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SYMPOSIUM ON THE BANDUNG CONFERENCE AT 70: INTERNATIONAL LAW'S MANY THIRD WORLDS

CAN THE NON-COLONIALS DECOLONIZE?

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Introduction

Decolonization, naturally, assumes the presence of colonization. For most formerly colonized states decolonization has meant: (1) honoring the inherited colonial treaties; and (2) accepting *uti possidetis juris*. But what does decolonization mean for the Bandung states that were never formally colonized? For these states, colonial treaties are allegedly unequal while *uti possidetis* is a restriction on acquiring imagined pre-colonial territories. This essay argues that Bandung's platitudes about Third World unity notwithstanding, states that were never colonized, or non-colonials, had a different and at times tense relation to some of Bandung's fundamental commitments. The cases of the law of the sea (LOS) negotiations between 1972 and 1982 and China's claims to the South China Sea show that these tensions are still unresolved.

The International Law of Decolonization

How do the non-colonial states achieve territorial and oceanic decolonization? There are more non-colonial states with interstate boundary and territorial disputes than meets the eye of most international lawyers: China, Thailand, Nepal, Iran, and Afghanistan all have territorial disputes with their neighbors. The issues of colonial treaties and *uti possidetis juris*—twin legal bases of a colonial state's inherited territory—remain ubiquitous in these disputes. Therefore, territorial disputes between colonial (peninsular or archipelagic) and non-colonial states become the chief sites for understanding if the decolonial norms have cooked right or not in a normative kitchen full of Bandung's platitudes. A close reading of the interstate territorial disputes involving non-colonial states—China, Thailand, and Nepal—present two issues meriting the attention of international lawyers.

First, the relationship between the self-proclaimed "uniqueness" of the non-colonial states and decolonization falls through the cracks in the euphoric debate on Bandung. In the *Chagos* advisory proceedings, Thailand had argued that "non-colonial States" are in a "unique" position on "issues arising out of colonialism and decolonization."[1] Indeed, non-colonial states would not have a post-colonialism like states that were fully colonized. That is what Thailand had argued: "[t]he consequences" of decolonization "for these non-colonial States, such as Siam (now Thailand) are real and even today they face problems arising out of the relationship of

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[1] Public Sitting Held on Thursday 6 September 2018, at 10:40 a.m., at the Peace Palace, President Yusuf Presiding, on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius, Doc. No. 169-20180906-ORA-01-00-BI, Verbatim Record, Statement of H.E. Mr. Virachai Plasai, para. 2 (Sept. 6, 2018).

that prior colonial period without the benefit of any alleviating rules."[2] What does Bandung mean to such non-colonial states? Even as the law of decolonization remains insufficient for non-colonial states, as Thailand argues, they invoke Bandung in their international affairs.

Second, as discussed later, scholars from non-colonial China stake claims using customary international law and ancient literature to territories in the South China Sea, a legal space governed by a treaty: the United Nations Convention on the Law of the Sea (UNCLOS).[3] Since the law of the sea is characterized by the principle land-dominates-the-sea, Bing Bing Jia argues that "the existence" of this principle "in customary law can restrict the scope of applicability of the UNCLOS and, consequently, the jurisdiction of such tribunals as referred to in Article 287 UNCLOS."[4] The Philippines had initiated the *South China Sea* arbitration using UNCLOS Articles 286 and 287 and in accordance with Article 1 of Annexure VII of this Convention.[5] More recently, non-colonial Nepal too has resorted to epic-based narratives that bypass colonial treaties in a brewing border dispute with India.[6] Non-colonial states are, in such ways, attempting to find ways to target—legally and politically—both colonial treaties and *uti possidetis juris*.

Most recently, in the *Gabon/Equatorial Guinea* case, Judge Xue declared that a colonial "Convention cannot provide [a] solution to the border disputes between the parties" since "context" beyond "formal answer" is important.[7] Xue argues that while relying on "colonial documents" is Africa's *fait accompli*, "[n]otwithstanding its positive objective for stability and peace, such practice is not without question, in particular in respect of maritime disputes."[8] Indeed, simmering under the façade of Afro-Asian solidarity at Bandung were competing claims to territories—on land and in the seas—by Asian states and decolonization and its sources—treaties, customs, or epics—as the basis of these claims in international law.

Bandung, Decolonization, and Law of the Sea

What is mostly ignored in international law debates is that Indonesia, along with the Philippines and the like, had an unarticulated archipelagic anxiety at Bandung.[9] Islands and archipelagos had been the main political and legal concern of Indonesia, Bandung's host, since its independence from the Dutch. Five years after the Bandung Conference, the Indonesian government passed in February 1960 the law of "national waters" embodying, for the first time, the idea of "archipelagic principle" to "preserve the unity of the nation" made up of islands.[10] Indonesia went on to set up under the directorship of Kusuma-Atmadja—later Indonesia's foreign minister—the "Archipelago Law and Development Centre" in Bandung. It was from Bandung that Indonesia, with the help of

[2] *Id.*

[3] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 UNTS 397.

[4] Bing Bing Jia, *The Principle of the Domination of the Land Over the Sea: A Historical Perspective on the Adaptability of the Law of the Sea to New Challenges*, 57 GER. Y.B. INT'L L. 63 (2024). Both nationalist and communist Chinese prefer customs over treaties. For example, Judge Koo found not just a civil but also a military right of passage from "local" customs against India. The Right of Passage over Indian Territory (Port. v. Ind.), Merits, 1960 ICJ Rep. 6, 54 (Apr. 12) (Sep. Op. Koo J.).

[5] South China Sea Arbitration (Phil. v. China), PCA Case No 2013-19, Award (July 12, 2016).

[6] "Cultural Encroachment": PM Oli Says Hindu Deity Ram from Nepal, AL JAZEERA (July 14, 2020).

[7] Land and Maritime Delimitation and Sovereignty Over Islands (Gabon/Eq. Guinea), Judgment, paras. 13–14 (ICJ May 19, 2025) (dec., Xue, J.) [hereinafter Xue Dec.].

[8] *Id.*, para. 18.

[9] Mochtar Kusuma-Atmadja, *The Contribution of New States to the Development of International Law*, 32 SANTA CLARA L. REV. 889, 896 (1992).

[10] *Id.* at 896.

Fiji and the Philippines, successfully took to the LOS negotiations the idea of an archipelagic state distinct from a peninsular India and a territorial China.

Incidentally, archipelagos and decolonization were the primary question for the International Court of Justice (ICJ) to answer in the *Chagos* advisory opinion: "whether the process of decolonization of Mauritius was lawfully completed in 1968, having regard to international law, following the separation of the Chagos Archipelago from its territory in 1965."[11] Nevertheless, this is hardly a question we can ask about the non-colonial states.

It is well known that the LOS negotiations became the crucible for peninsular India and archipelagic Indonesia to pestle Bandung principles into the treaty law of the sea. The American Central Intelligence Agency (CIA) dubbed India's negotiator at the conference, SP Jagota, "Mr. LOS."[12] By the 1970s, the delimitations of maritime zones and continental shelves as well as the exploitation of seabeds were key issues for the developing and the least developed states since industrialized states had begun to explore the deep seas alongside outer space.

Indonesia's efforts at the LOS negotiations led to the recognition of an "archipelagic state" as a separate normative category under the UNCLOS treaty. Article 46(a) of UNCLOS defined an "archipelagic State" as "a State constituted wholly by one or more archipelagos and [which] may include other islands."

Two issues animated the LOS negotiations for Bandung's host: (1) the archipelagic nature of certain states; and (2) delimitation of maritime boundary and continental shelf. Egged on by the Truman doctrine, Asian states, at the time, argued for the "occupation" of the continental shelf with natural prolongation against the existing idea of "exclusive" jurisdiction.[13]

India, first, erected real estate for offshore oil drilling in Bombay High in the Arabian sea in the middle of the LOS negotiations. Next, India argued that its two archipelagos, Lakshadweep and Andaman and Nicobar Islands —an "archipelagic regime" having been defined in UNCLOS Article 46(b)—"should have been entitled to archipelagic regime similar to that of an archipelagic state" as defined in UNCLOS Article 46(a). For SP Jagota, "the distinction between the two is neither logical nor justifiable."[14] UNCLOS, in fact, precluded states with continental territory from claiming the status of, and thus the rights that accrue to, an archipelagic state. The chief drivers of the Bandung event, Indonesia and India, thus stood in a conceptual disagreement on the legal distinction between entitlements to an archipelagic "state" and an archipelagic "regime" in the treaty law of the seas.

The CIA's 1975 LOS Report on China, on the other hand, noted: "For China, then, the LOS conference is merely an opportunity to curb the power and influence of the developed countries and to gain for itself some measure of influence and leadership in the Third World."[15] China's goals at the LOS conference have, in the twenty-first century, given way to the strategic use of customary international law and ancient literature in the *South China Sea* dispute. As a result, archipelagic states, like the Philippines, have their UNCLOS-given maritime entitlements claimed by non-colonial states, like China, using extra-UNCLOS arguments (customary law and epics).

[11] *Chagos* Advisory Opinion, *supra* note 1, at 129, para. 136.

[12] Central Intelligence Agency, Law of the Sea Country Study: India, Doc. No. BGI LOS 74-13 Supp, para. 6 (1975).

[13] Kusuma-Atmadja, *supra* note 9, at 903.

[14] S. P. Jagota, *India and the Law of the Sea*, 22 Archiv des völkerrechts 49 (1984).

[15] Central Intelligence Agency, Law of the Sea Country Study: People's Republic of China, para. 4 (1975).

Non-colonial's decolonization

Non-colonial China's decolonial life since 1949 began with claims against Russian territories on the basis of what China called the unequal treaties establishing Russo-Chinese boundaries. By 1943, the Nationalist Chinese government had concluded "new and equal treaties with several Western Powers" replacing older treaties, but it had to sign a "new, unequal treaty in 1945 with the Soviet Union as prearranged by the Yalta Agreements."[16] When the Communists came to power in 1949, the Chinese government accepted, as Chang notes, "restrictions imposed by the 1945 Treaty and several older treaties, especially those concerning the borderlands" even as the Beijing "government also entered into a treaty with the Soviets."[17] Nevertheless, pointing at the misuse of the unequal treaty arguments, Jiangfeng Li argues that "it is impossible to achieve absolute legal equality because of the reality of the political inequality that exists between all states."[18] Indeed, China's economic power makes it, like the United States, unequal to most of the countries of the world.

In tandem with this rise in power, there has been a rise in lawfare from China. Chinese judges and scholars have used the ICJ as well as scholarly spaces to offer a defense of the Chinese position. This is a response to limits imposed by existing international law on acquiring land and oceanic territories. It harmonizes the position of Chinese judges and scholars with the Chinese state on maritime disputes. As a matter of substance, this lawfare argues for customs beyond treaty formalism in support for China's extra-treaty claims. This claim stands on twin legs of customary international law and invocation of ancient literature as a source of title to the South China Sea.

It goes as follows. First, the Chinese state invoked millennial claims in the South China Sea in 2014: "Chinese activities in the South China Sea date back to over 2,000 years ago."[19] Strategically, Judge Xue has used disputes in Africa and the Caribbean to platform the Chinese views on islands disputes, resource-extraction, and maritime territory: "The disputed islands became attractive largely because of the subsequent development of the law of the sea and the discovery of maritime non-living resources" and they "may be used as the base points to affect the direction of the maritime boundary, possibly impacting the division of natural resources between the coastal States."[20] The African states, for Xue, should not have to "dive into colonial archives" for answers to maritime disputes.[21]

Second, Chinese scholars and judges have used literature as a non-treaty source to claim the entire South China Sea represented in a nine-dash line unilaterally drawn on a Western map. For example, Zhiguo Gao and Bing Bing Jia argue:

> The early history of Chinese use of the South China Sea and its islands includes accounts of tributes made to the Imperial Court of various dynasties before the third century AD by "barbarians" from the southern seas. The term *Nan Hai* (Southern Sea) appeared in the classic poetry book *Shi Jing* (The Classic of Poetry), a publication of the Spring and Autumn Period (475–221 BC), and it has remained the standard appellation in Chinese for the South China Sea ever since. In later Chinese dynasties . . . references to the southern seas and islands became more frequent in geographical and literary works.[22]

[16] Luke Chang, *Legal Analysis of the Sino-Soviet Frontier Disputes*, 3 HASTINGS INT'L & COMP. L. REV. 231 (1980).

[17] *Id.*

[18] Jiangfeng Li, *Equal or Unequal: Seeking a New Paradigm for the Misused Theory of Unequal Treaties in Contemporary International Law*, 38 HOUS. J. INT'L L.. 465, 487 (2016).

[19] Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines, para. 4 (Dec. 7, 2014).

[20] Xue Dec., *supra* note 7, para. 23.

[21] *Id.*

[22] Zhiguo Gao & Bing Bing Jia, *The Nine-Dash Line in the South China Sea: History, Status, and Implications*, 107 AJIL 98, 100 (2013).

China's claims of "2,000 years ago" anchored in epics is problematic since ancient time of 2,000 years ago lies beyond the province of intertemporal law despite Bing Bing Jia's argument that "[e]ven inter-temporal law would need to consider a proper, inchoate title."[23] The essence of intertemporal law, as Judge Elias elaborated, is that "the creation of a right must be appreciated in the light of the law contemporaneous with the acts creative of the right and that the continued validity of that right at any future date must depend on the state and requirements of international law at that particular moment."[24] Put simply, how does China claim sovereignty to all of the South China sea using "2,000 years old" literature when sovereignty itself is only 377 years old?

Third, much as Gao and Jia target the post-colonial sea treaty, UNCLOS, Judge Xue argues that "there are no customary laws on changing watersheds" within land boundaries.[25] In other words, for the Chinese, there are customary law where post-colonial treaties exists (UNCLOS) but there is no customary law (*uti possidetis*) for watershed on the mountain territories. The former position is aimed at the states fringing the South China sea, while the latter for South Asian states that share mountain boundary with China.

Rivers that cross boundaries, as in case of China and India, raise problems of watersheds most acutely. For example, during the Indo-Chinese war of October 1960, as Wilkes notes, "both sides assumed that the way in which geographical features, such as mountains and watersheds, divided their territory was a key to establishing the boundary between them."[26] Keeping the international law of watershed outside the domain of customary law ensures that the Chinese can question on the Himalayan frontiers the application of *uti possidetis juris*, a customary law, as well as colonial treaties made by British India.

That is the reason behind Chinese judges (Xue and Gao), scholars (Jia), and the government harmonizing their extra-UNCLOS claims buttressed with customary international law and ancient literature. Jia goes the farthest in expecting the world's gratefulness to China: "By claiming sovereignty over the islands [in the South China Sea] on the basis of customary law, China is actively helping the cause of the international rule of law."[27]

Strikingly, quite unlike the Chinese, scholars from non-colonial Thailand argue about law in pre-colonial times without making territorial claims based on literature. For example, Sucharitkul—agreeing that the "influence of Indian culture on Thai society is more linguistic" and that "the Codes of Thai Ahom and Khun Borom" ensured Thai rule up until "Assam in Northeast India"[28]—separates the territorial conception of modern Thailand from the pre-colonial Thai rule.[29]

In the 1960s, Indian scholars, but not the Indian state, made arguments similar to those made by China in the 2010s. For example, K. Krishna Rao wrote that "[f]or well over 8,000 years the Himalayas have universally been regarded as the frontier of India" in "Sanskrit Texts as far back as 1500 B.C."[30] Soon the politically romantic idea of an "Akhand Bharat"—pre-colonial and undivided India—collided with the idea of "Akhand" non-colonials, China and Nepal. This nudged Indian scholars to fully embrace post-colonialism engendered by treaties and *uti*

[23] Bing Bing Jia, *Remarks*, 107 ASIL Proc. 346, 348 (2013).

[24] T. O. Elias, *The Doctrine of Intertemporal Law*, 74 AJIL 285, 307 (1980).

[25] Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicar. v. Colom.), Judgment, 2022 ICJ Rep. 266, 404, paras. 2, 9 (Apr. 21) (dec., Xue, J.).

[26] Daniel Wilkes, *Conflict Avoidance in International Law: The Sparsely Peopled Areas and the Sino-Indian Dispute*, 9 Wm. & Mary L. Rev. 716, 728 (1968).

[27] Jia, *supra* note 23, at 348.

[28] Sompong Sucharitkul, *Thai Law and Buddhist Law*, 46 Am. J. Comp. L. 69, 75 (1998).

[29] Indeed, in its dispute about the Temple of Preah Vihear with Cambodia, a French colony, non-colonial Thailand did not use literature or epics to argue about its ownership of the Temple. Case Concerning the Temple of Preah Vihear, Judgment, Merits, 1962 ICJ Rep. 6 (June 15).

[30] K. Krishna Rao, *The Sino-Indian Boundary Question and International Law*, 11 Int'l & Comp. L. Q. 375, 378–79 (1962).

possidetis.[31] Today, Chinese arguments of an "Akhand" China collides with an archipelagic Philippines's post-colonialism and UNCLOS-given rights using a combination of customary law and epics. China certainly makes its customary mooncakes with literary fillings.

Conclusion

Bandung's solidarity narrative hides more than it reveals. It hid Asia's archipelagic anxieties and the issue of the decolonization of the non-colonials. The Chinese state and its scholars, under the pretext of China's non-coloniality, bring epics and customary law as evidence of China's claim to nearly all of the South China Sea. This comes on the back of the Chinese state's penciling in nine dashes on a Western map of the South China Sea. The non-colonials can decolonize but in a way that does not challenge the decolonization of the ex-colonials.

[31] T. S. Rama Rao, *India's International Disputes*, 22 ARCHIV DES VÖLKERRECHTS 22, 23–24 (1984).