As their economic clout grows, Asian countries need to pay more attention to the development of international law. They should also participate more fully in international institutions.

International law and the rise of Asia

By Simon Chesterman

International Criminal Court, as well as newer doctrines promoted by the UN such as the Responsibility to Protect (R2P), reflect similar concerns that international law will be used against the interests of states that have only achieved the full benefits of sovereignty, aimed at preventing crimes such as genocide, war crimes, and crimes against humanity.

Fear of meddling by international institutional systems, however, are not overblown. Asia is an outlier with regard to the International Criminal Court. For example, almost three-quarters of the rest of the world have ratified the Rome Statute. In Asia, only one-third of countries have done so. Nor is this suspicion limited to areas such as human rights. Asian countries are also the least likely to have accepted the jurisdiction of the International Court of Justice or to have joined the World Trade Organization.

It is true, however, that the institutions of world order are not created ex nihilo. They are products of the interests of the powers that be, and the Asian experience is no different. The Asia-Pacific region has been an outlier in the international legal world, and the ascendency of the Asian countries in the global economy has led to a rise in their legal and political influence.

No coherent response

Yet if Asia were to get more seats at the table, it is possible that Mahathir and others have argued, what would “Asian” say? There is no prospect of a coherent “Asian” response. Depending on the alignment of interests and the diversity of the continent, it appears that the continent is divided in the interests of many countries to promote sub-regional bodies such as ASEAN, SAARC and the Shanghai Cooperation Organization, in which the countries have a higher and more distinct voice than they would in a pan-regional organization.

But there is no question that Asian countries and regions have more generally – and should – play a more substantial role in addressing global challenges. These range from climate change to reform of the global financial architecture, and from human rights to new frontiers of cyberspace.

In such areas, there is demand for and space for new ideas and new solutions, perhaps for new ways of speaking.

An Asian way?

Some would argue that the “Asian way” of policymaking offers a positive alternative to the hostage diplomacy that sometimes characterizes Western engagement in international affairs. Generalizing greatly, the positive aspects of an “Asian” approach include respect for diversity, consensus-building over conflict, and pragmatic approaches instead of rigid principles.

Any such account must, however, also acknowledge negative aspects of the “Asian way.” Elaborate consultation and conflict avoidance can sometimes delay or prevent agreement entirely. A superficial consensus may mask the real politics at work.

Perhaps the most refreshing part of the Asian Society of International Law’s conference last week was the breadth and depth of the papers presented by young scholars and practitioners from across the region and beyond. In addition to the three full days of panels covering the entire spectrum of international law, the organizers received much more proposals from students that an additional day was added solely for student papers.

Areas for improvement

There is, however, still a long way to go in translating theory into practice. Three areas for improvement stand out.

First, the lawyers who actually practice international law at the highest level are largely limited to Europeans and Americans. There are few Australians. When Singapore and Malaysia litigated the Pedra Branca case, for example, Singaporean and Malaysian lawyers played important roles. But the majority of the arguments before the International Court of Justice were presented by lawyers from Western countries.

Secondly, respect for international institutions in Asia continues to be inconsistent. Saudi Arabia, which is part of the Asia-Pacific Group on the Money laundering, recently made waves by successfully campaigning to be elected to a rotating seat on the Security Council – only to announce that it will not accept the council’s responsibility to have an impact on the Syrian conflict.

(Within a few weeks, however, Saudi Arabia took up a seat on the Human Rights Council, prompting a new round of protests from Western states and NGOs.)

Thirdly, and more generally, the willingness of Asian states to resolve disputes in accordance with the law remains uncertain. The role that law will play in addressing the many claims to the South China Sea is an open question, for example, with China strenuously opposing “internationalisation” of the dispute.

Preah Vihear test case

An interesting test will be what happens in the dispute between Thailand and Cambodia. Last week’s judgment was a “clarification” of an earlier decision concerning competing claims to the Preah Vihear Temple, which in 1962 was found to be on Cambodian territory.

The recent decision was an elegant example of international law as a form of mediation. The 35-page judgment carefully resolved the narrow dispute before it, but gently pushed back the larger question of territorial demarcation outside the temple grounds for the two parties to resolve themselves.

Since the next biennial meeting of the Asia Society of International Law will take place in Bangkok in 2015, the Preah Vihear Temple dispute will be a case that many members will be following with interest.

The conference demonstrated the enthusiasm and creativity of scholars and practitioners from Asia as well as those working on topics relevant to the region. A more prominent role for Asia and Asians in international law in the future will depend in part on the growing political influence of Asian countries. One hopes, however, that an even greater influence will be the quality and the effectiveness of their ideas.