Contextualizing International Law in the Northeast Asian Matrix

'International Law not grounded in its context is set to wither!'

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Abstract

This paper discusses the importance of approaching international issues in a contextualised manner And although the title of this paper is 'Contextualizing International Law in the Northeast Asian Matrix' the thesis of this focus is the need for a further contextualisation of the discipline in the Northeast Asian matrix. In some senses context in law is a given. From the perspective of NEA (China, Japan, Korea) however it cannot be a mere given. To this end the paper takes NEA as its model. The underlying premise of this paper is that contextualising International Law is an imperative of justice. The paper surveys the practice of International Law wherein context is a constituent element. The conclusions proffered are that regionalism has a normative basis in International Law both at the level of implementation as well as its development. Context exists in the very nature and practice of International Law.A contextualised approach to International Law is beginning to develop in NEA. There is some more room however for its development.

Keywords: International Law. Regionalism. Anatomy of International Law. China. Korea. Japan.

I . Introduction

Contemporary Northeast Asia (NEA) is simmering in territorial and maritime tensions, in historical claims and arguments but also in overtures of assimilation and cooperation. The emotive layer of NEA is also informed by the economic development that has embraced it, and the promise that it portends. International Law that can arbitrate in this simmer, International Law that can advance the development of the region, has to be contextualised in the Northeast Asian matrix.

Northeast Asia comprises in the sense of its common[1] description in its regional setting, of China, Korea and Japan. This description is not necessarily a neutral self-evident geographical encapsulation of the region since it does not include Russia and Mongolia both of which may be said to have a presence in the region. Russia's absence may be explained by the racial difference in its population and generally its Janus-faced mass that straddles Europe, central Asia and NEA. Mongolia on the other hand may be considered ethnically relatively closer to the population in the NEA, although arguably it is located more in central Asia than in NEA. That said the same could be said of China whose significant mass is in central Asia. Exclusive geographical presence in the north-eastern region is thus not a condition. The description NEA therefore is not completely set in geography, it is a combination of geography and common racial, cultural, linguistic, religious and historic heritage that configures in the description.

Certainly, common Western conceptions of the region are often less discerning, grouping Northeast Asia into the wider 'Far East.' However, there is no juridical description of the region as such, although it is to be noted that the UN Economic and Social Commission for Asia and the Pacific has a specific focus on Northeast Asia *qua* Northeast Asia, including a Sub regional Office for East and North-East Asia located in Korea.[2] This UN focus on the region however embraces Mongolia and Russia, with a specific development oriented integration agenda. Perhaps a more relevant, although not complete, reinforcement of the concept of NEA, is to be found in the Trilateral Cooperation Secretariat (TCS), an international organisation set up in 2011, as between China, Korea and Japan — 'established with a vision to promote

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1) Wikipedia, http://en.wikipedia.org/wiki/Northeast_Asia (last visited Aug., 2014).

2) See U.N. Economic & Social Commission for Asia and the Pacific [UNESCAP], http://northeast-sro.unescap.org/about.html (last visited Aug., 2014).

peace and common prosperity among the People's Republic of China (China), Japan, and the Republic of Korea (ROK/South Korea).'[3] In this vision though, the Democratic People's Republic of Korea is excluded, presumably on political grounds. In sum, given that the common geography and heritage of the region is marred by historic conflicts, including some spatial ambivalence as to its contours — the commonly held description 'Northeast Asia' is in essence a political aspiration in NEA for some form of regional solidarity.

Individually the countries in the Northeast Asia are now important economic powerhouses. But collectively they can be even more formidable. Politically the three are important players in international decision making respectively, but could be very significant with a common agenda. Historically the three have been intertwined through conquests, divisions and disputes. These have been politically internally driven and have become historically entrenched. Moreover, the divisions have also been externally influenced. For example, the US foreign policy in the region may be considered as being constructed within the context of the balance of power within NEA. This external influence may be considered benign or negative, depending on the standpoint of the observer, in terms of the development of the integrity of the region. Be that as it may the fact remains that racially, culturally and in religious terms the three countries share a wealth of common ground for further social and cultural associations. Geographically there is a unity that underlines environmental, and in some measure, economic, interdependence. Thus, there is a sense of promise, commonality and interaction in this geographic proximity. In sum, the NEA matrix is an internal inter-se construct the borders of which have been externally reinforced. This construct calls for solidarity or at the least peaceful co-existence.

In this regional milieu, therefore an enquiry into the setting of International Law and its role has much to commend it — as an 'arbitrator', as a normative force, and as a facilitator, — indeed as a vehicle for the external impact of the region. More importantly an effective and justice oriented role for its application to the States in NEA individually and in the foreign relations inter-se of the States in NEA, necessitates its regional contextualization. This need for the regional contextualisation is probably relatively more important with respect to relations inter se the States in NEA. Of course, the dynamics of the inter-se relations in NEA trigger the application of International Law but more significantly fuel the need for its contextualisation to the exigencies of the region. Moreover, the practice inter-se may inform the existence of local Customary International Law as a facet of its contextualised consideration.

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3) *See* http://www.tcs-asia.org/en/tcs/overview.php (last visited Nov., 2016).

The value and policy rational for contextualising International Law in a regional setting are varied. First, as has been pointed out:

> 'closeness to context better reflects the interests and consent of the relevant parties. As a matter of legal policy, it may often be more efficient to proceed by way of taking a regional approach. Both human rights and economic integration constitute examples of this type of reasoning.'[4]

This is a stand-point concerned with enforcement/implementation as much as participation in its development. Second, if regionalism is the 'natural tendency of development from States to larger units of international government'[5] then International Law has to respond to that development. Third, just as the necessity for law is inherent to the existence of societies, the necessity for International Law is inherent in the existence of an international society — including regional ensembles of its constituents. Fourth, if as has been asserted 'International Law and international politics cohabit the same conceptual space'[6] the political space that regions occupy have a relevance to its development.[7] Fifth, justice calls for the formulation and application of law in a contextualised manner. Thus, it is a central tenet of equity that differently circumstanced entities should be accorded different treatment.[8] Similarly, Rawls's differential principle[9] is an illustration of contextualising law — the rational individual behind the veil of ignorance displacing the notion of 'one size fit for all.' Finally, given the perception often of the equation of universalism with Western cannons of jurisprudence, there is a need to take into account other legal traditions.[10] Thus, in order to respond to the 'multi-polar and multi-civilisational reality of twenty

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4) *See,* Int'l Law Comm'n [ILC], *Fragmentation of Int'l Law: Difficulties Arising from the Diversification and Expansion of Int'l Law,* ILC A/CN.4/L.682, ¶ 206 (Apr. 13, 2006).

5) *Id.*

6) Ann-Marie Slaughter, *International Law in a World of Liberal States*, 6 Eur. J. of Int'l L. [E.J.I.L.] 503, 503-38 (1995).

7) *See also,* Martti Koskenniemi, The Politics of International Law, 221, (Hart, 1st ed. 2011).

8) *See also,* Lon L. Fuller, Anatomy of the Law 94 (Praeger, new ed.,1968) ("Since no two cases are ever exactly alike, one cannot act justly unless one is able to define what constitutes an essential likeness.").

9) John Rawls, Theory of Justice, 65, (Belknap Press, Revised ed. 1999).

10) *See generally* Onuma Yasuaki, A Transcivilizational Perspective on International Law, (The Pocket Books of the Hague Acad. of Int'l Law, Ser. No. 8, 2010); and William Twining, General Jurisprudence: Understanding Law From a Global Perspective, (Cambridge Univ. Press, 2009).

first century, first century,' Onuma Yasuaki calls for the need to develop 'a cognitive and evaluative framework based on the recognition of plurality of civilizations and cultures that have long existed in human history.'[11]

The discourse on relativism in International Law, which also partakes of its contextualisation, has in some measure, a particular relevance to the individual States in NEA. However, the purpose of this context based focus of International Law in NEA is not to engage/re-hearse in the discourse on relativism as such. Rather, whilst recognising the echoes of relativism, and without prejudice to the arguments for and against relativism in International Law, the following observations are proffered. First, there may be echoes of relativism in this focus, the relativism advanced is diluted. Second, the arguments advanced here are not policy based viz., whether relativism is apposite in a regional context but rather that contextualism is anchored in the very nature of law, positivism and the architecture of the international legal system. Third, whereas a central pillar of the discourse on relativism is set in human rights, the focus of 'contextualism' in International Law herein is general. Finally, to the extent that there are traces of relativism herein, relativism on a regional setting has more of a chorus of claimants in its favour than relativism on a State basis — the contextual focus here is located in a regional, as opposed to a State setting.

The case for a NEA specific contextualisation of International Law is but an instance of the wider question of the nature of its relationship with regionalism, the nature of its integrity outside a contextual setting, and contextualisation as a process of justice and its efficient application. Accordingly, this paper outlines the theoretical foundations for a contextualised focus on the role of International Law in NEA. In this paper, first, the normative basis of regionalism is explored; then followed by a focus highlighting how in different ways International Law operates in a contextualised manner drawing mainly from the practice of the International Court of Justice (ICJ). Finally, some brief observations are proffered with respect to the contextualisation of International Law in practice.

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11) Yasuaki, *supra* note 11, at 107.

Ⅱ. Does regionalism have a normative basis in International Law?

There is a dearth of legal analysis of International Law from a regional perspective.[12] In particular, its building blocks have not been considered adequately *qua* regional blocs. The nature and 'transformation' of International Law as it engages within a regional setting has not been sufficiently analysed, other than in terms of its scope. However, the subject has featured variously, for example in the discourse on the phenomenon of fragmentation in International Law;[13] in terms of the European contribution to it;[14] from an ideological stand-point assimilated from a regional setting viz., communism in the Soviet era,[15] or Third World perspectives;[16] with reference to international governance versus regionalism;[17] and regional consciousness in the representative regional works,[18] or regional State practice.

None of these perspectives however directly engage in a theoretical discourse of International Law from a regional perspective as such. There are several reasons for this:

First, traditionally the basic unit of International Law has been the State and therefore, despite the developments of new subjects, for example international

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12) ILC, *see supra* note 5 at ¶ 195 (echoing the observation herein; however the ILC study itself provides quite a comprehensive discourse on regionalism, in the context of fragmentation of Int'l Law.

13) *Id.*

14) *See* the regular survey of the international practice of the European Union in the E.J.I.L, 1 -7 *Int'l Practice of the Eur. Communities: Current Survey;* Peter Hay, *The Contribution of the European Communities to International Law*, 59 Proc. of Am. Soc. of Int'l L. (1965); Martti Koskenniemi, *International Law in Europe: Between Tradition and Renewal* 16 E.J.I.L. 113-124 (2005); Alexander Orakhelashvili, *The Idea of European International Law* 17 E.J.I.L. 315-347 (2006).

15) *See generally* G. I. Tunkin, Theory of International Law (Harvard Univ. Press 1974).

16) *See generally* Richard Falk et al., International Law and the Third World: Reshaping Justice (Routledge 2008).

17) Both in trade law and political economy. *See generally, e.g.*, Jagdish Bhagwati, Termites in the Trading System (Oxford Univ. Press 2008).

18) *E.g.*, Liliana Obregon, *Latin American International Law, in* Handbook of International Law, (David Armstrong ed., Routledge 2011).

organisations and individuals, discourse has been mainly focussed on the State. In conclusion, generally regions have not been the measure for discerning either the origins of International Law or its practice. This is despite the fact that much of State practice historically originated in geographical proximity, since the extent of foreign relations were geographically informed. Likewise, contemporary multilevel analysis of International Law[19] — specifically international economic law — underpinned by a human rights approach — has not taken the regional dimension specifically as such, as a level for its approach to International Law, even though the development of human rights including conceptions of human rights, have a regional setting — including such a setting prior to becoming universalized.

Second, a regional perspective of International Law has been understood as undermining the notion of its 'universality.' In this debate regionalism is positioned in contradistinction to the universal validity of International Law. This discourse has both a European historical setting, as well as a modern one. In the historical European context, the idea of a 'European International Law' with European Christian values and applicable only as between the 'civilized' European States, was developed in the 19 century essentially through European classical writings.[20] This claim of an International Law confined essentially to the European region has been contrasted with the notion of a universal one based both on natural law precepts dating back as long ago as the 7th century; and its actual practice both within and outside Europe.[21]

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19) *See* generally, Ernst-Ulrich Petersmann, *Human Rights Require 'Cosmopolitan Constitutionalism' and Cosmopolitan Law for Democratic Governance of Public Goods* (Eur. Univ. Institute Working Papers LAW 2013/04), http://cadmus.eui.eu/bitstream/handle/1814/27155/LAW_2013_04.pdf?sequence=1 (last visited Jan. 26, 2015).

20) Orakhelashvili, *supra* note 15, at 315-347.

21) The idea of European International Law as a legal system or a sub-system of International Law implies a certain degree of exclusivity, manifested in legal rules and principles applicable within a close-knit legal community and different from the rules and principles applicable outside that community…. Universality of International Law based on natural law applicable to all nations was accepted in European thinking as long ago as the 7th century. In classical writings there is nothing to suggest that the law of nations applied differently to different nations.... The idea that International Law had a specifically European character was most actively and fully developed in and around the 19th century. It became conventional wisdom that International Law developed through European treaties and customs, and that non-European countries did not participate in its development. This approach contradicts the classic conception of the universal law of nations.

Id. at 316-17;

The proponents of European International Law based their views not on empirical evidence, but on the assumptions and prejudices of racial, cultural and religious superiority of Europeans over non-Europeans. Obsession with the European character of International Law went so far that some writers tried to present their own attitude as the attitude of the legal system…. The idea of European International Law was part of the ideology of colonialism. Colonial expansion and exploitation found no explanation in the classical law of nations, which embodied the principles of universality and uniformity and recognized the equality of nations…. The idea of European International Law was part of the ideology of colonialism. Colonial expansion and exploitation found no explanation in the classical law of nations, which embodied the principles of universality and uniformity and recognized the equality of nations. But in the 19th century, non-European countries were viewed either as objects of colonization or as attractive markets. Given this, a radical reinterpretation, or vulgarization and perversion, of the doctrine of natural law took place in the 19th –century writings, presenting non-European nations as naturally unfit to be part of the Family of Nations due to their lack of civilization. Writers like Lorimer, Holtzendorff and Westlake relied on certain constructed natural states of things to provide approval for civilizational difference, and its implications, hence justifying International Law under which colonial wars and annexations, as well as wars for opium markets, were legal.

Orakhelashvili, *supra* note 15, at 325;

The thesis put forward by the proponents of European International Law that non Europeans were incapable of understanding International Law was based on pure prejudice. Their writings ignored the fact that the cultural and intellectual heritage of non-European nations had ling embraced and developed fundamental ideas of International Law. Kautilya's Arthasastra and the Code of Manu, to mention only a couple of examples, provide evidence of non-European concepts of the sanctity of treaties, inviolability of ambassadors, principles of humanity in conducting wars and fundamental principles of the law of the sea… Descriptions of international legal history presented by the major proponents of European International Law in their treatises were in a way irreconcilable with historical reality: they asserted that International Law was a European development and that other states became its subjects only if and when they were admitted into European family of nations…. The practical side of history demonstrates that International Law has been as Asian or African as it has been European. The first instruments and institutions of International Law identified to date originate outside Europe.

Id. at 328-29;

All this evidence suggests that no specifically European International Law has ever existed: it was merely constructed in doctrinal writings by reference to extra-legal factors and circumstances which never possessed any practical significance in inter-state relations…. International Law was never restricted to Europe. It was a secular law and its essential norms emerged as universally valid norms.... a single universal law of nations applied both to European and non-European nations in their intercourse from the 16th century. However, from the 19th century, which witnessed Afro-Asian confrontation with Europe and

Thus, Alexander Orakhelashvili observes:

> 'The idea of European exclusivity has remained a doctrinal aspiration. Practical experience confirms, in line with the views of the classic writers on universality, that International Law has not emerged in Europe, nor has it ever acquired a specifically European character.'

This debunking of the idea of a 'European International Law' focuses on the 'European' claim qua Europe with reference to a universal one. It is not intended however as an elucidation of its nature as such from a regional dimension. It does however touch upon the question of the very relevance of the existence of different regions, including NEA.

A somewhat similar discourse focusing on contemporary regional State practice is to be found in the evaluation of the contribution of different regions to the development of modern International Law, and their relevant characteristics. Thus, Gillian Triggs observes:[22]

> 'A review of the literature and state practice suggests that states in the Asian Pacific have played little role in the development of modern International Law...'

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colonization, International Law started to abandon its centuries old universality. European egocentrism left Asians "outside" civilization and International Law shrank to regional dimensions.

Id. at 333; "From the 15th century onwards, on the basis of the classical concept of universality, well consolidated in doctrine, the history of International Law witnessed the irreversible affirmation of universality and secularity of International Law, realized through extensive treaty and diplomatic practice between European and non-European powers." *Id.* at 336; "The idea of European exclusivity has remained a doctrinal aspiration. Practical experience confirms, in line with the views of the classic writers on universality, that International Law has not emerged in Europe, nor has it ever acquired a specifically European character." *Id.* at 339;

However, universal the terms in which International Law is invoked, it never appears as an autonomous and stable set of demands over a political reality. Instead, it always appears through the positions of political actors, as a way of dressing political claims in a specialized technical idiom in the conditions of hegemonic contestations.

See also, Koskenniemi *supra* note 8, at 221..

22) Gillian Triggs, *Confucius and Consensus: International Law in the Asian Pacific,* 21 Melb. Univ. L. Rev 650, 651 (1997).

The characteristics of the Asian Pacific Region contributing to this conclusion are described as follows:[23]

- 'a preference for consultation and consensus decision-making and good neighbourly relations
- a dislike of confrontational/adversarial litigation of disputes, particularly third party dispute resolution before a court or tribunal
- a preference for conflict avoidance mechanisms demonstrated by a trend towards workshops, joint management and development regimes' cooperation agreements and 'track-two' diplomacy as a means for resolving disputes
- a community and social welfare orientation to human rights issues
- a strong emphasis on economic priorities in law-making and foreign policy

This discernment of regional features is no doubt of value. It is however a focus on the region from an external vantage removed from the region and set against the 'modern' model of universal International Law.

In the same vein, within the regional settings there is growing awareness and discourse on regional importance, as for example the setting up of Societies of International Law (for example, the Asian Society of International Law); edited monographs that focus on regional challenges from the stand-point of International Law (for example boundary disputes);[24] including works on its sub-sets of disciplines, as for example Human Rights and Environmental Law.[25] It will be noted however that in some senses Societies of International Law however promote a particular regional perspective within its 'universal paradigm;' as do the edited volumes. Moreover, the focus on sub-sets of disciplines tends to be mainly from a positivist practitioner's perspective.

Third, the focus of international legal analysis on regionalism such as it is, is

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23) *Id.* at 675.

24) *See generally, e.,g.,* Xue Hanqin, Chinese Contemporary Perspectives on International Law: History, Culture and International Law, 355 Recuel Des Cours (Brill 2011); Nisuke Ando, Japan and International Law, Past, Present and Future: international symposium to mark the centennial of the Japanese Association of International Law (Brill 1999); Northeast Asian Perspectives on International Law: Contemporary Issues and Challenges (Seokwoo Lee & Hee Eun Lee eds., Brill 2013).

25) *E.g.*, China and International Environmental Liability Legal Remedies for Transboundary Pollution (Michael G. Faure & Song Ying eds., Edward Elgar 2008).

mainly set in Western legal discourse, with a Euro-centric preoccupation, with much of the rest of the world taking its cue largely from this international legal scholarship, as given. Thus, analysts from NEA have repeatedly referred to the characteristics of the original International Law inherited in the region as partaking of 'Christian' values.[26] For example it has been observed:[27]

> 'So it was national survival, not Korea's appreciation of Judaeo-Christian precepts embodied in the Western law of nations that induced Yi Korea to assimilate International Law to the extent that it did.'

To some extent this is understandable since the original inception of modern International Law into NEA was through the translations of the writing of Henry Wheaton.[28] His writings form the basis of the characterization of the modern International Law originally introduced in NEA as partaking of Christian values; and echoed still in contemporary writings. Indeed, William A.P. Martin in 1864 wrote, albeit in English in his preface to his translation into Chinese of Wheaton's book:[29]

> 'International Law in its present form is the mature fruit of Christian civilisation. It springs, however, spontaneously from the intercourse of nations…'

However, as Orakhelashvili points out, Wheaton was one of those writers who advanced the idea of 'European International Law' fit for the Christian civilized world only, and denied its existence in a universal form.[30] Such writings Orakhelashvili rightly points out were not based on evidence but on prejudice and that in fact International Law was secular and universal.[31]

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26) *See, e.g.*, Eric Yong-Joong Lee, *Early Development of Modern International Law in East Asia --- With Special Reference to China, Japan and Korea*. 4 J. Hist. Int'l. L. 42, 42 (2002); Nam-Yearl Chai, *Korea's Reception and Development of International Law*, in Korean International Law 7-36, 20 & 25 (Berkeley U.C. 1981).

27) *See* Chai, at 20.

28) Henry Wheaton, Elements of International Law (William B. Lawrence ed., Boston: Brown & Co. 6th ed. 1855) (translated into Chinese by American missionary William A. P. Martin, who was visiting China in 1863), *see, e.g.*, Lee, *supra* note 27, at 46). See also Rune Svarverud, *International Law as World Order in Late Imperial China: Translation, Reception and Discourse,1847-1911*, ch. 3 (Brill 2007).

29) *See* Svarverud, at 98. .

30) *See* Orakhelashvili, *supra* note 15, at 318.

In sum, the circumstances when regionalism is considered have been described as involving 'the question of the universality of International Law, its historical development or the varying influences behind its substantive parts.'[32] Thus, the discourse in terms of the European dimension, as has been pointed, is not so much about regionalism *qua* Europe and International Law but more in terms of its historical development, the contribution of Europe, and its assimilation with European values and 'European International Law.' Similarly, general discourse on 'regionalism versus universalism' focus on the merits or otherwise of regional governance to the development of the world order,[33] thus proffering an elucidation that is essentially utilitarian as opposed to doctrinal. Moreover, the conclusion even in terms of a utilitarian approach is not clear. Thus, it has been observed albeit in the context of international organizations that the 'complex interplay of regional and universal elements … permits few generalizations.' Indeed, that there is 'no inherent superiority in either regionalism or universalism.'[34] In the same vein, efforts to deconstruct the universality of International Law and its origins[35] skew the focus on regionalism from the perspective of universalism. In fact, the closest deliberation is the observation by the ILC viz.:

> '*If regionalism* itself is not automatically of normative import, its significance is highlighted as it mixes with functional differentiation. (Emphasis added)'

The former part of the observation leaves in some measure the question of the normative import of regionalism open, which is to be welcomed. All states of learning and advanced approaches to knowledge leave doors open for possible argumentation. However, further on in the ILC report the conclusion is somewhat dismissive:[36]

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31) *See id.* at 325; see also Koskenniemi, *supra* note 15, at 347.

32) ILC, *supra* note 5, at ¶ 195.

33) *See e.g.*, Richard Falk, *Regionalism and World Order After the Cold War*, 4 Australian J. of Int'l Affairs (May 1995); Christoph Schreuer, *Regionalism v. Universalism*, 6 E.J.I.L. 477 (1995).

34) *See* Schreuer, at 477.

35) Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20 E.J.I.L. 265-97 (2009); Emmanuelle Jouannet, *Universalism and Imperialism: The True-False Paradox of International Law?* 18 E.J.I.L. 379-407 (2007); Anu Bradford & Eric A. Posner, *Universal Exceptionalism in International Law*, 52 Harv. Int'l. L. J. 1 (2011).

36) *See* ILC, *supra* note 5, at ¶ 215.

> 'In fact there is very little support for the suggestion that regionalism would have a normative basis on anything else apart from regional customary behaviour, accompanied, of course, with the required opinion juris on the part of the relevant States.'

This is somewhat incorrect. The evidence is not so much that there is little support but rather that the focus as such simply has not been there *inter alia* for the reasons explained already.

Another close encounter of the normative import of regionalism is to be found in a reference by Bruno Simma when he describes different possible conceptions of universalism:[37]

> 'At a second level a -wider- understanding of universality responds to the question whether International Law can be perceived as constituting an organized whole, a coherent legal system, or whether it remains no more than a 'bric-a-brac', to use Jean Combacau's expression — a random collection of norms, or webs of norms, with little interconnection.'

This 'bric-a-brac' description of International Law gives regions a different normative foundation. Regional systems acquire a normative *pari pasu* status. In fact, the origins of International Law are not set in the advent per se of the institution of the State. Thus, a hermit State or indeed a group of hermit States have little to contribute to its development absent *relations* as between these States. Rather, the origins of International Law are coterminous with relations as between States. Historically relations as between States emerged within a region as between proximately located States. Subsequently, relations as between States within regions formed, and 'International Law' evolved accordingly to this circumstance. And in this process the regions did not surely wither. The relations within the region amongst the States of the region in differing degrees continued. Indeed, where common goals are best achieved regionally, functionally specific regional frameworks have and are evolving for instance in the trade and monetary spheres. Moreover, States within regions engaged in the development of International Law multilaterally do not just take to this forum their national perspectives but also surely have an eye on the regional implications of their deliberations internationally. This may as much be a regional perspective or one that distorts it. But even in the latter case it originates from a regional setting.

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37) Simma, *supra* note 36, at 267.

In sum, regions therefore had a normative basis in the historical development of International Law; continue to have a normative basis to the extent that that basis has not been displaced by a universal system of law; have a normative basis in its future development, including in the building of new regional utilitarian based normative frameworks. The nature of International Law is not discernible through the dogma of a universalist paradigm alone — which approach is emotive, aspirational and distortive of the way in which it needs to be engaged in. The reality in international relations is that International Law partakes of a 'bric-a-brac' setting, to borrow a description — of building and interacting blocs, of varying units of measure and force. Such an analysis is confirmed and reinforced by its contextual nature as set out below.

Ⅲ. Contextualising International Law

Context here is used widely to describe the elements that inform the scope and content of a norm without which the norm could be too wide, too narrow, too rigid — indeed could lead to absurd senses. As such 'context' is built in the very anatomy of International Law.[38] Indeed context approximates to what Lon Fuller described in his *Anatomy of Law* in a more general manner as the 'implicit elements' in law, and which can partake of elements that are in a sense extraneous to it.[39] At a micro normative level context serves to place an interpretation on an international norm and is internal to it. The internal aspects that inform the context may be set within the norm, or partake of the circumstances involved in the creation of the norm. However, context can also be constructed on to a norm from an external vantage imbuing it with a certain meaning. Such a context may be said to have an external dimension normally deriving from a macro normative framework, or extraneous in the sense that the normative scope is informed by the relevant facts.

Whatever the locus of the context however it is inherent to a norm. Context exists in the very nature of law and International Law, particularly if law is defined as a

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38) Fuller, *supra* note 9, (although does not expressly refer to 'context' as such in his anatomy of law in his work).

39) The interpretation of statutes is, then not simply a process of drawing out of the statute what its maker put into it but is also in part, and in varying degrees, a process of adjusting the statute to the implicit demands and values of the society to which it is to be applied. In this sense it may be said that no enacted law ever comes from its legislator wholly and fully 'made'. *Id.* at 57. *See also, id.* at 69.

process of decision-making.[40] Law as a process operates within a wider contextual framework and indeed emphasises context.

Moreover, contextualisation is an imperative in the process of interpreting a norm. Interpretation involves contextualisation and contextualisation itself can partake of interpretation. However, the two are conceptually distinct although related. 'Interpretation' *stricto sensu* located in a spectrum of its meaning is closer to the source of the law whereas, on the other end, context may be said to be closer to 'the implicit demands and values of the society to which it is to be applied.'[41] This difference is illustrated in the Advisory Opinion of the ICJ in the Legality of the Threat or Use of Nuclear Weapons, when the court was establishing the contextual scope of international humanitarian law and the law on armed conflicts in relation to 'the threat or use of nuclear weapons'. The court observed as follows:[42]

> '86. …Indeed, nuclear weapons were invented after most of the principles and rules of humanitarian law applicable in armed conflict had already come into existence; the Conferences of 1949 and 1974-1977 left these weapons aside, and there is a qualitative as well as quantitative difference between nuclear weapons and al1 conventional arms. However, it cannot be concluded from this that the established principles and rules of humanitarian law applicable in armed conflict did not apply to nuclear weapons. Such a conclusion would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to al1 forms of warfare and to al1 kinds of weapons, those of the past, those of the present and those of the future. In this respect, it seems significant that the thesis that the rules of humanitarian law do not apply to the new weaponry, because of the newness of the latter, has not been advocated in the present proceedings. On the contrary, the newness of nuclear weapons has been expressly rejected as an argument against the application to them of international humanitarian law:
>
> "In general, international humanitarian law bears on the threat or use of nuclear weapons as it does of other weapons. International humanitarian

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40) *See* generally, W.M. Reisman, *International Law Making: A Process of Communication*, 75 Proc. of Am. Soc. of Int'l L. 101 (1981); and Rosalyn Higgins, Problems and Process: International Law and How We Use It (Oxford Univ. Press 1995).

41) Fuller, *supra* note 9, at 57.

42) Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. (July 8).

> law has evolved to meet contemporary circumstances, and is not limited in its application to weaponry of an earlier time. The fundamental principles of this law endure: to mitigate and circumscribe the cruelty of war for humanitarian reasons." (New Zealand, Written Statement, p. 15, paras. 63-64.)'
>
> '90. Although the applicability of the principles and rules of humanitarian law and of the principle of neutrality to nuclear weapons is hardly disputed, the conclusions to be drawn from this applicability are, on the other hand, controversial.
>
> 91. According to one point of view, the fact that recourse to nuclear weapons is subject to and regulated by the law of armed conflict does not necessarily mean that such recourse is as such prohibited.
>
> 92. Another view holds that recourse to nuclear weapons could never be compatible with the principles and rules of humanitarian law and is therefore prohibited. In the event of their use, nuclear weapons would in al1 circumstances be unable to draw any distinction between the civilian population and combatants, or between civilian objects and military objectives, and their effects, largely uncontrollable, could not be restricted, either in time or in space, to lawful military targets. Such weapons would kill and destroy in a necessarily indiscriminate manner, on account of the blast, heat and radiation occasioned by the nuclear explosion and the effects induced; and the number of casualties which would ensue would be enormous. The use of nuclear weapons would therefore be prohibited in any circumstance, notwithstanding the absence of any explicit conventional prohibition. That view lay at the basis of the assertions by certain States before the Court that nuclear weapons are by their nature illegal under customary International Law, by virtue of the fundamental principle of humanity.'

Thus, the Court unanimously agreed on the context for the disciplines on nuclear weapons viz, 'threat or use of nuclear weapons should also be compatible with the requirements of the International Law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear Weapons'. However, the court could not agree unanimously on the actual interpretation of the law on armed conflicts and international humanitarian law to nuclear weapons. This is because there was room for disagreement on actual interpretation of the relevant norms in the context disciplines. It deliberated on this as follows:

> 'E. By seven votes to seven, by the President's casting vote. It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of International Law applicable in armed conflict, and in particular the principles and rules of humanitarian law…However, in view of the current state of International Law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake;'

Context in the anatomy of International Law is to the found variously, and through different mechanisms. First, it is set in the requirement of 'good faith' which is ubiquitous in International Law. Good faith helps in managing context to the limits of its intended and reasonable scope. Thus, in the Legality of Threat or Use of Nuclear Weapons the ICJ pointed:[43]

> 'One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith.'

Second, context is specifically embellished in the anatomy of all the major sources of International Law. First and foremost, context features prominently in the interpretation and implementation of treaty obligations. Thus, as is well appreciated Article 31 and 32 of the Vienna Convention on the Law of Treaties 1969 (VCLT) specifically requires the interpretation to be in 'good faith' whilst taking into account a range of considerations that describe the relevant context. Indeed, context of a treaty in the general sense of 'context' is described in the Articles 31-32 of VCLT extensively.[44] In the same vein, UN Security Council Resolutions have a somewhat

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43) *Id.* at ¶ 102.

44) 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context:
(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant

similar contextual framework to their interpretative process as treaties. Thus, the ICJ has observed:[45]

> 'Before continuing further, the Court must recall several factors relevant in the interpretation of resolutions of the Security Council. While the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also requires that other factors be taken into account. Security Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty. Security Council resolutions are the product of a voting process as provided for in Article 27 of the Charter, and the final text of such resolutions represents the view of the Security Council as a body. Moreover, Security Council resolutions can be binding on all Member States (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 54, para. 116), irrespective of whether they played any part in their formulation. The interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions.'

Furthermore, the requirement of good faith in the interpretative process is further

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rules of International Law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32: Supplementary means of interpretation: Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

Vienna Convention on the Law of Treaties [V.C.L.T.] arts. 31-32, May 23, 1969, 8 I.L.M. 679.

45) Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. ¶ 94 (July 22).

reinforced in the performance of the treaty under Article 26 VCLT.

Second, context in the anatomy of Customary International Law (CIL) is certainly present, if not readily evident. CIL is in some senses inherently contextual in its origins with respect to the practice and *opinio juris*, given that the State practice in question is specific/concrete. Thus, Lon Fuller asserts albeit in the domestic law context:[46]

> 'The great advantage of customary law is that in its inception it permits the parties subject to it "to try it on for fit." If it does not fit at all, it will normally be abandoned before it has become so firmly fixed that it cannot readily be discarded.'

Moreover, the presumption of legitimacy of State action embedded in the Lotus case[47] ensures that prohibitory norms of International Law arise and are set within a contextual milieu. On the other hand, State actions justified on the basis of a permissive rule would draw from a non-contextually founded rule. In addition, the interpretation of customary international norms must perforce reflect the customary rules of interpretation of treaties viz., the interpretation must be in good faith, taking into account the context within which the CIL norm arises. Thus, if the particular CIL norm is set within the framework of an underlying principle the principle can inform a wider application of the CIL norm as illustrated by the ICJ in Costa Rica v Nicaragua as follows:[48]

> 'Furthermore, the Court concluded in that case that "it may now be considered a requirement under general International Law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource" (I.C.J. Reports 2010 (I), p. 83, para. 204).'

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46) Fuller, *supra* note 9, at 77.

47) *See* PCIJ, The Case of the S.S. Lotus (France v. Turkey), Judgment, 1927 P.C.I.J. (Ser. A) No. 10, at 18-19 (Sep. 7) (stating, "Far from laying down a general prohibition . . ., it [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules.").

48) Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Judgment, 2015 I.C.J. ¶ 104 (Dec. 16).

Although the Court's statement in the Pulp Mills case refers to industrial activities, the underlying principle applies generally to proposed activities which may have a significant adverse impact in a transboundary context.[49]

In addition, CIL obligations must be performed in good faith as per treaty obligations. Finally, the context of CIL is defined by certain temporal principles. Thus, the ICJ applied the doctrine of intertemporal law to prescribe a particular time framework for the law on State immunity as follows:[50]

> The Parties are thus in broad agreement regarding the validity and importance of State immunity as a part of customary International Law. They differ, however, as to whether (as Germany contends) the law to be applied is that which determined the scope and extent of State immunity in 1943-1945, i.e., at the time that the events giving rise to the proceedings in the Italian courts took place, or (as Italy maintains) that which applied at the time the proceedings themselves occurred. The Court observes that, in accordance with the principle stated in Article 13 of the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, the compatibility of an act with International Law can be determined only by reference to the law in force at the time when the act occurred. In that context, it is important to distinguish between the relevant acts of Germany and those of Italy. The relevant German acts — which are described in paragraph — occurred in 1943-1945, and it is, therefore, the International Law of that time which is applicable to them. The relevant Italian acts — the denial of immunity and exercise of jurisdiction by the Italian courts — did not occur until the proceedings in the Italian courts took place. Since the claim before the Court concerns the actions of the Italian courts, it is the International Law in force at the time of those proceedings which the Court has to apply.

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49) *See* also Reparation for Injuries in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 12 (April 11) (wherein it is observed "Thus, the rule of the nationality of claims affords no reason against recognizing that the Organization has the right to bring a claim for the damage referred to in Question 1 (b). On the contrary, the principle underlying this rule leads to the recognition of this capacity as belonging to the Organization, when the Organization invokes, as the ground of its claim, a breach of an obligation towards itself.").

50) Jurisdictional Immunities of the State (Ger. v. Italy: Greece intervening), 2012 I.C.J. ¶ 58 (Feb. 3).

The time dimension to context is also embedded in disputes involving territories namely the *uti possidetis juris*[51] principle; and the principle that gives significance to the date when a territorial dispute is crystalized.[52]

Third, the law creating agencies of International Law allow for regional normative structures. Thus, fundamentally regional customary norms[53] are acknowledged; modifications inter-se of multilateral treaties can take place; [54] and regional co-operative arrangements have an accepted place in the international legal system.[55] One manner of understating this phenomenon is to regard these as exceptions. However, these are not self-evidently exceptions. Indeed, they are not articulated as such in any of the spheres referred to herein. In fact, these are instances that are consistent with the 'bric-a-brac' nature of International Law; and a contextually driven approach to the development of International Law.

Fourth, a number of International Law norms specifically have embedded in them a contextual dimension which determines the content and scope of the norm. Thus, the requirement under CIL for the delineation of the limits of the exclusive economic zone and continental shelf in the absence of an agreement should be such as to achieve an equitable solution[56] — an equitable solution calls for the taking into

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51) *See, e.g.*, Case Concerning the Frontier Dispute (Burk. Faso/Rep. of Mali), Judgment, 1986 I.C.J. 565, ¶ 20 (Dec. 22) .

52) *See, e.g.*, Case Concerning Sovereignty Over Pedra Branca/Pulau Baut Puteh, Middle Rocks and South Ledge (Malay./Sing.) 2008 I.C.J. ¶ 32. (May 23) (stating that, in the context of a dispute related to sovereignty over land such as the present one, the date upon which the dispute crystallized is of significance. Its significance lies in distinguishing between those acts which should be taken into consideration for the purpose of establishing or ascertaining sovereignty and those acts occurring after such date, "which are in general meaningless for that purpose, having been carried out by a State which, already having claims to assert in a legal dispute, could have taken those actions strictly with the aim of buttressing those claims." Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond), Judgment, 2007 I.C.J. Reports 697-698, ¶ 117 (Oct. 8)).

53) *See, e.g.*, Asylum (Colum./Peru), Judgment, 1950 I.C.J. 266 (Nov. 20).

54) V.C.L.T. *supra* note 45, at art. 41.

55) U.N. Charter art. 8.

56) Case Concerning Maritime Dispute (Peru v. Chile), Judgment, 2014 I.C.J. ¶ 179 (Nov. 20). (proceeding on the basis of the provisions of U.N.C.L.O.S. arts. 74(1), and 83(1), which, as the Court has recognized, reflect customary International Law). Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bah.),

account of the specific context of the particular maritime zones. Thus, this has been explained as follows:[57]

> 'The methodology which the Court usually employs in seeking an equitable solution involves three stages. In the first, it constructs a provisional equidistance line unless there are compelling reasons preventing that. At the second stage, it considers whether there are relevant circumstances which may call for an adjustment of that line to achieve an equitable result. At the third stage, the Court conducts a disproportionality test in which it assesses whether the effect of the line, as adjusted, is such that the Parties' respective shares of the relevant area are markedly disproportionate to the lengths of their relevant coasts.' (Footnotes omitted).

Likewise, certain CIL norms are inherently structured or interpreted such that the obligations are differential in terms of the particular factual circumstances in question. The context of such norms is thus externally informed, as for example the degree to which there needs to be exercise of State authority in the determination of title to territory. The ICJ recently affirmed this as follows:[58]

> 'The Court further recalls that, as expounded in the Eastern Greenland case …International Law is satisfied with varying degrees in the display of State authority, depending on the specific circumstances of each case.'

Fifth, the practice of differential treatment for developing countries is widespread in important spheres of international disciplines viz., International Economic Law and Environmental Law. This is a contextualised approach to normative development and its implementation. Although this practice is considered treaty based there is now sufficient practice to re-visit this analysis.[59] From the perspective of this paper

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Judgment, 2001 I.C.J. 91, ¶ 167 (July 1); Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 I.C.J. 674, ¶ 139 (Nov. 19). (The texts of these provisions are identical, the only difference being that art. 74 refers to the exclusive economic zone and art. 83 to the continental shelf, which read as follows: "The delimitation of the exclusive economic zone [continental shelf] between States with opposite or adjacent coasts shall be effected by agreement on the basis of International Law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.").

57) Peru v. Chile, *supra* note 57, at ¶ 180.

58) Malay./Sing., *supra* note 53, at ¶ 67.

59) *See, e.g.*, A. H. Qureshi & A. R. Ziegler International Economic Law 64-71 (Sweet &

however the underlying principle of differential treatment is that differently located subjects need to be treated differently. This is a facet of the contextual nature of International Law and has a relevance to the interface between International Law and regional affairs too.

Sixth, adjudication, which is fundamental to the implementation and development of International Law, is a process that further contextualises International Law, and in this regard the deliberations of the ICJ are important. First and foremost, the process of adjudication is essentially a process of contextualisation. Thus, the ICJ has observed: [60]

> 'In contentious cases, the function of the Court, as defined in Article 38, paragraph 1, of the Statute, is to "decide in accordance with International Law such disputes as are submitted to it". Consequently, the requests that parties submit to the Court, must not only be linked to a valid basis of jurisdiction, but must also always relate to the function of deciding disputes.'

Moreover, as Lon Fuller stated adjudication 'is a collaborative process of decision in which the litigant plays an essential role.'[61] In addition, he asserts with reference to adjudication in the common-law system that 'the courts of the common law do not lay down their rules in advance, but develop them out of litigated cases. This inevitably means that the shape taken by legal doctrine in a particular jurisdiction will be influenced by the accidents of litigational history within the jurisdiction.'[62]

Second, generally the ICJ approach, in particular to territorial and maritime disputes, is to set out at the outset in the judgements, the historical context and origin of the dispute.[63] Whilst this may be considered to be mainly a historical approach to

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Maxwell 2011).

60) Frontier Dispute (Burk. Faso/Niger), Judgment, 2013 I.C.J. ¶ 48 (April 16).

61) Fuller, *supra* note 9, at 101.

62) *Id.* at 98.

63) *See, e.g.*, Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 2013 I.C.J. (Nov. 11); Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen), Judgment, 2012 I.C.J. (July 20); Jurisdictional Immunities of the State (Ger. v. Italy: Greece intervening), Judgment, 2012 I.C.J. (Feb. 3); Application of the Interim Accord of 13 September 1995 (The former Yugoslavia v. Mac. v. Greece), Judgment, 2011 I.C.J. (Dec. 5); Peru v. Chile, *supra* note 57; Burk. Faso/Niger, *supra* note 61; Dispute Regarding Navigational and

the elucidation of the factual circumstances of the dispute, it is the case that this approach is also about setting and adjusting the locus of the relevant International Law in question and the manner in which it informs the facts of the dispute. Thus, in the Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge,[64] the ICJ observed in terms of the implications of a particular agreement as follows:

> 'In light of this analysis, in the context of the history surrounding the conclusion of the 1824 Anglo-Dutch Treaty, the Court is led to conclude that the division of the old Sultanate of Johor and the creation of the two Sultanates of Johor and of Riau-Lingga were part of the overall scheme agreed upon by the United Kingdom and the Netherlands that came to be reflected in the 1824 Anglo-Dutch Treaty. In other words, 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.'

Finally, International Law where appropriate is open to taking cognisance of the diverse nature of its subjects. In other words, the process of recognising its subjects for different purposes involves taking into account the context of the recognition. Thus, the ICJ has observed once in the context of 'international organisations,' and on another, with reference to a 'State like' regime as follows:[65]

> 'In the case concerning Reparation for Injuries Suffered in the Service of the United Nations, the Court observed: "The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community". In

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Related Rights (Costa Rica v. Nicar.), Judgment, 2009 I.C.J. (July 13); Malay./Sing., *supra* note 53.

64) Malay./Sing., *id.* at ¶ 98.

65) Western Sahara, Advisory Opinion, 1975 I.C.J. ¶ 148 (Oct. 16).

> examining the propositions of Mauritania regarding the legal nature of the Bilad Shinguitti or Mauritanian entity, the Court gives full weight both to that observation and to the special characteristics of the Saharan region and peoples with which the present proceedings are concerned.' (Footnote omitted)

In the same vein, the mandate of a key subject of International Law viz., an international organisation, is contextualised by the principle of speciality. This was explained, for example, as follows:[66]

> '[i]nternational organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.'

In summary, contextualism is fundamental and overarching in International Law; an essential driver in its engagement. This is in some senses axiomatic in so far as its operation generally is concerned — in particular in the field of treaty interpretation. However, what is being extrapolated from this contextual nature of International Law here is a specific normative interface with the different regions within which States operate. There is a symbiotic relationship between International Law and the different regional spheres that is fuelled by its contextualism. International Law in context has to take cognisance of the regional setting it is engaged in and is informed by it.

Ⅳ. Contextualising International Law in Practice

Whereas the case for contextualising International Law in a regional setting is not difficult to substantiate, although it needs to be made, for it cannot be taken for granted, the challenge of contextualising in practice in a regional setting is complex, and raises a bundle of questions. What is the context of a regional setting? How can it be discerned? How can International Law be contextualised in a regional setting? How can it be contextualised without necessarily engaging in a relativist claim?

Generally, the context of a regional setting depends on the purpose for which it is being considered. It is not possible in abstract to determine its constituent elements

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66) Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. ¶ 25 (July 8).

and contours. Moreover, questions about culture, history and practice can sometimes be difficult to ascertain, substantiate or agree upon. However, despite the difficulties, the important point is that in the same way as there is a concerted focus on the relevant law, there has to be also a conscientious focus on the context which implicates the law. In this respect the onus is on those relying on the context to substantiate it. This is essentially an endogenous exercise.

The contextualisation of International Law in a regional setting can take place both *ex ante* and ex-post. Regional efforts at shaping International Law in its very inception can take the form of developing regional practices adapted to the exigencies of the region, ensuring in multilateral fora an organised regional perspective, and entering into regional agreements. Of course, there needs to be consensus but the fact that there is no consensus on some issues does not mean there cannot be consensus on other issues. For example, there is much ado in the Korean peninsula about unification of the two Koreas but this discourse is not accompanied by any foresight on what should be the appropriate rules on State succession, indeed how the International Law on State succession should evolve. Ex-post contextualisation is the process of shaping the law for a just resolution. For example, given that acquiescence can be of significance in the prescriptive mode of territorial acquisition, the interpretation of acquiescence has to be set against the cultural trait in the region of restraint in immediately reacting to a situation. In the same vein, does the principle of *uti possidetis* apply to NEA, given that the rational and contextual origins of the principle are outside the context of NEA?

A survey of existing academic discourse in International Law in NEA suggests that there is room for its more contextualised comprehension and practice and its development. Moreover, the discourse suffers the dangers of being partisan --- taking a particular Korean, Japanese or Chinese perspective. This is compounded by the fact that there is no dialogue with experts in International Law from North Korea. There may be reasons for this that are set within North Korea and its predicament in international relations but there are barriers too within South Korea in this respect with prohibitions on access to North Korean materials/websites and discourse amongst academics in the two countries. Moreover, there is a dearth of legal analysis from a theoretical perspective of the various issues, apart from scholarship based on Marxist philosophy. Generally, the literature is of relatively recent origins, although the pace at which the focus in International Law is developing is very noticeable — particularly in the field of International Economic Law and issues of conflict as between the three nations respectively viz., maritime and territorial disputes. In some measure the content and quality of the literature originating in NEA reflects the research culture

in Universities; State influence in the work of academics and their work with the respective governments; along with the degree and manner in which International Law scholarship from the West is received within the region. Thus, in some States textbooks may be the subject of greater State scrutiny than scholarship in journal articles. Moreover, textbooks and monographs generally are less weighted than article publications in terms of academic career progression in universities. Where research funding is dependent on the State and there is active involvement of academics in governmental work, the exposition of law is more 'practitioner oriented' — almost in the nature of advocacy.

The general works in International Law do not normally draw as much as they could on regional case studies — reflecting instead western scholarship, or even simply translating it in the native language. There is a significant reliance on western standard general works in International Law including the cases referred to in those textbooks,[67] for example Shaw and Brownlie's textbooks on International Law. The three countries in Northeast Asia together generate several specialized journals in the field, including journals on sub-sets of subjects in International Law, in particular International Economic Law. The medium of the journals is not only in the respective native language but also English. Some journals publish selected translations of English language published articles. Most of the journals are published by Societies of International Law.[68] Some journals are affiliated with the State system.[69] In recent years, a number of new journals have been established.[70]

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67) *See, e.g.*, China: Wang Tieya (王铁崖), International Law (国际法), (Law Press China 1981); Jia Bing Bing (贾兵兵), Public International Law: Theory and Practice (国际公法: 理论和实践), (Beijing: Tsinghua Univ. Press 2009); Japan: プラクティス国際法講義 (第 2 版) The Practice of International Law (Seiji Koichi & Atsuko Kanehara, eds., 2nd ed., Tokyo: Shinzansha 2013); International Law 講義国際法 (第 2 版) (Akira Yuji & Akio Morita eds., 2nd ed., Tokyo: Yuhikaku 2010); Korea: Kim Dae Soon (김대순), Theory of International Law (국제법론) (17th ed., Seoul: Samyoungsa 2013); Chung In Seop (정인섭), Lectures on International Law: Theory and Cases (4th ed., Seoul: Bakyoungsa 2014).

68) *E.g.*, Japanese Y.B. International Law; Journal of Korean Society International Law (국제법학회논총); Seoul International Law Journal (서울국제법연구); Korean Yearbook of International Law; and, Chinese Journal of International Law.

69) *E.g.*, Japanese Journal of International Law and Diplomacy (国際法外交雑誌); Trends and Practices in International Law (국제법 동향과 실무); Unification and Law (통일과 법률); and, International Trade Law (통상법률).

70) *E.g.*, The Korean Journal of International and Comparative Law (Seokwoo Lee & Won-Mog Choi eds., Brill 2013) (available in English since 2013); and Korean Yearbook of International Law (2013) (available in English since 2013).

In sum a greater emphasis on the comprehension, practice and shaping of International Law from a contextual perspective is called for. Unfortunately, despite great economic advances including in the technological sphere, the intellectual inspiration in International Law in universities in the region still is westward oriented. This is the case too in terms of hiring lawyers in dispute settlement in international fora. The opportunities that may be availed from a contextual approach to International Law however are endogenous.

Ⅴ. Conclusions

Whilst the title of this paper is 'Contextualizing International Law in the Northeast Asian Matrix' the thesis of this focus is the need for a *further* contextualisation of the discipline in the Northeast Asian matrix. In some senses context in law is a given. From the perspective of NEA however it cannot be a mere given. In Eurocentric International Law, contextualisation is not so much significant as it is almost taken for granted. Moreover, a contextualised approach may well be equated with relativism and a threat to universalism. In the NEA matrix contextualism has a different significance indeed a necessary one. Context assimilates the regional matrix to International Law thus facilitating a more democratic, just and efficient engagement in it.

In conclusion, regionalism has a normative basis in International Law both at the level of implementation as well as its development. Context exists in its very nature and practice. A contextualised approach to International Law is beginning to develop in NEA. There is some more room however for its development.

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