

T.M.C. Asser Institute
Symposium on International Law and Japanese Approaches:
The Law of the Sea and International Peace Operations
Keynote Address:
“Japan and the Law of Nations”

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Excellencies,
Distinguished guests,
Ladies and gentlemen,

It is a great honour as well as a personal pleasure for me to address you here at the T.M.C. Asser Institute. This Institute has been a world-renowned academic institution in the field of international law, which I already knew as a research student at Cambridge University half a century ago, together with the name of Dr. Tobias Asser, after whom the Institute was named. I would also like to thank Dr. Olivier Ribbelink and Professor Janne Nijman for inviting me to address you today. As a disclaimer, I would like to emphasize that the views expressed today are entirely my own, are delivered in my personal capacity, and do not reflect the position of any organization with which I have been or am affiliated, most particularly the Government of Japan and the International Court of Justice.

The topic of today’s symposium, namely Japanese approaches to issues of contemporary international law, including the law of the sea and international peace operations, is highly fitting in light of the many challenges currently facing Japan and the greater Pacific region. The distinguished panellists will no doubt engage in an enlightening discussion of these challenges and Japan’s approach to these fields of international law.

In light of my position as a Judge of the International Court of Justice and my corresponding duty of maintaining impartiality and neutrality, however, I have decided not to address in my presentation this morning current topics of law and politics relating to the issues of this symposium. What I will try to do instead is to provide some historical context for them, which could serve as a conceptual framework for thinking about contemporary Japanese approaches to issues that are the subject matter of today’s symposium. I hope that this background could be helpful for your understanding of Japan’s foreign policy perspectives. It is with this in mind that I have chosen to focus this

keynote address on the problem of the first encounter of Japan with the concept of the “law of nations”—and its exposure to this concept which was entirely novel to the people of Japan in its early stage of becoming a member of the “community of civilized nations.”

I. The Encounter of Japan with the Concept of the “Community of Nations”

Japan’s introduction into what was then called the “community of civilized nations” took place less than two centuries ago. Although many States have since had a comparable experience of entering into the community of nations, Japan’s experience followed a very different path from theirs. The manner in which Japan encountered and internalized the law of nations during the nineteenth century was unique in the sense that it paved the way for the successful entry of Japan into the community of nations, and established a foundation for its engagement with the community of nations” as well as with modern international law. Other nations, such as Qing Dynasty China and Yi Dynasty Korea, not to mention many other Asian and African nations which acquired independence during the period of decolonization in the wake of the Second World War, followed a much different course.

At the time of Japan’s first encounter with the “community of nations,” international law was still largely perceived in the Western world as the “law of European nations.” Though the precise origins of this perception may be difficult to trace with any great precision, there are two key elements which in my view contributed to this development in the modern history of the “law of nations.” The first element emerges from the development of early international law as essentially the “law of Christian nations” based on the understanding of the law as a part of Christian doctrine, as Pope Innocent IV professed when engaged in his efforts to justify the Christian Crusades. Innocent IV, who has been described as “the greatest lawyer that ever sat upon the chair of St. Peter,” famously opined that the Pope, as the “vicar of Jesus Christ...has power not only over Christians but also over infidels.” This doctrine was further developed by early Spanish international lawyers of Christian faith, such as Francisco de Vitoria, who theorized about the Spanish conquest of the Americas and attempted to justify this action on the ground that “the issue was less one of faith and more one of protecting certain natural rights [of the Spaniards].”

The second element, developed on the basis of this doctrine rooted in Christian ideology, was systematized by, among others, Hugo Grotius, universally regarded as the “Father of the Law of Nations.” Grotius discussed the law of nature and noted that proof that something is consistent with the law of nature requires “[a conclusion,] if not with absolute assurance, at least with every probability, that is according to the law of nature which is believed to be such among all nations, or among all those that are more advanced in civilization.” It was thus he who consolidated the concept of the law of nations on the basis of the doctrine of the natural law. These two elements came to gain special significance later in the age of expansion of Europe of the nineteenth century as justifications for the propagation of the “civilizing mission” (*la Mission Civilisatrice* of Victor Hugo), as Europe expanded its domination, first over South America, and then over Asia and Africa.

II. The Period of Enlightenment for Japan with the Law of Nations

It was precisely at this historical moment that the initial exposure of Japan to the concept of the “law of nations” came about with the arrival in 1853 of the “black ships” of Commodore Perry of the United States. It is well-known that this historic event triggered a fierce internal commotion in Tokugawa Japan with a devastating result in the subsequent political history of Japan. It had the effect of dividing the whole country between those advocating for the expulsion of these barbarians and those in favour of *kaikoku* (opening of the country to foreigners), which led to a political revolution against the established authority of the Shogunate, eventually leading to the Meiji Restoration of 1868.

What is more important for our purposes, however, is that this event produced a much greater and deeper impact upon the spiritual life of Japan as a modern State in the coming years by bringing about the exposure of Japan to the “community of civilized nations” and with it the concept of “the law of nations” as its normative framework. Less than a decade earlier, China had been defeated in the Opium War and had been forced to cede Hong Kong to Great Britain and to open five of its ports, including Shanghai, to Western powers. It was the Dutch who relayed the news of China’s defeat to the Shogunate in 1844. In a State Note delivered on 15 February 1944, King Willem II cautioned the Japanese authorities that: “if your happy land is to be spared of devastation of the war, laws strictly

forbidding foreigners [to enter into intercourse] should be relaxed.” At that time, the Shogunate vowed that it would not alter its ancient laws and traditions. Yet the outcome of the Opium War and the warning by the Dutch King foreshadowed the intense internal commotion triggered by the arrival of Commodore Perry in 1853.

After an intense internal strife, the more enlightened of the views ultimately prevailed. The whole country eventually came to embrace the new era of openness. The Shogunate Government concluded the Treaty of Peace and Amity with the United States in 1854 and treaties with other powers (the Ansei treaties), such that Japan was no longer closed to the influences of the outside world.

An important point here is that it was not just the show of arms of the United States that forced Japan to reverse 250 years of self-imposed seclusion and set in motion the introduction of the “law of nations.” It is true that the first U.S. Consul-General to Japan, Townsend Harris, invoked the concept of the “law of nations” repeatedly during the course of the negotiations for the conclusion of the more exhaustive 1858 Treaty of Amity and Commerce. Harris’s diary reveals that the rights of diplomatic officials proved to be a major point of contention, with the American negotiators insisting that the minister “must have all the rights enjoyed by such person under the laws of nations.” The recognition of such rights under the alien concept of the law of nations was indispensable for the development of a bilateral relationship and for the integration of Japan into the “community of civilized nations.” Understanding this mutual code of conduct between States thus became an urgent task for the Japanese authorities.

What is significant here is that this eager attitude struck a stark contrast with that of the Chinese authorities during the same period. The Qing Dynasty Chinese elite were already aware of the concept of international law during the seventeenth century, yet deliberately maintained the position that Western emissaries should conform to Chinese protocols based on the tributary system. Japanese officials, by contrast, tried hard to grasp the *raison d’être* of international law. They embarked on a concerted effort not only to understand the concept of the law of nations, but also to trace its sources and contextualize it within the intellectual tradition of their Confucian culture. In their efforts to understand the rules governing relations between States, they tried to draw an analogy between this novel

concept and the Confucian principles of the universe (*tendo*) that were familiar to them as the rules governing human relations in society.

What is significant in this whole history is that this encounter between the two different civilizations demonstrated the process through which the Japanese came to grasp the law of nations as a system that consisted of universal principles of justice which they observed in common with the West. In other words, these Japanese intellectuals tried to comprehend the true meaning of what was presented to them as specific rules to be observed by identifying what was universal contained in that specificity. It was this intellectual process of interaction that made it possible for Japan to embrace these precepts of the “law of nations” and accept these rules of conduct as universal principles equally applicable to the East as well as to the West.

The new Imperial Government of Meiji, which replaced the 250-year rule of the Tokugawa Shogunate, issued proclamations affirming its commitment to the “law of nations.” In its 1868 Imperial Proclamation on Foreign Policy, for example, the new Government declared that: “[o]ur foreign intercourse shall be conducted henceforth in conformity with the public law of the universe (*udai no koho*).”

Throughout the late nineteenth century, Japan continued to internalize the law of nations in its own culture. It was during this period that Japan demonstrated its enthusiasm for the newly developing system of dispute resolution through international arbitration. International arbitration was becoming increasingly incorporated into the modern practice of international law in the West, especially following the “Alabama Claims Arbitration” of 1872. What is surprising is that Japan brought its first international dispute, known as the *Maria Luz* case, to arbitration in 1873. In the following 30 years, Japan embarked upon as many as seven arbitrations, of which no less than four resulted in the settlement of the disputes by arbitration—an unparalleled record for that period. It was within this environment of growing enthusiasm for the law of nations that Japan, encouraged by this positive record of arbitration, welcomed in 1903 the submission of the *Yokohama House Tax* case to the newly-established Permanent Court of Arbitration. Ultimately, however, the case proved to be a serious setback affecting Japan’s faithful acceptance of the law of nations.

The case involved a dispute over the interpretation and application of certain provisions in the new treaties replacing the old so-called “Ansei treaties,” which were finally concluded after protracted negotiations between the Meiji Government and the Governments of Great Britain, France, and Germany. The Ansei treaties were called “unequal,” containing as they did the regime of extraterritoriality that had guaranteed that foreign residents within Japan were immune from local jurisdiction and only subject to the consular jurisdiction of the Treaty Powers. Given the fact that these Ansei unequal treaties had been a source of fierce resentment for the Japanese, it is small wonder that issue of the exemption from taxation of foreign nationals, to whom real property had been leased in perpetuity under the old regime, became a question of honour and respect for Japan. The provisions at issue in the revised treaties stipulated, *inter alia*, that “existing leases in perpetuity under which real property is now held in the Settlements [under the Ansei Treaties] shall be confirmed, and no conditions of any kind other than those contained in the existing leases shall be imposed in respect of such property.” In implementing these provisions, the Government of Japan sought to abolish this extraterritoriality of taxation by levying taxes against the houses built on the land that remained subject to this clause. Japan claimed that the “real property” in question referred to the land, which was the only property that remained exempt from the payment of imposts and other charges under the new regime.

Whatever may have been the merits of the respective parties’ arguments, the arbitral award, exploring the intent of the parties as well as the subsequent State practice, ultimately came to the decision that the favoured treatment of foreigners established by the “Ansei treaties” continued to apply to both the land and the houses built on it under the revised treaties, thus perpetuating the exemption of these properties from taxation.

The optimistic faith of the Japanese authorities in the law of nations and in this new forum for international dispute resolution was thus shattered to pieces. The award, going against the firm Japanese conviction in the strength of their legal case, made this defeat all the more devastating. It served to rekindle the repressed suspicion that the Western powers might be manipulating the “law of nations.” When it should have been based on the principles of fairness and justice, it was instead used in reality in order to deceive Japan under the guise of international justice. More importantly, the arbitral award in the

Yokohama House Tax case appeared to many in Japan to demonstrate that international law was in reality a set of technical tools that could be manipulated by the powerful players in the conduct of their foreign relations. Although Japan remained committed to the position of faithful compliance with international law throughout the Meiji period (1868-1912), as evidenced by the conduct of the Japanese military during the Sino-Japanese War (1894-1898) and the Russo-Japanese War (1904-1905), the prevailing feeling of disillusionment was inevitable. The sense that the desperate efforts to revise the Ansei treaties had come to nothing was everywhere—in academic circles, in journalism, and among the people at large. It could be argued that this experience planted a seed of indelible suspicion in the ulterior motives of the West, eventually enticing Japan into finding ways to manipulate international law, which it had initially embraced as an embodiment of the universal law of nature.

III. The Impact of the Imperialistic Advances of Western Powers

This growing trend of this disillusionment and suspicion on the part of Japan was reinforced by the external environment, as Japan's exposure to the actual behaviour of the Western Powers increased. Even as the Government of Japan struggled to address internal societal transformation, Japan simultaneously had to face challenges posed by the imperialist designs of the West, especially Russia, Prussia, and France. In fact, Japan came to realize that it had not been wholeheartedly accepted as an equal by these Western powers, which was demonstrated at the time of the so-called "Tripartite Intervention" of 1895 in the aftermath of the Sino-Japanese War.

In the midst of this external environment, the Meiji Government urgently undertook the task of introducing a major overhaul of the legal system in line with the legal systems as practiced in Europe in an effort to revise the unequal treaties and of establishing a more equitable relationship with the Treaty Powers. One major element of this task was to shore up its internal legitimacy through the consolidation of the rule of law in its legal system. At the suggestion that Japan should transition to a constitutional monarchy modelled after the European system, the Meiji Government proceeded to dispatch a mission (the Iwakura Embassy) to the West to study European systems of government.

Despite these efforts to overhaul the legal system, the Imperial Government did not find a receptive audience amongst the European powers in its efforts to revise the existing unequal treaty regime imposed upon Japan at the time of its opening at the Tokugawa period. As previously mentioned, the unequal treaties were only revised after years of negotiations. These treaties were fundamentally unequal because of (a) the regime of extraterritoriality, (b) the unilateral imposition of tariffs, and (c) the unilateral nature of the most-favoured nation clause. In an attempt to rectify these inequalities, the Japanese Government sent an official mission to the Treaty Powers in 1871, but the result was disappointing. The mission had to return without a commitment from the Western powers to end the regime of extraterritoriality. Especially devastating in its impact was the experience of the Iwakura mission when, during its visit to Prussia, the Japanese officials met Chancellor Otto Von Bismarck. Bismarck declared to the mission that “[the pretence of equality championed by advocates of the law of nations was] merely a lip service, behind which lies actual practice, that is, insults to which the strong subject the weak, and scorn in which the big hold the small.” The mission led by Iwakura Tomomi, who had started as an ardent advocate for the “law of nations” in the Imperial Cabinet of Emperor Meiji, was completely disheartened by this attitude of the Europeans and returned to Japan persuaded that the law of nations was in reality a tool used by the more powerful nations to dominate the weak. This experience left an indelible mark on the minds of the Japanese intellectuals.

In spite of these setbacks, Japan’s efforts to modernize its own legal system in order to qualify for membership in the “community of civilized nations” continued throughout this period. In 1871, the Government restructured the pre-existing *han* system (composed of feudal estates ruled by *daimyo*) into prefectures, which became part of a centralized system of government. Although earlier attempts to codify Japanese law had proved largely unsuccessful, the effort to replace the decentralized, customary legal system was recommenced in the 1880s, which included the process of drafting a new Constitution. The new Constitution of Imperial Japan entailed a hybrid system of government that blended elements of the modern constitutional structure of the West with elements of the traditional imperial system. These changes, in addition to many others, represented the transformation of Japan and the relatively rapid construction of a modern State by the Meiji Government.

Becoming a member of this exclusive class of States, however, involved more than just learning and employing the lexicon of international law. At a time when the Western powers were engaged in the process of expanding their influence to their “less civilized” neighbours, it became significant for Japan to participate as an equal member in this struggle for power and adopt an expansionist world view.

Against this complex background, the next critical chapter in the story of Japan’s introduction to and reception into the so-called “community of nations” came with the Sino-Japanese War of 1894. This war represented Japan’s first involvement in an international conflict that drew the attention of Europe. Japan’s conduct during the war and the changes in its relationship with the Western powers served to make this a key moment in Japan’s development as a player in the international community.

It is generally agreed that the Government of Japan undertook conscious efforts to prosecute the war in a manner consistent with international law. The Japanese Imperial Rescript, for instance, stated as follows:

“We command each and all of our competent authorities, in obedience to our wish and with a view to the attainment of that aim, to carry on hostilities by sea and land with all means at their disposal, consistently with the law of nations.”

In order to ensure this, the Government ordered the deployment of legal advisors to accompany the Army and the Navy. These legal advisors later published treatises on the conduct of the war from the perspective of international law. International law studies in Japan were solidly established during this period as a substantive academic undertaking.

Furthermore, the European powers’ interest in East Asia had rapidly increased during the turn of the century, at a time when the rise of Germany as a great power engendered competition over international trade and military power, and Russia was seeking to expand its sphere of influence into East Asia. Britain, concerned about the threat of Russia against the Indian subcontinent under its rule, found in Japan a potential partner in the wake of its victory over China and in its rivalry with Russia. The conclusion of the Anglo-Japanese

Treaty of alliance in 1902 thus symbolized in Japanese eyes a final acceptance of Japan as an equal partner in global politics.

IV. The Gradual Transformation of Japan's Attitude towards International Law

The transformation of the governmental structure of Japan that I have described above gave Japan an opportunity, after its initial period of assimilation with the international community and its law, to reshape its foreign policy orientation in the context of the challenges posed by Western powers with imperialist designs.

It is in this complex situation of dichotomy that Japan entered the twentieth century as a modernizing State. In spite of several setbacks in its integration efforts into the international community, Japan was by and large maintaining its active engagement with the evolving concept of the law of nations. It has to be noted, nevertheless, that these developments gradually grew into a complex "mentor-cum-rival relationship" with the Western powers. This conflict was already manifest in the termination of the Anglo-Japanese Alliance in 1924 and the increasing tension across the Pacific in an atmosphere of growing pressure and mutual bitterness, including with respect to issues relating to racial discrimination. The unsuccessful attempt of Japan to include the principle of racial equality in the Covenant of the League of Nations, exacerbated by the movement towards restrictive legislation on immigration in the United States in the late 1920s, also contributed to the escalation of tension in the Pacific. At the same time, this tension was aggravated by the overblown sense of self-confidence in Japan growing from the victories over China and Russia, as well as the eventual participation of Japan in the First World War on the winning side.

In fact, it is my view that the First World War brought a major shift in the existing Euro-centric global order and had the effect of marking a significant turning point in the history of Japan. This shift gave Japan an opportunity to expand its own sphere of influence in Asia. These considerations along with a desire to improve its status as a global power prompted Japan to participate in the establishment of a new world order at the conclusion of the First World War. When the League of Nations was established, Japan joined its

ranks in 1920 as one of the four permanent members of the Council of the League of Nations.

It is through this process that Japan's perspective on international law gradually transformed from one of eager obedience in order to gain admission into the community of nations into one based on the desire to pursue its own self-interest on the basis of acquired knowledge and experience. Although Japan in this period could be said to have maintained its strong record of compliance, the great change in the global scene also provided Japan with an opportunity to consolidate its position as a dominant power in East Asia, while at the same time its position began to provoke negative reactions from Western powers, including the United States. The tension that arose eventually came to a head with the outbreak of the Manchurian affair in 1931. Although members of the Council of the League of Nations initially took a tolerant view of Japan's position, the League eventually grew suspicious of Japan's involvement and conducted an inquiry into the incident. When the resulting Lytton report criticized Japan's conduct, the Japanese delegation walked out of the Assembly of the League and Japan communicated its official withdrawal on 27 March 1933, thus isolating itself from the "international community," in which it had so long aspired to be accepted as an equal.

Over time, Japan's aspiration to be accepted into the community of nations as an equal thus miserably failed. The resulting tragic period eventually came to leave a dark stain on the history of modern Japan, in which it moved to realign itself so as to be able to change the *status quo* of the international legal order to which it had so faithfully cleaved. The Second World War—and Japan's fate in it—are so well-known that I do not consider it necessary to elaborate more on this sad chapter of Japan's history here.

V. The Birth of a New Japan with its New Outlook on International Law

It is my view that the more important point to focus on for our purposes today is the manner in which the outlook of Japan on the international legal order has been transformed in the aftermath of the Second World War. Japan, like most of Europe, was devastated by the unprecedented loss of human life and the destruction of its whole nation—both materially and spiritually. Indeed Japan suffered perhaps much more as the only State to

have suffered as the victim of two atomic bombs. In this new situation, Japan adopted the new Constitution of 1947 with an idealistic objective to establish and maintain its national identity as a “peace-loving nation.” Article 9 famously declares that “the Japanese people forever renounce war as a sovereign right of the nation” and that “land, sea, and air forces...will never be maintained.” On the basis of this newfound faith in the international pacific legal order, Article 98(2) of the Constitution provides that: “[t]reaties concluded by Japan and established laws of nations shall be faithfully observed.” Simultaneously with the Treaty of Peace with Japan, the U.S.-Japan Security Treaty was concluded in 1951 as an effort to shield Japan from the security vacuum thus created by this new mandate of the Peace Constitution.

A new Japan, determined not to repeat its pre-war history of isolation and aggression, has come to re-embrace a new and vigorous internationalism. It sought admission into the United Nations only months after its Peace Treaty came into effect, though its initial application for admission in 1952 was vetoed by the Soviet Union, until its admission came to be realized in 1956. In order to give concrete experience to its new desire to pursue diplomacy based on international law as the centrepiece of its foreign policy, Japan joined the International Court of Justice in 1954, even before its admission into the United Nations. In 1958, it accepted the compulsory jurisdiction of the Court and remains to this day one of the few States to have accepted the Optional Clause without major reservations. The fact that Judge Tanaka, the former Chief Justice of the Supreme Court, was elected as the first Japanese Judge of the International Court of Justice in 1960 symbolizes this.

Somewhat ironically, however, this commitment of Japan to the purposes of the United Nations has not been translated into action through faithful participation in every aspect of its activities, as will be discussed during today’s symposium. Indeed, until the end of the twentieth century, it denied itself the ability to participate in the peacekeeping operations of the United Nations, due in large part to the absolute commitment to peace embodied in Article 9 of the Constitution. It was only in 1992 that Japan, prompted by the desire to shore up the peacekeeping efforts of the United Nations, adopted a law permitting the deployment of its Self-Defence Force for the purpose of U.N. peacekeeping and other humanitarian missions. It is interesting to me that opposition to this new evolution in the policy orientation of Japan has at times been quite strong in Japan against the background

of the history that Japan has come through. Nevertheless, this new orientation could be said to reflect the final step in its commitment to contribute to the maintenance of international peace and security through full cooperation with the United Nations.

Conclusion

By way of a conclusion, it should be interesting to reflect upon these vicissitudes that Japan and its society have undergone in this exposure to international law throughout the last century and a half since its reception into the community of nations. It would be tempting to conclude from this history that I have described that, except for the period of some ten years of duration immediately preceding the Second World War, Japan has basically positively engaged with the international community, first by studying and absorbing the concept of the law of nations and then by learning to apply the law, albeit sometimes in a somewhat self-serving way.

I wish to caution you, nevertheless, that this image could be too simplistic and would not accurately reflect the complex reality. The dark period of Japan's history leading up to the Second World War should be appreciated against the entire background of this growth of modern Japan which was achieved at the cost of extraordinary impacts on the political, economic, and social life of the country. The rise of the military, which precipitated Japan's realignment in the pre-war period, arose out of a fundamental, though mistaken, belief shared by the majority of Japanese that the country could and should succeed as a powerful player in global politics only by competing with the Western powers. Against this background, it is inevitable that the defeat suffered by Japan during the War itself has left an indelible mark on the spiritual life of the Japanese people.

The defeat inevitably brought a major spiritual crisis in the minds of the people in Japan by creating a vacuum in their faith as to what to believe. The arrival of the Cold War in the outside world at this time gave rise to a mini-Cold War within Japan, which was fought fiercely on the political front between two hostile camps expressing conflicting views on how to face the legacy of the past, including the last War. On the one hand, in the period immediately after the defeat, a view came to prevail among many in Japan that the whole history of the past leading to the creation of a militaristic Japan should be characterized as

a complete failure of the process of modernization. The past should thus be disowned and rejected. On the other hand, as a new generation of Japanese came to engage with this issue, a fierce reaction to this spiritual nihilism emerged in the form of a new revisionist view that Japan should get out of this pervasive, masochistic approach to history.

The vestiges of this divide reflecting the complex experience of Japan since its opening in the previous century still remain alive in Japan. In my personal view, this spiritual divide affects in many ways the fundamental debate about what it means for Japan to be a respectable member of international society in the contemporary setting. Some adhere to the view that the idealism of Japan's post-War orientation as a strictly peace-loving State should be maintained and pursued, while others advocate instead for a more robust Japan as a "normal State," meaning a Japan that possesses and exercises power in the traditional sense, thus arguing, especially in the context of the present day environment surrounding Japan, for a greater emphasis on Japan's ability to stand against competing sources of power in its neighbourhood. In this sense, Japan could be said to be going through a crucial period of transition in search of its new identity at this moment. It is in this context that the historical experience of Japan, with all of its ups and downs since the days of its opening through its acceptance of the "law of nations" as the universal law, should in my view be relevant to our reflection in discussing Japan's foreign policy approach to a number of issues, such as those that we are taking up in today's symposium.