

Symposium on International Law and Japanese Approaches: The Law of the Sea and International Peace Operations

Introduction & Keynote Speech

On 26 February 2016, a symposium on international law and Japanese approaches was held at the T.M.C. Asser Instituut in The Hague. The panel sessions were devoted to two topics: the disputes in the maritime areas of East Asia, and the changing role of the Japan Self-Defense Forces (JSDF) in international peace operations. Prof. Dr. Janne Nijman, Academic Director of the T.M.C. Asser Instituut, provided a word of welcome to the participants. She spoke about the Institute as a natural place for critical and constructive reflection on international and European law. The Institute conducts both fundamental and policy-oriented research in international and European Law, and provides a forum for various conferences, workshops and lectures to discuss these matters. Prof. Nijman then briefly outlined the Asser Strategic Research Agenda (2016-2020) which focusses on international and European law as a source of trust in a hyper-connected world. Dr. Olivier Ribbelink, Senior Researcher at the T.M.C. Asser Instituut, provided a brief introduction to the symposium. He elaborated on the increased importance of East Asia and Japan's historic ties with the Netherlands. He argued that Japan's peaceful approach to international relations which it had adopted after the Second World War is under strain because of the changing security environment surrounding Japan. Dr. Ribbelink stressed the importance of trust in this context, and expressed the hope that the symposium could contribute to an understanding of the issues at hand. He then outlined the program for the event.

In the **keynote speech**, H.E. Judge Hisashi Owada of the International Court of Justice spoke about Japan's early encounters with the Law of Nations and thereby aimed to provide a contextual framework within which the current developments could be evaluated. Japan's introduction into what was then called the "community of civilized nations" took place less than two centuries ago. At the time of this encounter, international law was still largely perceived in the Western world as the "law of European nations". Judge Owada argued there were two key elements that contributed to this perception. The first element emerged from the early international law developed as a "law of Christian nations" based on the understanding of the law as part of Christian doctrine. The second element, developed on the basis of this doctrine rooted in Christian ideology, was systemised by, among others, Hugo Grotius. It was the doctrine of the law of nature on which Grotius based the concept of the law of nations that reserved a central place for advanced nations. These two elements were later used to justify European expansion under the guise of "civilising missions". It was against this background that Japan was first exposed to the Law of Nations in 1853. Judge Owada argued that the event produced a deep impact upon Japan's spiritual life as a modern State in the coming years by bringing about the exposure of Japan to the community of civilised nations and with it the law of nations as its normative framework. After being initially divided as to whether it should open the country to foreigners, Japan eventually embraced the outside influences.



Being newly introduced to the law of nations with the conclusion of the Treaty of Peace and Amity with the United States in 1854, Japanese officials embarked on a concerted effort not only to understand the concept of the law of nations, but also to trace its sources and contextualise it within the Japanese culture. They embraced the law of nations as specific rules flowing from universal principles of justice, applying equally to the East and the West. Japan continued to internalise the law of nations throughout the late nineteenth century, and eagerly embarked upon a large number of international arbitrations, until the *Yokohama House Tax* case before the Permanent Court of Arbitration, where it was decided that an unequal treaty regime favouring Western nations continued to apply. This instilled in the Japanese a sense that Western powers could manipulate the law of nations, where they had previously believed it to be based on the principles of justice and fairness. In order to be fully accepted in the community of nations, Japan modernised its legal system and adopted an expansionist world view. After its victory over China in the First Sino-Japanese War it concluded an alliance with Great Britain, which in the eyes of the Japanese symbolised the acceptance of Japan as an equal partner in global politics. Judge Owada then discussed the post-World War II period, in which Japan adopted its 1947 Constitution in order to establish and maintain its national identity as a “peace-loving nation”. Japan re-embraced international law and became one of its strongest proponents, although it denied itself the ability to participate in peacekeeping operations. Judge Owada stressed that the tempting conclusion that Japan, besides the period of some ten years preceding the Second World War, has been positively engaged with the international community, first by studying and absorbing the law of nations and then by learning to apply the law, might be too simplistic. Internally, the country had been divided many times as to its proper course vis-à-vis the international society. Judge Owada concluded by reflecting on the importance of these historical experiences for the current developments in Japan’s foreign policy and approach to international law.

Session One

The first session consisted of a discussion on the topic of disputes in the maritime areas of East Asia. The session began with a presentation by Dr. Yurika Ishii, assistant professor at the National Defense Academy of Japan. Dr Ishii gave her presentation on Japanese positions with regard to maritime delimitations of the continental shelves in the East China Sea and the Sea of Japan. To begin, Dr. Ishii gave an overview of the factual situation of both Japan-China relations on the continental shelf of the East China Sea, and also of the Japan-Republic of Korea (ROK) relations on the continental shelves of the East China Sea and the Sea of Japan. With regard to the Japan-China relations, there is no maritime delimitation agreement between the two States, and there is a major difference of opinions concerning the maritime delimitation of the continental shelf. After a brief discussion on the position of both Japan and China in this regard, Dr. Ishii explained the cooperation that has taken place between the two States in the development of the continental shelf of the East China Sea and arrangements adopted thereof, however she noted that the cooperation according to the arrangements has not been done. Dr. Ishii then explained the situation between Japan and ROK with respect to the Sea of Japan. There is a partial maritime delimitation agreement and a joint development agreement between these two parties. The territorial dispute over Takeshima (Dokdo) has been one of the major obstacles in delimitating the northern section of the area. Further, an overview of the potential venues for dispute settlement between the parties was given. Firstly, there is the possibility of the International Court of Justice (ICJ) as a venue. Japan has accepted compulsory jurisdiction of the ICJ with certain reservations, while neither China nor ROK has done so. Secondly, all parties are subject to compulsory judicial settlement procedure under UNCLOS. However, China and ROK have declared that they do not accept this proceeding for sea boundary delimitation. Therefore, there is no possibility for Japan to settle the case judicially unless the other party agrees. The presentation concluded, however, by briefly pointing out the possibility to settle the dispute concerning the use of the undelimited area.



The second speaker was Prof. Dr. Alex Oude Elferink, Director of the Netherlands Institute for the Law of the Sea of the School of Law of Utrecht University and associate of the K.G. Jebsen Centre for the Law of the Sea of the University of Tromsø, who gave a presentation on 'The implications of the case law on maritime delimitation for the East China Sea and Sea of Japan'. Prof. Dr. Oude Elferink began by giving an overview of the applicable law, namely Articles 74 and 83 of the UNCLOS, which provide for provisional arrangements and the duty of restraint (common paragraph 3), and the rules applicable to the delimitation (common paragraph 1). Prof. Dr. Oude Elferink gave an insight into the award in *Guyana v. Suriname*, which confirms that States have to make a good faith effort to reach agreement in provisional arrangements, but that there is no duty to reach agreement on such arrangements. The award also confirms that unilateral drilling is not in accordance with the duty of restraint contained in Articles 74(3) and 83(3) and this may also be the case for seismic surveys, depending on the circumstances of the case, and any authorisation of a State to drill in a disputed area. The speaker then discussed substantive rules of maritime delimitation law. Delimitation is judge-made law and consists of a three-stage approach: 1. the establishment of a provisional line; usually an equidistance line, 2. checking the presence of relevant circumstances that may require adjustment of the provisional line, and 3. checking whether proposed line results in an equitable solution by carrying out a proportionality test. Prof. Dr. Oude Elferink gave an overview of the geography of the East China Sea and Sea of Japan, before describing the applicable law. With regard to provisional agreements, there exists the 1974 Agreement Japan-ROK on the continental shelf. Additionally, there are a number of provisional arrangements on fisheries, which seem to lessen tensions and be relatively successful. Sovereignty disputes lead to greater complexity than would otherwise be the case for these arrangements. As there have been instances of non-compliance with the duty of restraint, Prof. Dr. Oude Elferink questioned whether there was a need for clarification of the legal framework between the parties, or if the problem is mainly political rather than legal. In the final section of his presentation, Prof. Dr. Oude Elferink concluded his presentation on the issue of delimitation of maritime boundaries in the Sea of Japan and the East China Sea. In both cases, small, offshore, islands, may constitute relevant circumstances. These islands might be disregarded in drawing a boundary based on equidistance, but they would in any case be entitled to a 12-nautical-mile territorial sea. He also looked separately at the delimitation of the continental shelf in the East China Sea. He stated the major issue is that Japan and China have different views on the basis of continental shelf entitlement in that area – distance from the coast or natural prolongation –, which raises the question of what would be an appropriate starting point for the delimitation. If an equidistance line would be adopted as a provisional delimitation line it might require adjustment in view of the fact that this line might divide the area of overlapping entitlements in an unequal manner.

The last speaker of session one, Dr. Cristina Hoss, Legal Advisor at the Iran-US Claims Tribunal, gave a presentation on the 'peaceful settlement of international disputes'. Dr. Hoss began by explaining the historical context of international dispute settlement, from the 1899 Hague Conference to the International Court of Justice today. Dr. Hoss noted that many commentators regretted the central role of States' consent to jurisdiction in international judicial settlement, those commentators oftentimes would favour a more 'robust' framework of compulsory jurisdiction. However, Dr. Hoss underlined the central role of consent to jurisdiction, not only for the smooth running of proceedings but also and maybe foremost for the compliance of states with decisions of international courts and tribunals. As far as the ICJ is concerned, various ways to give consent to its jurisdiction exist, a declaration under Article 36 (2) of the ICJ Statute, as Japan has done (including three important reservations), being only one of them. Another way of consenting to jurisdiction is through a special agreement, which is essentially a treaty between the parties submitting a particular dispute, or only some aspects of a dispute to the Court.



This *ad hoc* treaty will limit the scope of the specific dispute to be brought before the Court. This method is very respectful of the limits of the States' consent as in this context States are the masters of the dispute the Court will be able to decide upon, and the Court is very careful not to overstep those limits. A number of maritime and territorial boundary disputes, including in the Asian region, have been submitted by special agreement and the compliance record speaks for itself. Another method of dispute resolution would be under Article 287 of the UNCLOS. This Article provides different mechanisms of which the State parties are free to choose from, and include the ICJ, Arbitral Tribunals and the International Tribunal for the Law of the Sea. However, Dr. Hoss pointed out that not one of the relevant States to the current disputes in Asia have opted for the ICJ as a forum under this Article, and in fact several States, such as China and RSK, have chosen to exclude all procedures under Art. 287, RSK reserving the right to intervene in proceedings which might affect its interest of a legal nature. Dr. Hoss then discussed further avenues to pursue in order to settle a dispute other than international adjudication. Such an alternative means of dispute settlement may be negotiation, which allows States to include considerations other than legal ones and might play into acceptable solutions to all States. Negotiation is not simply a loose idea, but rather a concept that is gradually being filled with normative content. The ICJ jurisprudence contains a number of requirements for States to fulfill in negotiations, such as actually contemplating modification of their position whilst negotiating. In view of the cases currently before it, the Court might make additional findings on the legal content of the obligation to negotiate. Additionally, Article 283 of the UNCLOS contains an obligation to negotiate and the Tribunal has reviewed the normative content of the obligation in a rather liberal way. To conclude, Dr. Hoss stated that there are many routes to reach the peaceful settlement of disputes. Of course, there is international adjudication, but other ways also exist, in particular negotiations and in some cases mediation is necessary. She confirmed that sometimes States are themselves in the best position to know the appropriate means to fulfil their obligation to settle their disputes by peaceful means.

To end the session, there was a discussion among the speakers, moderated by Dr. Olivier Ribbelink of the T.M.C. Asser Instituut, and a Q&A session with the audience, in which topics such as enforcement mechanisms of courts, Japan's negotiation attempts and Japan's recent reservation to its declaration recognising the ICJ's jurisdiction were discussed, among others.

Session Two

The second session addressed the changing role of the JSDF in international peace operations. The first speaker of the session, H.E. Judge Shunji Yanai of the International Tribunal for the law of the Sea, spoke about Japan's new legislation for peace and security and the reinterpretation of Article 9 of the Japanese Constitution. Firstly, he provided an overview of the security environment in East Asia, and contrasted the relatively small size of Japan's armed forces with that of countries neighbouring Japan. He elaborated this comparison by observing that, while Japan is a non-nuclear State, Russia and China are major nuclear powers, and North Korea is accelerating the development of its nuclear weapons and ballistic missiles in addition to its large scale conventional forces disproportionate to its population. Following this comparison, Judge Yanai explained the scope of Article 9 of the Japanese Constitution and how for decades the provision has been interpreted by the government as allowing only individual self-defence. It was thereby more restrictive than what is allowed under international law and the letters of Article 9, limiting Japan's peace and defence capabilities significantly. Judge Yanai provided a number of examples to illustrate how restrictive this traditional interpretation of Article 9 was. Against this background, the Japanese Prime Minister Shinzo Abe established the Advisory Panel on Reconstruction of the Legal Basis for Security (the Advisory Panel) and tasked it with the re-examination of the legal basis for Japan's national security in light of changes in the security environment surrounding Japan.



The Advisory Panel argued that Article 9, if interpreted correctly, permits, next to individual self-defence, also collective self-defence and Japan's participation in collective security operations under the United Nations. Therefore, the Advisory Panel recommended that the Japanese Government adopt this less restrictive interpretation of Article 9 and amend relevant laws accordingly. Indeed, the Japanese government proposed new peace and security legislation in line with this advice, allowing, for instance, the exercise of the right of collective self-defence; the participation in a wider range of UN peace-keeping operations and other international peace cooperation activities; and the JSDF to provide necessary support activities in situations that have an important influence to Japan's peace and security or threatens international peace and security. Especially the legality of collective self-defence attracted criticism, but the new legislation was nevertheless adopted and passed into law in September 2015. Although Judge Yanai argued that the new conditions for self-defence are still more restrictive than those under international law and those under the Advisory Panel's recommendation, the new legislation would enhance collective self-defence under the US-Japan Alliance, by expanding Japan's possibility to contribute to collective self-defence under that alliance (for example, to protect and to support US naval vessels at High Seas in times of armed conflict). Furthermore, the new legislation is less stringent on Japan's participation in international peace operations, although Judge Yanai noted that Japan's participation in international peace operations would remain in the field of traditional UN peace-keeping operations and logistic support to international coalition forces. Judge Yanai stressed that there is of yet no national consensus for dispatching JSDF combat units to international peace operations entailing the use of force.

The second speaker, Prof. Craig Martin of Washburn University, gave a critical evaluation of the reinterpretation of Article 9 of the Japanese Constitution from a constitutional and international law perspective. He argued that the process was illegitimate and a violation of principles of constitutionalism and the rule of law, and that the purported new meaning is not supported by accepted canons of constitutional interpretation, nor is it consistent with the international law principles from which Article 9 was drawn. The key issue concerns Article 9 paragraph 1 of the constitution, which renounces war and the threat or use of force. In its traditional interpretation, this article thereby went further than international law in the limits it imposed on the use of force, waiving certain of the rights of states to use force, such as that of collective self-defence. Prof. Martin noted that it is therefore important that in interpreting Article 9, note should be taken not only of established and accepted canons of constitutional interpretation, but of the international law principles from which the article was drawn. Since the 1950s, Article 9 has been interpreted as allowing the use of force only in cases of individual self-defence in the event of a direct attack on Japan. Prof. Martin discussed which government branch is tasked with interpreting the constitution, noting that the executive has the least constitutional authority to do so. He further discussed the procedure to amend the constitution, noting that current the current reinterpretation was an illegitimate effort to circumvent the formal amendment procedure. In the case at hand, Prime Minister Abe had been looking to amend or reinterpret Article 9 for a long time. To this end, he formed the Advisor Panel in 2007, and reinstated the Panel during his second term, in 2014. Prof. Martin argued that the Advisory Panel had no authority to reinterpret the constitution, and that its reports were flawed because they provided result-oriented arguments that began with an examination of the changes in the security environment, and concluded that because of such changes the meaning of the constitution must have changed as well. The cabinet nevertheless decided to adopt the reinterpretation to a large extent, and thus, *inter alia*, accepted the legality of collective self-defence. Subsequently, legislation was enacted in the Diet that revised several national security laws and created one new one, in line with the new interpretation of Article 9, although the revised legislation did not constitute the "reinterpretation" itself, and so the Diet was never called upon to thereby approve the "reinterpretation" as such.



Whether the constitution has actually changed by these acts remains to be seen, as judicial challenges are likely, but the courts will likely be reluctant to answer this question. Prof. Martin argued that the process was a deliberate and flagrant circumvention of the amending procedure of the constitution. Furthermore, he argued that in substantive terms, the new interpretation conflicts with the actual text of Article 9 and could, depending on how it is implemented, lead to actions that is inconsistent with international law. Prof. Martin touched upon four elements of the new interpretation and legislation that could give rise to international law violations if acted upon: the elimination of the armed attack threshold for the use of force in individual self-defence, the possible use of force for the rescue of nationals abroad, the support of belligerents in armed conflicts, and the (in its new formulation broadly interpretable) right of collective self-defence. Prof. Martin concluded by arguing that while it is yet unclear how exactly the new interpretation will operate, it is apparent that a constitution, which should be durable and stable, should not be subjected to such radical and unilateral reinterpretations by the executive.

The final speaker of the session, Dr. Bérénice Boutin, researcher at the T.M.C. Asser Instituut, spoke about 'Participation in International Military Operations within the Framework of International Law', putting the prior discussion about Japan's approach in a more general perspective. Participation in international military operations (IMOs) may take various forms, ranging from limited logistical support to operations involving use of force. This may obscure the boundaries of attribution for international law violations during such military operations. Dr. Boutin illustrated these difficulties with a number of examples. In her presentation, she specifically focussed on two topics: the use of force grounded in (collective) self-defence and the logistical support to IMOs and the facilitation of wrongful acts by others. Dr. Boutin provided an overview of relevant practice regarding (collective) self-defence, discussing the implications UN authorisations, the 2003 invasion of Iraq, and IS, and stressed the dangers of supporting the self-defence operations of others when the legal basis is debated. She then discussed the legal framework of self-defence, focussing especially on the debated modalities. She noted that the increased reliance on controversial interpretations may eventually lead to a liberalisation of the use of force. Dr. Boutin cautioned, however, that the reliance on such interpretation for the participation in or support of a military operation may be found unlawful *ex post*, and give rise to state responsibility. She then identified a number of elements regarding the reinterpretation of the Japanese Constitution that could give rise to state responsibility if acted upon. Dr. Boutin went on to discuss logistical support, noting that countries increasingly opt for this form of participation. She gave an overview of recent practice, focussing on Libya (2011) and Mali (2013), where a number of states provided logistical support without being involved in combat action. However, not being involved in actual combat does not shield states from state responsibility. States can be held responsible for the facilitation of wrongful acts by others in a number of ways. Dr. Boutin discussed a number of them, focussing on article 16 ARSIWA (although she noted that its threshold is high, and it is therefore rarely used), article 1 of the Geneva Conventions, and the ECHR. She noted that states that are highly involved in unlawful conduct usually have a higher degree of knowledge and intent and can therefore be held responsible more easily and to a higher degree. In light of the above, Dr. Boutin touched upon the differences between the Japanese criterion of integration of Japan's activities with the use of force by others and the international law criterion of knowledge for state responsibility following logistical support, noting that in practice, the two may not be that different. Dr. Boutin concluded by highlighting three points: limited participation in IMOs does not shelter states from responsibility, the decision to participate in such operation is at the intersection of legal, political and moral considerations, and self-defence is increasingly being relied upon for offense. In the lively closing discussion, moderated by Mr. Onur Güven of the T.M.C. Asser Instituut, various topics, such as prior changes in the interpretation of Article 9 of the Japanese Constitution, the purpose of the new reinterpretation, and the judicial review on domestic and international level were discussed, among others. The Symposium was concluded with a reception, offered by the Embassy of Japan in The Netherlands.