J.L. Kaul · Anupam Jha *Editors*

Shifting Horizons of Public International Law

A South Asian Perspective

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Dedicated to Siddheswari Daadi

Foreword I

In an era of exponential expansion of public international law marked by fragmentation and specialization where lex specialis prevails and iex generalis seems to be all but over,[1] this excellent work by Vice Chancellor J.L. Kaul, Dr. Anupam Jha, and the learned contributors tells us a special story. The unusual story is about how the SAARC region may have contributed to the progressive development of late post-Westphalian international legal development.

The work is focussed on 'peripheral' nations. This is a precious focus as contributions of such nations to the making and unmaking of international law have gone largely unrecognized. The term 'peripheral' has some wholesome meanings.[2] Kaul and Jha write (in the Introduction) that the SAARC contributions to international 'negotiations' regarding international law were rarely considered. A 'newer grouping of nations' is itself an important development, enhanced when perceived as a 'challenge to status quo in international affairs' and the fact that 'nations of South Asia have asserted their collective will which is, at times, at variance with the common will of other nations'. The work in your hands speaks about the 'greater involvement of these nations, which … have greatly influenced outcomes of international law making'. And yet the sad fact is that the contributions made by the SAARC region 'are yet to be' fully explored or even acknowledged in the burgeoning literature on international law.

A part of this neglect can be laid at the doorstep of Eurocentrism that still persists. Eurocentrism is a state of social consciousness as well as a state of social

[1] Andreas Fischer-Lescano & Gunther Teubner, 'Regime-Collision: The Vain Search for Legal Unity in the Fragmentation of Global Law', 25 *Mich. J. Int'l L.* 999 (2004). See also, 'Comment Commentary to Andreas Fischer Lescano & Gunther Teubner The Legitimacy of International Law and The Role of the State', https://antoniovaronmejia.files.wordpress.com/2010/04/fisher

[2] I was alerted to the less pejorative and more benign uses of the term by Prof. David Armitage when he termed the contributions of the Polish school of international law as' peripheral'. See, David Armitage and Jennifer Pitts, *C. H. Alexandrowicz, The Law of Nations in Global History* (Oxford: Oxford University Press, forthcoming, 2017). See also, Arnulf Becker Lorca, *Mestizo International Law* (Cambridge, Cambridge University Press, 2014).

organization of the empire. An ascendant imperialism was marked by an aggressive (and regressive) Eurocentrism—in which Charles de Gaulle can talk of Afghanistan as the 'dust of the empire',[3] King Leopold II of Belgium can claim the whole Congo and Rwanda as a 'piece of this magnificent cake',[4] Sir Winston Churchill may describe M.K. Gandhi as a 'half naked fakir',[5]and a Margaret Thatcher could name Nelson Mandela (without a later apology) as belonging to a 'terrorist' organization.[6] Self-determination and sovereign equality of nations now forbid official derogation of state and its leaders, explicit in new norms of interstate political correctness.

Subtle Eurocentrism persists in various forms. For example, very little work has been done on Radhabinod Pal (whose dissent in Tokyo trials should be better known)[7] and Justice Weeranmantry (who, among other things, delivered a learned dissent in the nuclear weapons case).[8] What has been named 'colonization without colonies'[9] is insidious as the experience of coloniality. And this work illustrates the perils of such colonialism as well as the promise of a genuine post-colonialism. I say genuine because I regard achievement of a true post-colonial condition as a reflexive task, rather than as merely a process of historical passage.[10]

I do not mean here to exhaustively deal with 'eurocentrism', which remains a protean term. Rather, I wish to indicate the value of studying this work which highlights some advantages of liberation from its iron cage.

The learned authors make a valuable contribution towards an understanding of chosen areas and themes. These include the promotion and protection of human

[3]Karl F. Meyer, The Dust of Empire: *The Race for Mastery in The Asian Heartland* (Century Foundation Book, 2004).

[4]See, generally, Thomas Pakenham, *The Scramble for Africa*: White Man's Conquest of the Dark Continent from 1876 to 1912 (Avon Books, 1992).

[5]Peter Gonsalves, 'Half-Naked Fakir': 'The Story of Gandhi's Personal Search For Sartorial Integrity' Gandhi Marg, 31:1, 5–30. (Gandhi Peace Foundation, New Delhi, 2019).

[6]See, James Hanning, 'The 'Terrorist' and the Tories: What did Nelson Mandela really think of Margaret Thatcher?', *The Independent*, Sunday 8 December 2013.

[7]Adil Khan, 'International Lawyers in the Aftermath of Disasters: Inheriting from Radhabinod Pal and Upendra Baxi', *Third World Quarterly*, 37:11, 2061–2079 (2016).

[8]See, Siddarth Mallavarpu, *Banning the Bomb*: The Politics of Norm Creation (Delhi, Person/Longman, 2007).

[9]The expression refers to the invisible processes of globalization rather than to the visible agents, See, Upendra Baxi, The Future of Human Rights (Delhi, Oxford University Press, 2013: 3rd edition, Chapters 8 & 9).

[10]It is my belief that many a Third World society, state, and people moved from colonialism to neocolonialism, which Kwame Nkrumah described as systems of 'power without accountability' and 'exploitation without redress': see Kwame Nkrumah, in his 'Introduction' to *Neocolonialism, The Last Stage of Imperialism*, (London, Thomas Nelson & Sons, Ltd. 1965; International Publishers Co., Inc. (1966; transcribed by Dominic Tweedie). He also said:' A state in the grip of neocolonialism is not a master of its destiny. It is this factor which makes neocolonialism such a serious threat to world peace.' What Nkrumah describes as neocolonialism appears in the times of hyper-globalization, neoliberalism, and austerity in face of 'debt' (and development) crises as illiberal governance and unconstitutional authoritarianism.

rights; use of force across internationally recognized borders and boundaries; humanitarian law, regional international law, and jurisprudence (as well as the process of International Criminal Court); law relative to diplomatic immunity; international trade; principles of law regarding state responsibility; maritime affairs; environmental protection; law of the sea; and indigenous peoples.

A main concern of this book, and one of its many notable successes, is to avoid the mistake of presenting the concept and histories of South Asia as homogenous. National differences, and regional diversities, stand fully recognized. If some of these differences persist because of geopolitical security considerations, others arise out of contemporary history. The principles of decolonization, self-determination, and sovereign equality of states have ushered in a fierce insistence to any emergence of a SAARC hegemon and even a global one. This work pursues remarkably well the ways in which the international legal framework of public international law has brought a modicum of universality within regional diversity in the difficult quest for a just cooperation in the world orderings. The book conveys a precious message: gains of learning from each other far outstrip the mere arrogance of power.

The canvas is rather vast as each of the arenas warrants a whole book by itself, and yet this work adroitly deals with commonalties as well as divergences of state values and practice in each domain of enquiry. Rather than engaging the vertiginous heights of state practice and diplomatic conduct, these areas have been analysed as resisting the 'legalized hegemony' of the 'Great Powers' in relation to their non-Euro Other (the enemy or the outlaw).[11]

I place this valuable work in your hands with 'great expectations'.

New Delhi
March 2017

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[11]See generally Antony Anghie, Imperialism, Sovereignty, and The Making of International Law 196–244 (2007); Gerry Simpson, Great Powers, and Outlaw States: Unequal Sovereigns in the International Legal Order (2004); Upendra Baxi, 'New Approaches to the History of International Law', Leiden J. Int'l L. 19:555 (2006). The term opens many an interpretation: see, particularly, Saskia Sassen, Territory, Authority, Rights: From Medieval to Global Assemblages (2006); Josè Medina, The Epistemology of Resistance: Gender and Racial Epistemic Injustice, and the Social Imagination (2013); Bonaventura de Sousa Santos, Epistemologies of the South. Justice against Epistemicide, (Boulder/London: Paradigm Publishers (2014).

Foreword II

I must confess that I am not a legal expert and was surprised when Dr. Anupam Jha asked me to write the foreword to this book. My experience of international law comes as a diplomat. Although a diplomat is involved in the process of creating and operating international law, the experience is slightly different from that of an academic or even legal practitioners. Unlike domestic law, which is *legislated*, international law is *negotiated*. A diplomat is intrinsic to the process of negotiation—which involves 'both the act of discussion aimed at reaching an agreement as well as the action or process of transferring legal ownership of the agreement thus reached'. Diplomats are usually the first point of contact and develop the lexicon and structure of exchange and transaction. They are involved with the formalization or drafting of the agreements and treaties, and thereafter, in implementation of the agreed law. The diplomat's task, however, does not end there, as they are also concerned with, especially in democratic societies, justifying the agreement to domestic and international opinion by creating an environment where it finds wider acceptability.

In the past few years, the forces of economic and cultural globalization have ushered in a focus on universally applicable normative legal instruments. In parallel, there has been a renewed interest in international law led by scholars working from a liberal institutionalist perspective which regards law not as a set of normative aspirations or mutual obligations but 'rather as a reflection of efforts to create self-enforcing equilibria in the international environment'.

International law flows from treaties and agreements, both freely concluded and imposed, or from widely accepted customary practice. It is not limited to legal obligations or restraints, but also establishes the normative aspiration of international behaviour. Every treaty or agreement reflects the relative power of the parties.

This hierarchy of International Agreements and Treaties is most visible in the use of 'exceptionalism' by Great Powers. The belief in exceptionalism is rooted in the notion that a particular State has, through its own genius or manifest destiny, developed a set of practices and rules, which are better than any other and should thus become the normative for the others to follow. It also flows from the

exceptionalist argument that because of its internal inherent qualities, the said power is not, or should not be, subject to other international covenants and agreements. A sober examination reveals that there is no universal consensus on how countries are to be judged. It is all relative to the one who chooses the assessment criteria. Yet the belief in exceptionalism continues to persist.[12]

International law is at best a synthesis of national and regional exceptionalisms. There have been, and continue to exist, differences in the perception and narrative of how international law is created and operated. The underlying process of international law formation, and its application, thus, appears *relative* rather than *normative*.

A Euro-centric world vision often results in the flawed assertion that currently *en vogue* legal traditions, law formulation process, and institutions, which on closer examination are revealed to be Anglo-Saxon traditions, are the 'normative' and modern edifice of international law. These 'norms' were first imposed on most Europeans following sustained violence and then dressed as '*Westphalian*', and they piggy-backed on the European colonial expansions and became the implanted *but* dominant view in colonized lands often obscuring earlier legal traditions.

India's ancient civilization was a veritable source of rules on interstate conduct, from the laws of war, the law of treaties, the right of asylum, the treatment of aliens and foreign nationals, the modes of acquiring territory, and rules on navigation and interstate trade.[13] The *Mahabharata* reflects a well-developed and sophisticated tradition of diplomatic and interstate practices and rules of engagement. The Mauryan Empire was sending and receiving embassies[14] at a time when Western Europe and Britain were being 'discovered' by the Greeks.[15] Indian States had a well-developed code of maritime laws dealing with freedom of the seas, the rules of flag state jurisdiction on the seas, superior coastal state jurisdiction over all ships while near the coast, prohibition of piracy, the rules of charter party, customs and tolls, permits of entry and departure, and even some rules relating to contraband,[16] much before the English had a fortuitous escape from the Spanish Armada.

The post-colonial development of international law in India (and South Asia) is an example of the 'myriad ideological strands, historical origins and significant contributions to contemporary international law doctrines' formative and

[12]Robert Schlesinger, 'Obama has mentioned Exceptionalism more than Bush'. US News and World Report, 31 Jan. 2011

[13]RP Anand, Development of Modern International Law and India, (Nomos Verlagsgesellschaft, Baden-Baden, Germany 2005) 1–5, 29–30, 39–40, 54–55, 108–109, 121–130.

[14]Biswanath Sen, A Diplomat's Handbook of International Law and Practice, Springer, 06-Dec-2012, p. 04

[15]Robert Henry, The History of Great Britain: From the First Invasion of it by the Romans under Julius Caesar, Volumes 1–2, Cadell and Davies, 1814, Great Britain, p-207 (accessed via Google Books)

[16]Peter Fitzpatrick, 'Terminal Legality: Imperialism and the (de)composition of Law' in Diane Kirkby and Catharine Coleborne, Law, History, Colonialism: The Reach of Empire (Manchester University Press, United Kingdom, 2001).

qualification process—towards identifying, locating, and applying South Asian values and philosophical traditions.[17] The complexities of the emerging international law system have necessitated that the South Asian discourse on international law has focused on areas that create 'the most urgent development consequences: trade, investment and the international economic order; the Law of the Sea and the environment; international humanitarian law, self-determination, social, economic and cultural human rights'.[18]

Since the end of colonial rule, India and other states that emerged in the decolonization of South Asia have developed and enunciated their own perspective on international issues, even as they have continued to collaborate with the existing global legal framework. India led the way by rejecting the Euro-American monopoly on norm creation and insisted that under the new approach to positivist international law, the formulation and operation of the law had to be 'a broader process of development conjoined with the new realities and contingencies of international life'.[19]

In the domain of international security, the concept of Panch-Sheel, initially articulated in a 1954 treaty with China, would resonate across time to many of South and Southeast Asia's regional instruments on international law, most especially the 1976 Treaty of Amity and Cooperation of Southeast Asia that laid the foundation for the Association of Southeast Asian Nation (ASEAN) and the 1985 Charter of the South Asian Association for Regional Cooperation (SAARC).[20] India was a leading advocate of the decolonization process under United Nations, culminating with the General Assembly's landmark 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples.[21] The concept of *non-alignment* was an innovation in international relations that allowed India to carve political space and create a mechanism independent of the Cold War.

In recent years, South Asia has seen remarkable progress in defining its own narrative of international law in several domains such as distribution of shared natural resources (Indus Water Treaty), maritime boundaries (India–Bangladesh maritime agreement), settlement of land boundary (India–Bangladesh land boundary Accord), issues of indigenous people (all Indians are indigenous),[22] war crimes, regional trade (SAFTA), counterterrorism, cross-border movement of

[17]Diane A Desierto, 'Postcolonial International Law Discourses on Regional Developments in South and Southeast Asia', International Journal of Legal Information: Vol. 36: Iss. 3, Article 4. (2008).

[18]SK Agrawala (tr), TS Rama Rao and JN Saxena, New Horizons of International Law and Developing Countries (N.M. Tripathia Private Limited, 1983); Sienho Yee, 'The Role of Law in the Formation of Regional Perspectives in Human Rights and Regional Systems for the Protection of Human Rights: The European and Asian Models as Illustrations' (2004) 8 SYBIL, p. 157–164.

[19]Desierto, op cit, p. 402

[20]ibid.

[21]UNGA Res 1514 (XV) (14 December 1960).

[22]Many other Asian States take a similar stand, for example, Bangladesh, China, Indonesia, and Laos, see Kingbury, 1998.

citizens (India–Nepal Friendship Treaty), ensuring sustainable development practices and technology transfers, space exploration, nuclear disarmament and fundamental international environmental law principles such as the prohibition against transboundary harms, the precautionary principle, common but differentiated responsibilities, intergenerational equity, and sustainable development.

India (along with other South Asian States) has been a major contributor to international peacekeeping operations under the United Nations flag, has engaged with our partners in shaping the Sustainable Development Goals (SDGs) agenda, and continues to work with like-minded countries to make the global financial and trade systems more equitable and transparent. India took the lead at the COP 21 at Paris to forge an international consensus and has become one of the strongest advocates of clean energy, particularly solar energy and energy innovation.

In instances where India has not become a party to the existing international system, uniquely local practices have been developed to resolve problems such as on treatment of refugees, where the Indian track record, arguably, is better than many European nations that are state parties to the UN Refugee Convention.[23]

Resistance from the existing power structures to India's demand for a seat on all global decision-making bodies is seen as undemocratic and unethical. It was articulated by the Vice President of India who proclaimed that '*as one sixth of the humanity and in keeping with the growing capacities and aspirations of our people, India has a much larger role to play in charting a more equitable and sustainable future for our world. For this reason we believe that any global forum which does not include India has limited relevance*'.[24] This has also led, at times, to India circumventing unfair multilateral international regimes by concluding bilateral agreements and seeking waivers in its own form of 'Indian exceptionalism' as in the case of India–US Civil Nuclear Agreement.

South Asia's multidirectional engagement of, and contributions to the development of, modern international law has, naturally, inspired concomitant proposals for teaching methodologies and curricular content of international law in South Asian law schools.[25] The answer to all parts of the not so rhetorical question posed by Prof. B. S. Chimni, 'Is there (a South) Asian approach to international law?', is an unequivocal yes.

Bringing together views by legal experts from India, Bangladesh, Nepal, and Sri Lanka, the present volume is a veritable *tour de* force of the emerging contours of the South Asian narrative on international law in its many manifest forms. This book, with contributions from emerging South Asian scholars in the field, presents a cross section of views on the dominant international law issues rooted in the South Asian perspective on these issues and their resolution. This volume also gives

[23]Lakshman, Sriram. 'We can learn from India on refugee crisis', The Hindu, September 12, 2016

[24]Keynote Address by Shri M. Hamid Ansari, Honourable Vice President of India at the Tunisian Institute of Strategic Studies, Carthage, Tunisia on 03 June 2016.

[25]Desierto, op cit, p. 412.

the readers an insight into the trajectory of international law study and teaching in South Asia.

The stated objective of this volume is to present to the reader a reference source on the recent developments in international law with South Asian perspective. The editors are to be congratulated as the book successfully achieves this aim. It covers a wide set of issues ranging from South Asian perspective on UN Security Council to social and economic reforms and from accountability in conflict and human right violations to combating terrorism. Other topics include a South Asian look at the International Criminal Court.

These, and other chapters, provide an insight into the complex issues that confront the modern global citizen and the approach taken by South Asian States to international problem-solving. It should be of interest not only to lawyers, academics, and diplomats, but also to students of law, international relations, and other sociopolitical disciplines as well as general readers who are looking to develop an understanding of international legal issues, particularly in the South Asian context.

Knowledge of international law is essential for the work of any lawyer today. There are few areas of legal practice that are not affected in some way by international law, whether transacted or litigated at a national, regional, or international level. International dimension of law impacts commercial and competition matters, as much as it does matrimonial matters. Awareness of treaty obligations is required for dealing with interstate trade disputes, as well as for computing personal income tax. Knowledge of the legal responsibilities and immunities of government is as vital for concluding a commercial contract as for reporting a human rights violation.

International law is increasingly providing us with a common framework where governments, institutions, corporates, and even individuals can interact on a more equitable plane. The world has never before had a standing International Criminal Court or a functioning World Trade Organization. We never had such an elaborate international human rights system. In a rapidly digitizing environment, issues such as intellectual property rights, privacy, identity and information ownership, virtual resources, cybercrime, and bioethics are likely to continue challenging the established norm and narrative in international legal system. Those dealing with the rapidly developing system would need to be nimble and well informed to cope.

New Delhi
January 2017

Anshuman Gaur*

*(*Anshuman Gaur is an IFS Officer. The views expressed here are personal and not those of the Government of India.)*

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Secondly, we would like to acknowledge the hard work of contributing authors to this book. These authors from India, Bangladesh, Nepal, and Sri Lanka stood their ground by reiterating their long commitment to produce the work of this magnitude. They promised to stand by us through thick and thin in the prolonged process of editing work of this book. Some of us have not seen each other, yet the only bond which kept us united together was the objective of producing a high-quality introductory book on public international law. Perhaps the students, practitioners, and policy makers would find this work useful.

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Dr. Anupam Jha has been teaching international law at the University of Delhi for more than a decade. He has received prestigious fellowships to pursue his research interests at the University of Kansas (USA), University of Leeds (UK), and the University of Mauritius. His work has been published in reputed international journals. He specializes in international criminal law, human trafficking, human rights, and energy law.

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Abbreviations

AALCO	Asian African Legal Consultative Organization
ASEAN	Association of South East Asian Nations
BIMSTEC	Bangladesh, India, Myanmar, Sri Lanka, Thailand Economic Cooperation
CESCR	Committee on Economic, Social and Cultural Rights
CPA	Comprehensive Peace Accord
DPSP	Directive Principles of State Policy
DRDO	Defence Research and Development Organization
ERW	Explosive Remnants of War
FATA	Federally Administered Tribal Areas
GA	General Assembly
GATT	General Agreement on Trade and Tariff
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICT	International Crimes Tribunal (Bangladesh)
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IED	Improvised Explosive Devices
IGN	Intergovernmental Negotiation
IHL	International Humanitarian Law
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organization
ITLOS	International Tribunal for the Law of the Sea
LTTE	Liberation Tigers of Tamil Eelam
MFN	Most Favoured Nation
NAM	Non-Aligned Movement
NGO	Non-Governmental Organization
NIEO	New International Economic Order

NNWS	Non-Nuclear-Weapon State
NWS	Nuclear-Weapon State
P5	5 Permanent Members of Security Council
PATA	Provincially Administered Tribal Areas
PCIJ	Permanent Court of International Justice
PKO	Peacekeeping Operations
PSO	Public Security Ordinance
RTA	Regional Trade Agreement
SAFTA	South Asian Free Trade Area
SC	Security Council
SLOS	Sri Lanka Overseas Service
TPP	Trans-Pacific Partnership
TRC	Truth and Reconciliation Commission
UAV	Unmanned Aerial Vehicles
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCIP	UN Commission for India and Pakistan
UNCLOS	UN Convention on the Law of the Sea
UNCTAD	UN Conference on Trade and Development
UNDRIP	UN Declaration on the Rights of Indigenous People

Chapter 1
Changing Horizons of International Law: A South Asian Perspective

J.L. Kaul and Anupam Jha

1 Introduction

International law has received a renewed attention after the end of the Cold War. This branch of law has not only expanded horizontally to bring within its fold new States which have been established since the end of the Second World War but also extended its scope of protections in vertical ways to individuals, groups, and international organizations, both private and public (Shaw 2008). Conceptually, it has also tried to proclaim legal regulations covering new fields, such as international trade, problems of environmental protection, human rights, law of the sea, international criminal law, State responsibility, indigenous law, and regulation of modern weaponry. Traditional subjects, such as States, and international organizations are still relevant, but new entities have not only been recognized; they have been given a new role (Brownlie 2008). Regional organizations are growing and taking a firm foothold in the international affairs and even providing newer directions for a robust and fulfilling international order. Non-governmental international organizations and individuals have become the new focus of international law in the present century.

South Asia, consisting of Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka, is home of 1.7 billion people (in 2013) and of a quarter of the world's population. In South Asia and in the Third World, traditional Euro-centric international law has been questioned at times, paving way for either redefining existing doctrines of international law, or focusing on creation of new legal regimes. Professor Upendra Baxi noted, 'with the passing of colonialism,

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Euro-centrism in thinking about international law has become anachronistic' (Anand 1972). He added that in its most acute form, Euro-centrism had led to needless denigration of indigenous traditions of the colonized nations. In its milder form, he observed further, it had led to a continuing indifference to these traditions even in the scholarly discourses. Lastly, he added that whatever be the causes of Euro-centrism, its cure was imperative. This book is an attempt to cure this anachronism by focusing upon the regional scholarship as well as regional themes, such as free trade in the region, protection of indigenous population, institutions of diplomacy.

International negotiations and engagements have involved newer grouping of nations, which is perceived as a challenge to *status quo* in international affairs. The nations of South Asia have asserted their collective will which is, at times, at variance with the common will of other nations. Consequently, greater involvement of these nations, which were at best 'peripheral' in international negotiations, has greatly influenced outcomes of international law making. The latest examples in this regard are the *Bali Summit* (2013) where India's chief concern of food security was not given due consideration resulting in the failure of the summit, *Paris Agreement on Climate Change* (2015) where India and other South Asian nations took a definite stand to prevent climate change and the summit was successful.

Toward institution making at international level, South Asia has played an important role in the past and in the current times. India was invited to participate in the San Francisco Conference in 1945 for drafting of the UN Charter, though still a British colony comprising India, Pakistan, Bangladesh. After India's independence in 1947, it advocated for universal membership of the UN and helped overcome the veto of Big Powers on the membership issue of newly independent countries (Anand 2006a, b). Prime Minister Nehru persuaded the Soviet leaders, on their trip to India in 1955, to refrain from exercising veto for admission of new members and that broke the ice and numerous newly independent States from Asia and Africa were admitted in the UN (Anand 2006a, b). Since the issue of Security Council reform and expansion of its membership was initiated in the UN General Assembly in the early 1970s, India has been supporting the principle of 'equitable representation on and increase in the membership of the Security Council.' The system of casting 'veto' has also been opposed by India. According to India's Permanent Representative to the UN, since the creation of Security Council in 1946 till today, 317 vetoes were cast, and as a result, in total, 230 draft resolutions or parts thereof have been vetoed, many of them pertaining to membership of the UN (Akbaruddin 2016). Other South Asian nations have also supported this principle of equitable representation.

India was among the very few select countries who were members of the former Commission of Human Rights throughout over 60 years of its existence. The formation of Human Rights Council in 2006 was hailed in the region. While presenting its candidature to the Human Rights Council for a 3-year term in December 2006, India made several voluntary pledges and commitments (OHCHR 2008). It extended a standing invitation to Special Procedures Mandate Holders during the 18th session of HRC in September 2011, in keeping with our Voluntary

Pledges and Commitments made to the HRC in May 2011 (OHCHR 2002). The Human Rights Council has a total strength of 47 members. India and Bangladesh have been its members from South Asian region during 2015–17. Pakistan (2006–2008, 2008–2011, 2012–2015), Sri Lanka (2006–2008), and Maldives (2010–2013, 2013–2016) have already been the members of the Council. This Council had also passed a resolution in the matter of large-scale violation of human rights of Tamils in Sri Lanka during the last years of civil war (1983–2009).

It is heartening that in this emerging international legal horizon, South Asian nations have played an important role. South Asian consciousness has been growing not only among the people of region but also in the Diasporas. South Asian culture, art, language, and history are taught in world-renowned Universities, increasingly Institutes of South Asian studies are coming up the world over, South Asian food and film festivals, trade fairs are taking place in a regular fashion. The concept of South Asia is having a global appeal today. Scholars argue that the destiny has already been proclaimed for Asia and South Asia will be the fulcrum for its growth in the coming decades (Delinic and Pandey 2015).

It is in this context that the editors of the present volume have conceptualized the publication of this book. The editors also note that there is no dearth of literature on international law; however, this edition is particularly of relevance and importance from a South Asian perspective. The world leaders look at South Asian continent in new context and importance; therefore, the need for such a work has been felt for a long time. As this book covers diverse topics related to public international law with a special focus on South Asian traditions, State practice, the editors hope that this volume would evoke strong interest among the readers of international law in the region. The readers would find the discussions and analysis presented in the book as very useful at the national, regional, and international level.

2 Rationale

According to Professor R.P. Anand, the doyen of international law in the South Asian region, the debate between universalism and regionalism has its own merits and demerits (Anand 1972). Supporters of regionalism argue that in a diverse and unwieldy world, global unity based upon a common way of life and common values was still a distant possibility. Regional arrangements and agencies afforded a directness of association which could not be attained through universal institutions. On the other hand, it was argued by the advocates of universalism that neighboring nations were not necessarily and always logical or actual cooperators, while distant nations often were. Physical proximity was no guarantee for friendly relations and more often tended to result in controversy. South Asian regionalism, however, is a combination of physical proximity as well as directness of association. This regionalism has influenced the international politics as well with the creation of the South Asian Association for Regional Co-operation (SAARC), European Union

(EU), African Union (AU), Asian African Legal Consultative Organization (AALCO), and Association of South East Asian Nations (ASEAN).

From Iran to Afghanistan and from Kashmir to Kosovo, international politics has been changing from universalism to regionalism. South Asia has become a theater of conflicts, smaller or bigger. The use of force during civil strife, insurgency, acts of terrorism, massive human rights violations of citizens, problems related to State responsibility, trade disputes, environmental degradation, maritime disputes, disputes related to access to water, etc., have equally raised new but distressing universal as well as regional issues in the international arena. A whole lot of work has been done by the International Law Commission on State responsibility (1949–2004), international crimes (1981–1995), individual criminal responsibility (1981–1995), effect of armed conflict on the law of treaties, protection of the environment in relation to armed conflicts (2013), the Most Favored Nations Clause (2006 onwards), immunity of State officials from foreign criminal jurisdiction (2006 onwards), protection of the atmosphere (2013).[1] Judicial pronouncements made by International Court of Justice, Permanent Court of Arbitration, and Supreme Courts of South Asia, for instance, *United States Diplomatic and Consular Staff in Tehran* (1980), *Interpretation of Case Concerning Avena and other Mexican Nationals* (2008), *Questions relating to the Obligation to Prosecute or Extradite* (2009), *Interpretation of Case Concerning Temple of Preah Vihear* (2011), *Obligation to Negotiate Access to Pacific Ocean* (2013), *The Indus Waters Kishenganga Arbitration* (2014), *The Enrica Lexie Incident* (2015), *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (2016), are yet to be examined in its South Asian context.[2]

Supreme Courts and other prominent tribunals of South Asia have also enriched the regional jurisprudence. One of the outstanding examples of this contribution is from the International Crimes Tribunal of Bangladesh established to try the perpetrators of war crimes and crimes against humanity during the 1971 Liberation War. In South Asia, this tribunal applied the concept and law on war crimes and crimes against humanity for the first time. Nepal, a tiny Himalayan nation, has also constituted a five-member Truth and Conciliation Commission in accordance with the Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2014. One of the main objectives of the Commission is to find out and publish the incident of the grave violation of human rights committed in the course of the armed conflict between the State Party and the then Communist Party of Nepal (Maoist) from February 13, 1996, to November 21, 2006, and of the persons involved in those incidents upon realizing the essence and spirit of the Interim Constitution of Nepal, 2007 and the comprehensive peace accord. Similarly, the Courts in India have laid down a remarkable corpus of jurisprudence in the field of

[1]See, International Law Commission Web site at http://www.un.org/law/ilc/ (last visited on December 3, 2013).

[2]For the judgments of International Court of Justice, see http://www.icj-cij.org/docket/index.php?p1=3&p2=3 (last visited on December 3, 2013).

protecting human rights of its citizens. With a view to attain the objective of Constitutional philosophy of socioeconomic equality and freedom to all, the Supreme Court and various High Courts have implemented various international obligations undertaken by India, such as *Enrica Lexie* (2015) case relating to maritime disputes between India and Italy.

Maritime disputes in the South Asian region are also increasing in the present twenty-first century. It was not so in the distant past. From the first century A.D., regular maritime commercial relations were established between Rome and several States in India and the Indian Ocean region, and they continued for nearly 300 years (Rawlinson 1926; Warmington 1974). On the eve of European penetration into the Indian Ocean by the end of fifteenth century, the freedom of the seas and trade was well recognized in customary law of South Asia. When the Portuguese arrived in India by the end of fifteenth century, they found no maritime powers, no warships, and no arms in the sea (Anand 2006a, b). South Asians were essentially land powers. From fifteenth century to late twentieth century, South Asians remained under colonial domination and exploitation. After getting independence, these nations have grown in maritime power and international influence. India has a coastline of 7,516 km, its territorial waters extend to 155,889 km^2, and exclusive economic zone extends to 2,013,410 km^2. It has a strong fleet of offshore patrol vessels (Samarth, Samar, Vikram, Sankalp, Viswast), fast patrol vessels (Priyadarshini, Sarojini Naidu, Rani Abakka, Rajshree, Aadesh), pollution control, and air cushion vehicles to protect its coast. Pakistan's coast spreads to 1,050 km, which is protected by its strong fleet of fast patrol vessels, lethal interceptor boats, and other utility boats with latest equipment on board. South Asian nations are also parties to the UN Convention on the Law of the Sea (UNCLOS), 1982. Once maritime belt is secured, the trade routes through the sea become attractive to the international traders.

Trade and intellectual property disputes need new orientation, as the Bali Round and the earlier Doha Round have been not so successful. Nations are looking forward to regional free trade Agreements, regional common markets, such as South Asian Free Trade Agreement (SAFTA) launched in 2006, and Trans-Pacific Partnership (TPP) signed in early 2016. In terms of economic strength, South Asia accounted for around 2% of the world's gross national income at current U.S. dollars and 6% at purchasing power parity-corrected exchange rates. SAFTA was launched to reduce tariffs for intra-regional trade among SAARC countries. Member States have agreed to reduce their tariffs on each other's goods not on sensitive lists as long as those goods have been produced in accordance with the Agreement's Rules of Origin provisions. The Agreement also includes provisions related to customs cooperation, dispute settlement, trade facilitation, safeguards against inquiry to industry, and eligibility for technical assistance. The ultimate aim of SAFTA is to put into place a fully fledged South Asian Economic Union similar to the European Union. This will take a long time. Currently, SAFTA only covers trade in goods. However, the formation of this free trade group is considered a good start for further economic cooperation in the region.

The reasons behind rapid proliferation of the regional trade Agreements, need of Security Council reforms, sharing of trans-boundary rivers, appropriate selection of forum to resolve maritime disputes, growth of law on State responsibility, diplomatic immunities, etc., need a serious scholarly enquiry. Editors of this volume note that these are some of the pressing issues, which needs an exhaustive treatment by scholars of international law, particularly from South Asia. The editors also have in mind that the purpose of this book is to give ample space to specialist distinguished authors to examine these subjects in finer details and legal analysis. Indeed, we also note that such a study and analysis would prove most crucial to understand the changing horizons of international law. Consequentially, such an approach may supplement the increasing role of international law in current times.

3 Objectives of the Book

The book is intended to be a reference book on the recent developments in international law with South Asian perspective. South Asia has always remained desirous to promote peace, stability, amity, and progress in the region through strict adherence to the principles of the United Nations Charter and Non-Alignment, particularly respect for the principles of sovereign equality, territorial integrity, national independence, non-use of force, and non-interference in the internal affairs of other States and peaceful settlement of all disputes (SAARC Charter 1985). In an increasingly interdependent world, the objectives of peace, freedom, social justice, and economic prosperity are best achieved in the South Asian region by fostering mutual understanding, good neighborly relations, and meaningful cooperation among the Member States which are, in many instances, integrated by family ties and culture.

Keeping in view the above objectives of South Asian integration, this book involves many subject experts who are either the mid-level eminent scholars in the region or are emerging scholars in the field. Joint efforts of the contributors on the theme of the book have paved the way to incorporate the latest scholarship on the subject. This book has the potential to prove to be an important resource book for the five hundred plus Universities of India, 15 Universities of Sri Lanka, twenty plus Universities of Pakistan, four Universities of Nepal, fifteen plus Universities of Bangladesh, apart from other world universities dealing with international law and South Asian studies in a comparative outlook. Ten themes identified for the book are as follows:

(i) Protection of Human Rights and International Law;
(ii) Use of Force and Its Limitations;
(iii) International Humanitarian Law, International Criminal Court and National Tribunals;
(iv) Diplomatic and Consular Immunity;

(v) Trade and International Law;
(vi) State Responsibility;
(vii) International Law and Marine Affairs;
(viii) International Watercourses Law and Protection of Environment;
(ix) Law of the Sea;
(x) Indigenous People.

4 The Contributors' Perspectives and Topics

The chapter 'UN Security Council: South Asian Perspective and Challenges Ahead' is jointly authored by Ms. Ujjwala Sakhalkar from Pune and Mr. Brijesh Kumar Singh from Delhi. This chapter analyzes the functions and powers of the Security Council of the UN in light of the new dynamics of international power relations wherein the emerging powers of the world, including India from South Asia, assert their claim to a permanent seat. This claim has been also supported by France and UK, which also favors the inclusion of Brazil, Japan, and Germany. Many other countries, such as the U.S., also support this claim but with a rider that the veto would not be given to any new permanent member (Sreenivasan, T.P., Reform Eludes UN Security Council, The Hindu, September 17, 2015). The chapter also deals with the peacekeeping powers of the Security Council to which the South Asian nations have contributed wholeheartedly. India, Pakistan, and Bangladesh have spontaneously, without any reservation, participated in peacekeeping operations over the years, and it is a clear demonstration of the region's commitment to the objectives set out in the UN Charter. Finally, the chapter investigates Security Council' s role in resolving South Asian disputes, such as Kashmir, Sri Lankan civil war, Afghanistan occupation, and Bangladesh liberation. These disputes have tested the utility of Security Council in promoting international peace and security in the region.

In the chapter on 'Socio-Economic Rights in South Asia,' Dr. Uday Shankar from Indian Institute of Technology, Kharagpur, highlights the implementation of the obligations contained in the International Covenant on Economic, Social, and Cultural Rights (ICESCR) in the form of Constitutional values and goals. He examines the role played by the respective Constitutional norms of India, Bhutan, Sri Lanka, Bangladesh, and Nepal in achieving the universalization of this second generation of human rights. He further discusses the enforcement of these rights by the judicial system of these countries. Regarding India, he has discussed leading cases, such as *Keshavanad Bharati* (1973), *Minerva Mills* (1980). The reporting mechanism established by the ICESCR provisions has been also thoughtfully discussed by him. Another institution investigated by him to implement the socioeconomic rights in this region is called 'National Human Rights Commission' or simply 'Human Rights Committee.' He finds out that every South Asian nation is uniformly committed to dignified and economically independent life of every citizen with clear direction to the State agencies to achieve the same.

In another chapter titled 'Indigenous Peoples in South Asia and International Law,' Dr. Shashi Kumar from Central University of Lucknow investigates the legal protection available to the indigenous people in South Asia under international law. In the wake of United Nations Declaration on Indigenous Peoples, 2007, and the International Labor Organization Convention No. 169 on Indigenous and Tribal Peoples, the author discusses their rights to self-determination, protection of their traditional knowledge, and sociocultural value systems in the given international and domestic legal frameworks. Indigenous peoples in the region share the historical legacy of colonialism and their exclusion from the mainstream political, social, economic, and cultural life. The author has examined the domestic legal framework of South Asian nations to make the reader understand how these nations have incorporated the international legal framework in their respective legal systems. Dr. Kumar argues that the international commitments undertaken by these South Asian nations can only be effective when they effectively apply and implement those commitments through their domestic laws and policy.

Another chapter on 'Regional Trade in South Asia: An International Legal Analysis' is written by Mr. Bipin Kumar from National Law School, Jodhpur. His perspective on regional trade in South Asia is a balanced one as he analyzes the role of Regional Trade Agreements (RTAs) and its impact on regional and international trade. In doing so, he discusses various theories on multilateralism and regionalism and finds out that each theory has its own merits and demerits. He cites the latest WTO report to assert the point that substantial portion of the global trade takes place through the regional trading groups. Moving further, he examines the various RTAs entered into by India which is quite complex due to its overlapping jurisdictions. However, he thinks that the rapid proliferation of RTAs has certainly deepened the crisis of Rules of Origin and has led to trade diversion and distortion. Mr. Bipin then goes on to evaluate the formation and utility of South Asian Free Trade Agreement (SAFTA) which has a tremendous potential for the regional growth. As South Asian nations exhibit symmetric economic activities, the promotion and effective working of SAFTA should prove to be a game-changer at an international level. At the same time, Mr. Bipin submits that multilateral trade regime should not be dismantled.

Another trade-related chapter titled 'The Conundrums Of Trade Barriers in Preferential Trading: Prospects From SAARC' is authored by Mr. Divesh Kaul, S.J.D. candidate at Tulane University Law School, USA. He argues that multilaterism still remains an important stimulant in addressing contemporary challenges, such as reducing trade barriers as a means to stem mercantilist tendencies. He laments that South Asia remains one of the least-integrated regions of the world. In this chapter, Divesh examines the possibility of eliminating trade barriers in South Asian milieu. He compares SAPTA and SAFTA in this connection with FTAs agreed to by the small countries of South Asia. He lays down a blueprint of future SAARC trade liberalization in view of the current global trends.

The chapter on 'Access to Water and Sharing of Trans-boundary Rivers in South Asia,' written by Dr. Stellina Jolly from South Asian University, New Delhi, focuses on human rights aspect of the sharing of trans-boundary rivers and access to water.

She examined the issues of accessibility, sharing, and the application of public trust doctrine in the region by the establishment of Constitutional norms, judicial verdicts, and legislative initiatives. Her analysis reveals that most of the South Asian countries have carved out the right to a clean environment through the expansionist interpretation of Right to Life. In the context of water management, the doctrine of public trust confers on the Government ultimate control and ownership to water but directs it to hold water in its capacity as a trustee for the whole of public. She finds that the doctrine is firmly entrenched as part of jurisprudential development in the region. Apart from the domestic efforts, the author explores the UN Watercourse Convention and its importance in this region. As most of the nations of South Asia have not ratified it, the application of its norms depends on the State practice. She highlights the problem-solving capacity of international institutions such as Permanent Court of Arbitration (PCA) to resolve the water disputes between South Asian nations by giving an example of *Kishenganga* case. The author suggests that a comprehensive human rights declaration is needed for the SAARC region. She further suggests that an institutional mechanism to treat trans-boundary water issues from human rights perspective should be established for the region.

The chapter 'UNCLOS Dispute Settlement System and India,' written by Mr. Vinai Kumar Singh from New Delhi, explores the different forums envisaged for dispute settlement under the UN Convention on the Law of the Sea. One group advocated for compulsory jurisdiction of the ICJ, whereas the developing countries resisted such moves. Another group advocated for the creation of a new tribunal to resolve maritime disputes, as the ICJ lacked jurisdiction over international organizations, trans-national corporations, and individuals. Due to the potential rigidity of these forums, the third group advocated for flexible mechanisms, such as arbitration to resolve such disputes. To ensure universal adoption, the Convention incorporated the views of all the groups in its Article 287. India ratified the Convention on June 29, 1995, and made a declaration, inter alia, by which it reserved the right to make a proper choice as to appropriate forum to resolve such disputes. Mr. Vinai has successfully examined the advantages and disadvantages of each and every forum available under the UNCLOS with the cases law and State practice on these matters. Although he has focused on the State practice of India, his investigations are wider than India's position. As a result, he examines the interesting case of South China Sea (*The Republic of the Philippines* v. *The People's Republic of China*, 2016) and concludes that even if a State excludes jurisdiction while making a declaration under Article 298 of UNCLOS, the Convention provisions would apply with respect to those matters which are not excluded, such as a feature which meets the definition of an island and rock under Article 121(1) & (3). He suggests that India should not exclude 'all' disputes relating to maritime delimitation from compulsory procedure as laid down in Article 298(1)(a). South Asia has an important lesson to learn from the approach taken by India.

In a separate chapter 'Accountability for Conflict-Era Human Rights Violations in Nepal,' Mr. Raju Prasad Chapagai and Mr. Pankaj Kumar Karna from Kathmandu investigate the difficult progress of Nepal's tryst with justice for human rights violations during the civil war from 1996 to 2006. They have examined the