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Hitoshi NASU

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Revisiting the Principle of Non-Intervention: A Structural Principle of International Law or a Political Obstacle to Regional Security in Asia?

Hitoshi NASU*
Australian National University, Australia
NasuH@law.anu.edu.au

Abstract
The principle of non-intervention remains a significant legal issue, particularly in Asia, for regional efforts to address a wide range of transnational security issues in the absence of a regional collective security mechanism. This article revisits the principle of non-intervention with a particular focus on the application and interpretation of the principle by Asian states for the purpose of identifying whether and in what respect an Asian approach or approaches can be found, and considering its implications for regional efforts to address transnational security issues. This article finds that the emerging regional norm of comprehensive security requires clear demarcation between the principle of non-intervention and the norm of comprehensive security, as well as an institutionalized mechanism to ensure that regional efforts to address transnational security issues are not used as a disguised form of intervention and that the fear of intervention does not impede those regional efforts.

The principle of non-intervention is a structural principle of international law. On the one hand, it protects the jurisdictional autonomy of sovereign states in dealing with matters within the domestic jurisdiction of a state, and, on the other, it regulates the exercise of jurisdictional authority by an international organization. Under the United Nations (UN) collective security system, the principle of non-intervention has become less of a legal obstacle to the adoption of collective decisions and measures, especially since the end of the Cold War, because of the UN Security Council's increased reliance on Chapter VII powers to circumvent the principle of non-intervention.[1] In Europe, the

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1. Art. 2(7) of the UN Charter provides: "Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any

principle of non-intervention has been replaced by the principle of subsidiarity as the rule of jurisdictional conflicts between different levels of governance.[2] In Africa, the requirement of consent for external involvement in internal affairs has been transformed into a treaty obligation, explicitly restricting the principle of non-intervention.[3] In contrast, it has been observed that Asian states have maintained a strict interpretation of, and adherence to, the principle of non-intervention,[4] as is exemplified by the policy of non-interference favoured by the leaders of the Association of Southeast Asian Nations (ASEAN).[5]

In the Asian context, where no collective enforcement authority exists, how states understand the principle of non-intervention in the contemporary, globalized world remains a significant legal issue, particularly for regional efforts to address a wide range of non-traditional, transnational security issues, such as environmental security, food security, resource/energy security, health security, bio-security, and transnational organized crime. Asian states have been at the forefront of the move towards a wider notion of security, as illustrated by the concept of "human security" advanced by Japan, and the principle of "comprehensive security" embraced by ASEAN in addressing non-traditional security issues. Those contemporary developments in Asia require us to revisit the principle of non-intervention in its application to Asian states. In particular, this article identifies whether and in what respect an Asian approach or approaches to the principle of non-intervention can be

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state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

2. See e.g. Gareth DAVIES, "Subsidiarity as a Method of Policy Centralisation" in Tomer BROUDE and Yuval SHANY, eds., *The Shifting Allocation of Authority in International Law* (Oxford/Portland, OR: Hart Publishing, 2008), 79; Theodor SCHILLING, "A New Dimension of Subsidiarity: Subsidiarity as a Rule and a Principle" (1994) 14 Yearbook of European Law 203.

3. See *Constitutive Act of the African Union*, 11 July 2000, 2158 U.N.T.S. 3 (entered into force 26 May 2001), art. 4(h) and (j); *Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security*, ECOWAS Doc A/P10/12/99 (10 December 1999). For analysis, see e.g. Ademola ABASS and Mashood BADERIN, "Towards Effective Collective Security and Human Rights Protection in Africa: An Assessment of the Constitutive Act of the New African Union" (2002) 49 Netherlands International Law Review 1; Ademola ABASS, "The New Collective Security Mechanism of ECOWAS: Innovations and Problems" (2000) 5 Journal of Conflict and Security Law 211; Funmi OLONISAKIN, *Reinventing Peacekeeping in Africa: Conceptual and Legal Issues in ECOMOG Operations* (The Hague: Kluwer Law International, 2000).

4. It is difficult to define Asia precisely. For the purpose of this article, Asian countries include Bangladesh, Bhutan, Brunei Darussalam, Cambodia, China, The Democratic People's Republic of Korea (DPRK), India, Indonesia, Japan, The Lao People's Democratic Republic, Malaysia, Maldives, Mongolia, Myanmar, Nepal, Pakistan, the Philippines, the Republic of Korea, Singapore, Sri Lanka, Thailand, Timor-Leste, and Vietnam.

5. There is a voluminous literature on this subject. The representative work includes: Lee JONES, "ASEAN's Unchanged Melody? The Theory and Practice of 'Non-Interference' in Southeast Asia" (2010) 23 Pacific Review 479; Amitav ACHARYA, *Regionalism and Multilateralism: Essays on the Cooperative Security in the Asia-Pacific* (Singapore: Eastern Universities Press, 2003), Chapter 10; Kao Kim HOURN, ed., *ASEAN's Non-Interference Policy: Principles under Pressure?* (London: ASEAN Academic Press, 2000); John FUNSTON, *ASEAN and the Principle of Non-Intervention-Practice and Prospects* (Singapore: Institute of Southeast Asian Studies, 2000); Linjun WU, "East Asia and the Principle of Non-Intervention: Policies and Practices" (2000) 5 Maryland Series in Contemporary Asian Studies 1; Robin RAMCHARAN, "ASEAN and Non-Interference: A Principle Maintained" (2000) 22 Contemporary Southeast Asia 60; David DICKENS and Guy WILSON-ROBERTS, eds., *Non-Intervention and State Sovereignty in the Asia-Pacific* (Wellington: Center for Strategic Studies, 2000).

found, and considers its implications for regional efforts to address transnational security issues.

To that end, it will first review the conceptual issues surrounding the principle of non-intervention, emphasizing the significance of examining the views expressed by states in ascertaining the interpretive scope of the principle. Second, it will examine the application and interpretation of the principle of non-intervention by Asian states, both historically and in relation to three recent representative situations—East Timor, Myanmar, and Sri Lanka—discussed in UN forums. Third, it will discuss to what extent and in what way the principle of non-intervention, as understood and applied by Asian states, might guide or impede regional efforts to advance comprehensive security in addressing transnational security issues in the region, and how the notion of comprehensive security can be advanced within the framework of non-intervention as the structural principle, without it being impeded by political manipulation of the principle. This analysis will draw on the debate within ASEAN in relation to its policy of non-interference. It should be noted here that, while reference will be made to the position of ASEAN and its Member States as a view of Asian states, these views do not represent the entire region, but rather form a discrete part in examining the views of Asian states more broadly.

I. THE PRINCIPLE OF NON-INTERVENTION

As a structural principle of international law, the principle of non-intervention demarcates two different relationships.[6] First, the principle of non-intervention is a well-established rule of customary international law governing the horizontal relationship between sovereign states based on sovereign equality,[7] which has also been expressly adopted in various treaties such as the 1933 Convention on Rights and Duties of States,[8] the 1948 Charter of the Organization of American States,[9] the 2000 Constitutive Act of the African Union,[10] and the ASEAN Charter.[11] Second, as is exemplified by Article 2(7) of the UN Charter, the principle of non-intervention stipulates the vertical relationship between an international organization and its

6. See Georg NOLTE, "Article 2(7)" in Bruno SIMMA, ed., *The Charter of the United Nations: A Commentary*, 2nd ed. (Oxford: Oxford University Press, 2002), 148 at 151.

7. See *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States)*, [1986] I.C.J. Rep. 14 at 106–9, paras. 202–7 [*Nicaragua Case*]; *Corfu Channel Case (United Kingdom v. Albania)*, [1949] I.C.J. Rep. 4 at 35.

8. *Convention on Rights and Duties of States*, 26 December 1933, 165 L.N.T.S. 19 (entered into force 26 December 1934), art. 8.

9. *Charter of the Organization of American States*, 30 April 1948, 119 U.N.T.S. 47 (entered into force 13 December 1951), as amended by *Protocols of Amendment to the Charter of the Organization of American States*, 27 February 1967, 721 U.N.T.S. 324, O.A.S.T.S. No. 1-A (entered into force 27 February 1970) (Protocol of Buenos Aires); 5 December 1985, O.A.S.T.S. No. 66, 25 I.L.M. 527 (entered into force 16 November 1988) (Protocol of Cartagena de Indias); 14 December 1992, 33 I.L.M. 1005 (entered into force 25 September 1997) (Protocol of Washington DC); 10 June 1993, 33 I.L.M. 1009 (entered into force 29 January 1996) (Protocol of Managua), art. 3(e).

10. *Constitutive Act of the African Union*, 11 July 2000, 2158 U.N.T.S. 1 (entered into force 26 May 2001), art. 4(g).

11. *Charter of the Association of Southeast Asian Nations*, 20 November 2007 (entered into force 15 December 2008), online: ASEAN <http://www.aseansec.org/21069.pdf> [*ASEAN Charter*], art. 2(e).

Member States, regulating the exercise of jurisdictional authority by the international organization and, at the same time, protecting the jurisdictional autonomy of its Member States.[12] The principle of non-intervention in the Asian context concerns, first and foremost, customary international law governing the horizontal relationship between regional states. However, with the prospect of the further development of existing subregional institutions, such as ASEAN and the Asia-Pacific Economic Cooperation (APEC), as well as political ambition to establish an Asia-Pacific Community,[13] it is equally important to ascertain the approach of Asian states towards the principle of non-intervention in a vertical sense, through their attitude to the application of Article 2(7) of the UN Charter in the regional context.

The actual meaning of the principle may well differ according to the exact legal context in which the principle is enunciated. Yet, the debate under general international law has centred upon: (1) the scope of domestic jurisdiction; and (2) the definition of intervention.

The Permanent Court of International Justice in the *Nationality Decrees Issued in Tunis and Morocco* observed that what constitutes the domestic jurisdiction of a state is an essentially relative question and depends on the development of international relations.[14] With the increased pace of globalization, a wide range of issues such as arbitrary detention,[15] anti-terrorism legislation,[16] pharmaceutical patents,[17] and tobacco packaging[18] have become of international concern. Such an expansion of international concerns has been perceived as eroding the scope of domestic jurisdiction,[19] or even as leaving nothing more than "a psychological effect of assuring some States that their sovereignty would thereby be preserved".[20]

It remains contentious whether the scope of domestic jurisdiction is defined by international law or is determined by taking into account various factors as found in

12. See Nicolas TSAGOURIAS, "Security Council Legislation, Article 2(7) of the UN Charter, and the Principle of Subsidiarity" (2011) 24 Leiden Journal of International Law 539 at 547–50; Kenneth MANUSAMA, *The United Nations Security Council in the Post-Cold War Era: Applying the Principle of Legality* (Leiden: Martinus Nijhoff, 2006) at 51–5.

13. See "Full Text of Kevin Rudd's Speech to the Asia Society Australasia" *The Australian* (5 June 2008); cf. "China: Time is 'Not Ripe' for an Asia-Pacific Community" (14 April 2009), online: Singapore Institute of International Affairs <http://www.siiaonline.org/?q=programmes/insights/china-time-not-ripe-asia-pacific-community>.

14. *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion, [1932] P.C.I.J. (ser B) No. 4 at 24. See also *Documents of the United Nations Conference on the International Organization*, Vol. 5 (1945) at 507.

15. See e.g. *Report of the Working Group on Arbitrary Detention*, UN Doc. A/HRC/16/47 (19 January 2011).

16. See e.g. SC Res. 1373 (28 September 2001).

17. See e.g. Frederick ABBOTT, "The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health" (2005) 99 American Journal of International Law 317 at 348–58; Ellen SHAFFER et al., "Global Trade and Public Health" (2005) 95 American Journal of Public Health 23 at 23–4.

18. See e.g. Tania VOON and Andrew MITCHELL, "Face Off: Assessing WTO Challenges to Australia's Scheme for Plain Tobacco Packaging" (2011) 22 Public Law Review 218.

19. Ian BROWNLIE, *Principles of Public International Law*, 7th ed. (Oxford: Oxford University Press, 2008) at 295.

20. A.A.C. TRINIDADE, "The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organisations" (1976) 25 International and Comparative Law Quarterly 715 at 761–2.

the actual practice of states and international organizations.[21] Yet, even if it is assumed that the scope of domestic jurisdiction is defined by international law,[22] there is an ample scope for the practice of states and international organizations to be taken into account, through the progressive development of customary international law or by way of the interpretation of treaty provisions.[23]

The principle of non-intervention prohibits an "intervention" into the matters falling within the domestic jurisdiction of a state. In other words, "intervention" is a priori an internationally wrongful act unless it is justified with recourse to a legally recognized exception, such as Chapter VII enforcement action by the UN Security Council or, more controversially, humanitarian intervention. Depending on what constitutes an "intervention", a certain action adopted by a state or by an international organization to interfere in matters within the domestic jurisdiction of a state may not contravene the principle of non-intervention. In relation to the 1946 Spanish question, the Australian representative to the Security Council, Dr H.V. Evatt, illuminated this point by proposing three criteria for compliance with the principle of non-intervention: "first, the nature of the situation; secondly, the action proposed; and thirdly, the objective to be obtained by that action."[24] Thus, what is meant by "intervention" is of pertinent significance in ascertaining what constitutes a breach of the principle of non-intervention.

However, the definition of intervention has also been a subject of controversy.[25] According to Sir Hersch Lauterpacht's renowned definition, intervention is a technical term of unequivocal connotation that "signifies dictatorial interference in the sense of action amounting to a denial of the independence of the State".[26] Other commentators have disagreed with this narrow definition, suggesting that recommendations, fact-finding missions, and even discussion would constitute an intervention.[27] Yet others have formed the view that recommendations addressed to a

21. Compare e.g. C.H.M. WALDOCK, "The Plea of Domestic Jurisdiction Before International Legal Tribunals" (1954) 31 British Year Book of International Law 126 at 126–7; with Leland M. GOODRICH, Edvard HAMBRO, and Anne Patricia SIMON, *Charter of the United Nations: Commentary and Documents*, 3rd ed. (New York: Columbia University Press, 1969) at 67–8; Trinidade, *supra* note 20 at 722–44.

22. The original text of the Dumbarton Oaks Proposal made an express reference to international law: "The provisions of paragraph 1 to 6 of Section A should not apply to situations or disputes arising out of matters which by international law are solely within the domestic jurisdiction of the state concerned", Dumbarton Oaks Proposal, Chapter VIII, Section A, para. 7.

23. *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980), art. 31(3)(b) [*Vienna Convention*].

24. UN SCOR, 1st Year, 1st Series, 44th meeting, 6 June 1946, UN Doc S/PV.44, 318–19.

25. See generally Goronwy J. JONES, *The United Nations and the Domestic Jurisdiction of States* (Cardiff: University of Wales Press, 1979) at 18–32; Goodrich, Hambro, and Simons, *supra* note 21 at 68; Rosalyn HIGGINS, *The Development of International Law Through the Political Organs of the United Nations* (London: Oxford University Press, 1963) at 68–74; M.S. RAJAN, *United Nations and Domestic Jurisdiction* (Bombay: Orient Longmans, 1958) at 66–78.

26. H. LAUTERPACHT, *International Law and Human Rights* (London: Stevens & Sons, 1950) at 167.

27. See e.g. D.R. GILMOUR, "The Meaning of 'Intervene' within Article 2(7) of the United Nations Charter-An Historical Perspective" (1967) 16 International & Comparative Law Quarterly 330; Lawrence PREUSS, "Article 2, Paragraph 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction" (1949-I) 74 *Recueil des Cours* 553 at 605–11.

particular state would constitute an intervention, whereas general recommendations addressed to all states and discussion or placement of a particular matter on the agenda would not.[28]

Frustration with the ambiguity of the principle of non-intervention was clearly expressed when, in 1964, the Philippines observed "a compelling and urgent necessity to attempt an authoritative definition of what constitute matters of domestic jurisdiction and acts of intervention, and to supplement these definitions with illustrations of acts and transactions comprehended within the terms".[29] The attempt to clarify the principle, including the idea of enumerating prohibited acts, was discussed within the UN General Assembly in relation to the agenda on the Principles of International Law concerning Friendly Relations and Co-operation among States in the 1960s.[30] While various ideas about the meaning of intervention were expressed, the illegality of intervention appears to have been clearly acknowledged. In fact, some delegates expressly rejected the idea of distinguishing "lawful intervention" and "unlawful intervention" as being incompatible with the sovereign right to independence.[31]

The attempt for enumeration subsequently culminated in the adoption of UN General Assembly Resolution 36/103 in 1981,[32] which lists a broad range of acts as constituting intervention. The resolution was adopted by majority, including most of the Asian states, over the opposition of Western states.[33] It is debatable to what extent this resolution can be considered a genuine reflection of general agreement among states as to the meaning of intervention in its application to the relationship between sovereign states. In fact, the International Court of Justice (ICJ) in *Nicaragua* appears to have adopted a much narrower definition of intervention by stating that the element of coercion "defines, and indeed forms the very essence of, prohibited intervention".[34] In any event, the meaning of intervention must be ascertained through examination of the practice of states and international organizations.

The practice in this respect, however, must be examined by reference not only to the practice of international organizations (such as resolutions of the UN General Assembly and the UN Security Council), but also to the practice of states (through,

28. See e.g. Oscar SCHACHTER, "The United Nations and Internal Conflict" in John Norton MOORE, ed., *Law and Civil War in the Modern World* (Baltimore: Johns Hopkins University Press, 1974), 401 at 421–2; Quincy WRIGHT, "Is Discussion Intervention?" (1956) 50 American Journal of International Law 102.

29. UN Doc. A/5725/Add.7 (11 December 1964) at para. 3.

30. The process resulted in the adoption of *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res. 2625 (XXV) (1970). Cf. *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, GA Res. 2131 (XX) (1965).

31. *Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States*, UN Doc. A/5746 (16 November 1964) at paras. 248–9.

32. *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States*, GA Res. 36/103 (1981).

33. Adopted by 120 to 22, with 6 abstentions. Australia, Japan, New Zealand, and Venezuela are the only non-Western states that voted against the resolution.

34. *Nicaragua Case*, *supra* note 7 at 108, para. 205.

for example, expression of their views and voting in public forums). In fact, one of the criticisms of the ICJ's decision in *Nicaragua*, in finding that customary international law prohibits the use of force, concerns the methodology employed by the Court, which primarily relied upon General Assembly resolutions without discriminating between different forums where the resolution was adopted or between resolutions of a different nature.[35] The practice of states is equally of particular significance for the interpretation of the customary international law principle of non-intervention in a horizontal context, given that, even though the principle itself is widely accepted, it remains to be settled as to "what is the exact content of the principle so accepted".[36]

On the other hand, the practice of international organizations may well be considered decisive in interpreting the principle of non-intervention in a vertical sense, such as Article 2(7) of the UN Charter, if institutional bodies such as the UN General Assembly and the UN Security Council have the competence to decide what matter falls within the domestic jurisdiction of a state and what constitutes an intervention. M.S. Rajan observes that "their persistent actions by way of discussion, recommendation and appointment of subsidiary bodies to investigate, study and report on and to see to the implementation of their recommendations, or for purposes of conciliation and mediation … undoubtedly imply that these organs alone are competent to decide issues of disputed jurisdiction".[37] In contrast, J.S. Watson argues that the power of authoritative interpretation of domestic jurisdiction has been reserved to sovereign states and has not been handed to the UN through a political notion of international concern, unless states begin to feel that they must comply with the UN's interpretation of its scope.[38]

The latter approach is consistent with the treaty interpretation rule in respect of subsequent practice under the Vienna Convention on the Law of Treaties, which requires "the agreement of the parties regarding its interpretation".[39] Thus, the ICJ observed, in considering whether the question concerning the legality of the use of nuclear weapons falls within the competence of the World Health Organization, that the subsequent practice of an organization, when adopted not without opposition, "could not be taken to express or to amount on its own to a practice establishing an agreement between the members of the Organization to interpret its Constitution".[40]

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35. See e.g. Anthony D'AMATO, "Trashing Customary International Law" (1987) 81 American Journal of International Law 101 at 102–3; H.C.M. CHARLESWORTH, "Customary International Law and the Nicaragua Case" (1991) 11 Australian Year Book of International Law 1 at 18–19.

36. *Nicaragua Case*, *supra* note 7 at 108, para. 205.

37. Rajan, *supra* note 25 at 499. See also, Goodrich, Hambro, and Simons, *supra* note 21 at 68; Higgins, *supra* note 25 at 65–7.

38. J.S. WATSON, "Autointerpretation, Competence, and the Continuing Validity of Article 2(7) of the UN Charter" (1977) 71 American Journal of International Law 60. See also Hans KELSEN, "Limitations on the Functions of the United Nations" (1946) 55 Yale Law Journal 997.

39. *Vienna Convention*, *supra* note 23, art. 31(3)(b). See also Jean-Marc SOREL and Valérie BORÉ EVENO, "1969 Vienna Convention, Article 31: General Rule of Interpretation", in Olivier CORTEN and Pierre KLEIN, eds., *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford: Oxford University Press, 2011), Vol. 1, 804 at 826 ("only if practice is concordant and common to all parties"); Richard GARDINER, *Treaty Interpretation* (Oxford: Oxford University Press, 2008) at 246–8.

40. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)*, [1996] I.C.J. Rep. 66 at 81, para. 27. Cf. *Legal Consequences of the Construction of a Wall in the Occupied*

Also, the International Criminal Tribunal for the former Yugoslavia (ICTY) adopted the same position in ascertaining the common understanding that the "threat to the peace" in Article 39 of the UN Charter might include internal armed conflicts.[41] It is therefore clear that the practice of an international organization, without reference to the view of its Member States, is not conclusive evidence of subsequent practice.

In the absence of an established agreement among UN membership at large, each state may well consider what constitutes an intervention differently and according to its own understanding of what falls within the domestic jurisdiction of the state. This does not challenge the competence of UN organs to make an initial determination about the applicability of the principle of non-intervention in a specific situation, which is presumed to be valid.[42] But rather, possible disagreement about the content of the principle means that Asian states' approach to the principle—if there is a cohesive one shared among Asian states—may well differ from that of the rest of the world. The same observation applies equally to the customary international law principle of non-intervention as interpreted and applied by Asian states. It is therefore necessary to examine the application and interpretation of the principle of non-intervention by Asian states in the specific context that confronts them within or outside UN forums, from which an Asian approach or approaches to the principle can be extracted. That Asian approach or approaches may lay a foundation for an Asian vision as to how regional security should be governed.

II. ASIAN CONCEPTION OF THE PRINCIPLE OF NON-INTERVENTION

In the inaugural volume of the *Asian Journal of International Law*, Christian Tomuschat relevantly observed that "Asia can today be considered as being fully integrated in the system of the traditional rules of inter-state law".[43] While this observation is beyond contention, the question remains whether Asian states have been integrated into the system with the same understanding of the traditional rules of international law, such as the principle of non-intervention. This section discusses how Asian states have approached the principle of non-intervention in their views and practices.

A. *Historical Overview*

The principle of non-intervention as customary international law governing the horizontal relationship between states emerged in the nineteenth century as an antithesis of the right of intervention that was, from time to time, exercised by powerful states against weaker

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Palestinian Territory (Advisory Opinion), [2004] I.C.J. Rep. 136 at 149–50 (distinguished on the grounds that the practice of the UN General Assembly is examined solely to delimit its competence in relation to the Security Council, not in relation to Member States, under art. 12(1) of the UN Charter).

41. *Prosecutor v. Tadić (Jurisdiction) (Appeals Chamber)*, (1997) 105 I.L.R. 453 at 466–7, para. 30.

42. *Certain Expenses of the United Nations (article 17, paragraph 2, of the Charter) (Advisory Opinion)*, [1962] I.C.J. Rep. 151 at 168.

43. Christian TOMUSCHAT, "Asia and International Law - Common Ground and Regional Diversity" (2011) 1 Asian Journal of International Law 217 at 226.

states in many different forms.[44] The Asian states' view of the principle of non-intervention does not appear much at the initial stage of its development, partly due to the small number of Asian states recognized in international relations. Japan's failed attempt to insert a racial equality clause into the Covenant of the League of Nations represents an early Asian engagement with the principle of non-intervention. Although it was based on Japan's self-interest in an attempt to gain equal status in relation to the European countries, the initiative received overwhelmingly enthusiastic support from Afro-Asian countries.[45] However, Japan's proposal that required equal treatment of aliens in the territories of the contracting parties met strong opposition from European countries, particularly Australia and more covertly the United Kingdom, on the grounds that it would constitute interference in the domestic affairs of Member States,[46] due to its implications for domestic immigration and colonial policy.[47]

The then US President Woodrow Wilson also gradually came to realize the significance of this issue for securing the two-thirds majority in the US Senate required for the ratification of the Treaty of Versailles.[48] President Wilson's attempt to reassure US domestic constituencies eventually led to the proposal to insert Article XV(8) into the Covenant,[49] to prevent the League Council from dealing in any way with a dispute "[i]f the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the jurisdiction of that party".[50] Yet this paragraph also meant that the League members entered into no commitment against commencing war in the case of a dispute arising from a domestic question, by excluding such disputes from the collective dispute management mechanism under Article XV of the Covenant.[51] There is no doubt that the principle of non-intervention, as formulated in the Covenant, was meant to serve the interest of the major powers to protect their internal sovereignty from international interference through the League of Nations.[52]

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44. For early historical analysis, see e.g. P.H. WINFIELD, "The History of Intervention in International Law" (1922–23) 3 British Year Book of International Law 130; Ellery C. STOWELL, *Intervention in International Law* (Washington, DC: John Byrne & Co, 1921) at 317–55.

45. SHIMAZU Naoko, "The Japanese Attempt to Secure Racial Equality in 1919" (1989) 1 Japan Forum 93 at 94.

46. David Hunter MILLER, *The Drafting of the Covenant* (New York: G.P. Putnam's Sons, 1928) Vol. 2 at 325, 389.

47. For detailed analysis, see e.g. Shimazu, *supra* note 45 at 95–9; ONUMA Yasuaki, "*Harukanaru Jinshu Byodo no Riso - Kokusai Renmei Kiyaku e no Jinshu Byodo Joko Teian to Nihon no Kokusaihoukan*" [The Ideal of Racial Equality on the Horizon - The Racial Equality Clause Proposal to the Covenant of the League of Nations and Japan's Perspective to International Law] in ONUMA Yasuaki, ed., *Kokusaiho, Kokusai Rengo to Nihon* [International Law, the United Nations and Japan] (Tokyo: Kobundo, 1987), 427 at 441–56.

48. For documented criticisms in the US Senate against the League of Nations, see Henry Cabot LODGE, *The Senate and the League of Nations* (New York: Scribners, 1925) at 246.

49. Alfred ZIMMERN, *The League of Nations and the Rule of Law 1918–1935* (London: Macmillan, 1936) at 244–5.

50. *Covenant of the League of Nations*, annexed to *Treaty of Peace*, 28 June 1919, 225 C.T.S. 188 (entered into force 10 January 1920).

51. See J.L. BRIERLY, "Matters of Domestic Jurisdiction" (1925) 6 British Year Book of International Law 8 at 9; David Hunter MILLER, *The Geneva Protocol* (New York: Macmillan, 1925) at 64–5.

52. In fact, the universal attempts to achieve racial equality were repeatedly rejected in the League Assembly, whilst the equitable treatment of racial, linguistic, and religious minorities was separately

Racial equality and non-discrimination remained the overriding concern, in comparison to the principle of non-intervention, among Asian states in the wake of the UN era. The Chinese delegation pressed for the inclusion of a provision on racial equality during the first phase of the Dumbarton Oaks conversations.[53] India and the Philippines joined China, expressing similar views, during the 1945 United Nations Conference on International Organization at San Francisco.[54] The absence of strong concern among Asian states for intervention by the UN stood in sharp contrast with the preoccupation of the Great Powers, particularly the Soviet Union, with potential intervention by the UN General Assembly, over which, unlike the UN Security Council, they had no control by veto.[55]

The liberal approach to the principle of non-intervention by Asian states continued in the UN's formative stage in the context of decolonization. For example, the Philippine delegation argued that a recommendation by the UN General Assembly which proposed the holding of regional representative conferences on Non-Self-Governing Peoples would not constitute an intervention in domestic affairs, favouring a flexible and liberal interpretation of the UN Charter.[56] India (and also later Pakistan) voiced deep concerns about the discriminatory treatment of Indians in South Africa as early as 1946 in the UN General Assembly, despite South Africa's opposition on the grounds of the principle of non-intervention.[57] China, India, Pakistan, and the Philippines, together with other small nations, were all active participants and contributors in the drafting stage of the 1948 Universal Declaration of Human Rights.[58]

As the question of Tibet emerged following the Chinese People's Liberation Army's march into Tibet on 7 October 1950,[59] the Asian cohesion in their liberal approach to the principle of non-intervention was put to the test. From the beginning of the dispute, the People's Republic of China (PRC) maintained its position that

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guaranteed through peace treaties with individual European states, vesting the League Council with a right to intervene for the purpose of the protection of minorities in Europe. See Paul Gordon LAUREN, *The Evolution of International Human Rights: Visions Seen* (Philadelphia: University of Pennsylvania Press, 1998) at 126–9; P.E. CORBETT, "What is the League of Nations?" (1924) 5 British Year Book of International Law 119 at 136–8.

53. For details, see Lauren, *supra* note 52 at 166–71.

54. *Documents of the United Nations Conference on International Organization* (1945) Vol.1 at 245 (India); Vol. 3 at 527 (India); Vol. 3 at 535 (the Philippines).

55. *Documents of the United Nations Conference on International Organization* (1945) Vol. 5 at 535–7. It does not mean that Asian states had no concern for foreign intervention, particularly armed intervention. Thus, the Philippine delegation regarded as an act of aggression an interference with the internal affairs of a state "by supplying arms, ammunition, money or other forms of aid to any armed band, faction or group, or by establishing agencies in that nation to conduct propaganda subversive of the institutions of that nation": *Ibid.*, Vol. 3 at 538.

56. UN GAOR, 1st sess., Supp. 2nd pt, Sixth Committee 25th mtg, UN Doc A/C.6/100 (30 November 1946) at 124–5.

57. UN Doc. A/68, A/68/Add.1, A/68/Add.2, A/149 and A/167. The discussion resulted in the adoption of GA Res. 44(I) (8 December 1946). For details, see Richard SCHIFTER, "Human Rights at the United Nations: The South Africa Precedent" (1993) 8 American University Journal of International Law and Policy 361 at 363–5.

58. See Susan WALTZ, "Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights" (2001) 23 Human Rights Quarterly 44 at 53–66.

59. See generally H.E. RICHARDSON, *Tibet and Its History* (London: Oxford University Press, 1962).

Tibet was an integral part of China and therefore that the problem of Tibet was entirely a domestic problem of China, to which many states, including the United Kingdom (the former colonial power) and India (the successor of the United Kingdom in the continent), responded with deference.[60] When the matter was discussed in the General Committee of the UN General Assembly in 1959, the position taken by Asian states was sharply divided.[61] Indonesia and Nepal, for example, regarding Tibet as part of China, argued that China's proper representation at the General Assembly was indispensable, even though it maintained its previous position that the principle of non-intervention would not prevent the General Assembly from considering questions involving fundamental human rights.[62] On the other hand, Thailand, the Federation of Malaya, and Pakistan considered that this question was solely an issue of human rights violations and could not be regarded as exclusively an internal problem.[63]

The idea that the question of Tibet was an "Asian" problem that should be dealt with without international interference was absent throughout the entire debate of the General Assembly. Interestingly, the International Commission of Jurists in its preliminary report on the situation of Tibet, published in July 1959, observed that "relations between Asian states were not governed by Western political ideas and cannot be described in Western political terms".[64] Nevertheless, the Commission found widespread and systematic violations of human rights of the Tibetans in universal terms.[65] The US delegation relied upon the fact that eight of the eleven jurists who drafted the report were from Asia in order to dispel any accusation of a Western intervention.[66]

In the 1960s, while the question of Tibet continued to be debated in the UN General Assembly, a few Asian countries still maintained their basic position that

60. For a detailed analysis, see R.P. ANAND, *Studies in International Law and History: An Asian Perspective* (Leiden: Martinus Nijhoff, 2004) at 127–37.

61. It should be noted that the position of other states was equally divided on different grounds including, not insignificantly, ideological differences. See UN GAOR, 14th sess., 826th, 831st–834th plen mtgs, UN Doc. A/PV.826, 831–834 (12, 20–21 October 1959). The draft resolution sponsored by the Federation of Malaya and Ireland calling for the restoration of human rights to Tibet was adopted by forty-five (including Federation of Malaya, Japan, Laos, Pakistan, the Philippines, Thailand, and Taiwanese China) votes to nine, with twenty-six abstentions (including India, Indonesia, Nepal, Burma, Cambodia), which became GA Res. 1353 (XIV) (21 October 1959).

62. UN GAOR, 14th sess., 826th plen mtg, UN Doc. A/PV.826 (12 October 1959) at paras. 44–6 (Indonesia); UN GAOR, 14th sess., 831st plen mtg, UN Doc. A/PV.831 (20 October 1959) at para. 57 (Nepal). See also UN GAOR, 19th sess., 1299th plen mtg, UN Doc. A/PV.1299 (11 December 1964) at para. 22 (Cambodia).

63. UN GAOR, 14th sess., 826th plen mtg, UN Doc. A/PV.826 (12 October 1959) at paras. 91–4 (Thailand); UN GAOR, 14th sess., 831st plen mtg, UN Doc. A/PV.831 (20 October 1959) at paras. 2–7 (Federation of Malaya); UN GAOR, 14 sess., 832nd plen mtg, UN Doc. A/PV.832 (20 October 1959) at paras. 2–3.

64. International Commission of Jurists, *The Question of Tibet and the Rule of Law-A Preliminary Report* (Geneva, 1959) at 76.

65. *Ibid*., at 17–18. The findings were confirmed in its full report: International Commission of Jurists, *Tibet and the Chinese People's Republic - A Report to the International Commission of Jurists by its Legal Inquiry Committee on Tibet* (Geneva, 1960).

66. UN GAOR, 16th sess., 1084th plen mtg, UN Doc. A/PV.1084 (19 December 1961) at para. 175; UN GAOR, 16th sess., 1085th plen mtg, UN Doc. A/PV.1085 (20 December 1961) at para. 104.

issues of international concern, particularly those involving systematic suppression of human rights, would not fall within a reserved domain of a sovereign state.[67] However, as the ideological conflicts mounted in Southeast Asia, where states started challenging the governmental legitimacy of their neighbouring states,[68] this position started shifting more towards a conservative end. It was against this background that ASEAN was founded by Indonesia, Malaysia, the Philippines, Singapore, and Thailand "to ensure their stability and security from external interference in any form or manifestation".[69] ASEAN became the political platform with dual functions to maintain their national stability and security:[70] committing themselves to the idea of "a Zone of Peace, Freedom and Neutrality" free from external interference, on the one hand;[71] and entering into reciprocal arrangements to ensure the internal stability and security of the government in each Member State, on the other.[72] Thus, it was the concern for regional security from external interference, as well as the regime security of each Member State, that shifted the position of ASEAN states more towards a strict interpretation of the principle of non-intervention.

This policy of "non-interference" was turned into a legal principle when ASEAN states adopted the Treaty of Amity and Cooperation in Southeast Asia in 1976.[73] The difference in terminology adopted—"non-interference", rather than "non-intervention"—appears significant, though commentators have tended to understand them interchangeably.[74] As explained in Part I, the term "intervention" in the context of the principle of non-intervention is understood as an unlawful interference, and is therefore in and of itself an internationally wrongful act, unless justified by a legally recognized exception. Thus, it is arguable that the principle of "non-interference" adopted by ASEAN is distinguished from the principle of "non-intervention", even prohibiting otherwise lawful forms of interference that would not constitute an "intervention". In fact, ASEAN's subsequent practice of non-interference went so far as to refrain from criticizing the actions of a Member State towards its own people,[75] even those involving systematic suppression of human rights, such as the repressive treatment of East Timorese by Indonesia

67. See e.g. UN GAOR, 20th sess., 1394th plen mtg, UN Doc. A/PV.1394 (14 December 1965) at para. 50 (Thailand); UN GAOR, 20th sess., 1403rd plen mtg, UN Doc. A/PV.1403 (18 December 1965) at para. 76 (Malaysia).

68. See e.g. Acharya, *supra* note 5 at 80; Michael LEIFER, "The ASEAN Peace Process: A Category Mistake" (1999) 12 Pacific Review 25 at 26–7; Shaun NARINE, "ASEAN and the Management of Regional Security" (1998) 71 Pacific Affairs 195 at 196–201.

69. *The Bangkok Declaration*, 8 August 1967, online: ASEAN <http://www.asean.org/1212.htm>.

70. Amitav ACHARYA, *Constructing a Security Community in Southeast Asia: ASEAN and the Problem of Regional Order* (London: Routledge, 2001) at 57.

71. *Zone of Peace, Freedom and Neutrality Declaration*, 27 November 1971, online: ASEAN <http://www.aseansec.org/1215.htm> [*Kuala Lumpur Declaration*]. For a detailed analysis, see Pranee SAIPIROON, *ASEAN Governments' Attitudes Towards Regional Security 1975–1979* (Bangkok: Institute of Asian Studies, 1982) at 5–7.

72. For detailed analysis, see e.g. Acharya, *supra* note 5 at 227–30; Funston, *supra* note 5 at 3–4.

73. *Treaty of Amity and Cooperation in Southeast Asia*, 24 February 1976, 1025 U.N.T.S. 319 (entered into force 15 July 1976), art. 2(c).

74. See e.g. Acharya, *supra* note 70 at 225.

75. See e.g. Sheldon SIMON, "ASEAN and Multilateralism: The Long, Bumpy Road to Community" (2008) 30(2) Contemporary Southeast Asia 264.

(which regarded East Timor as an integral part of Indonesia),[76] and the genocidal acts of the Pol Pot regime in Cambodia between 1975 and 1978.[77] At the same time, ASEAN Member States disapproved of any interference—even verbal or rhetorical criticisms—in the domestic affairs of a Member State,[78] which led most prominently to the concerted criticism against the Vietnamese intervention in Cambodia in 1978.[79] Even though this principle of non-interference does not apply outside ASEAN, other Asian states have traditionally abided by ASEAN's principle of non-interference in dealing with any ASEAN Member States.[80]

While ASEAN Member States strongly and consistently advocated against external interference in official discourses, commentators have also reported a number of incidents in which ASEAN Member States "interfered" in the domestic affairs of another state in various forms, including verbal support, diplomatic campaigning in multilateral forums, and direct military assistance to the neighbouring governments.[81] Such ambivalent practice can be interpreted, in the words of Peter Lyon, as a positive policy of non-intervention that requires confidence and deliberate restraint with "a tacit bias in favour either of the incumbent government, or, where change is taking place, in favour of the newly emerging forces".[82] Pointing out the inconsistency of their attitude, especially towards interventionist activities outside Southeast Asia, Lee Jones argues that their approach represented a political, not a principled position.[83] However, it is also possible to observe that, consistent with the original intention, the imperative of national and regional security concerns dictated the application of the principle of non-intervention, presumably allowing interference only to the extent that it did not jeopardize the stability and security of the region.

The extreme reliance on the principle of non-intervention reached its peak when the PRC defended its violent action against the democracy movement in Tiananmen Square in 1989. In response to strong international condemnation, the PRC government issued a White Paper, *Human Rights in China*, in 1991, in which it expressly stated that "human rights are essentially matters within the domestic jurisdiction of a country".[84] ASEAN states also supported the PRC's position,[85] as they themselves came under pressure for better compliance with international human

76. See Sonny INBARAJ, *East Timor: Blood and Tears in ASEAN* (Chiang Mai: Silkworm Books, 1997).

77. See Archarya, *supra* note 70 at 59.

78. Wu, *supra* note 5 at 12–14.

79. For detailed analysis, see Lee JONES, "ASEAN Intervention in Cambodia: From Cold War to Conditionality" (2007) 20 Pacific Review 523 at 527–8; Narine, *supra* note 68 at 204–7. See also "Statement by the Philippine Foreign Minister As Chairman of the ASEAN Standing Committee (on the Cambodia Issue)", Manila, 6 February 1981, reproduced in Wu, *supra* note 5 at 8–9.

80. Wu, *supra* note 5 at 19.

81. See e.g. Jones, *supra* note 5; Funston, *supra* note 5 at 5–8; Ramcharan, *supra* note 5 at 66–70.

82. Peter LYON, *War and Peace in South-East Asia* (London: Oxford University Press, 1969) at 176.

83. Jones, *supra* note 79 at 527.

84. Information Office of the State Council of the People's Republic of China, "White Paper: Human Rights in China" (1991), online: <http://www.china.org.cn/e-white/7/7-L.htm>.

85. Wu, *supra* note 5 at 14. Asian states also turned a blind eye to the 1991 Santa Cruz massacre in East Timor: Rodolfo C. SEVERINO, *Southeast Asia in Search of an ASEAN Community: Insights from the Former ASEAN Secretary-General* (Singapore: Institute of Southeast Asian Studies, 2006) at 121.

rights obligations.[86] However, such a position must be understood in the light of the peculiar international political climate prevailing at that time, when the demise of the Soviet Union resulted in the end the Cold War. In fact, since 1991, the PRC has increasingly become open to international engagement with human rights issues, particularly when those issues are not politically sensitive.[87] This shift in the PRC's policy on intervention was also reflected in its approach to Kosovo,[88] East Timor,[89] and most recently Libya,[90] though it has consistently maintained a cautious position towards the use of force against a government in power as a form of intervention.[91]

ASEAN also shifted its non-interference policy towards "constructive engagement" in its approach to Myanmar and Cambodia during the 1990s. As part of this policy shift, the then Malaysia's Deputy Prime Minister, Anwar Ibrahim, proposed the idea of "constructive intervention" in July 1997. It was in principle designed to encourage ASEAN Member States to offer assistance when domestic events in one country would impact adversely on another or on the region as a whole—for example, when the progress of domestic reforms affects the economic recovery of the region due to extensive trade and investment ties.[92] It was a policy response to Western criticisms, and also reportedly a reflection of their own frustration, over the failure of constructive engagement towards Myanmar and Cambodia to achieve any results.[93] In a bid to make the concept more palatable prior to the ASEAN Annual Ministerial Meeting in late July 1998,[94] the then Thai Foreign Minister, Surin Pitsuwan, revised the concept into "flexible engagement", particularly in the context of a worsening Asian financial crisis, to facilitate more open and transparent dialogue in public rather than through private

86. Wu, *supra* note 5 at 21–2. This has, in part, resulted in the claim of "Asian values" to challenge the universality of human rights. For discussion, see e.g. Leena AVONIUS and Damien KINGSBURY, eds., *Human Rights in Asia: A Reassessment of the Asian Values Debate* (Hampshire: Palgrave Macmillan, 2008); Michael JACOBSEN and Ole BRUUN, eds., *Human Rights and Asian Values: Contesting National Identities and Cultural Representations in Asia* (Surrey: Curzon Press, 2000); Yash GHAI, "Human Rights and Governance: The Asia Debate" (2000) 1 Asia-Pacific Journal on Human Rights and the Law 9.

87. For a detailed analysis, see Wim MULLER, "Chinese Practice in UN Treaty Monitoring Bodies: Principled Sovereignty and Slow Appreciation" in Hitoshi NASU and Ben SAUL, eds., *Human Rights in the Asia-Pacific Region: Towards Institution Building* (London: Routledge, 2011), 87.

88. The Chinese delegation voiced its opposition, but abstained on the final vote on SC Res. 1160 (31 March 1998): see UN SCOR, 53rd Year, 3868th mtg, UN Doc S/PV.3868 (31 March 1998) at 11–12.

89. The Chinese delegation expressed support for the deployment of multinational forces in East Timor: UN SCOR, 54th Year, 4043rd mtg, UN Doc S/PV.4043 (11 September 1999) at 13 (stating that "[t]he issue of East Timor must be solved through the United Nations").

90. UN SCOR, 66th Year, 6491st mtg, UN Doc S/PV.6491 (26 February 2011) at 4.

91. See e.g. UN SCOR, 66th Year, 6498th mtg, UN Doc S/PV.6498 (17 March 2011) at 10. Subsequently this position was more strongly enforced in relation to the situation in Syria: see e.g. UN SCOR, 67th Year, 6710th mtg, UN Doc S/PV.6710 (31 January 2012) at 25. For a detailed analysis of the Chinese policy towards intervention, see e.g. Allen CARLSON, "Helping to Keep the Peace (Albeit Reluctantly): China's Recent Stance on Sovereignty and Multilateral Intervention" (2004) 77 Pacific Affairs 9; Bates GILL and James REILLY, "Sovereignty, Intervention and Peacekeeping: The View from Beijing" (2000) 42 Survival 41.

92. ANWAR Ibrahim, "Crisis Prevention" *Newsweek International* (21 July 1997) at 13; Ramcharan, *supra* note 5 at 75.

93. Carlyle A. THAYLER, "Reinventing ASEAN: From Constructive Engagement to Flexible Intervention" (1999) 3 Harvard Asia Pacific Review 67 at 70.

94. Funston, *supra* note 5 at 11.

communications when domestic issues have regional implications.[95] However, the concept met hostile reaction from other ASEAN Member States primarily because of the fear that a host of problems associated with this ambiguous and unarticulated approach might open the Pandora's box threatening their traditional methods of conflict resolution, internal regime security, and even the security of the region as a whole.[96] The final wording of the proposal was thereafter watered down to a less intervention-oriented notion of "enhanced interaction" as a policy framework to deal with transnational issues within the region.[97]

Nevertheless, ASEAN's changing attitude towards non-interference led it to delay Cambodia's admission to ASEAN, albeit reluctantly, when Cambodia's Second Prime Minister, Hun Sen, staged a coup to oust his coalition partner.[98] The subsequent developments, including most notably the adoption of ASEAN Concord II and the ASEAN Charter,[99] can be seen in this context as the search for an alternative approach with a view to reconciling their policy of non-interference with the need to meet the contemporary challenges posed by ever-deepening economic interdependence and the influence of globalization. It is notable in this context that, in response to the violent clashes between Thai security forces and red-shirt anti-government protesters in Thailand in April 2010, ASEAN issued a statement expressing the concern of its members, as well as their support for an early restoration of law and order according to the vision of an ASEAN Community.[100] This stands in sharp contrast to ASEAN's silence towards the 2006 coup that resulted in the ousting of Thaksin Shinawatra.[101]

B. *Recent Practice*

1. *East Timor*

The modern dispute over East Timor originated from the Indonesian military invasion that had commenced on 7 December 1975 and the subsequent annexation of the former Portuguese colony. The international and regional reaction to the Indonesian occupation of East Timor was based on the perceived political and

95. See Acharya, *supra* note 70 at 152–3; Jürgen HAACKE, "The Concept of Flexible Engagement and the Practice of Enhanced Interaction: Intramural Challenges to the 'ASEAN Way'" (1999) 12 Pacific Review 581 at 584–5.

96. For a detailed analysis of the reaction, see Acharya, *supra* note 70 at 153–4; Haacke, *supra* note 95 at 592–7.

97. Surin PITSUWAN, "Opening Statement", 31st ASEAN Ministerial Meeting, Manila, 24 July 1998. For an analysis of this debate, see e.g. Hiro KATSUMATA, "From 'Non-Interference' to 'Open and Frank Discussions'" (2004) 44 Asian Survey 237.

98. Mely CABALLERO-ANTHONY, "Southeast Asia's Points of Convergence on International Intervention" in Sorpong PEOU, ed., *Human Security in East Asia: Challenges for Collaborative Action* (London/New York: Routledge, 2009), 61 at 67; Jones, *supra* note 79 at 535–8.

99. *Declaration of ASEAN Concord II* (*Bali Concord II*), 7 October 2003, online: ASEAN <http://www.aseansec.org/15159.htm>; *ASEAN Charter*, *supra* note 11.

100. *ASEAN Chairman's Statement on the Situation in Thailand*, 21 May 2010, online: ASEAN <http://www.aseansec.org/24718.htm>.

101. See Tanvi PATE, "Crisis in Thailand-IV: Analysing ASEAN, US, UN and EU Responses", 22 June 2010, online: Institute of Peace & Conflict Studies <http://www.ipcs.org/article/southeast-asia/crisis-in-thailand-iv-analysing-asean-us-un-and-eu-3163.html>.

diplomatic imperative of maintaining friendly relations with the Suharto regime, rather than a principled adherence to the principle of non-intervention.[102] Thus, many Asian states, including Japan, Malaysia, and the Philippines, expressed support for the occupation of East Timor by Indonesia's anti-communist regime against the communist-inclined Revolutionary Front for an Independent East Timor (FRETLIN), and for the restoration of peace and order,[103] despite the fact that both the UN Security Council and General Assembly called upon Indonesia to withdraw from East Timor.[104] China, on the other hand, urged respect for non-intervention in the internal matters of East Timor and kept voting in favour of Indonesia's withdrawal from East Timor in the UN General Assembly from 1975 to 1982,[105] even though it did not apply any significant pressure upon Jakarta.[106]

The shift in public opinion, particularly in Australia and the United States, following the 1991 Santa Cruz massacre, was gradually turned into international pressure upon Indonesia to resolve the East Timor problem.[107] Yet Asian states remained supportive of Indonesia's occupation of East Timor, particularly after the 1998 regime change, because of the fear that external pressure might weaken the precarious legitimacy of the new Habibie government and eventually destabilize Indonesia, as well as concern for setting a precedent of international intervention in the domestic affairs of a state in Asia.[108] It is recalled that this position was taken in the period when ASEAN states became vocal about the need for a policy shift from non-interference towards "constructive engagement" or "flexible engagement" in its approach to Myanmar. This seemingly contradictory position demonstrates the core characteristic of the ASEAN non-interference doctrine, regarding the political stability of regional nations as being of the utmost significance for regional security.

Asian states maintained, more or less, the same position even when the militia violence increased drastically in the aftermath of the popular consultation on 30 August 1999, in

102. See e.g. Brad SIMPSON, "'Illegally and Beautifully': The United States, the Indonesian Invasion of East Timor and the International Community, 1974–76", (2005) 5 Cold War History 281.

103. UN GAOR, 30th sess., 2439th mtg, UN Doc A/PV.2439 (12 December 1975) at para. 72 (Japan); UN SCOR, 30th Year, 1864th mtg, UN Doc S/PV.1864 (15 December 1975) at para. 20 (Malaysia); UN SCOR, 31st Year, 1909th mtg, UN Doc S/PV.1909 (14 April 1976) at paras. 48, 52 (the Philippines).

104. SC Res. 384 (22 December 1975); SC Res. 389 (22 April 1976) (Japan, together with the US, abstained, while Benin did not participate in the vote). For the voting of each country on relevant General Assembly resolutions, see the table contained in Heike KRIEGER, ed., *East Timor and the International Community: Basic Documents* (Cambridge: Cambridge University Press, 1997) at 129–33. The number of votes in favour of adopting a General Assembly resolution against Indonesia declined steadily and its content was also watered down between 1975 and 1982: Peter CAREY with Pat WALSH, "The Security Council and East Timor", in Vaughan LOWE et al., eds., *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945* (Oxford: Oxford University Press, 2008), 346 at 354; Ivan SHEARER, "A Pope, Two Presidents and a Prime Minister" (2001) 7 ILSA Journal of International and Comparative Law 429 at 434–5.

105. UN SCOR, 30th Year, 1865th mtg, UN Doc S/PV.1865 (16 December 1975) at 1–2. See also the table of voting record in Krieger, *supra* note 104 at 129–33.

106. James DUNN, *Timor: A People Betrayed* (Sydney: ABC Books, 1996) at 327.

107. There were of course other factors at play, which led to Indonesia's decision to hold a "popular consultation" in East Timor: see Carey with Walsh, *supra* note 104 at 355–7.

108. Maiko ICHIHARA, "East Asian States' Collaborative Action in UN Peace Operations for East Timor" in Sorpong PEOU, ed., *Human Security in East Asia: Challenges for Collaborative Action* (London: Routledge, 2009), 94 at 98, 103–4.

which the majority of the East Timorese opted for independence from Indonesia. While calls for international intervention grew stronger, Cambodia, India, Laos, the Philippines, the Republic of Korea, and Singapore continued to call upon the Indonesian government to take necessary measures in a decisive and vigorous manner to restore law and order.[109] Vietnam formed the view that "[t]he deployment of any multinational forces in East Timor *must* … have the consent of the Indonesian Government".[110] When APEC convened a Special Ministerial Meeting on East Timor at the APEC Summit in Brunei, Asian states refused to participate in the meeting as an official part of the summit.[111] Even though Indonesia remained a de facto authority in East Timor, and therefore could not claim the situation in East Timor as an internal affair, it is inferred from those statements by Asian states that their response to the situation in East Timor was deferential to, and contingent upon, the will of the Indonesian authorities. In this respect, the following statement made by Singapore appears to indicate the cardinal concern among Asian states in approaching the East Timor issue:

> [T]he move [towards popular consultation in East Timor] had serious implications for the unity of Indonesia. Indonesia was undergoing a difficult political transition. A decision precipitately taken without broad national consensus – a decision that had profound implications for the country – was bound to be controversial.[112]

This statement makes clear that their concern was consistently the destabilization of Indonesia during the political transition, which dictated Asian states' approach to the East Timor issue, even though the principle of non-intervention, strictly speaking, was not applicable.

2. *Myanmar*

Since the military coup d'états in 1962 and 1988, the Burmese people have been subjected to widespread human rights violations by the military junta, particularly against political dissidents and ethnic minorities. Despite pressure from the US and the European Union to restrict economic relations with Burma (renamed as Myanmar by the military junta), ASEAN Member States pursued a policy of "constructive engagement"—an attempt to induce change in the domestic policies of another state through a policy of dialogue and persuasion, rather than by a threat of sanction or coercion.[113] While this policy was deeply rooted in the principle of non-interference, ASEAN Member States started to form the view that non-interference should not be used to shield gross violations of human rights in Myanmar as a

109. UN SCOR, 44th Year, 4043rd mtg, UN Doc S/PV.4043 (11 September 1999) at 18 (Republic of Korea), at 20 (the Philippines); UN SCOR, 44th Year, 4043rd (Resumption) mtg, UN Doc S/PV.4043 (Resumption) (11 September 1999) at 6 (Cambodia), 9 (Lao), 20 (Singapore), 25–6 (India).

110. UN SCOR, 44th Year, 4043rd (Resumption) mtg, UN Doc S/PV.4043 (Resumption) (11 September 1999) at 17 (emphasis added).

111. James COTTON, *East Timor, Australia and Regional Order: Intervention and Its Aftermath in Southeast Asia* (London/New York: Routledge Curzon, 2004) at 82–3.

112. UN SCOR, 44th Year, 4043rd (Resumption) mtg, UN Doc S/PV.4043 (Resumption) (11 September 1999) at 19.

113. Acharya, *supra* note 5 at 230–1. For a detailed analysis of the policy rationale behind the adoption of the policy of constructive engagement, see Ramcharan, *supra* note 5 at 70–4.

domestic matter.[114] In mid 2006, ASEAN reached the stage where it was no longer able to defend Myanmar from international scrutiny, as it failed to co-operate with ASEAN and to deliver tangible progress on economic and political reforms.[115] This sentiment, built after years of diplomatic efforts within ASEAN, paved the way for the discussion of the Myanmar issue in the UN Security Council for the first time in September 2006.

In the Security Council, the issue was raised of whether the situation in Myanmar should be included in its agenda. Asian members of the Council, namely China and Indonesia, advanced the claim that large-scale human rights violations and social issues such as the trafficking of people and narcotics were the internal affairs of a sovereign state and were not sufficient to constitute a threat to the peace.[116] The UK delegate refuted the claim that those issues in Myanmar were internal affairs simply on the basis of refugee flows, which had previously been deemed enough to constitute a threat to the peace.[117] It is recalled that transnational organized crime had already been recognized as a global security threat requiring a concerted international response at the 2005 World Summit Outcome.[118] If the issues were outside the domestic jurisdiction of Myanmar, the Security Council would not have needed to determine a threat to the peace in order to discuss the matter or even to take action.

Rather, the objection by China and Indonesia appears to have been directed to the idea that the Security Council is an appropriate organ to deal with the matter. In fact, a similar view prevailed, particularly among Asian states in the UN General Assembly, which also commonly emphasized that the issues should be dealt with by the newly established Human Rights Council through constructive dialogue and co-operation,[119] rather than by adopting a resolution condemning Myanmar for its use of violence against peaceful demonstrators.[120] It is fair to acknowledge that such a view was not unique to Asian states, but was more widely shared.[121]

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114. Ruukun KATANYUU, "Beyond Non-Interference in ASEAN: The Association's Role in Myanmar's National Reconciliation and Democratization" (2006) 46 Asian Survey 825 at 827–41.

115. Syed Hamid ALBAR, "It Is Not Possible to Defend Myanmar" *Asian Wall Street Journal* (24 July 2006), online: Burmanet News <http://www.burmanet.org/news/2006/07/24/asian-wall-street-journal-it-is-not-possible-to-defend-myanmar-syed-hamid-albar/>.

116. UN SCOR, 61st Year, 5526th mtg, UN Doc. S/PV.5526 (15 September 2006) at 2 (China); UN SCOR, 62nd Year, 5619th mtg, UN Doc. S/PV.5619 (12 January 2007) at 3 (China), 4 (Indonesia).

117. UN SCOR, 61st Year, 5526th mtg, UN Doc. S/PV.5526 (15 September 2006) at 4.

118. GA Res. 60/1 (16 September 2005) at paras. 111–15. See also Report of the High-Level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility*, UN Doc. A/59/565 (2 December 2004) at 23.

119. See e.g. UN GAOR, 62nd sess., Third Committee, 50th mtg, UN Doc. A/C.3/62/SR.50 (20 November 2007) at 4 (DPRK), 5 (Thailand), 6 (Malaysia), 7 (India, Indonesia), 7–8 (Singapore), 9 (Viet Nam); UN GAOR, 63rd sess., Third Committee, 45th mtg, UN Doc. A/C.3/63/SR.45 (21 November 2008) at 2 (DPRK, Malaysia), 2–3 (Thailand), 4 (India, Indonesia, Viet Nam); UN GAOR, 65th sess., Third Committee, 47th mtg, UN Doc. A/C.3/65/SR.47 (18 November 2010) at 9 (China, Viet Nam), 10 (Malaysia, India, Thailand).

120. The draft resolutions were sponsored mainly by Western states (with the exception of Australia, New Zealand, and the Republic of Korea): UN Doc. A/C.3/62/L.41/Rev.1 (2007); UN Doc. A/C.3/63/L.33 (2008); UN Doc. A/C.3/65/L.48/Rev.1 (2010). Although those draft resolutions were adopted, Asian states, with the exception of Japan, Mongolia, Palau, the Republic of Korea, and Timor-Leste, voted against it or abstained.

121. See e.g. UN SCOR, 61st Year, 5526th mtg, UN Doc. S/PV.5526 (15 September 2006) at 3 (Qatar); UN SCOR, 62nd Year, 5619th mtg, UN Doc. S/PV.5619 (12 January 2007) at 3 (South Africa), 5–6 (Qatar), 8 (the Democratic Republic of Congo).

However, non-Asian states addressed this question as an issue of intra-institutional competence and its boundaries,[122] whereas the views expressed by Asian states, particularly by China, were framed as an issue of intervention in matters within the domestic jurisdiction of a state.

This subtle difference in approach became more salient when the human rights situation in Myanmar was discussed in the fifth special session of the Human Rights Council on 2 October 2007, which was widely regarded as the most appropriate organ to deal with the situation in Myanmar. Asian states generally maintained their emphasis on constructive dialogue and co-operation,[123] whereas European states called for concrete and operational measures,[124] condemning the continued violent repression of peaceful demonstrations in Myanmar.[125] It is debatable as to whether this "Asian approach" simply represents their approach to human rights protection in general or can be reflective of the concern that the situation in Myanmar also involves issues such as the peaceful transition to democracy and reconciliation among the political parties and ethnic groups, which Asian states consider to be within the domestic jurisdiction of Myanmar. Such concern may well explain, for example, the caution suggested by Pakistan that the Human Rights Council should "avoid any step that would imperil the integrity of the country" and "de-escalate rhetorical hostility against the Government of Myanmar".[126] In any event, it is to be noted that, by contrast to the Security Council debate, there was no express reference to the principle of non-intervention in the Human Rights Council debate as a legal obstacle to international and regional engagement with the issues in Myanmar.

3. *Sri Lanka*

The conflict in Sri Lanka between the government and the rebel group, the Liberation Tigers of Tamil Ealam (LTTE), turned a critical corner when the ceasefire agreement was concluded in 2002.[127] After the conclusion of the ceasefire agreement, direct clashes between the government and the LTTE were rarely observed, with the exception of sporadic cases of post-ceasefire violence,[128] until the government commenced co-ordinated military assaults on the north-eastern part of the country

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122. See Hitoshi NASU, "The UN Security Council's Responsibility and the 'Responsibility to Protect'" (2011) 15 Max Planck Yearbook of United Nations Law 377 at 406–7.

123. See e.g. UN GAOR, Human Rights Council, 5th spec. sess., UN Doc. A/HRC/S-5/SR.1 (2 October 2007) at 5 (the Philippines), 7 (Pakistan), 8 (Malaysia), 13 (China), 14 (Indonesia); UN GAOR, Human Rights Council, 5th spec. sess., UN Doc. A/HRC/S-5/SR.2 (2 October 2007) at 3 (Singapore), 17 (India).

124. See e.g. UN GAOR, Human Rights Council, 5th spec. sess., UN Doc. A/HRC/S-5/SR.1 (2 October 2007) at 6 (Portugal on behalf of the EU), 9 (France), 11 (Germany).

125. The expression "condemns" was replaced with "strongly deplores" before the Europe-sponsored draft resolution was put to the vote for adoption: UN GAOR, Human Rights Council, 5th spec. sess., UN Doc. A/HRC/S-5/SR.2 (2 October 2007) at 16 (Portugal).

126. UN GAOR, Human Rights Council, 5th spec. sess., UN Doc. A/HRC/S-5/SR.1 (2 October 2007) at 7.

127. For details, see e.g. Jayadeva UYANGODA, "Government-LTTE Peace Negotiations in 2002–2005 and the Clash of State Formation Projects" in Jonathan GOODHAND, Jonathan SPENCER, and Benedikt KORF, eds., *Conflict and Peacebuilding in Sri Lanka: Caught in the Peace Trap?* (Abingdon: Routledge, 2011), 16.

128. See Philip ALSTON, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Mission to Sri Lanka*, UN Doc. E/CN.4/2006/53/Add.5 (27 March 2006).

controlled by the LTTE in 2008. Despite the escalation of violence in April and May 2009, which raised serious concerns of human rights and international humanitarian law violations, UN political organs failed to take any action that might have protected civilians.[129]

The issue was brought to the attention of the Human Rights Council at the request of the German representative, and was supported mainly by European states.[130] The divisions largely between European states and Asian states were apparent even before the Council's eleventh special session was convened. While European states considered that it was crucial for the legitimacy of the newly established Council to respond to urgent human rights violations, many Asian states, together with other Non-Aligned Movement states, took a more cautious view, suggesting that international assistance be rendered to Sri Lanka for its reconstruction and rehabilitation efforts.[131]

The Asian states' cautious position was based on the principle of non-intervention. The Malaysian and Maldivian delegations expressed their view that the Sri Lankan campaign against terrorism was an internal, domestic issue.[132] The Indonesian delegation urged the Council "not to allow discussions on issues that infringe a country's sovereignty and territorial integrity at the expense of its sovereign rights".[133] The Pakistani representative observed that "[u]nder international law, its government is fully justified to protect and uphold the sovereignty and territorial integrity of the country by all means at its disposal to defeat LTTE sponsored terrorism",[134] and implicitly criticized the European approach, stating that "it seems that for some there are differing standards for judging human rights as well as the criterion for combating terrorism".[135] The sentiment reflected in those comments was incorporated into the preamble of the Human Rights Council Resolution adopted at the end of the session, which reads, in relevant part, "[r]eaffirming the purposes and principles of the United Nations as contained in Articles 1 and 2 of the Charter, including the principle of non-interference in matters that are essentially within the domestic jurisdiction of States".[136]

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129. "Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka" (31 March 2011) at para. 427, online: UN <http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf>.

130. *Report of the Human Rights Council on Its Eleventh Special Session*, UN Doc. A/HRC/S-11/2 (26–27 May 2009) at paras. 2–5.

131. Shigeki SAKAMOTO, "Challenges to a Human Rights Mechanism in the Asia-Pacific Region: The Experience of the Universal Periodic Review of the UN Human Rights Council" in Nasu and Saul, *supra* note 87, 49 at 61.

132. Statement by Malaysia at the 11th Special Session of the Human Rights Council on the Situation of Human Rights in Sri Lanka, Geneva (26 May 2009) at para. 3, online: Office of the High Commissioner for Human Rights via <http://portal.ohchr.org>; Statement by the Maldives at the 11th Special Session of the Human Rights Council, Geneva (26 May 2009) at 1, online: Office of the High Commissioner for Human Rights via <http://portal.ohchr.org>.

133. Statement by the Head of Delegation of Indonesia His Excellency Mr Dian Triansyah Djani at the Special Session on the Human Rights Situation in Sri Lanka (26 May 2009) at 2, online: Office of the High Commissioner for Human Rights via <http://portal.ohchr.org>.

134. Statement by Ambassador Zamir Akram of Pakistan on behalf of the OIC at the Special Session of the Human Rights Council on the "Human Rights Situation in Sri Lanka", Geneva (26 May 2009) at 2, online: Office of the High Commissioner for Human Rights via <http://portal.ohchr.org>.

135. *Ibid.*

136. Human Rights Council Res S-11/1 Assistance to Sri Lanka in the Promotion and Protection of Human Rights (27 May 2009).

However, the Asian states' cautious position based on the principle of non-intervention should not be seen as an absolute reservation against the inquiry into the human rights situation in Sri Lanka, but rather should be understood as their recognition of the situation as an internal security matter. For example, the Thai representative expressed this distinction clearly in the following terms:

> No one should doubt the legitimate right of the Government of Sri Lanka to fight against terrorism within its national borders. At the same time, it is important for the Government of Sri Lanka to demonstrate that combating terrorism and promoting and protecting human rights go hand-in-hand and are mutually reinforcing.[137]

The Vietnamese representative also considered that post-conflict issues were internal affairs of the sovereign state "to be decided by the people of Sri Lanka with the solidarity and assistance of the international community".[138]

III. IMPLICATIONS FOR COMPREHENSIVE SECURITY IN ASIA

Particularly since the end of the Cold War, security concerns have diversified to cover a wide range of concerns including: economic issues such as the 1997–1998 Asian financial crisis; transboundary environmental degradation such as the haze problems in Southeast Asia; infectious diseases such as Severe Acute Respiratory Syndrome (SARS) and the avian flu; human and narcotic trafficking; international terrorism; and the long-term negative social, economic, and environmental consequences of natural disasters.[139] To the extent that those non-traditional security issues spread across national borders, a compromise must be reached between the level of control required to maintain the security of the incumbent regime and the need to co-operate with neighbouring countries to address those regional security issues.

To that end, the notion of comprehensive security has the potential to guide the policy debate as to how regional security should be governed in Asia. Comprehensive security is an approach to or perspective on security issues, acknowledging the multidimensional nature of security that spans across the political, economic, and social realms. ASEAN has adopted it as a principle of its Political-Security Community Blueprint.[140] The PRC has also recently become more receptive to a comprehensive approach

137. Statement by His Excellency Mr Sihasak Phuangketkeow, Ambassador and Permanent Representative of Thailand at the 11th Special Session of the Human Rights Council on the Human Rights Situation in Sri Lanka (26 May 2009) at 2, online: Office of the High Commissioner for Human Rights via <http://portal.ohchr.org>.

138. Statement by His Excellency Ambassador Vu Dung, Permanent Representative of Viet Nam at the 11th Special Session of the Human Rights Council on "The Human Rights Situation in Sri Lanka", Geneva (27 May 2009) at 1, online: Office of the High Commissioner for Human Rights via <http://portal.ohchr.org>.

139. See generally Mely CABALLERO-ANTHONY, Ralf EMMERS, and Amitav ACHARYA, eds., *Non-Traditional Security in Asia: Dilemmas in Securitization* (Aldershot: Ashgate, 2006).

140. ASEAN Political-Security Community Blueprint, Section B, online: ASEAN <http://www.aseansec.org/22337.pdf>. For the historical background, see Mely CABALLERO-ANTHONY, "Revisioning Human Security in Southeast Asia" (2004) 28 Asian Perspective 155 at 160–3; Muthiah ALAGAPPA, "Comprehensive Security: Interpretations in ASEAN Countries" in Robert A. SCALAPINO et al., eds., *Asian Security Issues: Regional and Global* (Berkeley, CA: Institute of East Asian Studies, 1988), 56.

to security.[141] As a notion that provides an alternative approach and process to collective security, it leaves open for discussion and decision by the parties concerned whose security should be focused on and how competing security issues should be prioritized.[142] Thus, comprehensive security, as adopted by the Organization on Security and Co-operation in Europe (OSCE),[143] is wide in its coverage and accommodates the protection of human security and human rights within its scope.[144] On the other hand, ASEAN Member States have rather seen it as an instrument of regime legitimization by emphasizing the mutually constituted relationship between regime security and economic development.[145] Depending on how the idea of comprehensive security is conceptualized, it potentially implicates collision with the Asian approach to the principle of non-intervention.

As discussed in Part II, the Asian states' approach to the principle of non-intervention has been shaped by their own political considerations and security concerns that prevailed at different points in time—racial equality to secure their independent and equal sovereign status in international relations, regional stability, and the security of national regimes. As demonstrated in Part II(A), the imperative of security concerns across many Asian countries has, since the time of decolonization, resulted in a stricter approach to what amounts to an intervention (particularly with the alternative reference to "interference"), rather than what is considered as a matter within the domestic jurisdiction of a state. To the extent that Asian conceptions of non-intervention have consistently been influenced by the imperative of security concerns, it can be argued that the discourse of security has been instrumental in defining the interpretive scope of the principle in the view of Asian states. This Asian approach to the principle of non-intervention arguably constitutes a structural principle upon which any policy debate as to the role of comprehensive security in Asia must be developed.

At the same time, however, Asian conceptions of non-intervention have been differently expressed, often from political considerations. There is no evidence that suggests that there has always been a cohesive Asian understanding of non-intervention—on the contrary, the principle of non-intervention has often served Asian states as a pragmatic policy response based on their own national interests in justifying their position in dealing

141. "China's Position Paper on the New Security Concept" (31 July 2002), online: Ministry of Foreign Affairs of the People's Republic of China <http://www.mfa.gov.cn/eng/wjb/zzjg/gjs/gjzzyhy/2612/2614/t15319.htm>.

142. For the author's analytical framework for the consideration of security in international law, see Hitoshi NASU, "The Expanded Conception of Security and International Law: Challenges to the UN Collective Security System" (2011) 3 Amsterdam Law Forum 15.

143. Originally founded as the Conference on Security and Co-operation in Europe by the 1975 Helsinki Accords: Final Act of the Conference on Security and Co-operation in Europe, 1 August 1975, 14 I.L.M. 1292.

144. Antonio ORTIZ, "Neither Fox Nor Hedgehog: NATO's Comprehensive Approach and the OSCE's Concept of Security" (2008) 4 Security and Human Rights 284 at 284–5.

145. Mely CABALLERO-ANTHONY, "Non-Traditional Security in Asia: The Many Faces of Securitisation" in A.F. COOPER, C.W. HUGHES, and P. DE LOMBAERDE, eds., *Regionalism and Global Governance* (London: Routledge, 2008), 187 at 193; Amitav ACHARYA, "Securitization in Asia: Functional and Normative Implications" in Caballero-Anthony, Emmers, and Acharya, *supra* note 139, 247 at 249.

with domestic and even regional issues.[146] This poses challenges in maintaining the interpretive scope of the principle of non-intervention free from unilateral political manipulation. There is no collective security decision-making body in Asia comparable to the UN Security Council, which can operate as a conduit to facilitate, if not always achieve, a cohesive approach to the relationship between security and non-intervention. Even though regional institutions such as ASEAN and APEC may provide institutionalized collective decision-making mechanisms, a consensus is unlikely to be reached with a degree of consistency in the absence of agreed norms relating to shared security issues and the political arrangements within their Member States or to the behaviour of those states towards their citizens.[147]

As the notion of comprehensive security emerges as a regional security norm, it may provide an alternative approach and process to collective security, through which the principle of non-intervention may become less of a political obstacle, as has been observed in Asian states' response to the situation in Myanmar and Sri Lanka during the debate in the Human Rights Council.[148] Therefore, the relationship between the notion of comprehensive security and the Asian approach to the principle of non-intervention becomes an important legal question. To what extent and in what way may the Asian approach to the principle of non-intervention impede regional efforts to advance comprehensive security? How is it possible to ensure that comprehensive security does not collide with the Asian approach to the principle of non-intervention, while playing a normative role to prevent political manipulation of the principle?

In considering these issues, the "constructive engagement" debate in the context of ASEAN's policy shift in the late 1990s illuminates the potential role for regional institutions in Asia more widely in reconciling the competing norms of non-intervention and comprehensive security. As was explained above, the ideas of "constructive intervention" and "flexible engagement" met resistance among ASEAN countries in the late 1990s and resulted in the acceptance of a much weaker notion of "enhanced interaction" as a policy framework to deal with transnational issues within the region. Yet the recognition of comprehensive security as one of the governing norms in Asia in the new millennium may cast a new light on this debate.[149] There are three important lessons that can be drawn from the debate within ASEAN surrounding those ideas. Those lessons will equally be valuable in reconsidering the principle of non-intervention in the broader context of Asian comprehensive security within or outside existing regional institutions such as the ASEAN Regional Forum (ARF), APEC, and the Council for Security Cooperation in the Asia-Pacific (CSCAP).[150]

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146. Illustrative is the Asian states' response to the situation in East Timor, as discussed in Part II(B1).

147. Severino, *supra* note 85 at 90.

148. See above, Parts II(B2) and II(B3).

149. In fact, ASEAN pursued a limited refinement of its security norms and culture within the scope of "enhanced interaction": Jürgen HAACKE, "'Enhanced Interaction' with Myanmar and the Project of a Security Community: Is ASEAN Refining or Breaking with Its Diplomatic and Security Culture?" (2005) 27 Contemporary Southeast Asia 188.

150. In December 1999, CSCAP's Working Group on Comprehensive and Cooperative Security held a meeting in Seoul to discuss the evolving concept of non-intervention. The summary of discussions is reproduced in Wu, *supra* note 5 at 37–9.

First of all, the two ideas, even though both originated from the overlapping concerns that prevailed in the region at the relevant time, appear to suggest completely different concepts in terms of which issues can still be considered within the domestic jurisdiction of a sovereign state. "Constructive intervention", as the expression "intervention" indicates, presupposes that it is focused on domestic affairs, whereas "flexible engagement" does not share this premise. In elaborating on his idea of "flexible engagement", Pitsuwan relevantly observed:

> The dividing line between domestic affairs on the one hand and external or trans-national issues on the other is less clear. Many "domestic" affairs have obvious external or trans-national dimensions, adversely affecting neighbours, the region and the region's relations with others. In such cases, the affected countries should be able to express their opinions and concerns in an open, frank and constructive manner.[151]

This observation shares the same perspective as comprehensive security. In fact, as Jürgen Haacke explains, "flexible engagement" was designed, as far as Thailand's official discourse is concerned, to allow ASEAN to confront new transnational security threats such as economic disruption, immigration, narcotic trafficking, transnational crimes, and environmental degradation as the region faced an ever greater level of interdependence.[152] To the extent that these traditionally domestic issues have become transnational security concerns, it is not "intervention" but rather "engagement" that remains the subject for debate. It must therefore be clearly acknowledged that those transnational security challenges, whilst stemming from domestic issues, fall outside the scope of the principle of non-intervention.

Second, the imperative of regime security concerns among Asian countries needs to be acknowledged and well protected from external influence and political manipulation. As a logical consequence of the first point, open and transparent dialogue in public domains, as suggested by the idea of "flexible engagement", is to be considered as taking place only in relation to those region-wide security concerns. The most serious concern about this idea among ASEAN leaders was the unknown impact and implication of such engagement for the stability of the political environment in each Member State and international relations in the region.[153] The constructive engagement in relation to a transnational security issue may well be used as a political platform to advance the national interests of a regional state or to bring in external influences. This concern is understandable, as such engagement, without any limitation in scope or clarification of procedure, will inevitably involve a degree of interference in the domestic affairs of a state and a risk of politicization. On the other hand, if each state is authorized to block any matter from debate on the grounds of non-intervention, that will compromise concerted efforts to implement the comprehensive security norm within the region. The limit of comprehensive security in

151. Thai Ministry of Foreign Affairs, "Thailand's Non-Paper on the Flexible Engagement Approach" Press Release 743/2541 (27 July 1998), as cited in Carlyle A. THAYER, "Southeast Asia: Challenges to Unity and Regime Legitimacy" (1999) 26 Southeast Asian Affairs 3 at 4.

152. Haacke, *supra* note 95 at 586.

153. *Ibid*., at 594–5.

relation to the principle of non-intervention must be clearly set out so that regional efforts to address transnational security issues are not used as a disguised form of intervention and so that the fear of intervention does not impede those regional efforts.

Third, in order to mitigate the risks associated with political recourse to the principle of non-intervention, a certain mechanism will need to be embedded to deter regional engagement from becoming a disguised form of intervention, particularly in domestic affairs concerning the stability of a national regime or the region as a whole. This mechanism must also facilitate the implementation of comprehensive security to co-operatively or collectively address non-traditional, transnational security issues in Asia. Extracting domestic issues that arise across national borders or have implications beyond borders from the domain of the domestic jurisdiction of a state would mean that ASEAN Member States would be required to compromise their traditional approach to settling their differences on a bilateral basis, in favour of more institutionalized decision-making, to the extent necessary to address those regional security issues. It is not difficult to imagine that Asian states will demonstrate great resistance and even hostility towards the idea of the delegation of authority to a regional institution. However, Asian states have already demonstrated their readiness to address regional security issues on a multilateral basis within the existing frameworks of regional co-operation. For example, the ASEAN Regional Forum has been taking an active role in the areas of preventive diplomacy and maritime security, particularly in relation to counter-piracy operations.[154] In 2002, APEC endorsed the Energy Security Initiative and adopted the APEC Cybersecurity Strategy.[155] Soon after Cyclone Nargis hit Myanmar, causing devastation, in May 2008, ASEAN took the lead in co-ordinating and liaising with the international community to deliver aid by establishing the ASEAN Humanitarian Task Force for the Victims of Cyclone Nargis,[156] while the rejection by the Burmese authorities of foreign humanitarian assistance caused controversy over the idea of military intervention to protect civilians.[157]

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154. Ralf EMMERS and TAN See Seng, "The ASEAN Regional Forum and Preventive Diplomacy: Built to Fail?" (2011) 7 Asian Security 44; Amitav ACHARYA, "Regional Institutions and Security in the Asia-Pacific: Evolution, Adaptation, and Prospects for Transformation" in Amitav ACHARYA and Evelyn GOH, eds., *Reassessing Security Cooperation in the Asia-Pacific* (Cambridge, MA: MIT Press, 2007), 19 at 26–9.

155. Acharya, *supra* note 154 at 30–1; John RAVENHILL, "Mission Creep or Mission Impossible? APEC and Security", in Acharya and Goh, *supra* note 154, 135 at 146–51.

156. Press Release: Inaugural Relief Flight for Victims of Cyclone Nargis in Myanmar from Don Mueang Airport Thailand, 24 May 2008, online: ASEAN <http://www.aseansec.org/21566.htm>.

157. See UN SCOR, 63rd Year, 5898th mtg, UN Doc S/PV.5898 (27 May 2008) at 15 (Panama), 18 (France), 21 (Belgium, Croatia). See also Rebecca BARBER, "The Responsibility to Protect the Survivors of Natural Disaster: Cyclone Nargis, a Case Study" (2009) 14 Journal of Conflict & Security Law 3. Subsequently, the East Asian Summit issued a statement on disaster management on 25 October 2009 to enhance the regional preparedness for natural disasters, and on 24 December 2009, ASEAN Agreement on Disaster Management and Emergency Response came into force. See East Asia Summit, *Cha-am Hua Hin Statement on EAS Disaster Management*, 25 October 2009, online: Australian Government Department of Foreign Affairs and Trade <http://www.dfat.gov.au/asean/eas/statement-disaster-management.pdf>; *ASEAN Agreement on Disaster Management and Emergency Response*, 26 July 2005 (entered into force 24 December 2009), online: ASEAN: <http://www.aseansec.org/17579.htm>.

IV. CONCLUSION

It is clear in both historical and contemporary contexts that the imperative of security concerns, be it national security, regime security, or regional security, has been instrumental in defining the interpretive scope of the principle of non-intervention in the view of Asian states. This element explains the shift from a liberal approach to the principle of non-intervention, adopted initially by a few Asian states that existed before decolonization, to a much stricter approach in terms of how an intervention is understood, particularly when the issues of their neighbouring states are discussed in multilateral forums. This suggests that the strict interpretation of, and adherence to, the principle of non-intervention, which is often observed among commentators in relation to Asian states, is not inherent to the region specifically, but is rather reflective of the political reality prevailing at different points in time.

This Asian approach to the principle of non-intervention, thus understood, provides a structural principle upon which any debate concerning comprehensive security must be built. Yet there is a risk of political manipulation of the principle, which might impede regional efforts to advance comprehensive security in addressing non-traditional, transnational security threats in the region. For the emerging regional norm of comprehensive security to develop further within the framework of the structural principle of non-intervention, this article has argued that Asian states will be required to achieve the following three changes:

(1) To recognize that certain regional security issues are, in and of themselves, not the domestic affairs of a state and therefore fall outside the scope of the principle of non-intervention or non-interference;

(2) To clearly set out the limits of comprehensive security in relation to the principle of non-intervention, so that regional efforts to address transnational security issues are not used as a disguised form of intervention and so that the fear of intervention does not impede those regional efforts; and

(3) To institutionalize a certain mechanism to deter regional engagement from becoming a disguised form of intervention by ensuring that the traditional approach to the settlement of differences on a bilateral basis can be compromised only to the extent necessary to address transnational security issues.

Failing to achieve these changes means that the principle of non-intervention will remain nothing more than a political obstacle to the maintenance of regional security in Asia.