

# Life of Imperialism: Thailand, territory and state transformation

**Abstract:** The paper argues that in territorial disputes before international courts between states that were formerly under colonial rule and semicolonialism, respectively, international courts favour the former. I study two cases – semicolonial Siam in *Cheek v Siam* arbitration (1897) and postcolonial Thailand in the *Temple of Preah Vihear* case (1962) – in their historical context to prove this. The critique of formalism here operates on two levels. First, in actual disputes the production of colonial stationary – for example, maps, photographs, and communiqué as demonstrable proofs of evidence – benefits states formerly under colonial rule. Second, in the *Temple of Preah Vihear* case, the ICJ pits, as it were, the French colonial history in Cambodia against Siamese semicolonial past. Arguably, the *Cheek v Siam* episode demonstrates nineteenth century Siam’s successful attempts to deploy politico-legal strategy to remain politically independent. By contrast, the ICJ in the *Temple* case defeats Siamese conceptions of shared sovereignty to confirm the continuing hegemony of modern geography and colonial cartography. The *Cheek* and *Temple* cases, respectively, among other untribunalized arm-twisting episodes typify Siam’s tryst with both semicolonial and postcolonial international law. Siam offers both epistemological lessons on history, past, and knowledge production and the possibility of prefiguring postcolonial Asian imperialism.

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## I. Introduction

More historians than lawyers have studied Thailand. Should the international lawyers' study of Thailand – called Siam before 1940 – yield a useful lens about, to wit, semicolonialism, history and international law? In Asia, Japan, Siam, and China share a common semicolonial past of varying degrees.<sup>1</sup> Siam managed to remain independent at a time the British and the French Empires had conquered Burma and Cambodia to Siam's west and East.<sup>2</sup> In the 20<sup>th</sup> century, while South Asia was under British "colonial rule", Thailand and China were under the "foreign domination" of Japan and European powers.

Siam's tryst with international law in the 19<sup>th</sup> century – its attempt to join the "civilized" Family of Nations – is, arguably, unique in Asia.<sup>3</sup> It is so because, their common history notwithstanding, Japan, China and Siam were to chart completely different futures during, respectively, interwar and post-war years.<sup>4</sup>

How did western lawyers treat Siam and Japan, however? Oppenheim – perhaps the most

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<sup>1</sup> It is notable that the International Law Association of Thailand, established in 1984, began with the *Thailand Yearbook of International and Comparative Law*. The *Thailand Journal of International Law* has replaced the yearbook in 2017. The journal aims to "serve as a forum for academics and practitioners to present their views on Public ... International Laws, especially, as they relate to Thailand". See, *Thailand Journal of International Law*, available at: <http://www.ilat.or.th/ilatjournal/Index.php>. However, The Siam Society in Bangkok has since 1904 published the *Journal of the Siam Society* – one of the leading scholarly publications in South-East Asia – which has been the fulcrum of studies on Thai history, state and international law. See, *Journal of the Siam Society*, available at, [http://www.siam-society.org/pub\\_JSS/jss\\_index.html](http://www.siam-society.org/pub_JSS/jss_index.html). However, *Thailand Yearbook of International Law* has been in print since 1985.

<sup>2</sup> Edward Gallaudet, *A Manuel of International Law* (S. Barnes & Co., NY, 1879) 159. Smith called Siam a "Partially civilized state[]". Frederick Smith, *International Law* (Dent & Sons, London/Toronto, 1918) 81. "It is difficult to imagine that Persia and Siam, which were members of the pre-19<sup>th</sup>-century Family of Nations, ceased to be original members in the 19<sup>th</sup> century and had to be re-admitted in the early 20<sup>th</sup> century." D. Armitage and J. Pitts (eds) *C. H. Alexandrowicz: The Law of Nations in Global History* (OUP, Oxford, 2017) 395.

<sup>3</sup> "[I]n the far East, the French and the English consolidated their position and advanced towards each other to meet at a point which was called Siam." Baron Eduardo Rolin-Jaequemyns, Foreword, in, Walter Tips, *Gustave Rolin-Jaequemyns and the Making of Modern Siam* (White Lotus, Bangkok, 1996) xi.

<sup>4</sup> While Japan went for "defensive modernization", geopolitics compelled the Siamese sate to pursue a strategy of "defensive underdevelopment". Tomas Larsson, Western Imperialism and Defensive Underdevelopment of Property Rights Institutions in Siam, 8 *Journal of East Asia Studies* (2008) 1-18.

influential of the writers of 20<sup>th</sup> century – had conflated the two political situations, colonial rule and semicolonialism, to hold Siam as a “doubtful” case in so far as its recognition and admission into the family of nations was concerned.<sup>5</sup> Only four years later, the *American Journal of International Law* had noted: “Oriental nations, however old their civilization, are not by the mere fact of statehood regarded as equals”.<sup>6</sup> To European lawyers, problematically, semicolonial Siam and colonial India were similar kinds of states. In effect, in the eyes of European scholars, a veritable lack of the wherewithal of states to engender competitive colonialism and the lack of fire-power excluded such oriental states from the reckoning for statehood.<sup>7</sup>

Therefore, as a framework of study, I focus on the distinction between colonialism and semicolonialism, the two simultaneous political experiences of Asian societies, and its role in the universalization of international law. A metropolitan country in semicolonialism exerts power and influence within an asymmetrical relationship without assuming “outright

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<sup>5</sup> Lassa Oppenheim, *International Law: A Treatise*, vol: 1, Peace (Longmans, Greens, & Co., Bombay, 1905) 33, 148, 157 saying “Siam ... [is] for some parts only within that family [of Nations].” More generally, Mainstream positivism treats Oppenheim as separating law from morals and from politics allowing critics dismissing Oppenheim’s positivism as amoral, apolitical, and atheoretical. Kingsbury, however, re-reads Oppenheim that challenges that view. Benedict Kingsbury, Legal Positivism as Normative. Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law, 13 *European Journal of International Law* (2002) 401–437. “As the only non-self-governing member of the League, India’s new international status exposed both its external, more imperial, as well as its internal, more colonial, anomalies.” ‘Examining the Indian international anomaly ... provides a series of insights into a particular sovereignty regime of colonialism.’ Stephen Legg, An international anomaly? Sovereignty, the League of Nations and India’s princely geographies, 43 *Journal of Historical Geography* (2014) 96. Hailegabriel Feyissa, European extraterritoriality in semicolonial Ethiopia, 17 *Melbourne Journal of International Law* (2016) fn 17 notes, “international legal scholarship is yet to adequately address the topic of extraterritoriality in black Africa.”

<sup>6</sup> Editorial, ‘British Extraterritorial Jurisdiction in Siam’, 3 *American Journal of International Law (AJIL)* (1909) 954. Richard Horowitz, ‘International Law and State Transformation in China, Siam, and the Ottoman Empire during the Nineteenth Century’, 15 *Journal of World History* (2004) 445– 86 noted the universalization of international law as a “joint enterprise”.

<sup>7</sup> While the Montevideo Convention lists the four essential characteristics for a state, there are no international laws on state recognition but only two competing theories: constitutive and declaratory. See, Article 1, Montevideo Convention on the Rights and Duties of States, (1933) 165 L.N.T.S. 19 (entered into force 26 December 1934). Naturally, the subject of state recognition has had an ample purchase with publicists. The two leading scholars are H. Lauterpacht, *Recognition in international law* (CUP, Cambridge, 1947) and James Crawford, *The Creation of States in International Law* (Clarendon Press, Oxford, 1979).

domination and formal sovereignty over the peripheral country” like in colonialism.<sup>8</sup> Foreign domination and semicolonialism are interchangeable political experiences in East Asia and Indochina, which can be contrasted with British colonialism in South Asia.<sup>9</sup> In their seminal paper, Vandergeest and Lee Peluso detail as well as compare the Thai situation while comparing with fully colonized societies:

The Bangkok monarchy avoided the legal fragmentation (separate legal codes for different categories of people) prevalent in colonized Southeast Asia, although legal extra-territoriality (i.e., the exemption of European and American subjects from Siamese laws as specified in the mid-nineteenth-century treaties) may be considered a limited form of such fragmentation. Instead [Siam] enacted a series of national codes modelled on European and Japanese codes, which formally applied to all Thai citizens, and which gave little recognition to local custom ... The Chinese were classified separately until the 1930s ... They were, however, generally subject to the same legal system as were the “Thais.” The primary motivation for changing the legal system was to meet European conditions for ending legal extraterritoriality. But the result has been an enormous gap between the law and practice.<sup>10</sup>

More particularly, I ask how do the varied colonial and semicolonial pasts of Asian nations play out in territorial disputes between such nations before international courts? This paper mainly studies two cases involving Siam (later Thailand) – *Cheek v Siam* (1897) and the *Temple of Preah Vihear* (1962) dispute between Cambodia and Thailand – to answer that question.<sup>11</sup> I argue that these two cases be read within its historical context. While *Cheek v*

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<sup>8</sup> Jürgen Osterhammel, ‘Semi-Colonialism and Informal Empire in Twentieth-Century China: Towards a Framework of Analysis’, in, Wolfgang Mommsen & Jürgen Osterhammel (ed) *Imperialism and After: Continuities and discontinuities* (1986) 290, 308 was one of the first to study 19<sup>th</sup> century semicolonialism of China as framework of analysis.

<sup>9</sup> Indochinese “states derive their civilisation from India but fall within the political orbit of China”. J.S. Furnivall, ‘The Tropical Far East And World History’, 39 *Journal of the Siam Society (J Siam Society)* (1952) 119, 120.

<sup>10</sup> Peter Vandergeest and Nancy Lee Peluso, Territorialization and state power in Thailand, 24 *Theory and Society* (1995) 423-424. “France is the paradigmatic case of a highly centralized territorial administration, whereas local administration in United States is relatively autonomous. In the colonies, the British tended to set up administrations with strong local-level institutions that drew on pre-existing systems of authority, although incorporating these in the British territorial system. The French-based colonial administration on the highly centralized French model, which aimed to assimilate rather than incorporate.” Vandergeest & Lee Peluso, *ibid* 423.

<sup>11</sup> *Case concerning the Temple of Preah Vihear* (Cambodia v Thailand), Merits, Judgment of 15 June 1962 ICJ Reports 1962, 6.

*Siam* is a key precedent to understand Siam's attempt to maintain its independence from the French colonial expansion, *Temple* case, I argue, exposes the ways in which semicolonial states stand at a disadvantage in relation to states that are a product of full-blown colonialism.

Notably, among the works on semicolonialism and informal empires in Asia, the study of China takes the lion's share of attention.<sup>12</sup> Siam's case is largely ignored. What are the Indochinese particularities, if any, in the universality of international law and semicolonialism? My paper aims to chart the varied ontologies of colonial rule and semicolonialism in actual disputes between such states to answer this question. Furthermore, it critiques the ICJ's refusal to go beyond its Eurocentric epistemology in the *Temple of Preah Vihear* case. In his dissent, Judge Koo went on to declare an "Oriental" view of international law while rejecting the ICJ's disempowering formalism. The combined opinions of Judge Koo in 1962 and that of Judge Cançado Trindade in 2011 and 2013 in the two temple cases, I argue, point to at least two possibilities of a new epistemology of international law of territory. They are:

1. Rethinking the law of territory on the basis of Siam's lived experience of a shared political "space" as against sovereignty based on a "territory", and,
2. Rejecting the totalizing statist law of territory in favour of a perspective of based on people and periphery

Clearly, the abundance of modern nation-states of Westphalian persuasion and its wilful universalization pushes into insignificance the semicolonial nations like Siam's alternative modernity. The alternatively modern lived experiences of such Asian polities – flexible and hybrid – ought to bear upon the rigid statist conceptions of the modern colonial international law.<sup>13</sup>

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<sup>12</sup> Semicolonialism, "foreign domination" and "joint-enterprise" are some of the words to describe the political situation of China, Ethiopia, Siam, and Turkey in the interwar years that postcolonial lawyers conflated with colonialism. While Asia is often inaccurately presented as a homogeneously colonised continent, the distinction between the nature of the Japanese and European semicolonialism is the new area of study pioneered by historian Prasenjit Duara, *Sovereignty and Authenticity: Manchukuo and the East Asian Modern* (2003) 91.

<sup>13</sup> In cases involving Asian states, the ICJ has "avoided assessing the quality of territorial control by states, which is at the heart of the difficulties of the law of territory in the post-colonial era." Sookyeon Huh, 'Title to Territory in the Post-Colonial Era: Original Title and Terra Nullius in the ICJ Judgments on Cases Concerning Ligitan/Sipadan (2002) and Pedra Branca (2008)', 26 *EJIL* (2015) 709, 712.

It is notable that Asian polities under semicolonialism or foreign domination were less legalistic in comparison to those under direct colonial rule.<sup>14</sup> This history yields the central thesis of my paper. I argue that colonialism is a phenomenon of advantage to countries formerly under colonial rule in relation to inter-state disputes on territory and boundary. Conversely, countries that battled semicolonialism stand in a position of permanent disadvantage in inter-state third party adjudication. This is so because countries under colonial rule could use the archives and expertise of the erstwhile colonial powers.<sup>15</sup> Indeed, as Crawford and Miles note, “unreliable record-keeping, non-maintenance or destruction of archives and linguistic barriers have prevented other voices from being heard.”<sup>16</sup>

Much less still, nations such as Siam under foreign domination – given their informal and less legalistic approach and consequently less stationary production – are found wanting not just in actual evidence such as maps but also on how to argue using them. Besides, in the *Temple* case, both Cambodia and Thailand argued using foreign council which minimizes if not completely preclude, the possibility of a critical legal approach to litigation before the ICJ.

The following argumentative structure would be necessary to establish my central thesis. Section 2 establishes semicolonialism as a framework to study Siam. Section 3 records the treaty making between Britain, France, and Indochina as Siam’s political strategy to ward off a potential colonial capture. Section 4 introduces the history of Franco-British threat to Siamese autonomy with reference to the *Cheek v Siam* arbitration of the late 19<sup>th</sup> century. Thereafter, Section 4 proffers two alternative possibilities for understanding the concept of the state: (a) state as space rather than territory, and (b) territory of the state as people-centric. Moving to

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<sup>14</sup> As a result, the former produced less stationary than did the latter where the production, cataloguing and archiving of the colonial stationary was an essential part of running the colony. Evidently, Siam could not compete with the French colonial administration in Indochina in stationary and cartographic productions. To this thesis, *why*, and more importantly *when* this advantage or disadvantage accrues is relevant. The time period in which the dispute arose when one state had not developed its modernity entirely is certainly implicit. Nevertheless, emerging states like China, although semicolonial in the past, could still reject the jurisdiction of international courts citing imperialism. *The South China Sea Arbitration* (The Philippines v PR China), PCA Case No. 2013-19, Award (12 July 2016).

<sup>15</sup> This explains the dominance of men; mostly white, from France and England – two countries that colonized most of the world – in litigations before international courts and tribunals. There is now a shift to Americans, albeit men again, with the arrival of law firms. See, Yves Dezalay & Bryant Garth, *Dealing in Virtue* (Chicago University Press, 1996).

<sup>16</sup> James Crawford & Cameron Miles, Four Ways of Thinking about the History of International Law, in, Juan Carlos Sainz-Borgo et al (eds) *Liber Amicorum: Guðmundur Eiriksson* (LexisNexis, Gurugram, 2017) 288.

20<sup>th</sup> century, for the readers unfamiliar with the history of the *Preah Vihear* litigation, Section 5 offers a clear account of the majority and minority judgments including their reasoning. Thereafter, Section 6, discusses early postcolonial jurists engaged with issues of territory, state, and people in Asia generally and the *Temple of Preah Vihear* in particular within an analytical contrast between jurisprudence and epistemology.

## II. Of historians and Lawyers: Setting up the Framework

Decades after the World War II, historians and lawyers deploy two lenses – poststructuralist and postcolonial – to read international law.<sup>17</sup> The intellectual methodological disputations between deconstruction by Derrida, Foucault’s post-structuralism, on the one side, and Said’s postcolonialism, on the other, continue to reflect in international legal scholarship today. One difference between poststructuralists and postcolonials is in their lived experiences. Besides, international legal scholarship has often conflated Asia’s colonial and semicolonial experiences. Bringing further nuance to Asian history, historian Durara theorizes that Japanese semicolonialism is functionally different from European interwar colonialism:

Manchukuo was the first full-blown instance of what I call the “new imperialism”—an imperialism rooted in the historical circumstances of the United States, the Soviet Union and Japan, rather than in those of the older European powers. The new imperialism reflected a strategic conception of periphery as part of an organic formation designed to attain global supremacy for the imperial power. The imperialism that evolved through the middle fifty or sixty years of the twentieth century differed especially from earlier European ... colonial[ism] in several ways. While the new imperialists maintained ultimate control of their dependencies or clients through military subordination, they often created or maintained legally sovereign nation-states with political and economic structures that resembled their own.<sup>18</sup>

In the post-war world, nations emerging in Indochina were both a product of a long European colonialism and a short Japanese semicolonialism. In any event, formal decolonization of Asia hardly erased imperialism as older and newer forms of imperialism continued to exist.

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<sup>17</sup> Besides as Subrahmanyam notes, proponents of “orthodox Marxist historiography” as well the adherents of a “continuity thesis ... wish[ing] to paper over differences between precolonial and colonial political regimes and knowledge systems” today reject Said and Foucault both. Sanjay Subrahmanyam, *Europe’s India: Words, People, Empires: 1500-1800* (Harvard University Press, London, 2017) xii.

<sup>18</sup> Prasenjit Duara, The New Imperialism and the Post-Colonial Developmental State: Manchukuo in comparative perspective, 4 *Asia Pacific Journal* (2006) 1

What was the response of the postcolonial international lawyers? In 1961, faced with spawning imperialism as well as in an attempt to diagnose the nature of postcolonialism, Indonesian scholar Syatauw attempted to decouple Asia's colonial and semicolonial past.<sup>19</sup> In the first decade of the 21<sup>st</sup> century, postcolonial international legal scholarship has witnessed the rise of the publicists of two different theoretical persuasions: those who use colonialism as against those deploying semicolonial epithet to amplify the post-war imperialism of international law. Antony Anghie has famously established that colonial rule is central to the formation of international law in the nineteenth century.<sup>20</sup> Matthew Craven, on the contrary, thinks that semicolonialism manifesting in the unequal treaty regime, and not colonial rule, is central to explaining the role of international law in Asia and the continuance of informal empires during the Cold War.<sup>21</sup> To make Craven's point differently, for Becker Lorca, international law did not so much as impose itself on non-Western nations as the lawyers from semicolonial states themselves appropriated international law to claim equality with European states.<sup>22</sup>

As Oppenheim had conflated colonial and semicolonial Asian states at the height of positivism, Oppenheim's appropriation by postcolonial scholars with colonial and semicolonial pasts

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<sup>19</sup> J.J.G. Syatauw, *Some Newly Established Asian States and the Development of International Law* (M. Nijhoff, Leiden, 1961) 3-4. Before the ICJ Beijing, much like Syatauw, described the political situation of Asia before the World War II in two distinct idioms: "colonial rule or foreign domination". Witten Statement of China to the International Court of Justice on the Kosovo Issue', ICJ Written Submissions (2009) 3, available at: <http://www.icj-cij.org/docket/files/141/15611.pdf>. Judge Xue was China's ambassador to the Netherlands a year before China's written submission to the ICJ in the *Kosovo* case where China made *verbatim* reference to "colonial rule and foreign domination". Xue Hanquin, 'Cultural Element in International Law', *Melland Schill Lecture*, University of Manchester (5 May 2016) 5. China's semicolonial and India colonial history has led to a deep divide between the two nations on the meaning and universal nature of international law in relation to territory. Prabhakar Singh, 'Sino-Indian Attitudes to International Law: of Nations, States and Colonial Hangovers', 3 *Chinese Journal of Comparative Law* (2015) 348-374.

<sup>20</sup> "[F]or the international lawyers, colonial problems constituted a distinct set of issues that were principally not of a theoretical, but rather a political character." Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', 40 *Harvard International Law Journal (HILJ)* (1999) 3.

<sup>21</sup> "It was not, as Anghie and others readily accept, merely about subjugation or rule, but about subjugation for a purpose – whether that be to civilise or exploit (or both)." M. Craven, 'What happened to unequal treaties? The Continuities of Informal Empire', 74 *Nordic Journal of International Law* (2005) 382.

<sup>22</sup> Building upon Horowitz and Craven, Becker Lorca notes, "international law became universal through semi-peripheral appropriation". AB Lorca, 'Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation', 51 *HILJ* (2010) 475. Valentine Vadi, 'International law and its histories: methodological risks and opportunities', 58 *HILJ* (2017) talks about two histories: "historians' histories" and "jurists' histories".



ensured the inheritance of an international law blind to the difference between Siamese (semicolonial) and South Asian (colonial) history. It explains a good deal what afterwards happened in postcolonial approaches to international law. Based on their semicolonialism and colonialism pasts, postcolonial lawyers spawned two kinds of postcolonial approaches to international law. While the semicolonials went the length of ossifying the individual history of their own nations in order to claim a place in the family of nations, the publicists of colonial states argued for an already existing native tradition of international law in their countries. In that sense, the Chinese and Indian scholars, for example, made different arguments about international law and its universality.

Notably, while disagreeing with Anghie, both Craven and Becker Lorca omit Syatauw's analytical work. Quite tellingly, Syatauw had prefigured the problems associated with painting 19<sup>th</sup> century Asian history in singularly colonial ink. Syatauw, much like historian Duara today, had gainfully decoupled Asian past as early as in 1961 to theorize that both erstwhile semicolonial and colonial states did not after decolonisation yield the same kind of "newly established Asian states".<sup>23</sup> Because Syatauw's analytical framework has since been lost on publicists, scholars of Asia and international law find inexplicable the Asian ambivalence toward international law.<sup>24</sup>

### III. Indochina, Britain and France in the nineteenth century

It is worth noting that the terms of the Siamese unequal treaties were very different from those Japan had signed. Tomas Larsson has noted the difference: "Differences in the international institutional context, in the form of provisions contained in the so-called unequal treaties that Western powers foisted on both Siam and Japan in the nineteenth century, were of critical importance as part of the incentive structures that state elites were facing."<sup>25</sup> These terms were to shape the content of the Bowring treaty of 1855.

#### A. The British Burma-Siam Boundary issue: 1824-1846

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<sup>23</sup> In any event, for Syatauw, Japan, China and the Philippines, on one hand, and India, Sri Lanka and Burma, on the other, could not both be part of the same study called "some newly established Asian states" in postcolonial times. Syatauw, *supra* note 19, 3-4.

<sup>24</sup> To the extent studies on Asia and international law are carried without engaging Syatauw, the conflation of Asian colonial and semicolonial histories continues. Sompong Sucharitkul, 'Asian Perspectives of the Evolution of International Law: Thailand's Experience at the Threshold of the Third Millennium', 1 *Chinese Journal of International Law* (2002) 527-554.

<sup>25</sup> Larsson, *supra* note 4, 7.

After the British conquest of Burma, Britain negotiated a treaty with Siam covering the general area of commerce and friendly relations. Article 3 of the Treaty agreed that should any boundary dispute evolve between the new British possession and Siam, it would be settled “by both sides in a friendly manner.”<sup>26</sup> By the turn of twentieth century, Burma was colonized by Britain and Siam—at least in terms of its official foreign trade—was an economic satellite of the British Empire.<sup>27</sup>

In 1825, the East Indian Company sent its envoy, Henry Burney (1825-26), to the court of Siam in Bangkok to negotiate affairs of the Malay states and the trade agreement between them.<sup>28</sup> During Burney’s stay the British conquered Southern Burma. Southern Burma thus became the British Tenasserim Province, as a result, bringing the British western frontier with Siam into question. Burney requested the Court of Siam to appoint a high-ranking official to negotiate the boundaries between Britain’s newly acquired territories and Siam.<sup>29</sup>

Now while the British requested Siam to negotiate and settle boundary, the Court of Siam could not quite understand the meaning of boundary in the British sense. For the Siamese, the issue of boundary should have been “a matter for the local people, not those in Bangkok.”<sup>30</sup> The Siamese court replied that “the boundaries between the Siamese and Burmese consisted of a tract of Mountains and forests, which in several miles wide and which could not be said to belong to either nation. Each had detachment on the lookout to seize any person of the other party found straying within the tract.”<sup>31</sup>

During 1834-36, the colonial administration of Britain in India sent a mission to Chiangmai, north of Thailand today, then the seat of the Lanna Kingdom. The Lanna Kingdom, like South Burma, was a centre for teak and timber.<sup>32</sup> The mission was tasked with the negotiation of boundary between Tennasserim Province of British Burma and Lanna Kingdom. This resulted

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<sup>26</sup> ‘Treaty with the King of Siam signed in Bangkok on June 20, 1826’, ratified at Agra, India on January 17, 1828, in, Great Britain, Foreign Office, British and Foreign State Papers, Vol. 23 (London) 1153 ff.

<sup>27</sup> Tagliacozzo, ‘Ambiguous Commodities, Unstable Frontiers: The Case of Burma, Siam, and Imperial Britain, 1800–1900’, 46 *Comparative Studies in Society and History* (2004) 354-377.

<sup>28</sup> Winichakul, *supra* note 109, 62.

<sup>29</sup> Robson and Kinzer (eds) *The Collected Works of John Stuart Mill, Volume XXIX: Public and Parliamentary Speeches Part II July 1869–March 1873* (1988) 223, para 963.

<sup>30</sup> Winichakul, *supra* note 109, 64.

<sup>31</sup> Quoted in *ibid* 64.

<sup>32</sup> Koo, *supra* note 107.

in the Bowring Treaty of 1855 between Britain and Siam.<sup>33</sup>

Notably, Chiangmai was ready to make a treaty with Britain without consulting Bangkok. Additionally, Chiangmai gave away a portion of territory as a present to British that the latter had not asked.<sup>34</sup> In line with the idea of the *Mandala* system, it was not at all unusual for a Siamese tributary, here the Lanna Kingdom of Chiangmai, to make treaties without consulting its overlord in Bangkok. In Asia, matters related to boundaries were not a sovereign concern but that of the periphery and local authorities. Again, the two concepts, one of shared sovereignty over the periphery, and the second, a conception of a “zone” as the actual boundary should not be conflated. Siam presented both types of situations.

To the British this was confusing, even unthinkable. Moreover, the British persistently ordered local chiefs to provide any treaty or document identifying the boundaries.<sup>35</sup> However as these were friendly neighbours, the boundary did not forbid to trespass or to earn their living in the area. Hence no documents were made.<sup>36</sup> Where documentation, legal stationary and cartography are used to defeat precolonial epistemologies, they had a colonial purpose to serve.

Customarily, the smaller polities would approach Bangkok with customary gifts – *Bunga Mas* – as a sign of submission. In the nineteenth century, a number of misunderstandings arose between British colonial officials and Malay states under the overlordship of Bangkok. For instance, the Malay state of Kedah under the overlordship of Nakhonsithammarat, itself Bangkok’s tributary, in 1829 received from Penang, a British colony, a suggestion that boundary be marked between Wellsley province and Kedah, Nakhon’s tributary.

The ruler of Nakhon was confused and upset at the request as in his view the 1802 Treaty, although done without Bangkok’s knowledge, was a legitimate instrument that settled the issue.<sup>37</sup> Notably, Kings of Chiangmai and Nakhon had both gifted more territory to the British than the British expected; this was so because Siamese kings did not see territory and sovereignty as one and the same. What is more, the gifts were made without the knowledge and consent of Bangkok. This manifested the *Mandala* system of governance where a boundary

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<sup>33</sup> Nicholas Tarling, ‘The Mission of Sir John Bowring to Siam’, *50 J Siam Society* (1952) 91.

<sup>34</sup> Winichakul, *supra* note 109, 68.

<sup>35</sup> *Ibid* 73.

<sup>36</sup> *Ibid*.

<sup>37</sup> *Ibid* 69. Jeshurun, ‘The British Foreign Office and the Siamese Malay States, 1890–97’, *5 Modern Asian Studies* (1971) 143-159.

was not the concern of the King in Bangkok but that of the provincial ruler.<sup>38</sup>

As stated before, for the Siamese boundary was a frontier, whereas the British saw it as a mathematical line on a map. And that caused the confusion between the Nakhon and the British colonies in Malaya. In any event, the 1902 Siamese-Kelantan Treaty “brought to an end the traditional relations between the two Southeast Asian States, which had long existed within the established framework of regional political system.”<sup>39</sup> Later, the Siamese government took the position that it would allow free trade in land only after the system of extraterritoriality was abolished or modified in such a way that it would no longer pose a threat to state authority.<sup>40</sup> The 1907 Franco-Siamese a treaty transferred jurisdiction over French Asiatic subjects and protégés to Siamese courts of law. The Anglo-Siamese treaty of 1909 put all British subjects under modified Siamese legal authority.<sup>41</sup>

### B. Siam, Cambodia and France: 1821-1909

Cambodia remained a dual tributary of Siam and the Nguyen, now in Vietnam, until the establishment of the French protectorate in 1863.<sup>42</sup> Thailand stated before the ICJ, “the French efforts to secure control of Cambodia continued, and on the 15th July, 1867 a treaty was concluded between France and Siam, by which the King of Siam recognised the protectorate of the Emperor of the French over Cambodia, renounced his rights of tribute over Cambodia, but retained the provinces of Battambang, Siem-Reap and Sisophon.”<sup>43</sup>

However, Siam ceded all the three provinces to France under the Treaty of 1907. Like in case of British-Siam relations, from time to time the conflict between the indigenous tributary relationship and the European view of modern international law caused misunderstandings between Siam and France. An appeal to and application of modern international law would naturally side with European practices in Asia. As a result, Siamese practices would have no

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<sup>38</sup> TS Murty, ‘Evidence on Traditional Boundaries and Some Problems in its Interpretation’, 8 *Indian Journal of International Law* (1968) 475.

<sup>39</sup> Kobkua Suwannathat-Pian, ‘The 1902 Siamese-Kelantan Treaty: an End to the Traditional Relations’, 72 *J Siam Society* (1984) 95, 96. Sharom Ahmat, Kedah-Siam Relations, 1821-1905, 59 *J Siam Society* (1971) 97.

<sup>40</sup> Larsson, *supra* note 4, 13.

<sup>41</sup> *Ibid.* 15.

<sup>42</sup> Christopher Goscha, *Going Indochinese: Contesting Concepts of Space and Place in French Indochina* (2012) 14.

<sup>43</sup> See, Counter-Memorial of the Royal Government of Thailand, 170, para 5, available at: <http://www.icj-cij.org/docket/files/45/9253.pdf>.

consequence in international law, while French customs would reflect international law. For example, the claims made by King Mongkut against the French were based on “the indigenous polity”.<sup>44</sup>

In part, the independence of Siam was the result of the British to keep Siam a buffer between the French colonies to the east and the British to the west. In the struggle for power, in July 1893 two French gunboats blockaded the Chao Phraya River. Bangkok in consultation with the British acquiesced to the French. As a result, Siam not only ceded to France the left bank of the Mekong River, including the greater part of Luang Prabang and the islands in the river, but also compensated the French for losses incurred in the limited war.<sup>45</sup>

Under the French treaty of 1907, therefore Siam regained judicial autonomy over French Asiatic subjects and proteges, but only for a heavy price. Siam had to grant to them every right and privilege enjoyed by Siamese subjects as such; she had to submit to the requirement of European legal advisers sitting in a Court of Appeals, at least for a limited period; and in addition the treaty was sealed by Siam’s cession to France of further Siamese territory i.e., the territory of Battambang, Siem Reap and Sisophon.<sup>46</sup>

Bangkok’s relationship with the British was friendlier than her relationship with France. Therefore, one would assume that the 1909 British-Siam treaty would offer relatively more autonomy to Bangkok. However, as Bowes Sayre – a foreign national and advisor to the Siamese court – says: “Siam by the treaty of 1909 had gained the shadow rather than the substance of actual judicial autonomy.”<sup>47</sup> Siam under the treaty ceded to Great Britain the States of Kelantan, Tringgam, Kedah, Perles and adjacent islands. Siam thus gave all that she had to give in return for a treaty, as Bowes Sayre noted, “which saddled her courts forever with foreign advisers and which still maintained unaltered the three percent tariff restriction. Without having gained autonomy, Siam had nothing left with which to bargain.”<sup>48</sup>

#### **IV. Unequal Treaties and semicolonial Siam**

What are unequal treaties and their significance in Asian history? Explaining rather clearly the earliest forms of unequal treaties in Asia – those that Japan had signed with the United States

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<sup>44</sup> *Ibid* 93.

<sup>45</sup> *Ibid*

<sup>46</sup> FB Sayre, ‘The Passing of Extraterritoriality in Siam’, 22 *AJIL* (1928) 70, 79.

<sup>47</sup> *Ibid* 80.

<sup>48</sup> *Ibid*. CC Hyde, ‘The Relinquishment of Extraterritorial Jurisdiction in Siam’, 15 *AJIL* (1921) 428-430.

– historians Mason and Caiger note: As much a threat to Japan’s economy as a violation of its sovereignty, unequal treaties gave “concessions no Western states would have made to another Western state.”<sup>49</sup> Besides, Advisor to the Kingdom of Siam, Rolin-Jaequemyns, notes how Siamese Princes and Kings did not “always exactly understand the value of words” they spoke to the Europeans.<sup>50</sup> The French naturally “gain[ed] advantage from this, and even exaggerate the importance of what he has said or admitted, and the discretely congratulate him for what they call an act of emancipation from my tutorship.”<sup>51</sup> A particular problem that Rolin-Jaequemyns noted in the Franco-Siamese negotiations about territories was that the Siamese prince “had been too polite and not strong enough in his denials” to the French.<sup>52</sup>

Of course, positivist international law would not admit such a context to treaty making and treaty-making part of treaty interpretations. Naturally, the unequal treaty with Japan became the template for the subsequent unequal treaties that Europe and Japan signed with China and Thailand. However, not all the unequal treaties were similarly worded. As Larsson notes:

The argument, in short, is that provisions in treaties imposed on Siam beginning in 1855 prevented a “developmental” political equilibrium from emerging in a state whose geopolitical vulnerability increased dramatically from the 1870s. The “unequal” treaties imposed on Japan by Western powers were not similarly constraining, thereby allowing for the emergence of a developmental political equilibrium.<sup>53</sup>

These different aspects of the Bowring Treaty constrained influenced the policy options available to the Siamese state in its efforts to respond to external threats and to strengthen its authority and control over territory and population. Consequently, we may not expect modern Siam or France to conduct in a “casual and inconsequential” manner in relation to territorial sovereignty although Siam still saw itself as an unbounded kingdom working gradually to revise unequal treaties.<sup>54</sup> As Wyatt puts it, from 1851 and 1910, Siam confronted three issues:

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<sup>49</sup> R.H.P. Mason & J.G. Caiger, *A History of Japan*, revised edition (Tuttle, Singapore, 1997) 264. More generally, within international law scholarship, Craven offers two obvious explanations – conceptual and historical – for why the phenomenon of unequal treaties no longer seems to have significance in international law. Craven, *supra* note 21, at 337.

<sup>50</sup> Tips, *Gustave Rolin-Jaequemyns and the Making of Modern Siam*, *supra* note 2, 74.

<sup>51</sup> *Ibid.*

<sup>52</sup> *ibid* 79.

<sup>53</sup> Larsson, *supra* note 4, 3, 8.

<sup>54</sup> The frontiers of states “need not be established beyond dispute”. MN Shaw, ‘Territory in International Law’, 13 *Netherlands Yrbk Intl L* (1982) 61-91.

internal integration or Siamese colonialism, external territorial losses and survival of an independent Siam.<sup>55</sup> In the 19<sup>th</sup> century, the modernization of states in Asia had a particular meaning. “Oriental nations” such as Japan, Siam and China, could be “admitted to full membership in the Family of Nations upon satisfactory evidence that the citizens or subjects of foreign states enjoy within their dominions the rights, privileges, and protection of law accorded in European and American communities.”<sup>56</sup>

Therefore, Siam deployed Gustave Rolin-Jaequemyns, a Belgian, for law reforms as well as for “Siam’s foreign relations” till 1902.<sup>57</sup> Between 1909 and 1925 revising unequal treaties that Siam had signed with colonial powers was the highest priority on political agenda for which Siam employed American lawyers.<sup>58</sup> As a result, much like Japan, Siam under Chulalongkorn had begun to learn colonial ways for territorial consolidation where, as Winichakul notes, “a new kind of geography in which neither overlapping margin nor multiple sovereignty was permitted.”<sup>59</sup> Although in the process of slow modernization, Siam had not abandoned its pre-colonial epistemology of statecraft. Maps continued to represent polity and not the exact territory leading to confrontations “between different realms of geographical knowledge”.<sup>60</sup> As the closest minister to King Chulalongkorn, Prince Damrong supervised administrative and legal reforms in modern Siam. However, after the death of Chulalongkorn, as Judge Koo noted, Prince Damrong gave up his ministry to take up “duties connected with the National Library and archaeology.”<sup>61</sup> Thus Damrong’s visit to the Temple, the visit that the ICJ held binding against Siam in the *Temple* case, was not in his capacity as the “Minister of Interior”.

That Prince Damrong is considered the first authentic historian of modern Siam should not be

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<sup>55</sup> David Wyatt, *Thailand A Short History* (1984) 181.

<sup>56</sup> Editorial, *supra* note 6, 954. “[I]t is not to be denied that the existence of a legal system is a primal condition of statehood.” Shearer, *Starke’s International Law*, 11<sup>th</sup> edn (1994) 86.

<sup>57</sup> Thamsook Nurnnonda, ‘The First American Advisers in Thai History’, 62 *J Siam Society* (1974) 121, 124. Mr. and Mrs. Jottrand, *In Siam. The Diary of a Legal Adviser of King Chulalongkorn’s Government* (White Lotus, Bangkok, 1996) (W.E.J. Tips, trans & intro) vii. Christian de Saint-Hubert, ‘Rolin-Jaequemyns (Chao Phya Aphay Raja) and the Belgian Legal Advisors in Siam at the Turn of the Century’, 53 *J Siam Society* (1965) 181, 187.

<sup>58</sup> Peter Oblas, ‘Treaty Revision and the Role of the American Foreign Affairs Adviser 1909-1925’, 60 *J Siam Society* (1972) 171.

<sup>59</sup> Winichakul, *supra* note 109, 106.

<sup>60</sup> *Ibid.* 107.

<sup>61</sup> Dissenting Opinion of Judge Koo, *supra* note 107, at [].

lost on international lawyers.<sup>62</sup> Between 1913 and 1932, Damrong had been “shifting his focus from administration to academia”.<sup>63</sup> He was the first writer in Siam to construct Siam’s history using Burmese sources for objectivity and perspective. Putting his works in context, editor of Damrong’s classic *Thai Rop Phama*, Becker notes that “[a]lthough Prince Damrong presents this pre-1767 phase of the Thai-Burmese wars as a 228-year struggle between two nations headed by monarchies, in fact the greater part of the conflict is packed into a fifty year period and is closely bound up with rivalry over an increasingly lucrative trade route, and with adjustment to a new type of warfare which rearranged the geopolitical balance of power.”<sup>64</sup>

Prince Damrong, in charge of Siam’s transition to modernity, was reconciling pre-colonial statecraft where boundaries as zones and frontiers were the preserve of the local tributary with a modern map, which now represented the sovereign territory. In an attempt to keep its independence, Siam was arbitrating pre-coloniality and modernity where modernity was spilling over into the Siamese epistemology, disfiguring and displacing the latter in the process. Ironically, given the history and nature of Prince Damrong’s contribution, the same Damrong’s actions were seen as ceding territory to Cambodia in the *Temple* case.

#### A. Situating *Cheek v Siam* Arbitration (1897)

The *Cheek v Siam* arbitration conducted at the end of 19<sup>th</sup> century provides an opportunity for a contextual analysis of competing colonial stakes in Indochina and its impact on the Siamese approach to international law.<sup>65</sup> *Cheek v Siam* prods us to go beyond the arguments of valid law alone to offer a contextual and distributive analysis of the stakes, assumptions and impacts of competing French and British colonialism in Indochina.

In fact, the *Cheek v Siam* dispute is key to understanding how Siam, as an unbounded kingdom, sagaciously distributed to nationals of European states concessions that, far from representing

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<sup>62</sup> Prince Damrong Rajanubhab, *Our Wars with the Burmese: Thai-Burmese Conflict 1539-1767* (2001) xv. Kennon Breazeale, A transition in historical writing: the works of Prince Damrong Rachanuphap, 59 *J Siam Society* (1971) 25.

<sup>63</sup> *Ibid.* x.

<sup>64</sup> *Ibid.*, xxxv.

<sup>65</sup> Award was given by Sir Nicholas Hannen, Chief Justice of Her Britannic Majesty, in the Supreme Court of China and Japan. *Marion Cheek (US) v Siam*, 1898, 3 *Whiteman, Damages in International Law* (1943) 1646. Arbitration in Siam, *The Straits Times* (27 December 1897) 2. See, 41<sup>st</sup> Session, 2 Yearbook of International Law Commission (1989), A/CN.4/SER.A/1989/Add.1(Part 1) at 20, para 70. Numnonda Thamsook, ‘The Angle-Siamese Secret Convention of 1897’, 53 *J Siam Society* (1965) 45.



a political threat, were expected to support and reinforce Siamese independence. Thus, while colonial powers had the technology of cartography upon which Siam heavily, even imprudently relied, Siam's only currency was her power to tactically distribute concession contracts to square off colonial threats. As a result, Siam signed almost all the treaties under the shadow of gunboats.<sup>66</sup>

France had been trying to increase its influence in Siam in the second half of the 19<sup>th</sup> century without much success.<sup>67</sup> At the time, Mr. Defrance, a politician and diplomat, was tasked with the conduct of the French colonial project in Indochina. Marion Cheek, an American national, who had operated a teak felling business in northern Siam, ran out of capital in 1888. Siamese government encouraged the presence of competing colonial powers in teak felling business to dilute the monopoly of the British in the timber trade. The Siamese government had therefore "twice loaned Cheek sufficient capital for the continuation of his business". However, when Cheek repeatedly defaulted on his interest payments between 1890 and 1892, "the government moved to confiscate his leases."<sup>68</sup> Cheek, thereafter, mounted a legal resistance where Cheek's case for ownership of the leases was upheld. The French came to know from the American Legation in about the "availability for purchase of the Cheek concessions".<sup>69</sup>

Siam could not legally cancel or prevent the French from acquiring the Cheek farm. In consultations with the Americans, the French proposed a French Syndicate to exploit the Cheek concessions. Defrance wrote to Paris beseeching the French government "to seize this opportunity for expanding French political influence."<sup>70</sup> As with other industries, Defrance saw the benefits of undermining the British hold on the Siamese teak industry too. He hoped that once Siam is forced to recognize French rights to register some 20,000 migrants from the Luang Prabang area of Indochina working Siamese teak forests in the north, "the French Syndicate would become a form of French political enclave." Unfortunately for Defrance, the *Banque de*

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<sup>66</sup> However, due to international law's formalism in dispute resolution, the threat of force in unequal treaty making has almost no bearing on the interpretation of such treaties in actual international disputes between erstwhile colonial and semicolonial states. Besides, later, the VCLT disallowed *rebus sic stantibus* for boundary-establishing treaties. *Vienna Convention on the Law of Treaties*, 1155 UNTS 331 (1969) art 62 (2)(a).

<sup>67</sup> Patrick Tuck, *The French Wolf and the Siamese Lamb: The French Threat to Siamese Independence 1858-1907* (1995) 181.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.* 182.

*l'Indochine* delayed its commitment for buying the *Cheek* concessions and DeFrance's political project collapsed.

Notably, in the matter of commercial concessions, the Siamese were acutely aware of the political implications of allowing large foreign commercial enterprise of any kind, let alone those of the French, to develop in Siam. On the infrequent occasions, as Tuck writes, when the Siamese government was "prepared to sanction important concessions to Europeans, they usually gave them to nationals of states which, far from representing a political threat, might be expected to support and reinforce Siamese independence."<sup>71</sup>

After decolonisation, international law of injuries to aliens would recognize the economic injuries to ex-colonial powers without looking at the context in which such colonial powers acquired land and other benefits in the colony. It was due to the lack of any critique in a such a formalist approach to injury to alien that Judge Guha Roy very poignantly noted, "To the extent to which the law of responsibility of states for injuries to aliens favors such [colonially acquired] rights and interests, it protects an unjustified status quo or, to put it more bluntly, makes itself a handmaid of power in the preservation of its spoils."<sup>72</sup> The international law of injury to aliens defends colonially acquired property much the same way the law of territoriality protects colonially acquired land under the principle of *rebus sic stantibus*.

Craven is one of the few international legal theorists who investigates semicolonial connections of international law. The unequal treaties with Asian polities, he thinks, did not have colonial capture or imperial annexation as their "overt intention".<sup>73</sup> Although the territory of China and Siam were ceded, or leased to Western Powers, "the dominant political ethos in Western Europe in the middle of the 19th Century was largely opposed to the expansion of formal colonial possessions – embracing, in its stead, the ideal of free trade." These unequal treaties thus encapsulate the aim to eliminate the "historic impediments to trade such as local monopolies".<sup>74</sup>

Nevertheless, should one pay close attention to the physical manifestation of the "ideal of free trade", a different reality emerges. The representation of colonialism as innocent spill for free market ideology emerges from the international lawyers' historically thin arguments. As

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<sup>71</sup> *Ibid.* 183.

<sup>72</sup> S.N. Guha Roy, 'Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?' 55 *AJIL* (1961) 863, 866.

<sup>73</sup> Craven, *supra* note 21, 345.

<sup>74</sup> Craven, *Ibid.*

historian Sunil Amrith explains, “The Indian shipping industry tumbled in the 1820s: pushed to the margins by the rise of steam technology, squeezed by political pressure from British shipbuilders to restrict entry to Indian ships”.<sup>75</sup> Thant Myint-U – a historian and grandson of the first Secretary General of the UN – notes a particular account of the *modus operandi* of the London Chamber of Commerce:

[T]he Burmese Council of State imposed a large fine of over a hundred thousand rupees on the Bombay Burmah Trading Corporation. A provincial governor had charged that the Scottish company, based in Rangoon, had been allegedly exporting timber from Upper Burma without paying the proper royalties. The governor had imposed a fine, the company had appealed, and Mandalay had now upheld the provincial decision ... The British commissioner in Rangoon suggested impartial arbitration. But the Court of Ava would not be moved, and the London Chamber of Commerce petitioned Lord Churchill either to annex Upper Burma or at least to establish a protectorate over the irksome kingdom.<sup>76</sup>

International law in Indochina thus established its legal validity by coercion of native states using unequal treaties for the promise of freedom of trade. Consequently, what matters to the states formerly under foreign domination as well as colonial rule today? Arguably, the facticity of occupation and possession in territorial disputes and not the real intentions behind the unequal treaty for free trade ultimately matters before international courts and tribunals. As a concrete example, the *Preah Vihear* dispute demonstrates that it is either the evidence of colonial possession or the colonial cartography, as facticity, that holds the key to the operationalization of the law before a tribunal.

Moreover, the irony of the ideal of free trade is further deepened when scholars today attribute Burma’s eventual loss of independence in 1885 to Britain to the Bombay-Burmah Trading Corporation where the Corporation played a “central role”.<sup>77</sup> This aspect becomes all too apparent in debates around the *Cheek v Siam* arbitration. Asia inherited its ambivalence for the law of nations from, to use Privy Council’s words, the European Colonial companies, that were “frequently of an ambiguous character, and that it becomes extremely difficult to ascertain, whether any particular act is to be attributed to the exercise of the political power of a sovereign State, or to the functions of a company of merchants trading to the East Indies.”<sup>78</sup> In such ways, the European corporations planted the seeds of colonial and semicolonial capture in Asia.

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<sup>75</sup> Sunil Amrith, *Crossing the Bay of Bengal* (Harvard University Press, 2013) 81.

<sup>76</sup> Thant Myint-U, *The River of Lost Footsteps: A personal History of Burma* (2008) 12.

<sup>77</sup> Nigel Brailey, ‘The Scramble for Concessions in 1880s Siam’, 33 *Modern Asian Studies* (1999) 513–549, 516.

<sup>78</sup> *Ex-Rajah of Coorg (Veer Rajundur Wadeer) v East India Company* (1860) 29 Beavan 300, 309.

## B. Space versus Territory in International Law: Error of the Erotic Map

In much of precolonial Asia sovereign boundaries had been the domain of the peripheral polity. It was this aspect that the ICJ clearly denied when rejecting Thailand's argument of the provincial administration of the region in which the temple was situated. The idea of a boundary for Siam did not mean a thin line on the territory but a zone or area under the administration of the local and provincial rulers – a political space where sovereignty was shared as opposed to a mathematically defined territory on a piece of paper called a map.

Maps, therefore, had different meanings for Siam and the Europeans; for the former it was a spatial representation of a non-bounded kingdom, for the latter, however, a map was a representation of a controlled territory inked on a paper with a mathematical precision. Peter Cusay attacks, as it were, Cambodia's acquired fetish for the Annex 1 Map in the *Preah Vihear* case in the following words:

If there is an erotics of the map, connected with pleasurable feelings of almost divine mastery that arise in a fantasy of exact visualization, from an eye-in-the-sky origin, of naked and submissive space yielding its secrets to the connoisseur, then the services of Dean Acheson [Cambodian lawyer] may relate to bodily senses as much as cerebral conceits. For Acheson repeatedly involves the judges in handling, manipulating, and ogling the sleek lines and contours of maps. He multiplies and disseminates maps, makes transparent overlays (ghost maps?) and urges judges to apply them. He instructs expert witnesses to look for moist streams in magnifying glasses and encourages judge-voyeurs.<sup>79</sup>

In direct contrast, a *Mandala* system of governance was central to the lives of the Asian polities from India to Indochina.<sup>80</sup> Historian Thapar defines *Mandala* theory as “a circle of kings, the one desirous of supremacy is surrounded by serried ranks of friends and enemies, and politics is connected with degrees of support and hostility within the widening circle.”<sup>81</sup> As a result the sovereignty of a state in the premodern Asian polity was neither single nor exclusive. It was multiple and capable of being shared. In Siam, the idea of extending a *Chakravartin* rule

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<sup>79</sup> Peter Cusay, ‘Borders on the Fantastic: Mimesis, Violence, and Landscape at the *Temple of Preah Vihear*’, 32 *Modern Asian Studies* (1998) 849, 869.

<sup>80</sup> Kautilya (400 BC) is credited with the theoretical exposition of the “the Circle of States” *Mandala* theory. L.N. Rangarajan (ed) *Kautilya, The Arthashastra* (1992) 95. Bandyopadhyay, *International Law and Custom in Ancient India* (1920). 9-10.

<sup>81</sup> Romila Thapar, *The Penguin History of Early India: From the Origins to AD 1300* (2002) 446.

exemplified a “self-presumed protector who sought the protected to fulfill his own desire.”<sup>82</sup> Notably, however, the Asian overlord did not usurp the sovereignty of weaker tributary states, nor was it encroached upon as in modern colonialism.<sup>83</sup> It is no wonder that while rooting for the validity of acts performed “by local or provincial authorities” over that of central Siamese authority, Judge Koo argued for the recognition for the *Mandala* system, although without naming it.<sup>84</sup> Judge Koo noted:

Thailand, on her part, has filed with the Court a number of affidavits and copies of original documents as evidence of acts of administrative control by Siamese authorities in exercise of sovereignty in the area in which the Temple of Preah Vihear is situated. These acts relate, among other matters, to the building of roads to the foot of Mount Preah Vihear, the collection of taxes by Siamese revenue officers on the rice fields of Mount Preah Vihear, the grant of permits to cut timber in the area, the visits and inspections by Siamese forestry officers, the taking of an official inventory in 1931 of ancient monuments which included the Temple of Preah Vihear.<sup>85</sup>

The ICJ’s failure to offer any legal validity to local and provincial administration not only confirmed a top-down monopoly of Westphalian state, it failed to accommodate the Asian practices of bottom up *Mandala* administration of state in Siam. In such ways, the hegemony of modern geography and mapping during the colonial period has obscured the premodern Asian practices that viewed sovereignty, state, and territory as non-exclusive concepts for governance. Disputes after decolonization in Asia occasioned the clash of the two models. As a result, Winichakul notes, “The grid of modern mind renders the unfamiliarity of the indigenous polity and geography more familiar to us by translating them into modern discourses. Such scholars fail to recognize the rapidly increasing role of new technology of space. Consequently, these studies mislead us into considering only the point of view of those states which become modern nations”.<sup>86</sup> In a manner of speaking, Asian states were permitted to the province of international law only after ossifying their histories in favour of uncritical universalism.

Ironically, the technology of mapping with apparent trappings of giving clarity and certainty

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<sup>82</sup> Winichakul, *supra* note 109, 84. The *mandala* system is similar, if not same, as the Chinese tributary system.

<sup>83</sup> *Ibid*, 88.

<sup>84</sup> Dissenting Opinion of Judge Koo, *supra* note 103, 93, para 39.

<sup>85</sup> *Ibid*. 92, para 38.

<sup>86</sup> “The fate of tiny tributaries under dispute remains virtually unknown. Their voices have not been heard. It is as if they occupied a dead space with no life, no view, no voice, and thus no history of their own.” Winichakul, *supra* note 109, 96.

to polities and kingdoms in Asia, singlehandedly pushed peripheral polities into a regressive path of ethnic conflicts. When push came to shove, i.e. determination of boundary between Thailand and Cambodia, Cambodia's colonial past, in particular the Franco-Siamese Treaty of 1907, became an advantage for Cambodia. The new technology of mapping, with territoriality as its core, would favour an ex-colonial nation against a nation that had could not be colonized. In that sense, ICJ's ruling that the Temple of Preah Vihear is situated in the territory under the sovereignty of Cambodia was not entirely surprising or unexpected.<sup>87</sup>

The relationship between the provincial authorities and central Siamese authorities, as Winichakul explains, works differently than the European idea of sovereignty: As a conglomeration of towns, a Siamese kingdom was composed of political-territorial patches with a lot of blank space in between".<sup>88</sup> These blank spaces sometimes did not belong to any overlord. Their presence was tolerated because they kept enemy at a distance.

As argued before, under the *Mandala* system, local or provincial authorities enjoyed independence in administrative matters. Such local polities represented the political extent of the Siamese polity without a boundary in European sense. Fixed boundary is a European invention and efforts to have a boundary-less Europe in Schengen treaty proves that Europe's idea of a fixed boundary in Asian was regressive and opportunist. Bangkok used a number of terms – *Khopkhet*, *Khetdaen*, *Anakhet*, *Khopkhantsima* – to denote frontiers but none corresponded to the European meaning of a thin-line boundary. A thin line boundary, a regressive concept, was a by-product of mapping, the new technology of colonialism. The older Chinese and Siamese maps depicted space and not territory in the modern cartographic sense.

Historically speaking, the boundaries of the Siamese kingdom were discontinuous and, therefore, the kingdom was nonbounded, an idea discomfoting, if not totally alien, to the colonial powers.<sup>89</sup> In premodern Siam, sovereignty and boarders were not coterminous and belligerent states preferred to leave space unsettled since it served as a buffer keeping a distance between them.<sup>90</sup> The study of Siamese-British attempt to draw a boundary, at the insistence of the British after the capture of Burma, on Siam's western frontier explains the clash of concepts

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<sup>87</sup> *Temple case*, *supra* note 93, 36.

<sup>88</sup> Winichakul, *supra* note 109, 75.

<sup>89</sup> *Ibid* 76.

<sup>90</sup> There are two concepts here. (1) Where there is shared sovereignty between the central kingdom and the peripheries, and (2) where two States left a buffer zone between them. The second concept applies *inter*-state and the first one operates *intra*-state. The shared conception of sovereignty and the buffer zone should not be conflated. *Ibid* 77.

clearly.

Importantly, the Siamese authorities continued to enforce administrative control over the area without any protest from the French authorities or any objection by the local inhabitants. This fact is significant as the documentation shows that the French authorities had elsewhere been alert and vigilant in having France's newly acquired territorial sovereignty respected by Siam.<sup>91</sup> The French would have certainly complained had they considered the Temple area to be part of the ceded territory. Yet a formalist World Court expected semicolonial Thailand, much less legalist, to register a protest.

## V. Thailand and International Law in the 20<sup>th</sup> century

In Indochina, while Siam signed unequal treaties with the French and the British – and therefore experienced semicolonialism, Cambodia was under the direct French colonial rule. Of the semicolonial Asian nations, notably, while Ottoman Turkey was a defendant in the classic *Lotus* case at the Permanent Court of International Justice,<sup>92</sup> Thailand defended itself in the *Temple* case before the International Court of Justice (the ICJ).<sup>93</sup> Quite notably, colonial power France was either a direct or, as it were, an indirect litigant in the *Lotus* and the *Temple* cases respectively. French colonial stationary and cartography, if you will, became the proxy for Cambodia's participation in the *Temple* case.

### A. The *Temple of Preah Vihear* case, 1962: The Original Sin

Cambodia instituted proceedings against Thailand in the *Temple of Preah Vihear* case in 1959. In 1962, by nine votes to three, the ICJ, found that the Temple of Preah Vihear was situated in Cambodia.<sup>94</sup>

Evidently, the subject of the dispute was sovereignty over the region of the Temple of Preah Vihear. This temple stood on a promontory of the Dangrek mountain range, which constituted the boundary between Cambodia and Thailand. The dispute had its origins in the boundary settlements made in the period 1904-1908 between France – then conducting the foreign relations of Indochina – and Siam.<sup>95</sup>

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<sup>91</sup> *Ibid* 95, para 41.

<sup>92</sup> *SS Lotus* [1927] PCIJ (ser. A) No. 10 (Sept. 7).

<sup>93</sup> *Temple case*, p. 6.

<sup>94</sup> *Temple of Preah Vihear case*, *supra* note 93, 8.

<sup>95</sup> *Ibid.* 14-15.

More particularly, the dispute involved application of the Treaty of 13 February 1904. The Treaty, by virtue of a Franco-Siamese Mixed Commission, allegedly settled the frontier. The Commission was also expected to delimit the exact boundary. As per the Treaty of 1904, in the eastern sector of the Dangrek range, in which Preah Vihear was situated, the frontier was to follow the watershed line.<sup>96</sup>

In January-February 1907, the President of the French section reported to his Government that the frontier-line had been definitely established. The ICJ assumed that a frontier had been surveyed and fixed although there was neither any record of any decision and nor reference to the Dangrek region in any minutes of the meetings of the Commission. The ICJ took this view also because, at the time when the Commission might have met for the purpose of winding up its work, a further Franco-Siamese boundary the Treaty of 23 March 1907 was concluded.<sup>97</sup>

The preparation of maps constituted the final stage of the delimitation. Crucially, the Siamese Government, lacking adequate technical means, had requested that French officers should map the frontier region. After the cartography, these maps were communicated to the Siamese Government in 1908. Amongst them was a map, the famous Annex I map, of the Dangrek range showing Preah Vihear on the Cambodian side. Cambodia principally relied on this map in support of her claim to sovereignty over the Temple.

Thailand, on the other hand, contested the Annex 1 map's validity. Thailand argued that the map had no binding character. It pointed out that the frontier indicated on the map was not the true watershed line according to the geography of the place. Consequently, Thailand made two arguments. First, for Thailand the true watershed line would place the Temple in Thailand as well as that the map had never been accepted by Thailand. Alternatively, if Thailand had accepted the Map, she had done so only because of a mistaken belief that the frontier indicated corresponded with the watershed line.<sup>98</sup>

The World Court, however, did not agree with Thailand's arguments. It ruled that the maps were communicated to the Siamese Government as purporting to represent the outcome of the work of delimitation. Given Thailand's silence at the time and even much later, Thailand was deemed to have acquiesced to the validity of the maps in law.<sup>99</sup> The maps were moreover

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<sup>96</sup> *Ibid.* 17.

<sup>97</sup> *Ibid.* 19-20.

<sup>98</sup> *Ibid.* 24.

<sup>99</sup> *Ibid.* See, R Gardiner, *Treaty Interpretation*, 2<sup>nd</sup> edn (2015) 264-65.



communicated to the Siamese members of the Mixed Commission. The Siamese Minister of Interior, Prince Damrong, even thanked the French Minister in Bangkok for the maps. Besides, the map was also shared with Siamese provincial governors. If the Siamese authorities accepted the Annex I map without investigation, the ICJ said, they could not now plead in law any error vitiating the reality of their consent.<sup>100</sup>

The later negotiations for 1925 and 1937 Franco-Siamese Treaties confirmed the existing frontiers. Subsequently, in 1947 before the Franco-Siamese Conciliation Commission, Washington, Thailand did not protest. For the World Court this meant a natural inference that Thailand had accepted the frontier at Preah Vihear as it was drawn on the map, irrespective of its correspondence with the watershed line.

Thailand stated that – having been at all material times in possession of Preah Vihear – she had had no need to raise the matter. In fact, Thailand cited the acts of her administrative authorities on the ground as evidence that she had never accepted the Annex I line at Preah Vihear. The Court found it difficult to regard such “local acts” as overriding the consistent attitude of the “central authorities”. The Court therefore felt bound to pronounce in favour of the frontier indicated on the Annex I map in the disputed area and it became unnecessary to consider whether the line as mapped did in fact correspond to the true watershed line. The Court in such ways upheld the submissions of Cambodia concerning sovereignty over Preah Vihear.<sup>101</sup>

#### B. The three Musketeers: Judges Quintana, Koo and Spender

The three dissenting opinions to the merits ruling of 1962 show the possibility of an epistemological alternative. Not that the majority bench in *Preah Vihear* was incapable of generating an intellectual dialectic that appreciated an oriental epistemology. However, what the ICJ was incapable of during the Cold War was a political conviction to rethink international law’s epistemological bases. The Court was not willing enough to go beyond the colonial law despite the prodding by Judges Koo and Quintana in their dissenting opinions. The following section revisits the dissenting opinions of Judges Koo, Quintana and Spender.

##### 1. Judge V.K. Wellington Koo

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<sup>100</sup> *Ibid.* 30.

<sup>101</sup> In the *Temple of Preah Vihear* case Cambodia’s independence from France notwithstanding, the ICJ did not address the issue of Cambodia’s of succession from France. Matthew Craven, *The Decolonization of International Law* (2007) 182.

As the head of the nationalist China's delegation to the League of Nations, Wellington Koo was a famous proponent of *clausula rebus sic stantibus* in relation to unequal treaties. Koo had experienced Japanese imperialism in China first hand during interwar years.<sup>102</sup>

In the post-war world, the same Judge Koo was clearly well placed to appreciate Thailand's predicament. Much like China, Siam too was a semicolonial state in the interwar years. Judge Koo displayed an acute understanding of Siam's semicolonialism to offer an "Oriental" view of international law. Given Koo's interwar Manchurian experiences while reporting to the League of Nations, his empathy for the Siamese situation in relation to French colonialism in Indochina made his powerfully reasoned dissent in the *Temple of Preah Vihear* case inevitable.<sup>103</sup> Conclusively, as a lawyer trained in America and an eminent Chinese diplomat, Koo was perhaps the most perceptive, informed, and empathetic of the judges on the merits bench. He could offer, as he did, simultaneously an equally powerful legal and a situational analysis of the facts and law in the case.

Arguably, at the time Judge Koo was a leading proponent of "local customary law" given his disappointments with unequal treaties resulting in his advocacy for *rebus sic stantibus*. Two years before, in his separate opinion in the *Right of Passage* case (1960) between an erstwhile colonial power (Portugal) and an ex-colony (India), Koo had rooted for a "local custom" and Portugal's colonial rights of military passage subject to India's "control and regulation".<sup>104</sup> Effectively, Koo had sided with the Portuguese claims. However, by writing a separate and a dissenting opinion in these two cases Koo had made a distinction between India's colonial past and Siam's semicolonial past. Thus, the ICJ's formalist reading of Siam's "customary act of Oriental courtesy" as binding on an erstwhile semicolonial state to Judge Koo was unsustainable "in fact or law".<sup>105</sup>

Judge Koo asked whether the Annex I map has a treaty character? He noted that the frontier line marked on the Annex 1 map was neither approved nor even discussed by the Mixed Commission of Delimitation. Besides the French and Siamese Presidents of the said

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<sup>102</sup> Wellington Koo, 'Letter from the Chinese Delegation to the Secretary-General of the League of Nations, 26 April 1933, (Geneva 1933)', 5 *League of Nations Official Journal* (1933). 6. Earlier Koo had resisted the legalisation at the PCIJ of ROC's unilateral revision of the unequal treaty with Belgium. *Denunciation of the Treaty of 2 November 1865 between China and Belgium* [1927] PCIJ (Ser. A,) No. 8, p. 4, 5.

<sup>103</sup> Dissenting Opinion of Judge Koo, in, *Temple case*, *supra* note 93, 80.

<sup>104</sup> Separate Opinion of Judge VK Wellington Koo, in, *Case concerning Right of Passage over Indian Territory* (Merits) ICJ Reports 1960, p. 6, 54.

<sup>105</sup> Dissenting Opinion of Judge Koo, *supra* note 103, 90, 75.

Commission did not agree to this. After tabling these “indisputable facts” Judge Koo opined that “the map in question does not possess a treaty character as claimed by Cambodia and therefore, as such, obviously cannot be binding upon Thailand in regard to the issue of territorial sovereignty over the Temple of *Preah Vihear*.”<sup>106</sup>

Cambodia, *inter alia*, argued that the planting of the French flag during a visit of Prince Damrong of Bangkok to the temple area constituted acquiescence by the latter in favour of the French. Judge Koo’s dissent noted the clash between Asian and European customs and their different interpretation by the Thai Prince Damrong:

The display of his national flag by a foreign official, even by a private Occidental, was not an uncommon sight in an Asiatic country during that epoch; it may or may not have displeased the Prince. There was no clear cause for the Prince to make a protest at the time or to ask his Government to lodge one in Bangkok, though in the affidavit of one of his daughters who was with the Prince during this visit, it is stated that he privately considered the hoisting of the French flag at the place of their meeting and the donning of his official uniform by the French officer to be “impudent”.<sup>107</sup>

As to Prince Damrong’s request for further copies of the alleged map to the French, Judge Koo said, it was not difficult to understand his request. Prince Damrong, given Siam at the time did not yet have a good modern map showing the whole frontier region between Siam and French Indochina, called for more copies for distribution to the Siamese provincial authorities”.<sup>108</sup> It was part of a gradual learning in Siam where, as Winichakul would put it, “To fulfill the desire to have their geo-bodies concretized and their margins defined for exclusive sovereignty, the French and the Siamese alike had fought both with force and with maps.”<sup>109</sup> Because maps signified different priorities, a century of colonial experience had forced Siam to learn colonial cartography for which it was dependent upon Britain and France. Therefore, decades prior to the dispute Siam did not possess European cartographical abilities.<sup>110</sup>

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<sup>106</sup> *Ibid*, 80.

<sup>107</sup> Dissenting Opinion of Judge Koo, in, *Temple case*, *supra* note 93, 90, para 33.

<sup>108</sup> *Ibid* 84.

<sup>109</sup> Thongchai Winichakul, *Siam Mapped: A History of the Geo-body of a Nation* (1995) 112.

<sup>110</sup> Thai cartography emerged from Chinese knowledge wherein the “Chinese paid more attention to their inland waterways than to their seacoast, rarely sending scientific expeditions oceanward.” Phva Salwidhannidhes, ‘Study of Early Cartography of Thailand (Siam)’, 50 *J Siam Society* (1952) 81, 82. Jordan Branch, Mapping the Sovereign State: Technology, Authority, and Systemic Change, 65 *International Organization* (2011) 1-36

Moreover, Judge Koo gives context to the establishment of Franco-Siamese Mixed commission. Thailand's chief claim before the Commission consisted retrocession from France of several entire provinces. Siam had yielded territories to France mainly in 1904-1907, and the map in dispute was obviously used to indicate their location and limits.<sup>111</sup> Naturally, the precise question of the ownership of the *Temple of Preah Vihear* was not an original issue. Raising this question involving the territorial sovereignty of an area of the size covered by the ruins of this sanctuary along with Thailand's principal claim for the retrocession of several provinces would obviously have appeared incongruous and out of place at the time.<sup>112</sup> Besides, as the daughter of Prince Damrong noted: "It was generally known at the time that we only give the French an excuse to seize more territory by protesting. Things had been like that since they came into the river Chao Phya with their gunboats".<sup>113</sup>

As a result, Judge Koo wrote, "customary act of Oriental courtesy" and the then prevailing conditions in Siam — and, in fact, in other parts of Asia — did not have the meaning and significance sought to be inferred from it by the French and other European colonial powers.<sup>114</sup> The hostile relations between Siam and French Indochina allowed Judge Koo to uphold "natural and reasonable" Bangkok's explanation that Siamese actions must not always be seen with a European eye.<sup>115</sup> Indeed, a situation not peculiar to Siam, generally speaking, it was "the common experience of most Asiatic States in their intercourse with the Occidental Powers during this period of colonial expansion."<sup>116</sup>

## 2. Judge Moreno Quintana

Judge Quintana dissented saying to take a decision "on the basis of assumptions or hypotheses in order to resolve the question at issue would not seem very consistent with the rules of judicial settlement. There has been no conclusive evidence showing any tacit recognition by Thailand of the alleged Cambodian sovereignty over the area in question. It is the facts, clear facts, which must be taken into account."<sup>117</sup> More importantly, "watershed is not an intellectual abstraction", he noted.<sup>118</sup> He cautioned, "territorial sovereignty is not a matter to be treated

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<sup>111</sup> Dissenting Opinion of Judge Koo, *supra* note 107, 89.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.* 91, para 34.

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.* 91.

<sup>116</sup> *Ibid.*

<sup>117</sup> Dissenting Opinion of Judge Moreno Quintana, in, *Temple of Preah Vihear*, *supra* note 93, 67.

<sup>118</sup> *Ibid.* 68.

lightly, especially when the legitimacy of its exercise is sought to be proved by means of an unauthenticated map.”<sup>119</sup>

Next, Quintana defended Thailand’s silence. Silence has consequences in law, he said, “only if the party concerned is under an obligation to make its voice heard in response to a given fact or situation.”<sup>120</sup> Before acquiescence is used against Thailand, the Court must first show that Thailand was under such an obligation.<sup>121</sup>

Thailand had argued that the temple, built upon a plateau, makes it difficult of access the temple from the Cambodian side while from the Thai side it is far more easily accessible. This contention seems to be correct as it is based on a geographical fact which is clearly in favour of the exercise of territorial sovereignty by the country having easy access. Having regard to the topography of the frontier area, Quintana said, “the very suggestion that the Preah Vihear area lies within Cambodian jurisdiction is really contrary to sense.”<sup>122</sup>

### 3. Judge Sir Percy Spender

Judge Spender’s dissent makes observations similar to that made by Judge Koo. It is easy, Sir Percy said, to fall into the error of thinking that the Temple and its sovereignty was the principal concern of the two States in 1908-1909 and therefore, “when Thailand received the maps, almost the first thing which she might be expected to do would be to see whether sovereignty over the Temple had been accorded to her. All this, I think, bears little relation to the realities.”<sup>123</sup> Judge Spender noted: “If these unsupportable assertions were deemed correct the two States in 1908-1909 could not have conducted themselves in a more casual and inconsequential manner in matters affecting territorial sovereignty.”<sup>124</sup> Between the three dissenters, Quintana and Spender based their opposition to the majority decision on doctrinal grounds while Koo took a postcolonial approach.

## VI. Rereading the *Temple case* in 2011 and 2013

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<sup>119</sup> *Ibid* 69.

<sup>120</sup> *Ibid* 70.

<sup>121</sup> “An error remains an error and cannot by repetition make good acts of later date that are based upon that error.” *Ibid* 71.

<sup>122</sup> *Ibid*.

<sup>123</sup> Dissenting Opinion of Judge Spender, in, *Temple of Preah Vihear case*, ICJ Rep 6, 137.

<sup>124</sup> *Ibid*.

While speaking of the universalization of international law, Becker Lorca has noted that resisting international law's eurocentrism is not an "exclusive patrimony of third worldist international lawyers who were active during the 1960s decolonization".<sup>125</sup> This is a potential straw man as Anand had in 1972 noted that in fact not the Third World scholars, "[m]ost of the recent suggestions for radical, structural legal changes have come from Western scholars".<sup>126</sup> Nevertheless, given its colonial origins, as Sookyeon Huh puts it, the law of territory could not be sustained intact today since colonization as a practice has been rejected leading to the "instability of the law of territory".<sup>127</sup> Indeed, after the ICJ ruling in the *Right of Passage* case, India incorporated Goa – formerly under Portuguese colonial rule – into the Union of India destabilizing the law of territory in the post-UN world. At the time, Judge Hidayatuallah ruled that the UN Charter does not prioritize "peace over justice" in the postcolony in relation to territory. Judge Hidayatuallah wrote:

The question, when does title to the new territory begin, is not easy to answer. Some would make title depend upon recognition. Mr. Stimson's doctrine of non-recognition in cases where a state of things has been brought about contrary to the Pact of Paris was intended to deny root of title to conquest but when Italy conquered Abyssinia, the conquest was recognised because it was thought that the state of affairs had come to stay. Thus, although the United Nations Charter includes the obligation that force would not be used against the territorial integrity of other States (Article 2 para 4), events after the Second World War have shown that transfer of title to territory by conquest is still recognised. Prof. R.Y. Jennings poses the question: What is the legal position where a conqueror having no title by conquest is nevertheless in full possession of the territorial power, and not apparently to be ousted? He recommends the recognition of this fact between the two States. If cession after defeat can create title, occupation combined with absence of opposition must lead to the same kind of title.<sup>128</sup>

Anyhow, it would be rather erroneous to view the *Temple of Preah Vihear* litigation in isolation. Equally inaccurate would be treating in isolation the views of Asian jurists such as Koo, Hidayatullah and Guha Roy in favour of justice over peace, local customary law and arguments for the validity of oriental customs over treaty-fiction of colonial stationary like maps. Evidently, a project of "justice over peace" in Asia underlies arguments of South Asian

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<sup>125</sup> Becker Lorca, *supra* note 21, at 502.

<sup>126</sup> RP Anand, *New States and International Law* (Vikas Publishing, Delhi, 1972) 65.

<sup>127</sup> Sookyeon Huh, *supra* note 13, 710-11. MacCorcudale & Pangalangan, 'Pushing back the limitations of territorial boundaries', 12 *EJIL* (2001) 867, 882 "an untangling of territorial boundaries and sovereignty is desirable".

<sup>128</sup> *Remedios Monterio v the State of Goa*, MANU/SC/0140/1969, para 25.

judges Hidayatullah and Guha Roy at the height of the Cold War imperialism.

Asian jurists, as a result, appear all too ambivalent towards international law's sources. Owing to their colonial and semicolonial pasts, respectively, Hidayatullah and Koo did not share views on sources of international law. For example, Koo, rooted for the rejection of colonial treaties – *rebus sic stantibus* – during East Asian semicolonialism. Moreover, in the *Right of Passage* and *Temple* cases after decolonization, Koo wrote for the recognition of local customary laws. The approaches of Hidayatullah and Guha Roy contrast with that of Koo because of their differing colonial and semicolonial experiences. As evidenced from the divergence between Indian and Chinese publicist, colonialism and semicolonialism had produced two kinds of postcolonialism in Asia. While one seeks to become a state, the rhetoric to recover territories betray the imperial working, however inadvertent, of the Middle Kingdom.

#### A. Statist *Jurisprudence* on Territory: Judges Owada and Xue

In 2008, the UNESCO listed the *Temple of Preah Vihear* as a World Heritage upon Cambodia's request. This angered Thai nationalists. Consequently, both sides began a build-up of troops in the area leading the death of a few soldiers. In 2011, Cambodia approached the ICJ for a re-interpretation of the original ruling of 1962. The ICJ on 18 July 2011 issued an order indicating provisional measures where no less than five judges dissented.<sup>129</sup>

Of those dissenting, two Asian judges from nations that had experienced semicolonialism – Japan and China – registered disagreements about Thailand's alleged international legal obligation to withdraw military from that territory. The then President of the Court, Judge Owada, offered a mild critique: "What appears to be reasonable on the map may not necessarily be reasonable from the viewpoint of implementation on the ground."<sup>130</sup>

Rallying behind the President of the Court, the Chinese Member, Xue Hanqin, expressed "serious reservations" with the ICJ's defining of a provisional demilitarized zone as "unprecedented in the sense that the Court has never before indicated provisional measures ordering the Parties to withdraw troops or personnel from their undisputed territories." Such a measure, in Judge Xue's views, "puts into question the proper exercise of the judicial discretion

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<sup>129</sup> *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear* (Cambodia v. Thailand), Provisional Measures, Order of 18 July 2011, [2011] ICJ Rep p. 537 . President Owada, Judges Al-Khasawneh, Xue , Donoghue and Judge *ad hoc* Cot all dissented.

<sup>130</sup> Dissenting Opinion of President Owada, in, *Request for Interpretation of the Judgment of 15 June 1962*, *ibid*, 561, para 15.

of the Court in indicating provisional measures, both under the law and by the jurisprudence of the Court.”<sup>131</sup> Finally, in 2013, the ICJ reaffirmed that “Cambodia had sovereignty over the whole territory of the promontory of Preah Vihear” requiring “Thailand to withdraw from that territory the Thai military or police forces, or other guards or keepers, that were stationed there.”<sup>132</sup>

Although critical of the ICJ’s overreach in the provisional measure, judges Owada and Xue are, arguably, limited in their approach due to jurisprudential formalism that is rather common in international legal disputes.<sup>133</sup> It is in this sense that an epistemological leap by individual judges allows a more nuanced and deeper engagement in international law than does jurisprudence and case laws that is, inadvertently, moored to the defence of one or the other state.<sup>134</sup> As in the case of Siam and other polities under “foreign domination” in the past, decoupling the relationship between free trade and territorial control is very important. Such a decoupling could be achieved with the currency of alternative modernity, fluidity of territory, and the hybridity of states although such views are politically contentious.

#### B. A People-centric *Epistemology* of Territory: Judge Cançado Trindade

Ironically, the long hands of jurisprudence in international law all too often do not come to the rescue of humans and populace as much as it appoints itself in the service of states and governments. Nevertheless, unlike the aforementioned Asian judges, Cançado Trindade’s separate opinions in 2011 and 2013, academic in structure and substance if also utopian, attempted an epistemic deconstruction of statehood by putting at the centre people and

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<sup>131</sup> *Dissenting Opinion of Judge Xue*, Provisional Measure, *supra* note 130, 608. Notably, while the nationalist China’s Judge Koo had in the *Right of Passage* case had found a “military” right of passage in favour of the colonial power, in 2011, the Communist China’s Member to the Court, Judge Xue, dissented from the provisional measure about removal of army, in essence, supporting Thailand, and by analogy, resiting the visible footprints of French imperialisms.

<sup>132</sup> *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v Thailand) Judgment*, ICJ Rep 2013, p. 281, 318.

<sup>133</sup> Scholars on colonialism have found a kind of “Hegelianism” inherent in international law’s functionalism. JT Gathii, ‘Geographical Hegelianism in Territorial Disputes Involving Non-European Land Relations’, 15 *LJIL* (2002) 581-622.

<sup>134</sup> Anand, ‘The Role of Individual and Dissenting Opinions in International Adjudication’, 14 *International & Comparative Law Quarterly* (1965) 788-808.



periphery.<sup>135</sup> By bringing the notion of territoriality to the center of sociological discussions of state-society relations in Siam, Vandergeest and Lee Peluso note that Siamese rulers “borrowed the Torrens system from Australia and other countries of the British common-wealth.”<sup>136</sup> Naturally, Siam too went on to construct a Westphalian state. However, Judge Cançado Trindade’s questions to Thailand during provisional measure hearings are worth noting. He asked Thailand the following questions:

What further information can be provided by the Parties to the Court about such displaced local inhabitants? How many inhabitants were displaced? Have they safely and voluntarily returned to their homes? Whereabouts do they live in the region? Have they been settled there for a long time? What is their *modus vivendi*? What is the population density of the region?<sup>137</sup>

About Judge Cançado Trindade’s questions about people and the area a slightly wary Cambodia noted “It should be recalled that, while the events are connected, Cambodia is only requesting measures in the area of the Temple.”<sup>138</sup> While commenting on Thailand’s reply to Judge CT, Cambodia further noted that “Thailand gives very little information on the area of the Temple of Preah Vihear, which is the sole subject of the dispute brought before the Court, and indicates that there was no population displacement. This is in keeping with the fact that the area of the Temple under Cambodian sovereignty does not contain any Thai settlements or populations.”<sup>139</sup> It is notable that while Judge Cançado Trindade had drafted his question in terms of people and populations generally, Cambodia takes a conservative position to refer to “Thai” populations. Indeed, Thailand accused Cambodia of setting up “civilians and villagers

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<sup>135</sup> For the apology-utopia dilemma in the *Temple* case, see, M. Koskenniemi, *From Apology to Utopia* (2005) 381.

<sup>136</sup> Peter Vandergeest and Nancy Lee Peluso, Territorialisation and state power in Thailand, 24 *Theory and Society* (1995) 385, 415.

<sup>137</sup> Reply of the Kingdom of Thailand to the question put to the Parties by Judge Cançado Trindade (7 June 2011), available at: <http://www.icj-cij.org/files/case-related/151/17656.pdf>.

<sup>138</sup> Reply of the Kingdom of Cambodia to the question put to the Parties by Judge Cançado Trindade (translation), Provisional measures (7 June 2011) para 3., available at <http://www.icj-cij.org/files/case-related/151/17658.pdf>.

<sup>139</sup> Comments of the Kingdom of Cambodia on the reply provided by the Kingdom of Thailand to the question put to the Parties by Judge Cançado Trindade (translation), Provisional measures (13 June 2011) para 2, available at: <http://www.icj-cij.org/files/case-related/151/17652.pdf>.

... to serve political motives”.<sup>140</sup> Naturally, in this case people-centricity and territoriality are faced with each other.

Admittedly, Cançado Trindade went “[b]eyond the classic territorialist outlook” to recognize “the *human factor*”. He called for the protection “of the rights to life and personal integrity of the members of the local population.”<sup>141</sup> While making this epistemological argument, Judge Cançado Trindade noted “one cannot consider the territory making abstraction of the local populations”. For judge Cançado Trindade “local populations”, with their particular cultural and spiritual heritage, “constitute the most precious component of statehood.” He noted the *Temple of Preah Vihear* dispute to be a “case of territorial sovereignty to be exercised to secure the safety of local populations” and to work “in co-operation with the other State concerned, as parties to the World Heritage Convention, for the preservation of the Temple at issue as part of the world heritage (reckoned as such in the UNESCO List) and to the (cultural) benefit of humankind.”<sup>142</sup>

The provisional measures indicated by the Court, for Judge Cançado Trindade, encompassed “the human rights to life and to personal integrity, as well as cultural and spiritual world heritage”. The Court’s final Order in 2013, he had guessed in 2011, would inevitably go “well beyond State territorial sovereignty, *bringing territory, people and human values together*”, well in keeping with the *jus gentium* of our times.<sup>143</sup> Judge Cançado Trindade further noted the need for “necessary attention” to the principles of humans over the territory is not “sufficiently worked upon in international case law and doctrine.”<sup>144</sup> He was of the opinion that in modern *jus gentium* it is these “principles that inform and conform the applicable norms”. Judge Cançado Trindade’s critical proposition turns international law of territoriality on its head.

More importantly, although inadvertently, Cancado Trindade while offering a people-centric view of territoriality and statehood in the *Temple of Preah Vihear* case limits the imperialist rigour of Hidayatuallah’s “justice over peace” argument. Doubtless, when used by powerful states, the argument of “justice over peace” has a great destabilizing potential for world peace.

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<sup>140</sup> Comments of the Kingdom of Thailand on the reply given by the Kingdom of Cambodia to the question put to both Parties by Judge Cançado Trindade, Provisional measures (14 June 2011) at 1.3, available: at <http://www.icj-cij.org/files/case-related/151/17654.pdf>.

<sup>141</sup> Separate Opinion of Judge Cançado Trindade, in, Request for Interpretation of the Judgment of 15 June 1962, Judgement of 11 November 2013, ICJ Rep 281, 322, 333 para 31 (original italics).

<sup>142</sup> Separate Opinion of Judge Cançado Trindade, Ibid, 322, 326, para 12.

<sup>143</sup> Ibid, 334, para 34.

<sup>144</sup> Separate Opinion of Judge Cançado Trindade, *supra* note 141, 337, para 42.

Since the ICJ does not give *locus standi* to human persons, it is almost revolutionary that a judge at the ICJ in a territorial dispute should speak of placing people at the core of territory and not territory at the core of people.

The fluidity between colonial and semicolonial rule in Asia points to the hybridity of this political situation. In such a story, two judges – Owada and Xue – nationals of erstwhile semicolonial countries appear to trim the ICJ’s overreach while siding with the centrality of territory for states. Moved by a people centric approach, Cançado Trindade, on the opposite, places people at the core of statehood and sovereignty by “bringing territory, people and human values together”.

## VII. Conclusion

Given erstwhile semicolonial Siam – now postcolonial Thailand – argued using the expertise of Western lawyers, a Westphalian state becomes the only ideal to root for before the ICJ. Participation in international litigation in relation to territorial questions becomes a proxy for converting semicolonial Asian past into European, thus universal history. For international law, semicolonial Siam’s historical scarcity while offers Siam a past while due to historical surpluses produced by colonial stationary gives Cambodia a history that is aligned with international law’s universalization. It is as if international law seeks it universalization by laundering Asian unauthentic past for a universal history though local and western lawyers as interlocutors.

In a manner of speaking, one would assume that dissimilar escapades – i.e. semicolonialisms, colonial rule or any other model in between – in Asia or elsewhere must necessarily lead to plural postcolonialism. Yet, as the *Temple* case explains, the ICJ as the “principle judicial organ” for international law’s universalism paints all histories with a wide brush. Theoretically speaking, the *Preah Vihear* dispute is a case of the deployment of Thailand’s assumed semicolonial scarcity against effusive surpluses from French colonialism in Indochina. Within positive international law, the production of colonial stationary such as photographs and cartography translates into the creation of a relative scarcity of evidence at international courts for territorial claims in erstwhile semicolonial polities.

In effect, Cambodia’s mimicking of colonial opportunism by using French colonial stationary represents an abdication of Siamese conceptions of space in favour of a colonial conception of territory. The artificial scarcity of colonial stationary in semi-colonies resulted in Thailand losing its claim over the temple and surrounding territory. Furthermore, insurmountable issues of essentialism often beset the debate on mapping, orientalism and alternative modernity in

Asia. Now having realized the value of maps as evidence, rising powers display a cartographic aggression to sustain newly acquired imperial ambitions.

Be that as it may, for international law's leading textbooks, the *Temple of Preah Vihear* case is known as a "leading case on estoppel"<sup>145</sup> while *Cheek v Siam* is a precedent for in damages in international law. Another textbook on international dispute settlement notes that the *Temple* case is an example that "a state may be a most unwilling litigant and yet still carry out a decision."<sup>146</sup> The textbook approach to the *Temple* case ignores the issue of space and state in relation to international law in Asia.

Consequently, international law appears to be conclusively biased in that it favours polities in Asia that are a product of colonial rule while disadvantaging semicolonial nations like Siam that managed to remain independent. It does so by its uncritical reliance on colonial stationary – maps, photographs and accounts – that were produced by colonial governments for administration.

In the *Preah Vihear* case, the ICJ confirmed that political postcolonialism and epistemological decolonization, if any, are not time twins. We are thus left with the question why does Westphalia always scuttle alternative-modern possibilities in actual disputes? International law on territory does not treat local populace as the most important part of statehood. For a start, had the ICJ not ignored the Siamese conception of political space, and the primacy it offered to provincial administration in matters of boundary, we would have seen an epistemological advancement on the international law on territory. In such ways, the ICJ generated space for the critique of international law more than settling the dispute.<sup>147</sup>

As the *Temple of Preah Vihear* case exhibits, international law in Asia seems to undermine its legitimacy by a wilful abdication of non-Western knowledge systems and practices, particularly those from the margins. Arguably, periphery and not centre should then construct the modern state. Such an untangling, even if politically brave, would prioritize the Siamese alternate-modern polity over colonial territorial conceptions of state. The conception of political spaces that Siam harboured does not only have an Asian application. Any revision of the international law of territory by conceptually displacing territory and planting people at its core in a world blinded by sovereignty-induced boundaries and territory is a knowledge production of universal application.

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<sup>145</sup> MN Shaw, *International Law*, 6<sup>th</sup> edn (2008) 518; R Kolb, *Theory of International Law* (2016) 401.

<sup>146</sup> JG Merrills, *International Dispute Settlement* (2011) 160.

<sup>147</sup> AM Weisburd, *Failings of the International Court of Justice* (2015) 295-318.

Table 1: THAI-EUROPEAN INTERACTION TIMELINE (BANGKOK PERIOD)

Year	Name of the Treaty/Legislation	Feature
1826	Burney Treaty	
1855	Bowring Treaty	<ul style="list-style-type: none"> <li>- Signed under military threat, particularly demonstrations of British military might in the attack on China over trade issues.</li> <li>- Treaties with the other imperialist states followed on the model of the Bowring Treaty.</li> <li>- Opened up internal markets by making most monopolies illegal, and by limiting import and export duties and internal taxations</li> <li>- The Bowring treaty affected the Siamese state's interests regarding the provision of formal property rights in land by limiting (1) the ability of the state to tax land, (2) the right of the state to decide who could own land where, and (3) the jurisdiction of the Siamese government over British subjects in Siam (extraterritoriality).</li> </ul>
1856	Parkes Agreement	<ul style="list-style-type: none"> <li>- Recodification of Financial System</li> <li>- specified what taxes the Siamese government could levy on land.</li> </ul>
1896	Anglo-French Declaration	<ul style="list-style-type: none"> <li>- Cadastral Survey</li> </ul>
1896	Anglo-French Declaration	<ul style="list-style-type: none"> <li>- Neither England nor France would advance their armed forces,</li> <li>- nor acquire any special privilege or advantage within the region, the Menam.</li> </ul>
1897	Anglo-Siamese Secret Convention	<ul style="list-style-type: none"> <li>- Preamble. His Majesty the King of Siam and Her Britannic Majesty, being desirous of making further provision for securing the mutual interests of Siam and Great Britain.</li> <li>- precaution to preserve the secrecy of the Convention.</li> <li>- Even the Straits Settlements Government in Singapore was not informed</li> </ul>
1901	Torrens System introduced in Siam	<ul style="list-style-type: none"> <li>- Territorial consolidation</li> </ul>
1902	The Siamese-Kelantan Treaty	
1904	Entente Cordiale	<ul style="list-style-type: none"> <li>- The Siam clause</li> </ul>

1907	Franco-Siamese Treaty	
1909	Anglo Siamese Treaty	- Secret convention of 1897 Abrogated