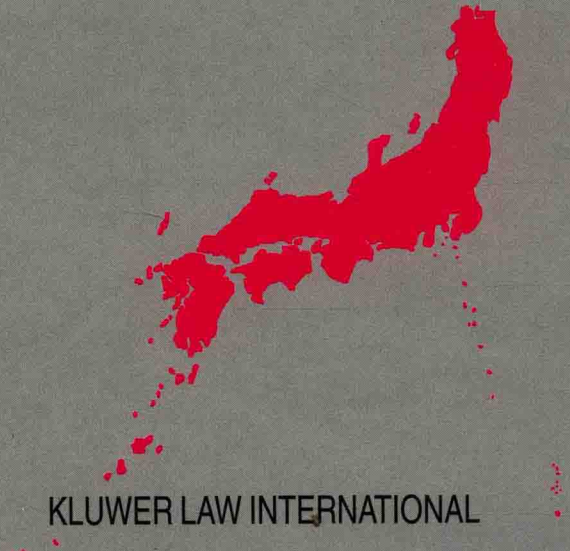
INTERNATIONAL LAW IN JAPANESE PERSPECTIVE

The Changing Postwar International Legal Regime

The Role Played by Japan

Wakamizu Tsutsui



KLUWER LAW INTERNATIONAL

The Changing Postwar International Legal Regime

The Role Played by Japan

WAKAMIZU TSUTSUI

Emeritus Professor,
University of Tokyo

KLUWER LAW INTERNATIONAL
THE HAGUE / LONDON / NEW YORK

Published by:
Kluwer Law International
P.O. Box 85889, 2508 CN The Hague, The Netherlands
sales@kli.wkap.nl
http://www.kluwerlaw.com

Sold and Distributed in North, Central and South America by:
Kluwer Law International
101 Philip Drive, Norwell, MA 02061, USA
kluwerlaw@wkap.com

In all other countries, sold and distributed by:
Kluwer Law International
Distribution Centre, P.O. Box 322, 3300 AH Dordrecht, The Netherlands

A C.I.P. Catalogue record for this book is available from the Library of Congress.

Printed on acid-free paper.

ISBN 90-411-1847-0

Printed and bound in Great Britain by Antony Rowe Ltd., Chippenham, Wiltshire.

THE CHANGING POSTWAR INTERNATIONAL LEGAL REGIME

The Role Played by Japan

International Law in Japanese Perspective

VOLUME 8

Series Editors

Shigeru Oda
Yuji Iwasawa

The titles published in this series are listed at the end of this volume

FOREWORD

The Second World War was the first war fought to destroy the enemy by use of the most advanced technological means developed by states at that time. However, it may also have been the last "world war" in the sense that great wars will no longer be fought between governments. In fact, immense destruction and inhumanity have occurred since the end of the Second World War in the form of irregular warfare known as class struggles, anti-colonial or national liberation movements, and terrorism in the name of various causes.

This is a reflection of the weakening of the sovereign state system on which traditional international law developed. The Allied Nations of the Second World War may have intended to rehabilitate the system after the War, but it was precisely the practices of the Allied Nations taken against the Axis states before and during the War that brought international law to invalidation.

We were told that the activities of the United Nations would bring international society closer to being a municipal one. The fact is that international society remains decentralized, with a considerably larger number of sovereign states all accepted as members of the United Nations.

Internationalization has brought people in closer contact across national borders, decreasing the control of states over them. The United Nations has been more successful in attaining its secondary purpose of "international cooperation in solving international problems of an economic, social, cultural, or humanitarian character" than in fulfilling its principal purpose of the "maintenance of international peace and security."

Since her surrender, Japan has enjoyed remarkable success in resurrecting her war-devastated economy, but has yet to free herself from the situation where she has no discretion to choose her own means of security. Under these circumstances, Japanese students have good reason to be interested in subjects other than the law of international peace and security, just as I did in my student days. It also accounts for their tendency to take an idealistic, rather than a realistic, approach in discussing that law.

This does not mean, however, that they are indifferent to overseas affairs involving the use of armed force. In the 1960s and 1970s, students engaged in insurrections against society and universities under the influence of the Chinese Cultural Revolution and demonstrated against American intervention in the conflict between the two regimes in Vietnam.

Amid this climate of unrest, I wrote a number of books and theses on "war and law" in Japanese. Some students agreed with my arguments, while others – especially those who eagerly supported anti-war demonstrations – resisted on the ground that discussions on war were at odds with the peace movement.

The tragedy caused by the terrorist attacks on New York and Washington on 11 September 2001 brought to mind our former fear of air raids. They were a daily phenomenon in cities in belligerent regions during the Second World War and have continued to be so in the armed clashes that have subsequently broken out.

While it may be natural to think ourselves not in the same situation as people in belligerent regions, we must not overlook the fact that force conditions peace. As any use of force involves some degree of inhumanity, law should elucidate such activity persuasively.

I have spent most of my academic career studying and lecturing in international law and jurisprudence at University of Tokyo. Apart from some contributions to overseas journals, the results of my research have all been published in Japanese. This is my first experience of planning and writing a book in English and this work has taken me an unexpectedly long time to complete. I have revised the draft many times as incidents have occurred during the process of writing.

Dr. Shigeru Oda, Judge of the International Court of Justice, cordially encouraged me to finish this work, and Mr. John Middleton, Associate Professor of Law at Hitotsubashi University in Tokyo, kindly polished my English.

I sincerely hope this book will enable readers in English to gain a better understanding of international law from a Japanese perspective, especially in relation to international peace and security.

Wakamizu Tsutsui

INTRODUCTION

This book consists of three chapters. Chapter 1 discusses how the international legal regime has changed in tandem with the foundations of such society over the past two centuries. There have been a number of impetuses to this change, but the most significant one has undoubtedly been the Second World War, which was fought in an unprecedented manner as far as international law and human life and property were concerned.

The Second World War was destructive, not only because of the advanced technology applied to warfare, but also because there was no normative restriction. International law originates in an agreement on the "freedom of conscience" reached among the belligerents in a religious war. As far as war is fought according to international law, the loss of human rights is kept to a minimum. In a war fought to realize an ideology inconsistent with the opponents', they would cease hostilities only after the annihilation of their enemy.

International law was originally limited in application to the "Family of European Civilized Nations" among whom it had been agreed. This meant that non-European nations did not enjoy the rights of international law on account of the differences in their civilization. The principle of sovereign equality would only be established after recognition of the multiplicity of civilization.

When the world was devastated by great war, a "world government" was conceived to realize eternal peace. Most states survived the Second World War by compromising their sovereignty to the benefit of greater powers. After this practice, it became possible for states' sovereignty to be subjugated to a "general international organization." The fact that individuals had come in ever-closer contact across state borders since the nineteenth century also justified the existence of "international government."

Any scheme, if it is intended to be positive, must be based on the practice from which it came to be realized. In this light, it may have been inevitable that the postwar international regime would not deter the recurrence of religious wars and wars of colonization. The problem is how the postwar international organization can effectively realize the principle of war renunciation or no use of force, having full regard to human rights.

The following chapters argue that the United Nations has been a positive postwar international order, recognizing the right of self-defense as inherent to every state, including "enemies." The organization has therefore weakened its collective

character, but outlived the Cold War by entrusting the collective function to self-defense taken individually.

Chapter 2 discusses the way in which such an international legal order has been achieved through self-defense.

The practice of self-defense is so rare under traditional international law that it cannot be regarded as comparable to any concept in municipal law. Municipal law allows individuals to take forcible action for their legitimate defense in circumstances where the government is not prepared to discharge its public function. The postwar international legal order has been realized by self-defense as an intermediate function between the individual and collective, as provided under article 51 of the UN Charter.

The United Nations has experienced some difficulty in its organizational function since the Security Council, the primary organ for peace and security, may be paralyzed by the use of veto powers. Apart from structural difficulties, it has no force of its own, so enforcement action is impracticable without the participation of the forces of individual states, including the more powerful ones. Individual states take forcible action on the express ground of self-defense under the UN Charter.

Peacekeeping is a practical activity undertaken by the United Nations for the maintenance of peace and security. It is sometimes reinforced by an act of self-defense taken by the participating states. After the Cold War, enforcement action has come to be taken more often by the United Nations as a successor to self-defense.

The conditions of self-defense are dependent upon the practice taken in that name. The conditions are not necessarily the same as those of legitimate defense in municipal society. Self-defense should be understood as activating the social function in international society.

The postwar international legal regime is a regime of self-defense in the sense that it is characterized by the social function of self-defense. It departs from the traditional international law knowing no public or collective part under the principle of free recourse to war. On the other hand, it is not assimilated with a municipal legal regime having a government under the authority of which no illegal use of individual force is overlooked except in an emergency.

The regime of self-defense is realized on the basis of regional cooperation. In fact, self-defense was conceived in the drafting stage of the UN Charter by promoting regional realities ahead of general collective principles. The concept of collective self-defense was in fact extracted from that of self-defense in order to emphasize its social aspect.

In light of wartime practices, the postwar international organization should be organized on the basis of regional cooperation. As a matter of fact, the postwar international order came to be possible by amending the original scheme of "general international organization."

Reconstructed on the basis of self-defense, the postwar international organization removes the deficiencies in the original concept, namely the limitation on membership and the incompleteness of the humanitarian principle.

Strictness in the collective principle threatens the humanitarian treatment of

belligerents and civilians in armed action, including enforcement. Adherence to ideology has brought out inhumanity in the wars of recent times, as practiced during the Second World War and the subsequent wars for national liberation. If the Cold War had developed into a "hot war," it would have been so destructive as to threaten the very survival of humankind.

The "enemy" nations were neither integrated into the Allied Nations regime nor the United Nations, nor rehabilitated through peace conferences held in accordance with traditional international law. It has been in self-defense arrangements that they have found their status in postwar international society.

It is natural that "enemy" states are situated not in the regime of the Allied Nations, but in something different from it, that is, the postwar international legal regime. The postwar international legal regime is thus characterized by the status of the "enemy" states. Chapter 3 discusses this phenomenon by reference to the process of rehabilitation of an "enemy" state, Japan.

Japan has neither been integrated into the United Nations collective security system nor the system of a peace treaty concluded according to general international law. The process followed was the adoption of the Constitution of Japan 1946 and the conclusion of a U.S.-Japan Security Treaty based on the right of self-defense inherent to every state, whether Allies or their enemies.

Japan preferred the garrison of foreign forces in her territory to the non-maintenance "of land, sea, and air forces as well as other war potential" provided by the Constitution. This indicates that Japan was not convinced that the United Nations would act as her guardian in its collective function and general character despite the provision of her Peace Constitution.

This does not mean, on the other hand, that the United States and Japan will have full regard to article 51 of the UN Charter. The U.S.-Japan Security Treaty expressly provides for "the Far East," which is not necessarily conditioned on article 51 of the UN Charter. It is also noteworthy that other states are also following suit in light of the events after the Cold War.

In order to inquire where the legal regime of international society is heading, it is necessary to trace the changes to date, the most significant impetus for which was the Second World War. We must not overlook the fact that the present international legal regime derives from the practices of the Second World War, the most distinctive feature of which was the disregard of an international law originating in an agreement on "freedom of conscience."

CONTENTS

CHAPTER 1

THE CHANGING LAW IN POSTWAR INTERNATIONAL SOCIETY

1. International Law as the General Order in International Society

(1) International law originating in a system of freedom of conscience

The first half of the twentieth century brought two great wars in succession in 1914–1918 and 1939–1945. They are usually referred to as the First and Second World Wars, but only the second one deserves the title of World War, being unprecedented both in its scale and geographical extent and having an epoch-making effect on international society. The legal situation arising from the Second World War remained unchanged in international society during the second half of the twentieth century and may well endure throughout this one.

Wars involve destruction, but the scale of this destruction is limited by normative and technological factors. War fought on a limited scale would therefore not bring the enemy to the brink of total destruction. The Second World War was fought with the latest technologies available at the time and under the grip of the most radical ideologies, and the physical destruction wrought on enemies was without limit.

In this regard, the Second World War is comparable to the medieval religious wars in Western nations, which were also fought with no normative restrictions. Opposition between Christian factions caused a series of wars in Germany from 1618. According to Hugo Grotius (1583–1645), these were waged with "a lack of restraint in relation to war, such as even barbarous races should be ashamed of." He continued: "Men rushed to arms for slight causes, or no cause at all, and when arms have once been taken up, there is no longer respect for law, divine or human; it is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes."[1]

Under the conviction that "there is a common law among nations," Grotius discussed "law, which is valid alike for war and in war." The law was extracted from the intelligent achievements of learned men, that is, the results of European civilization. In doing so, he intended to minimize the inhumanity of man to man observed in acts of war.

---

[1] H. Grotius, *De Jure Belli ac Pacis* (translation) in J.B. Scott (ed.), *The Classics of International Law*, 1925, vol. 1, esp. pp. 20–21.

He developed his argument with the aim of placing normative restrictions upon warfare. It would be attained by integration of the law into the practices of nations. Since restrictions developed on a theological basis would have little effect on wars between nations without a shared religion, "Law Among Nations" needed to be secular.

The peace thus attained would be institutionalized under the principle of the equal treatment of nations irrespective of their size and the religious beliefs of their monarchs and people. For as long as this principle was maintained, the society would remain peaceful, with different political systems and ideologies. It was later formulized as the "sovereign equality of nations" in accordance with the political theory of the absoluteness of monarchs. When war is fought within this institution, it will cease when the victor is satisfied with the position of power it has gained over the vanquished. In such a war fought among legally equal parties, no party either disappears or becomes a world empire.

Under this institution, Europe remained at peace for almost a century from the end of the Napoleonic War until the beginning of the First World War. Belgium and Switzerland became independent as a result of the peace conference in Vienna, which ended the Napoleonic War following the French Revolution. They were too small to survive without the protection of a system of sovereign equality. Permanent neutrality was a means of securing such independence.

However, it would be incorrect to conclude that society is driven to disunion by being based on the principles of freedom of conscience and the sovereign equality of states. Rather, the effect of these principles in society is to bring the members into intimate and constant relations with each other. "The separate state could never be accepted as the final and perfect form of human association, and in the modern as in the medieval world it would be necessary to recognize the existence of a world unity. The rise of international law was recognition of this truth."[2]

Under the international peace attainable under this principle, the law of peace is created through the intercourse of states. Their official intercourse is through diplomatic missions and leads to laws of diplomatic relations. The commercial intercourse of private individuals, which culminated in the laissez-faire economics of the mid-nineteenth century, motivated the conclusion of commercial treaties between governments. Laws of territory are formed through the states' practices of acquiring land and using the sea and air. Laws of state responsibility are recognized through remedies for the breach of such practices.

So long as a nation remains a member of international society, it enjoys the right of international law in relation to its activities in war and peace. International law was originally conceived as a method of mitigation of acts of war, but has developed to the stage where it is now a normative body in every field of relations between nations. Both the laws of peace and of war are integral parts of international law.

The legal situation in postwar international society in the second half of the twentieth century leads us to question whether we should focus our attention on the law

---

[2] J.L. Brierly, *The Law of Nations* (6th ed.), 1963, pp. 6–7.

of war rather than that of peace. There is, by definition, no international society under the rule of international law unless freedom of conscience prevails. If the practices in the Second World War are taken as being in accordance with the rules prevalent at the time, then traditional international law must have been rendered invalid already.

Indeed, the Second World War was too destructive for the traditional law of war to be proven valid. That may be a result of the invalidation of the traditional principle of freedom of conscience. It was possible in view of the fact that traditional international law proceeded on the premise of common values held by members of that society when there was in fact no standard of common values between them. What made the situation extreme was the fact that technology had developed to the stage where it was possible to destroy any people, race or nation regarded as different.

International law originates in the "Family of European Civilized Nations," excluding non-European civilized nations from the jurisdiction. The Europeans did indeed make annihilative warfare with non-Europeans in the process of advancing outwards. From a global perspective, international law was never established until it was believed to be beginning to decline.

Most non-European nations made the Second World War an opportunity to regain their independence from European colonial rule. The War fostered the dissolution of traditional international law on the one hand, but marked a turning point in globalization on the other.

The postwar international legal order cannot be a rehabilitation of traditional international law based on the homogeneity of civilization. It must be based on a variety of races, religions and ideologies, developed economic structures, stable political orders, and so on to be a truly international system. Science and technology make it possible to create such a system, but also to destroy any opponents on account of their heterogeneity.

In this situation, traditional international law may be somewhat obsolete, but is still important for the survival of human civilization through its fundamental doctrine. It must be remembered that international law originates as a device to prevent total destruction, conditional upon tolerance of different beliefs.

(2) International law developing into a general order

a) Civilizations regard encounters with others in various ways: friendly or antagonistic, peaceful or violent.[3] Europeans showed no tolerance of outsiders in the process of their advancement outwards, taking an antagonistic and violent attitude toward them rather than a friendly and peaceful one.

According to Immanuel Kant, who distinguished between relations with "barbarians" and those with "the civilized," the situation was as follows:

> "If we compare the barbarian instances of inhospitality referred to with the inhuman behavior of the civilized, and especially the commercial, States of our

[3] Arnold Toynbee discussed this subject in a study of at least twenty civilizations in every corner of the world at various stages in history: *A Study of History*, 1921–1954.

> continent, the justice practiced by them even in their first contact, the injustice practiced by them even in their first contact with foreign lands and peoples fills us with horror, the mere visiting of such peoples being regarded by them as equivalent to a conquest. America, the Negro lands, the Spice Islands, the Cape of Good Hope, etc., on being discovered, were treated as countries that belonged to nobody; for the aboriginal inhabitants were recognized as nothing."[4]

A considerable proportion of the non-Europeans – the Native Americans, Oceanians, Africans, and some Asians – were subjugated by European powers. Empires in India, Burma, Indochina, Indonesia and Africa disappeared, and China stood on the brink of total subjugation. There were conquests, annexations, enslavement and destruction on the part of non-Europeans, while the Europeans remained relatively peaceful under the system of "the Law of the Family of Nations."

If the Westphalia Rule were recognized as covering every relationship around the globe, there would be no war of annihilation, even against people and nations with different beliefs and civilizations. As long as it remained the rule of law, it would be omnipresent in every corner of human society. The Roman Empire, from which most European nations descended, remained peaceful under the rule of law, although it comprised a considerable number of different races and civilizations.

In applying the different standard to outsiders, they fell into the contradiction that certain nations were excluded from natural rule. This situation was against not only the tradition of European civilization, but also that of human civilization itself.

The dynasties in mainland China contemporaneous with the East Roman Empire in the seventh century, which handed down the text of Roman law in codified form, also conceived the idea of "peace through law." In fact, the dynasties of Sui and Tang completed the codification as a means of unifying their country. This was adopted by Japan and remained in force there until the nineteenth century, when it was replaced by a system of Western law.

Law is a synthesis of philosophy, theology and political science. The role taken by law in society as a social norm is different according to the civilization on which the society develops. Notwithstanding its similarity to the codified Roman law, a statute in Chinese society takes an inferior position to ethics in civil life and political activities. In a traditional Oriental society influenced by Chinese civilization, the tendency to take less account of law is maintained, even after it is reformed under the influence of Western civilization.

The Oriental peoples did not regard the difference as a defect in their civilization. Arai Hakuseki, a Japanese intellectual in the Edo period (1603–1867), concluded that Western civilization might be superior to the Orient in practical fields, but remained inferior in the field of metaphysics.[5] The question is whether the conclusion

---

[4] Immanuel Kant, *Zum ewigen Frieden,* 1795, translated by W. Hastie, *Kant's Eternal Peace*, 1914, p. 88.

[5] Arai Hakuseki (1657–1725), an outstanding Japanese intellectual and statesman in the Edo period, examined, in his capacity as a government official, a Dutch missionary jailed for propagation of the Christian faith in 1708. He reached this conclusion at a time when contact with Western civilization was almost prohibited: *Seiyokibun* (date of authorship unknown).

is the same when all the merits of both civilizations are judged with a correct understanding of each. The answer will depend on how the Western civilization is evaluated, when physical development brings destructive conquests and war leads to the annihilation of the achievements of human civilization itself, including the achievements of that Western civilization.

b) The Westphalia Rule was an agreement between political authorities to end the Religious Wars in medieval Europe. It could, at the same time, be humanitarian since it gave peace precedence over each religious belief. This was possible so long as they remained tolerant of different beliefs.

The rule was prevalent among European civilized peoples as it was proven natural on the basis of the literature of learned people and state practices. Francisco de Vitoria (1480–1546), a theologian and jurist, argued that human beings naturally had different habits and cultures, so should be treated equally regardless of such differences. As far as the rules among the Europeans were natural, they would apply to any nation around the globe in transactions during wartime as well as times of peace.

"It would not be lawful for the French to prevent the Spanish from traveling or even from living in France, or vice versa, provided this in no way enured to their hurt and the visitors did no injury. Therefore it is not lawful for the Indians ...

"If it were not lawful for the Spaniards to travel among them, this would be either by natural law or by divine law. And if there were any human law which without any cause took away rights conferred by natural law or divine law, it would be inhumane and unreasonable and consequently would not have the force of law."[6]

Establishment of international law as the global legal system suggests that the Law of the European Family of Nations is "natural," beyond the local body of law. As a matter of fact, however, it was realized not by means of a natural process, but rather through forcible advancement of the former to the latter.

Japan had closed its doors to all Western nations except Holland from the seventeenth century until the advancement of the Western powers outwards. Aware that Oriental nations were falling under the domination of Western powers one after another, she abandoned the traditional closed policy in 1858 to conclude friendship treaties with several Western powers, namely, the United States, Holland, Britain, France and Russia.

During almost the same period, Turkey was forced to make peace with Russia through a treaty mediated by Britain and France which provided in one article that she was admitted to participate in "public law" and the European Family.[7]

Treaty relations between Western powers and some non-European ones did not signify the natural enlargement of the European Family. In concluding friendship treaties, European nations tended to treat non-Europeans as "honorary citizens" of

---

[6] Francisco de Vitoria, *De Indis et de jure belli relectiones* (1532) in J.B. Scott (ed.), *Classics of International Law*, pp. 151–152.

[7] Article 7 of the Treaty for Re-establishing Peace signed at Paris, 30 March 1856, between Turkey and the five powers: Parry, 114 *Consolidated Treaty Series*, p. 414.