduct of external relations (and thus membership obligations under the ASEAN Charter), as well as emerging rules as to democratic governance and human rights at general international law.

The outcome is that, after evaluating non-intervention's content against general rules of international law, the internal affairs of a State are diminished, and the acts in question by ASEAN organs are not sufficiently coercive to form prohibited interventions. In other words, although there is a customary rule of non-intervention at general international law, which the ICJ in *Nicaragua* held is based on the broad attitude of States, the dynamic tension between general and regional international law is evident. Although a customary rule of non-intervention exists at general international law, its application to ASEAN is limited because the vagueness of non-intervention in descriptive and evaluative terms must be appraised against the general rules of international law at a given point. For these reasons, the ASEAN approach in disaster management is not likely to last.

VII. CONCLUSION

This chapter's principal argument is that non-intervention's content, as a regional code of conduct embodied in the TAC, has waned. Through a case study of ASEAN's conduct of external relations in relation to Myanmar's actions, as an ASEAN member State, this chapter advances the core proposition by demonstrating how far regional non-intervention is being shaped by the encroaching influence of general rules at international law. To this extent, I evaluated the acts of ASEAN organs, in the 2000s, with respect to Myanmar in two broad aspects. These acts involved a chain of developments at general international law which covered functional concerns on the international plane: democratic governance and human rights protection in disaster management.

First, in relation to democratic governance, I argued that non-intervention's content had already changed since the Kampuchean conflict, given the impact of the regional law-making activities by ASEAN organs. The clearest departure was the AMM's request to the Myanmar government that Aung San Suu Kyi and her party be allowed participation in the democratisation of Myanmar. This express involvement, regardless of its unsuccessful outcome in diplomatic and political terms, by an ASEAN organ into an internal matter of Myanmar's governance sharply contrasted with the Kampuchean conflict, which upheld a more exacting regional content of non-intervention in favour of the Khmer Rouge government.

Second, the Nargis practice was examined to advance two arguments. On the one hand, it underscored again the regional law-making of ASEAN organs, in the area of disaster management. Here non-intervention's content waned in relation to actions taken by ASEAN organs, on operational aspects of disaster management. On the other hand, and importantly for the core proposition, the Nargis practice provides an example of how general international law contains evolving rules on human rights protection which may, as created through the ILC as a venue, potentially weaken what is left of the regional law of non-intervention with an ASEAN character.

Accordingly, this chapter reinforces the core proposition of this study by illustrating the dynamic tension between the relationship of general and regional international law. The evolving nature of non-intervention's regional content with an ASEAN character, is shaped by international organisations (such as ASEAN and the ILC) as venues for law-making, and is always evaluated against general international law at a given point in time.

Chapter Six

CONCLUSION

I. Recapitulation

The core proposition in this study is that ASEAN's non-intervention practice is a distinctive, regional law which is made possible by general international law, but its scope as regional law is also constrained by general international law. It is, in this sense, that general and regional international law share a relationship of dynamic tension. In this concluding chapter, I make observations regarding this proposition's implications for the prospects of non-intervention with an ASEAN character.

However, it is useful to recapitulate how the arguments in each chapter contributed to this study's core proposition. Chapter One identified a key problem with the current studies of non-intervention that concern ASEAN. There are many International Relations (IR) literature concerning non-intervention by ASEAN States. But these were not studies of acts with an ASEAN character, i.e., an international organisation with a separate legal personality. As a separate legal person, ASEAN's practice (through its organs) can be separate acts, from the ASEAN member States which created the international organisation. This regional law as to non-intervention is distinctive because it is made by the ASEAN organs. The regional law is not made by ASEAN States acting in their sovereign, individual capacities which is the focus of the IR literature.

This study, then, is a legal examination of non-intervention with an ASEAN character, which is distinctive as regional law. This examination matters mainly because when we appraise ASEAN's non-intervention practice as regional law, the strong influence of general international law as to non-intervention's regional content is manifest. For example, we examined the regional character of the disaster management laws, created by ASEAN organs, which protected the management of "internal affairs" by affected States during a disaster – effectively providing a regional content to the rule of non-intervention.

This example also underscores the roles of powerful external actors in shaping the general rules of international law. Such general rules of international law, in turn, form

both the analytical framework to identify regional law and also influence the content of regional law regarding non-intervention. In short, although there is an ASEAN regional practice of non-intervention, its legal content is shaped by general international law. In this respect, non-intervention's legal content is much narrower when compared to the IR literature, which studies non-intervention as part of a diplomatic practice, i.e., the "ASEAN Way". The IR literature does not (it does not need to) distinguish acts between individual ASEAN States from ASEAN member States, and there is consequently scant legal basis to identify the legal content of non-intervention.

Chapter Two builds on this position that ASEAN has capacity for regional law-making by examining how general international law sets the rules regarding international organisations: namely, its separate legal personality and ability to act separately from its member States. To this extent, this chapter explores how soft law coexists with binding legal sources such as treaties and custom. Consequently, the legal rules which arise, at general international law, permit international organisations (such as ASEAN) to make regional law. In other words, without the general rules of international law, there is no firm basis (i.e., an analytical framework) to identify and assess the distinctive regional law which is made by ASEAN: it would be difficult to assess the regional law of ASEAN as being legally distinct to the region of Southeast Asia.

Having explained how international organisations (such as ASEAN) can make regional law, Chapter Three concentrates on one specific area and explains how its law is largely made through international organisations – non-intervention. This chapter gives a broad account of non-intervention's unstable content at general international law. First, it discusses the influence of Vattel and Oppenheim on the present content of non-intervention. Second, the Latin American practice is explored to show its difference from, and similarities to, non-intervention's present content today. Third, after decolonisation, the UN General Assembly's numerous attempts to agree content as to non-intervention is examined. Particularly, Chapter Three shows how the Friendly Relations Declaration (1970) had no clear legal content as to non-intervention. Finally, the ICJ's catalytic role in creating non-intervention's content with reference to the Friendly Relations Declaration in *Nicaragua* and *DRC v Congo* is examined.

The purpose of this broad account of non-intervention, over a period of time, is to demonstrate its unstable content at general international law. The key argument in Chapter Three is that this unstable content, a moving target, is part of general international law, which gives an influential and extensive basis for ASEAN to develop its own regional law of non-intervention. Therefore, Chapters One to Three progressively advanced the core proposition that an international organisation such as ASEAN can make distinctive regional law, i.e., non-intervention, precisely because of the basis which exist at general international law. Regional law exists because of general international law. Regional law, therefore, is continually shaped by the general rules of international law: its relationship with general international law is marked by dynamic tension.

Chapter Four illustrates, through this study's first case study, how ASEAN embraced this extensive basis at general international law to create a distinctive regional law of non-intervention, in its capacity as a separate legal person. During the Kampuchean conflict, ASEAN acted as a venue to manage a longstanding conflict between Kampuchea and Vietnam. This long conflict allowed ASEAN organs, the ASEAN Standing Committee and the AMM (i.e., ASEAN foreign ministers), to develop ASEAN practice regarding non-intervention. Importantly, the ASEAN organs' conduct against Vietnam's illegal occupation of Kampuchea was acquiesced to by ASEAN member States.

This acquiescence matters because the ASEAN member States confirmed the ASEAN organs' functions, under the Bangkok Declaration (1967), in maintaining regional peace and security which was endangered by Vietnam's actions in Kampuchea. The developments in Kampuchea involved the participation of powerful external actors (China, the Soviet Union, and United States) in the international politics of Southeast Asia. The regional distinctiveness of ASEAN's practice regarding non-intervention is illustrated through ASEAN's recognition of the CGDK. Non-intervention protects even morally vile governments such as the Khmer Rouge: it prohibits the illegal change of governments. In other words, this is the distinctively regional core of non-intervention, a fairly precise rule, which arose from the conduct of ASEAN organs during the Kampuchean conflict.

The regional rule as to non-intervention forms, it is argued, a code of conduct which is a subsequent practice to Articles 2(c) and 10, TAC. Notably, the regional content of this rule with an ASEAN character is repeatedly endorsed by ASEAN as a key code of conduct, in accordance with the TAC for conducting intramural relations in

Southeast Asia.¹ Significantly, the potential legal effect of this regional law regarding non-intervention is indirectly acknowledged by Australia and the United States, in their interpretative declarations to Article 10, TAC, on their accession to the TAC.

Chapter Five shows, through a second case study, how general international law continues to shape ASEAN's making of a distinct regional law of non-intervention. This argument is instanced through two phases of ASEAN practice in relation to Myanmar. First, after the Depayin incident (2003), ASEAN requested democratic governance as a condition of changes to Myanmar's internal political governance. A specific (and notable) request was that Aung San Suu Kyi had to play some part in these internal changes.

The distinctiveness of non-intervention's regional content is reflected in ASEAN's statements that democracy is now part of its conduct of external relations with other international legal persons. It is distinctive with a regional character because we should compare this with ASEAN's previous practice against Vietnam for overthrowing the Khmer Rouge government. Thus the extent of ASEAN's intention to limit non-intervention's regional content is evident in its persuading Myanmar to forfeit its chairmanship of ASEAN in 2005, because it had not satisfied the minimum level of democratic governance.

Second, during cyclone Nargis, the law-making by ASEAN in the form of ERAT and the TCG further suggested the waning of non-intervention's regional content. Through AADMER,² the regional rules for facilitating humanitarian assistance justified ASEAN's actions inside Myanmar. Indeed, the AMM's statements during cyclone Nargis made it clear that Myanmar's acceptance of humanitarian assistance, through ASEAN-led mechanisms like the ERAT and TCG, formed part of its membership obligations.

This discussion of the two phases of ASEAN's practice with respect to Myanmar serves to show the changes to its regional law-making of non-intervention's content. To demonstrate the influence of general international law that potentially encroaches onto ASEAN's regional content regarding non-intervention, Chapter Five's final part highlighted the dynamic tension between general and regional international law by exploring the implications, which potentially arise from the ILC's progressive rules on protecting persons during disasters.

¹ For a recent iteration, see Para 23, Chairman's Statement, 31st ASEAN Summit (13 November 2017), available at: <<http://asean.org/storage/2017/11/final-chairman's-statement-of-31st-asean-summit.pdf>>.

² I.e., ASEAN Agreement on Disaster Management and Emergency Response.

The ILC is part of the UN, a unique international organisation with some law-making powers. It is in this context that the ILC's non-binding work on protecting persons during disasters might intrude onto ASEAN's operationally focused approach during disasters. Whereas the AADMER and the extant ASEAN practice are focused on giving technical assistance to a requesting State, the ILC's work contains a human rights approach: it self-consciously proposes (new) general rules of international law regarding disaster management.

II. Implications of this Study

In future, with respect to ASEAN's content of non-intervention, regional law and general international law will likely converge. This study's core proposition offers an analytical framework to determine which are the "proper" acts of regional law-making by ASEAN organs, and how far general rules of international law encroaches onto the distinctiveness of regional law-making by ASEAN.

As illustrated in the case study regarding protection of persons during disasters, non-intervention's content, as regional international law, has already waned. In other words, general international law exerts strong and persistent influence in relation to non-intervention's content as regional law.³ Importantly, these general rules, which influenced regional law-making by ASEAN, were either created a long time ago or were developed outside the region of Southeast Asia.

In this respect, as explained already, Southeast Asia is an area which was constructed by external actors including through the Anglo-Dutch Treaty (1824).⁴ Furthermore, in Chapters Four and Five, I also discussed the role of the United States in shaping the regional law-making of non-intervention during the Kampuchean conflict. In short, powerful external actors have always played a key role in Southeast Asia.

Today this active role of powerful external actors in shaping the international politics of Southeast Asia remains unchanged. What is changing is the rise of a particular external actor – China. China will play an unquestioned role in shaping general international law that apply to all States, including those located in Southeast Asia. Its role will likely replace the influence of certain western States.⁵

³ Generally see Michael Byers, *Custom, Power and the Power of Rules (International Relations and Customary International Law)*, (Cambridge: CUP, 1999).

⁴ See Chapter Two, Part V.

⁵ See President Xi Jinping's Report at the 19th National Congress of the Communist Party of China, 18 October 2017 (决胜全面建成小康社会夺取新时代中国特色社会主义伟大胜利); an English transcript is

Significantly, its undeniable status in international relations, and its proximity to Southeast Asia, will exert powerful consequences for regional law-making of non-intervention by ASEAN. In future, it is likely that ASEAN (organs) will be unable to agree and make regional laws readily, which collectively involve the peace and security of Southeast Asia.

This is because (some) ASEAN member States, through their representatives at ASEAN organs, will prevent collective positions with law-making effects from being made by ASEAN organs. At the highest levels of the ASEAN Summit and AMM, there are already indications that ASEAN organs have difficulties agreeing joint communiques which involve the South China Sea.⁶ This is likely to continue in future, as specific ASEAN member States start to align themselves more with China.

Over time, therefore, China's interests with respect to Southeast Asia may come to resemble the Monroe Doctrine.⁷ In other words, Southeast Asia is deemed by China to form part of its "domestic space".⁸ To this extent, China has been moderately successful in persuading specific Southeast Asian States (who are also ASEAN member States) that their individual interests are best served on a bilateral basis, and not conducted by ASEAN through its organs.⁹ The Belt-and-Road initiative, a large scale multilateral trade project, will complement China's approach in this respect.¹⁰

Lately and particularly, China has started an ambitious initiative, i.e., the Lancang-Mekong Cooperation (LMC), which involves five Southeast Asian States who are located at the Mekong sub-region: Laos, Myanmar, Thailand, Cambodia and Vietnam, all of them are also ASEAN member States. The LMC is a new, Chinese-

available at http://www.xinhuanet.com/english/download/Xi_Jinping's_report_at_19th_CPC_National_Congress.pdf.

⁶ See "Asean Nations Fail to Reach Agreement on South China Sea, *BBC News* (13 July 2012), available at <http://www.bbc.com/news/world-asia-18825148>.

⁷ Generally see "Why Cambodia has Cosied up to China (and Why it Worries Cambodia's Neighbours)", *The Economist*, 21 January 2017; Ja Ian Chong, "Singapore's Foreign Policy at a Juncture", *East Asia Forum*, 21 November 2017; see further Chapter Three, Section IV.

⁸ Kerry Brown, "China: The Shadow Power for a Shadow Age", *The Diplomat* (24 April 2018), available at <https://thediplomat.com/2018/04/china-the-shadow-power-for-a-shadow-age/>.

⁹ For a recent example, see Charlotte Gao, "Chinese Premier: China-Philippines Relations as Warm as Manila's Weather", *The Diplomat* (16 November 2017), available at <https://thediplomat.com/2017/11/chinese-premier-china-philippines-relations-as-warm-as-manilas-weather/>.

¹⁰ See Xi Jinping's speech (n5): "China will actively promote international cooperation through the Belt and Road Initiative. In doing so, we hope to achieve policy, infrastructure, trade, financial, and people-to-people connectivity and thus build a new platform for international cooperation to create new drivers of shared development", at 58.

Development"; generally also see Linda Low, "China's Belt-and-Road Initiative: Future Bonanza or Nightmare?", *S Rajaratnam School of International Studies Commentaries* (29 March 2018), available at <https://www.rsis.edu.sg/rsis-publication/rsis/co18058-chinas-belt-and-road-initiative-future-bonanza-or-nightmare/#.Wscm-enVx9A>.

led, Southeast Asian cooperative arrangement whose goals are contextualised within the Belt-and-Road initiative, which contains investments opportunities, concessional loans and aid by China to its participants.¹¹

In short, it would be increasingly hard for ASEAN organs to agree a common position as to non-intervention's content. ASEAN cannot prevent China from using its material resources to influence the foreign policies of certain ASEAN member States, in aid of a favourable outcome to China's interests around the South China Sea. It is true that there are already indications various States, including ASEAN States, have begun to resist China's attempts to assert itself.¹² Therefore, China may not succeed in getting its way, on every issue, with every ASEAN State in Southeast Asia on over time.¹³

But this development must be examined against a bigger reality: the peace and security of Southeast Asia is no longer just a matter for ASEAN. This is inevitable because of the region's proximity to China. Southeast Asia's development is now part of China's broader interests because of the implications for China's internal plans to be a "great modern Socialist country that is prosperous, strong, democratic, culturally advanced, harmonious, and beautiful."¹⁴

The United States, as the only other major power with resources to conduct meaningful international relations in Southeast Asia, will likely struggle to assert its control. This is not just because the United States is far away from Southeast Asia. It is partly because the United States' democratic system will produce governments whose focus on Southeast Asia will wax and wane. China, through the Chinese Communist Party (CCP), has the apparent advantage of a cohesive and persistent foreign policy towards ASEAN.

Against this wider context, ASEAN would still make a regional law of non-intervention which is shaped by general rules of international law. The dynamic tension, then, between general and regional international law subsists. However, what is changing now is the role and resolve of China as a Great Power to shape general international law for all States. Because of China's proximity to Southeast Asia, which contains member States who form ASEAN, the close relationship between regional law (by ASEAN) and general international law (influenced by China) will probably converge.

¹¹ Generally see Nguyen Khac Giang, "China is Making Mekong Friends", *East Asia Forum*, 19 May 2018.

¹² Generally see Yoon Sukjoon, "Xi Jinping's "True Maritime Power" and ESCS Issues", (2014) 13 *Chinese Journal of International Law* 887.

¹³ Generally see Low, n10.

¹⁴ See Xi Jinping's speech n5, at 10-11.

It bears stressing that ASEAN was created, partly by general international law, which consequently affirmed the reality of Southeast Asia as a region with common values. This was partially achieved through the distinctive regional law-making of non-intervention by ASEAN organs. However, China's role, as a Great Power and thus a powerful external actor, will likely challenge ASEAN's ability and willingness to make regional law because it would be harder to agree common positions in future.

When this happens, regional law will still be distinctive on a narrower basis, but likely because some ASEAN member States would not identify themselves as belonging to Southeast Asia anymore. The establishment of an analytical framework in this study, on which acts of ASEAN organs can be assessed, might allow us to appraise the prospects of a "smaller" Southeast Asia, and a long period of uncertainty for ASEAN.

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