Contextualising International Law in Northeast Asia

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Contextualising International Law in the North East Asian Matrix[1]

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

Asif H Qureshi

I. Introduction

Contemporary North East 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 the region, and the promise that it portends. International Law that can arbitrate in this simmer, International Law that can further development in this development, has to be contextualised in the North East Asian matrix.

North East Asia comprises in the sense of its common[2] description of China, Korea and Japan. This description is not necessarily a neutral self-evident geographical encapsulation of the region. For instance, 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

[1] This chapter is based on an article published in the (2016) 6(2) *KLRI Journal of Law and Legislation*.
[2] http://en.wikipedia.org/wiki/Northeast_Asia.

conceptions of the region are often less discerning, grouping North East 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 North East Asia *qua* North East Asia, including a sub regional office for East and North-East Asia located in Korea.[3] This UN focus on the region however also 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 peace and common prosperity among the People's Republic of China (China), Japan, and the Republic of Korea (ROK/South Korea).'[4] In this vision though, the Democratic People's Republic of Korea and Republic of China (Taiwan),[5] are 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 'North East Asia' is in essence a political aspiration in NEA for some form of regional solidarity.

Individually the countries in North East 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, US foreign policy in the region is 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 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. There is thus in this geographic proximity a sense of promise, commonality and interaction. 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 in the region has much to commend it—as an 'arbitrator', as a

[3] See http://northeast-sro.unescap.org/about.html.

[4] See http://www.tcs-asia.org/dnb/user/userpage.php?lpage=1_1_overview.

[5] I am grateful to Professor Toyoda Tetsuya of Akita International University, Japan for drawing my attention to the absence of Taiwan.

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 International Law in its application to the States in NEA individually, as well as in the foreign relations inter-se of the States in NEA, necessitates a regional contextualisation of International Law. This need for the regional contextualisation of International Law is relatively more pressing with respect to relations inter-se the States in NEA than the role of International Law with respect to the States in NEA respectively. Of course, the dynamics of the inter-se relations in NEA trigger the application of International Law but more significantly fuel the need for an International Law that is contextualised to the exigencies of the region. Moreover, the practice inter-se may inform the existence of local Customary International Law as a facet of a contextualised consideration of International Law.

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

> [C]loseness 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.[6]

This is a stand-point concerned with enforcement/implementation as much as participation in the development of International Law. Second, if regionalism is the 'natural tendency of development from States to larger units of international government'[7] 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'[8] the political space that regions occupy have a relevance to the development of International Law.[9] 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.[10] In the same vein, Rawls's differential principle[11] is but 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 indeed a need to take into

[6] UN Study on Fragmentation in International Law—see ILC A/CN.4/L.682 para 206.

[7] ibid.

[8] Ann-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 6 *EJIL* 503—38, 503.

[9] See also M Koskenniemi, *The Politics of International Law* (Oxford, Hart Publishing, 2011).

[10] See also Lon L Fuller *Anatomy of the Law* (New York, Praeger, 1968) 94 wherein he states 'Since no two cases are ever exactly alike, one cannot act justly unless one is able to define what constitutes an essential likeness'.

[11] John Rawls, *Theory of Justice* revised edn (Cambridge MA, Belknap Press, 1999).

account other legal traditions.[12] Thus, in order to respond to the 'multi-polar and multi-civilizational reality of the twenty 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.'[13] However, the contextual approach adopted here, whilst recognising the value of taking an open minded and inclusive normative approach, does not necessarily partake of the advancement of a particular normative approach to International Law, although the consequence of its application may so result. The contextual approach focusses both on norm creation as well as its implementation; and it is more closely aligned to the necessary adaptation of the law for a just and efficient result rather than a tool for the advocacy of a particular substantive perspective on the development of International Law.

The discourse on relativism in International Law, which also partakes of contextualisation in International Law, has in some measure a particular relevance to the application of International Law to the individual States in NEA. However, the purpose of this context-based focus of International Law in NEA is not to engage in the discourse on relativism in International Law as such. Rather, whilst recognising that there may be echoes of relativism in this focus, and without prejudice to the arguments for and against relativism in International Law as such, the following specific observations are proffered. First, to the extent that 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 the relationship between International Law and regionalism, the nature of the integrity of International Law outside a contextual setting, and contextualisation in International Law as a process of justice and its efficient application. In this vein, this chapter outlines the theoretical foundations for a contextualised focus on the role of International Law in NEA. To this end first the normative basis of regionalism is explored. This is followed by a focus highlighting how in different ways International Law operates in a contextualised manner drawing mainly from the practice of the International

[12] See Onuma Yasuaki, *A Transcivilizational Perspective on International Law* 9 Pocketbooks of the Hague Academy of International Law, (Leiden, Martinus Nijhoff, 2010); and William Twining, *General Jurisprudence—Understanding Law from a global perspective* (Cambridge, CUP, 2009).

[13] Yasuaki, ibid 81 and 107.

Court of Justice (ICJ). In the final section some brief observations are proffered with respect to the contextualisation of International Law in practice.

II. Does Regionalism have a Normative Basis in International Law?

There is a dearth of legal analysis of International Law from a regional perspective[14]—although doubtless if regionalism is equated with civilisations then Onuma Yasuaki's work has much to offer.[15] In particular, the building blocks of International Law have not been considered adequately *qua* regional blocs. The discourse on the nature and development of International Law has not been located within a regional setting. It has not been sufficiently analysed in the consideration of the origins and development of International Law. However, the subject has featured in the discourse on the phenomenon of fragmentation in International Law;[16] in terms of the European contribution to International Law;[17] in terms of an ideological stand-point assimilated from a regional setting, for example communism in the Soviet era,[18] or Third World approaches to International Law;[19] in terms of international governance viz regionalism or multilateralism;[20] and in terms of regional consciousness in the representative regional works,[21] 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 contemporary developments in International Law in embracing

[14] A sentiment echoed also in the UN Study on Fragmentation in International Law—see ILC A/CN.4/L.682: para 195. However, it is to be noted that in the context of fragmentation in International Law the discourse on regionalism provided by the UN Study on Fragmentation of International Law is quite comprehensive.

[15] See for example Yasuaki, above n 12.

[16] ibid.

[17] See the regular survey of the international practice of the European Union in the *European Journal of International Law*; Peter Hay 'The Contribution of the European Communities to International Law' *Proceedings of the American Society of International Law at Its Annual Meeting (1921–1969)* (1965) 59, Development of International Law by International Organizations 195–201; M Koskenniemi, 'International Law in Europe: Between Tradition and Renewal' (2005) 16(1) *EJIL* 113–24; A Orakhelashvili, 'The Idea of European International Law' (2006) 17(2) *EJIL* 315–47.

[18] GI Tunkin, *Theory of International Law* (Cambridge MA, Harvard University Press, 1974).

[19] Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens (eds), *International Law and the Third World: Reshaping Justice* (Abingdon, Routledge, 2008).

[20] Both in trade law and political economy. See for example J Bhagwati, *Termites in the Trading System* (Oxford, OUP, 2008).

[21] For example, Liliana Obregon, 'Latin American International Law' in David Armstrong (ed), *Handbook of International Law* (Abingdon, Routledge, 2011).

new types of subjects, for example international organisations and individuals, discourse on International Law is and has been essentially focussed on the State. Thus, generally regions as such have not been the measure for discerning either the origins of International Law or the practice of International Law. This is despite the fact that much of State practice historically originated in geographical proximity, since the extent of foreign relations were geographically informed. In the same vein, contemporary multilevel analysis of International Law[22] has been underpinned by a human rights approach. However, it 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 universalised.

Second, a regional perspective of International Law has been understood as undermining the notion of the 'universality' of International Law. 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 'civilised' European States, was developed in the nineteenth century essentially through European classical writings.[23] This claim of an International Law confined essentially to the European region has been contrasted with the notion of a universal International Law based both on natural law precepts dating back as long ago as the seventh century; and the actual practice of International Law both within and outside Europe.[24]

[22] See Ernst-Ulrich Petersmann, *Human Rights Require 'Cosmopolitan Constitutionalism' and Cosmopolitan Law for Democratic Governance of Public Goods* EUI Working Papers LAW 2013/04, available at http://cadmus.eui.eu/bitstream/handle/1814/27155/LAW_2013_04.pdf?sequence=1.

[23] Orakhelashvili, above n 17.

[24] Orakhelashvili, ibid. Elsewhere in the same contribution he states at 317: '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'. 325: Concludes—'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. … 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 … And at 328: '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 long 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, inviobality of ambassadors, principles of humanity in conducting wars and fundamental principles of the law of the sea … .' At 329: '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.' At 333: 'All this evidence

This debunking of the idea of a 'European International Law' focuses on the 'European' claim qua Europe with reference to a universal International Law. It is not intended however as an elucidation of the nature of International Law 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, in terms of International Law.

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 characteristics in terms of that International Law. Thus, Gillian Triggs observes: '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,.'[25]

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

- 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.[26]

A similar analysis has led Simon Chesterman to describe Asia's attitude towards International Law as being ambivalent.[27] He observes that Asian States have not engaged with International Law and international institutions as they might. Thus, he asserts there are no significant regional organisations in Asia. Moreover, Asian States prefer bilateral relations and have not cooperated in orchestrating a common policy stand in international institutions—although Asian involvement in economic regimes has been different. The reasons for the lack of engagement in International Law and institutions are attributed to the negative experience that historically Asian States had with International Law under which they suffered

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.' See also M Koskenniemi, above n 9, 222.

[25] G Triggs, 'Confucius and Consensus: International Law in the Asian Pacific' (1997) 21 *Melbourne University Law Review* 650, 651.

[26] ibid, 675.

[27] See Simon Chesterman, 'Asia's Ambivalence About International Law and Institutions: Past, Present, and Futures' (2017) http://legal.un.org/avl/ls/Chesterman_IL_video_1.html.

from colonialism and unequal treaties; diversity in the States' political systems and outlook; and the lack of incentives for a more proactive engagement in international institutions. Both Simon Chesterman and Gillian Triggs offer a discernment of regional features and practices that are no doubt of value. Such a perspective however is 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);[28] including works on sub-sets of disciplines within International Law, as for example Human Rights and Environmental Law.[29] It will be noted however that in some senses Societies of International Law promote a particular regional perspective on International Law within the 'universal paradigm' of International Law; 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 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.[30] For example it has been observed: '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.'[31] 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.[32] His writings form the basis of the characterisation of the modern International Law originally introduced in NEA as partaking

[28] Xue Hanqin, 'Chinese Perspectives on International Law: History, Culture and International Law' (2011) 355 *Recueil Des Cours*; Nisuke Ando, *Japan and International Law. Past, Present and Future: international symposium to mark the centennial of the Japanese Association of International Law* (Boston, Kluwer Law International, 1999); Seokwoo Lee and Hee Eun Lee (eds), *Northeast Asian Perspectives on International Law: Contemporary Issues and Challenges* (Leiden, Martinus Nijhoff Publishers, 2013).

[29] For example, Michael G Faure and Song Ying (eds), *China and International Environmental Liability Legal Remedies for Transboundary Pollution* (Cheltenham, Edward Elgar, 2008).

[30] See for example, Eric Yong-Joong Lee, 'Early development of Modern International Law in East Asia—With Special Reference to China, Japan and Korea.' (2002) 4 *Journal of the History of International Law* 42; Nam-Yearl Chai, 'Korea's Reception and Development of International Law' in Jae Schick Pae et al, *Korean International Law* (Oakland, University of California, 1981) 20 and 25.

[31] Chai, ibid 20.

[32] Henry Wheaton, *Elements of International Law* 6th edn (Boston, Brown & Co, 1855) translated by WEP Martin an American missionary visiting China in 1863, as observed amongst others by Yong-Joong Lee, above n 31, 46. See also R Svarverud, *International Law as World Order in Late Imperial China: Translation, Reception and Discourse, 1847–1911* (Leiden, Brill, 2007) ch 3.

of Christian values; and echoed still in contemporary writings. Indeed, William AP Martin in 1864 wrote, albeit in English in his preface to his translation into Chinese of Wheaton's book: 'International Law in its present form is the mature fruit of Christian civilisation. It springs, however, spontaneously from the intercourse of nations …'[33]

However, as Orakhelashvili points out, Wheaton was one of those writers who advanced the idea of 'European International Law' fit for the Christian civilised world only, and denied the existence of any form of a universal International Law.[34] Such writings Orakhelashvili rightly points out were not based on evidence but on prejudice and that in fact International Law was secular and universal.[35]

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.'[36] Thus, the discourse in terms of the European dimension, as has been pointed out, is not so much about regionalism *qua* Europe and International Law but more in terms of the historical development of International Law, the contribution of Europe to International Law, and the assimilation of International Law with European values and 'European International Law.' Similarly, general discourse on 'regionalism versus universalism' focuses on the merits or otherwise of regional governance to the development of the world order, thus proffering an elucidation that is essentially utilitarian, as opposed to doctrinal in terms of the nature of International Law. Moreover, the conclusion even in terms of a utilitarian approach is not clear. Thus, it has been observed albeit in the context of international organisations that the 'complex interplay of regional and universal elements … permits few generalizations.'[37] Indeed, that there is 'no inherent superiority in either regionalism or universalism.'[38] In the same vein, efforts to deconstruct the universality of International Law and its origins[39] 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.'[40]

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

[33] Quote taken from Svarverud, ibid 98.

[34] See Orakhelashvili, above n 17, 318.

[35] See Orakhelashvili, ibid 325 and 333 and 328. See also Koskenniemi, above n 17, 347.

[36] UN Study on Fragmentation in International Law—see ILC A/CN.4/L.682 para 195.

[37] See for example R Falk, 'Regional and World Order After the Cold War' (1995) 49(1) *Australian Journal of International Affairs*; C Schreuer, 'Regionalism v. Universalism' (1995) 6 *EJIL* 477.

[38] Schreuer, ibid 477.

[39] B Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20(2) *EJIL* 265–97; E Jouannet, 'Universalism and Imperialism: The True-False Paradox of International Law?' (2007) 18(3) *EJIL* 379–407; A Bradford and EA Posner, 'Universal Exceptionalism in International Law' (2011) 52 *Harvard International Law Journal* 1.

[40] UN Study on Fragmentation in International Law—see ILC A/CN.4/L.682 para 204 (emphasis added).

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:

> 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 opinio juris on the part of the relevant States.[41]

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:

> 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.[42]

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 the development of International Law absent relations as between these States. Rather, the origins of International Law are coterminous with *relations* as between States. Historically relations as between States (including entities like States) emerged within a region as between proximately located States (including entities like States). Subsequently, relations as between States within regions formed, and 'International Law' evolved against this background. 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.

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

[41] UN Study on Fragmentation in International Law—see ILC A/CN.4/L.682 para 215.
[42] Simma, above n 40.

in the future development of International Law, 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 International Law 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 the contextual nature of International Law 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.[43] 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.[44] 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 context is inherent to a norm. Context exists in the very nature of law and International Law, particularly if law is defined as a process of decision-making.[45] 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

[43] Fuller, above n 10, does not focus on context in law as such.

[44] Fuller, ibid at 57 '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"' See also at 69.

[45] See WM Reisman, 'International Law Making: A Process of Communication' (1981) 75 *American Society of International Law Proceedings* 101; R Higgins *Problems and Process: International Law and How We Use It* (Oxford, OUP, 1995).

to the source of the law whereas context may be said to be at the other end of it closer to 'the implicit demands and values of the society to which it is to be applied.'[46] 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:

> 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 all 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 all forms of warfare and to all 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 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 all 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

[46] Fuller, above n 10, 57.

> 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.[47]

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.[48]

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 …[49]

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 out: 'One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith.'[50] 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 require 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

[47] *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion (ICJ: 1996).
[48] Para 105 (2) (D).
[49] Para 105 (2) (E).
[50] *Legality of the Threat or Use of Nuclear Weapons* ICJ Advisory Opinion (1996) para 102.

Articles 31–32 of VCLT extensively.[51] In the same vein, UN Security Council Resolutions have a somewhat similar contextual framework to their interpretative process as treaties. Thus, the ICJ has observed:

> 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 require 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, ICJ 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.[52]

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

[51] Art 31 of VCLT:

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 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.

[52] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (ICJ Advisory Opinion of 22 July 2010) para 94.

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:

> 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.[53]

Moreover, the presumption of legitimacy of State action embedded in the *Lotus* case[54] 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:

> 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' (ICJ Reports 2010 (I), p 83, para 204). 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.[55,56]

In the same vein, 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:

> 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, ie, at the time that the events giving rise to the

[53] Fuller, above n 10, 77.

[54] See *SS Lotus Case (France v Turkey)*, PCIJ Rep, (1927) Series A No 10, at 18–19 wherein the Court stated: '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.'

[55] See also Reparation for Injuries Suffered in the Service of the United Nations (ICJ Advisory Opinion 1949) p.12 wherein the ICJ 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.'

[56] *Costa Rica v Nicaragua* (ICJ: 2015) para 104.

> 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 52—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 timeof those proceedings which the Court has to apply.[57]

The time dimension to context is also embedded in disputes involving territories namely the *uti possidetis juris* principle;[58] and the principle that gives significance to the date when a territorial dispute is crystallised.[59]

Third, the law creating agencies of International Law allow for regional normative structures. Thus, fundamentally regional customary norms[60] are acknowledged; modifications inter-se of multilateral treaties can take place;[61] and regional co-operative arrangements have an accepted place in the international legal system.[62] 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

[57] *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (ICJ: 2012) para 58.

[58] See for example *Frontier Dispute (Burkina Faso/Republic of Mali)* (ICJ: 1986) 565, para 20.

[59] See for example, *Case Concerning Sovereignty Over Pedra Branca/Pulau Batu Puteh Middle Rocks and South Ledge (Malaysia/Singapore)* (ICJ: 2008): '32. The Court recalls 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" Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras), Judgment, (ICJ: 2007), pp 697–698, para 117.'

[60] See for example *Asylum (Colombia v Peru)* (ICJ: 1950) 266.

[61] Art 41 of Vienna Convention on the Law of Treaties 1969.

[62] Art VIII of UN Charter.

should be such as to achieve an equitable solution[63]—an equitable solution calls for the taking into account of the specific context of the particular maritime zones. Thus, this has been explained as follows:

> 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 (Maritime Delimitation in the Black Sea (Romania v. Ukraine), Jugement, ICJ Reports 2009, pp 101–103, paras 115–122; Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, ICJ Reports 2012 (II), pp 695–696, paras 190–193).[64]

In the same vein, 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: 'The Court further recalls that, as expounded in the Eastern Greenland case (see paragraph 64 above), International Law is satisfied with varying degrees in the display of State authority, depending on the specific circumstances of each case.'[65]

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.[66] From the perspective of this work 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.

[63] *Case Concerning Maritime Dispute (Peru v Chile)* (ICJ: 2014) Para 179. 'The Court proceeds on the basis of the provisions of Articles 74, paragraph 1, and 83, paragraph 1, of UNCLOS which, as the Court has recognized, reflect customary International Law (Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, ICJ: 2001), p 91, para 167; Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, (ICJ: 2012) (II), p 674, para 139). The texts of these provisions are identical, the only difference being that Article 74 refers to the exclusive economic zone and Article 83 to the continental shelf. They 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."'

[64] *Case Concerning Maritime Dispute (Peru v Chile)* (ICJ: 2014) para 180.

[65] *Case Concerning Sovereignty Over Pedra Branca/Pulau Batu Puteh Middle Rocks and South Ledge (Malaysia/Singapore)* (ICJ: 2008) para 67.

[66] See for example, A Qureshi and A Ziegler, *International Economic Law* (London, Sweet & Maxwell, 2011) 64–71.

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:

> 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.[67]

Moreover, as Lon Fuller stated adjudication 'is a collaborative process of decision in which the litigant plays an essential role.'[68] In the same vein, 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.[69]

Second, generally the ICJ approach, in particular to territorial and maritime disputes, is to set out at the outset in the judgments the historical context and origin of the dispute.[70] Whilst this may be considered to be mainly a historical approach to 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*,[71] 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

[67] *Frontier Dispute (Burkina Faso/Niger)* (ICJ: 2013) para 48.

[68] Fuller, above n 10, 101.

[69] ibid, 98.

[70] See for example *Request for Interpretation of the Judgement of 15 June 1962 In the Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)* (ICJ: 2013); *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (ICJ: 2012); *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (ICJ: 2012); *Application of the Interim Accord of 13 September 1995 (The former Yugoslav Republic of Macedonia v Greece)* (ICJ: 2011); *Case Concerning Maritime Dispute (Peru v Chile)* (ICJ: 2014); *Frontier Dispute (Burkino Faso/Niger)* (ICJ: 2013); *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (ICJ: 2009) 9; *Case Concerning Sovereignty Over Pedra Branca/Pulau Batu Puteh Middle Rocks and South Ledge (Malaysia v Singapore)* (ICJ: 2008).

[71] *Case Concerning Sovereignty Over Pedra Branca/Pulau Batu Puteh Middle Rocks and South Ledge (Malaysia v Singapore)* (ICJ: 2008).

> 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.[72]

Finally, International Law where appropriate is open to taking cognisance of the diverse nature of the subjects of International Law. In other words, the process of recognising subjects of International Law 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:

> 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' (ICJ Reports 1949, p 178). In 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.[73]

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: '[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.'[74]

In sum, contextualism is fundamental and overarching in International Law. It is an essential driver in its engagement. This is in some senses axiomatic in so far as the operation of International Law 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 mosaic of different regional spheres in the world that is fuelled by contextualism in International Law. International Law in context has to take cognisance of the regional setting it is engaged in and is informed by it.

[72] ibid, para 98.

[73] *Western Sahara* (ICJ Advisory Opinion 1975) para 148.

[74] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, (ICJ: 1996) (I), 78, para 25.

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 International Law 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 International Law 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 and contours. Moreover, questions about culture, history and practice can sometimes be difficult to ascertain, substantiate or agree upon. However, despite the difficulties, which are not necessarily insurmountable, 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 on the whole outside the context of NEA?

A survey of existing academic discourse in International Law in NEA suggests that there is a gradual orientation towards a contextualised approach to International Law and its development.[75] However, looked at collectively the discourse can be partisan—taking Korean, Japanese or Chinese perspectives

[75] See for example the works of Onuma Yasuaki (Japan), Seokwoo Lee (Korea) and Jia Bing Bing (China).

respectively particularly with respect to inter-se conflicts. There does not seem to be any meaningful dialogue in International Law 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 International Law 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 in international law 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.

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 work is 'Contextualising International Law in the North East Asian Matrix' the thesis of this focus is the need for a *further* contextualisation of the discipline in the North East 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. Whilst 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 the very nature and practice of International Law.

Moreover, discourse on International Law that is not sufficiently contextualised can result in obfuscating historic misdeeds and the real agenda behind the development of certain rules of International Law. Thus, whilst the need for contextualising International Law has been emphasised herein in terms of North East Asia; the question also needs to be posed whether contemporary West-centric discourse on International Law is sufficiently contextualised within its West-centricity. Generally, the approach to discourse on International Law in West-centric legal literature comprises of an effort in objectifying International Law as an objective science removed from its domestic/regional setting other than the historical European narrative. This is reinforced by elevating the discourse to a level of abstraction and theory. Thus, historical accounts of the origins and development of International Law are generally short in standard textbooks in International Law.[76] Moreover, the impact of individual empires on international relations is assimilated to a collective European history. In this manner the historical past of individual countries in international relations, as well as contemporary incidents, can be spared closer scrutiny, including the relationship of the development of International Law with those events. In sum the development and *fait accompli* of International Law in West-centric literature is projected as being an objective reality, whether underpinned by positivism, realism or natural law—at the expense of clearer insights into the reasons for the manner of its development, and the role of vested State interests that have shaped particular rules. In sum, International Law not sufficiently grounded in context not only is set to wither away, it also obscures the developmental history of International Law rules including individual State/regional responsibilities under it.

[76] See for example James Crawford, *Brownlie's Principles of Public International Law* 8th edn (Oxford, OUP, 2012).