

The Reception and Use of International Law in Modern Japan, 1853–1945

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- I. Introduction
- II. The Foundations of International Law in Japan, 1853–1905
- III. Japan's Attitude Towards Interwar Developments, 1905–1931
- IV. The Project of a "Greater East Asian International Law", 1931–1945
- V. Conclusion

I. INTRODUCTION

The reception of international law in Japan has received increasing attention in recent studies of the history of international law.¹ This is in line with a general tendency in history to shift the focus away from a solely western-oriented narrative towards a more polyphonic representation of developments that allows for more voices than just the European to be heard. Thus, more and more non-western perspectives are integrated into the historic narrative which traditionally described the development of international law merely as the formation of European regional law and its progress towards global domi-

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1 For Japan, see (inter alia) U. ZACHMANN, *Völkerrechtsdenken und Außenpolitik in Japan, 1919–1960* [The Discourse on International Law and Foreign Policy in Japan, 1919–1960] (Baden-Baden 2013); M. YANAGIHARA, Japan, in: Fassbender / Peters (eds.), *The History of International Law* (Oxford 2012); K. AKASHI, Japan – Europe, in: *ibid*; T. SAKAI, *Kindai nihon no chitsujo-ron* [The Political Discourse of International Order in Japan] (Tōkyō 2007); Y. MATSUI, The Social Science of International Law: Its Evolution in Japan, in: *The Japanese Annual of International Law* 45 (2002); Y. ŌNUMA, When Was the History of International Society Born? An Inquiry of the History of International Law from an Intercivilizational Perspective, in: *Journal of the History of International Law* 2 (2000); H. OWADA, Japan, International Law and the International Community, in: Ando (ed.), *Japan and International Law – Past, Present and Future* (Den Haag 1999); Y. ŌNUMA, "Japanese International Law" in the Postwar Period – Perspectives on the Teaching and Research of International Law in Postwar Japan, in: *The Japanese Annual of International Law* 33 (1990); Y. ONUMA, "Japanese International Law" in the Prewar Period – Perspectives on the Teaching and Research of International Law in Prewar Japan, in: *The Japanese Annual of International Law* 26 (1986); see also T. SOGAWA and T. MATSUDA, *Senkan-ki ni okeru kokusai-hō* [International law in the interwar period], in: *Hōritsu Jihō* 50.13 (1978); M. ICHIMATA, *Nihon no kokusai-hō-gaku o kizuuta hitobito* [The founders of international law studies in Japan] (Tōkyō 1973).

nance.² Consciously or unconsciously – such an approach also may reflect the understanding that since the end of the cold war international politics has become more complex and, more importantly, focused on non-western powers.

The case of Japan therefore seems at first sight especially relevant for the study of the reception of international law by a non-western country, as Japan was particularly successful in this respect, rising from a peripheral Asian power bound by unequal treaties in the mid-nineteenth century to the status of equal power and, in fact, the only non-western power in the otherwise European concert of powers by the beginning of the twentieth century. This was in stark contrast to her East Asian neighbours China and Korea which, within the same time span of a half-century, suffered the downfall of hegemonic power to semi-colony (China) or ceased existence as an independent nation altogether (Korea). For the next half-century, it was therefore only Japan which would be able to shape world politics in co-operation and, later, in confrontation with the western powers.

For the same reason, Japan also serves as an example of a non-western power which, starting with its defeat of Russia in 1904/05, successfully challenged the hegemony of the West in East Asia and indirectly also the normative order on which their position was built and whereby it was legitimized. This post-colonial drive *avant la lettre*, as it were, is credited with some informative value on how non-western powers (such as China) respond to the western challenge today and their efforts to have their normative experiences better reflected in international law.³

However, despite these obvious reasons for studying the reception of international law in Japan, existing studies still are troubled with certain inconsistencies and lacunae in their narrative. There is, first of all, the embarrassment that Japan for most of its modern history pursued a “Janus-faced” foreign policy⁴ which until the 1930s co-operated with the western powers, but did so consistently at the expense of its East Asian neighbours. The disputes on history and territories which prove so disruptive in East Asia today and in the near future are a persisting residual of this policy. Authors who, on the whole, consider “the reception of Western traditional law in Modern Japan [as] proper and successful” and conclude that “Japan continued persistently to play a role as ‘civi-

2 Cf. M. KOSKENNIEMI, A History of International Law Histories, in: Fassbender / Peters (eds.), *The History of International Law* (Oxford 2012), 943 ff.

3 See, for example, K. LEE, The Reception of European International Law in China, Japan and Korea: A Comparative and Critical Perspective, in: Maruhn / Steiger (eds.), *Universality and Continuity in International Law* (Den Haag 2011) 441. For a critique of this debate with further references, see B. SAUL / J. MOWBRAY / I. BAGHOOMIANS, Resistance to regional human rights cooperation in the Asia-Pacific: Demythologizing regional exceptionalism by learning from the Americas, Europe and Africa, in: Nasu / Saul (eds.), *Human Rights in the Asia-Pacific Region: Towards Institution Building* (London 2011).

4 S. SUZUKI, Japan’s Socialization into Janus-Faced European International Society, in: *European Journal of International Relations* 11.1 (2005).

lized nation', not as 'barbarous people', until 1945"⁵ have no problem to argue so for the initial phase of Japan's reception of international law until about 1894, but face difficulties in upholding the image for the second phase, when Japan actually applied the international law from a position of power. Consequently, even recent studies of Japan's engagement with international law tend to focus on the initial phase of reception and treat the latter half of its actual application only briefly.⁶

This latter tendency reinforces another contradiction, namely to view Japan's success in modernization, especially its integration into the international community and its laws, ultimately as a failure, or at least with considerable disappointment. Despite Japan's seemingly brilliant success on the outside and the apparent ease with which it made the transition into the "family of nations", the ultimate conclusion invariably is that Japan never managed to contribute anything substantial to the development of modern international law. Japan's success of adaptation thus testifies to the intrinsic rationality and latent universality of international law itself rather than the performance of Japan.⁷ Moreover, the attitude of Japan and its international lawyers then and now is unanimously criticized as "positivistic", which in the Japanese context means "passive", Eurocentric and uncritical, i.e. slavishly adopting and applying western norms without critical resistance or productive protest to it.⁸ For contemporary international lawyers after 1990, this even leads to the call for a less "positivistic" and more dynamic approach to international law that satisfies notions of "equity outside positive law" and, upon necessity and reason, seeks "for an up-dated legal order among states".⁹

From a historical perspective, the verdict of lacking creativity, a certain passiveness coupled with Eurocentrism certainly rings true for the period on which most studies focus, namely the period of reception (1853–1905). Although Japan *used* international law quite deftly and at times creatively from a very early period onwards, as we shall see, its reception was mediated through foreign works and foreign experts and was, in any case, derivative of western scholarship. The term "positivism" is associated to the attitude of this phase not without foundation, all the more since this was the disciplinary approach also of European legal scholars at the time. However, the verdict of uncritical passiveness is true to a lesser degree for the period from 1905 onwards, and certainly not during the 1930s, when Japan entered a phase of open confrontation with the West. This

5 M. YANAGIHARA, Japan's Engagement with and Use of International Law: 1853–1945, in: Maruhn / Steiger (eds.), *Universality and Continuity in International Law* (Den Haag 2011) 469; similar OWADA, *supra* note 1, 370.

6 E.g. YANAGIHARA, *supra* note 1 and 5; AKASHI, *supra* note 1.

7 AKASHI, *supra* note 1, 742.

8 E.g. AKASHI, *supra* note 1, 741; ŌNUMA (1986), *supra* note 1, 40–42; ŌNUMA (1990), *supra* note 1, 46 f.; OWADA, *supra* note 1, 376–378.

9 S. YAMAMOTO, Japanese Approaches and Attitudes Towards International Law, in: *Japanese Annual of International Law* 34 (1991) 123. Yamamoto was president of the Japanese Society of International Law at that time.

expressed itself in the project of a “Greater East Asian international law” (*Dai-tōa kokusai-hō*). Curiously, studies which acknowledge the Japanese “frustration” over western hegemony and the need to overcome its heteronomy as an important driver of Japan’s foreign policy at the same time completely disagree as to the nature of this latter project, arguing either that the “Greater East Asian international law” was radically different from the old concept of European international law¹⁰ or, again, another unimaginative copy of western concepts at the time.¹¹ Both sides misunderstand the real function of this project within the context of the war and, consequently, also fail to relate it to the massive transgression especially of the law of war possible at the time.

The following study of the reception and use of international law in modern Japan aims to present a coherent and consistent picture of international law in Japan by pursuing the whole trajectory of its reception and application in Japan’s foreign politics, from the opening up of the country in 1854 until the final demise of Japan’s imperial project in 1945. In doing so, the study seeks to elucidate the following questions: What enabled Japan’s smooth transition into modern international relations in contrast to China and Korea? What was the function and nature of international law during the initial phase of its reception, 1853–1895? What were Japanese attitudes to the developments of modern international law and institutions thereafter? What was the function and nature of the “Greater East Asian international law” in wartime Japan and its related project, the “Greater East Asia Co-Prosperity Sphere”? And, finally, what was Japan’s position on international law in relation to the massive war crimes of the time?

Answers to the above questions will also assist us to address in the concluding section the problem of universality and “East Asian challenges” to international law which will remain on the agenda for the foreseeable future.¹²

II. THE FOUNDATIONS OF INTERNATIONAL LAW IN JAPAN, 1853–1905

It is often said that Japan came into contact with international law only after the arrival of Commodore Perry in 1853 and when it finally “opened up” to the world.¹³ The American representative Townsend Harris therefore is often credited with having taught the Japanese the first lessons of diplomatic protocol according to the western canon of international law. However, contrary to the expectation that this relatively late encounter with international law would have disadvantaged Japan, this handicap even serves as an argument why Japan made the transition into the new order much more smoothly than, for

10 YANAGIHARA, *supra* note 5, 467.

11 AKASHI, *supra* note 1, 740.

12 For a book-length treatment of the subject, see ZACHMANN, *supra* note 1.

13 E.g. ŌNUMA (1986), *supra* note 1, 27; M. ICHIMATA’s seminal study *Nihon no kokusai-hōgaku kizuita hitobito* [The founders of international legal studies in Japan] (Tōkyō 1973) begins its narrative in the Bakumatsu period.

example, China. Thus, “[o]ne reason for the Westerners’ stunning success was that the real vacuum in diplomatic procedure lay in Japan, not in China as foreigners imagined. [Townsend] Harris did not have to labor to displace a time-tested international code”.¹⁴

Although such an argument seems plausible at first, it is also problematic because it focuses exclusively on Japan’s encounter with the West. The assumption of a vacuum of international relations ignores that Japan, if not with western powers, certainly had diplomatic relations with Korea and the Ryūkyū kingdom prior to the advent of the western powers.¹⁵ The nature of these relations is somewhat contentious, but the fact remains that they followed a certain structured protocol.¹⁶ Moreover, it has been argued from early on by Japanese international lawyers that in these pre-modern relations were embedded notions which are at the core of western international law, namely those of state sovereignty and equality.¹⁷ Thus, Japan’s relations with Korea on the formal level were considered equal, notwithstanding the interpretations for the respective audiences. Moreover, Japan’s diplomatic *incommunicado* with China came about exactly because the Tokugawa rulers did not want to accede to China’s suzerainty and remained a sovereign and equal subject outside of China’s tribute system.

We do not have to go as far as to assume the existence of a proto-“international law” for Japan in pre-modern times. Such a law would be rudimentary in any case, as the opportunities to practice and develop it were limited. However, the fact remains that notions of sovereignty and equality in their essence were known and accepted by Japanese rulers even before they came into contact with western international law, and this acceptance made the transition into the system so much easier than for the rulers of Qing China, which had considerable difficulties in coming to terms with the western notion of equality.¹⁸

The treaties which Japan concluded between 1858 and 1869 with the western powers were certainly far from equal, in that they lacked the essential element of reciprocity of privileges granted, and that among these the right to consular jurisdiction of foreigners residing in Japanese treaty ports, as well as the fixed tariff system were considered most obnoxious by the Japanese government and public. Thus, the exception of foreigners from the native legal system, i.e. extritoriality, was tantamount to the judgment that Japan was still “half-barbarian” on the evolutionary scale of civilization, and therefore

14 J. STERN, *The Japanese Interpretation of the “Law of Nations”, 1854–1974* (Princeton 1979) 1.

15 Cf. R. TOBY, *Reopening the Question of Sakoku: Diplomacy in the Legitimation of the Tokugawa Bakufu*, in: *Journal of Japanese Studies* 3.2 (1977).

16 YANAGIHARA, *supra* note 1, 476–484; ZACHMANN, *supra* note 1, 40–48; both with further references.

17 S. TAKAHASHI, *Le droit international dans l’histoire du Japon*, in: *Revue de droit international et de législation comparée* 33 (1901).

18 For the Chinese case, see S. KROLL, *Normgenese durch Re-Interpretation: China und das europäische Völkerrecht im 19. und 20. Jahrhundert* [Norm production through reinterpretation: China and the European international law in the 19th and 20th century] (Baden-Baden 2012) 33–48.

not fit to be recognized as a full legal subject under international law but eligible only for partial recognition of its capacities.¹⁹ It may be that many Japanese intellectuals initially accepted the verdict that Japan was, in relation to the western powers, only “semi-developed”, as for example Fukuzawa Yukichi did in his “Outline of a Theory of Civilization” (*Bunmei-ron no gairyaku*, 1875).²⁰ However, Fukuzawa was equally vocal about the fact that this was but a temporary setback and that Japan in the relentless competition that characterized the Social-Darwinian outlook of Japanese contemporaries in the late nineteenth century could and would draw equal with the western powers by adopting the western standard, or even supersede them.²¹ Thus, the notion of equality which informed Japan’s (non-)relations with China in early modern times very much fired Japan’s ambition when it was confronted with the “unequal treaties” (*fu-byōdō jōyaku*), as they were called, with the western powers in modern times.

This ambition drove the Japanese rulers to adopt western international law as the new “standard”. It is also for this reason that the period of reception that ensued could be most truly characterized as “passive” and Euro-centric, as we have seen in the introduction. This period of reception, which did not accidentally coincide roughly with the period of the *jōyaku kaisei* period (ca. 1869–1894), or the rather protracted and initially futile attempts at revising the old treaties, which ended with the conclusion of the first “new treaty” with Britain in 1894 and the abolition of consular jurisdiction in 1899, has already been the focus of many studies of Japan’s reception of international law²² and therefore only needs to be quickly retold.

The reception of western international law was the result of intensive movements of people, books and ideas between Japan, Europe and the US, but also China. It is well known that the first translation of a western work of international law in Japan, published in 1865, was not a Japanese translation but the reprint of the Chinese translation of Henry Wheaton’s *Elements of International Law* (1836), done by the American missionary William A. P. Martin to assist the Chinese Foreign Ministry and published in Beijing in 1864 under the title *Wanguo gongfa* (Japanese *Bankoku kōhō*), i.e. “the public

19 Cf. YANAGIHARA, *supra* note 5, 499 f.; Lee, *supra* note 3, 427–430; G. GONG, The Standard of “Civilization” in International Society (Oxford 1984) 164–200.

20 For a translation in excerpts, see W. DEBARY / C. GLUCK / A. TIEDEMANN (eds.), Sources of Japanese Tradition (2nd ed., New York 2005), vol. 2, 698–707.

21 FUKUZAWA, *Bunmei-ron no gairyaku* as cited in DEBARY *et al.*, *supra* note 20, 701–702.

22 E.g. AKASHI, *supra* note 1, 730–736; YANAGIHARA, *supra* note 5, 453–459; K. AKASHI, Japanese ‘Acceptance’ of the European Law of Nations: A Brief History of International Law in Japan c. 1853–1900, in: Stolleis / Yanagihara (eds.), East Asian and European Perspectives on International Law (Baden-Baden 2004); H. OTSUKA, Japan’s Early Encounter with the Concept of the “Law of Nations”, in: Japanese Annual of International Law 13 (1969); F. ITO, One Hundred Years of International Law Studies in Japan, in: The Japanese Annual of International Law 13 (1969); ICHIMATA, *supra* note 1. See also ZACHMANN, *supra* note 1, 77–84.

law of nations”.²³ The older Japanese term for international law, namely *bankoku kōhō*, and the term for “claim” or subjective right – *kenri* derive from this first translation. Other, direct translations into Japanese of numerous important works of western experts followed.²⁴ The first translation, for example, of Woolsey’s *Introduction to the Study of International Law* (1860) by Rinshō Mitsukuri in 1873 was titled *Kokusai-hō, ichimei bankoku kōhō* (“International law, also called the law of nations”) and is the origin of the current Japanese word for international law – *kokusai-hō*.

The exchange of ideas was also mediated through an extensive movement of people. The most famous instances on the Japanese side are the scholars Amane Nishi and Mamichi Tsuda, who were sent abroad by the Tokugawa Bakufu to study international law and other subjects under Simon Vissering in Leiden from 1863 to 1865. Nishi is also credited with authoring the first treatise of international law by a Japanese (*Bankoku kōhō*, 1868) after having returned and become an instructor at the predecessor of Tōkyō (Imperial) University.²⁵ Other students followed Nishi’s path, and in later times it became a “rite of passage”, as it were, for future professors of international law at Japanese imperial universities to go abroad one or two years to study the law at a renowned university in Germany, Britain, France or the US.

Among the multitude of foreign experts which the Japanese government hired (the so-called *o-yatoi gaikoku-jin*) during the 1870s and 1880s to assist Japan in “making the country rich and the army strong” (*fukoku kyōhei*, as the motto of the early Meiji period went), there were of course numerous legal experts, some of whom also had knowledge of international law. These advised the government in its foreign undertakings on an ad hoc basis (such as E. Peshine Smith, Charles William Le Gendre or Gustave Boissonade), acted as Foreign Legal Advisors on a long-term basis within the Foreign Ministry (such as Henry Williard Denison and Thomas Baty) or taught at universities.²⁶ Undoubtedly, these foreign experts made a significant contribution to the modernization of Japan and are one factor for its success.²⁷ However, since these experts were compensated for their troubles with princely salaries, they were also a considerable burden on the national budget, and the government sought to supplant them with home-grown talent as soon as possible.

The subject of international law was taught at Japanese universities from the beginning: It was already part of the curriculum when Tōkyō Imperial University was found-

23 On Martin’s translation and other early translations into Chinese, see KROLL, *supra* note 18, 85–106.

24 For a list, see YANAGIHARA, *supra* note 5, 454; ZACHMANN, *supra* note 1, 79 f.

25 On Nishi, see R. MINEAR, Nishi Amane and the Reception of Western Law in Japan, *Monumenta Nipponica* 28.2 (1973).

26 On the contribution of these experts to the founding of international law in Japan, see ICHIMATA, *supra* note 1, 11–18.

27 See BEAUCHAMP / IRIYE (eds.), *Foreign Employees in Nineteenth Century Japan* (Boulder 1990).

ed in 1877. However, foreign experts and later Japanese instructors in the initial phase treated international law only as a side subject outside their main expertise and not as a specialized discipline. It was only in the year 1895 that the first chair in international law was founded at Tōkyō University, and this date should be considered as the founding year of international legal studies in Japan in the proper sense.²⁸ However, this professionalization of international law as an academic discipline was less a product of academia than the by-product of Japan's practical engagement with its foreign relations during the time.

When talking about the reception of international law in this early phase, it should always be kept in mind that the initial motivation for doing so was a purely practical one, namely to engage with the western powers on their own terms and thereby eventually attain equal terms in their treaty relations; and, by applying international law in the same way as the western powers did to gain a strategic advantage over its regional competitor China. Thus, the Japanese government from the start treated studies of international law rather as practical manuals or "cookbooks", as it were, on how to conduct foreign policy, and cared less for the doctrinal complexities or contextual foundations of the law.²⁹ In the same way, it could be argued that the initial function of Japanese international lawyers lay in their role as advisers, and that the critical investigation of international law as an academic subject was a secondary development and, in a way, remained a secondary task from the perspective of the government up until 1945.³⁰

Thus, the Japanese government applied the rules and precepts of international law to their case with remarkable alacrity. Arguably one of the earliest instances is the application of the rules of neutrality: E.g. during the so-called Boshin war (1868–1869), the war between the Shogunate and the eventually victorious imperial troops, the Shogunate insisted on the neutrality of the western governments.³¹ Likewise, the new Meiji government complied with the request of Germany and in August 1870 declared its neutrality during the Franco-Prussian War.³²

In the following decades, the Meiji government applied the rules of international law with varying success as an instrument to gain advantage over its competitor China and justify its expansion in East Asia.³³ What it had learnt from western powers, it applied to its East Asian neighbours. From the beginning, Japan tried to establish unequal relations with China and Korea. Due to the power balance, it failed with China in 1871, but succeeded with Korea in the Kanghwa Treaty of 1876. It sought to justify taking Taiwan in 1874 as *terra nullius* and failed, but was more successful in doing so with the Senkaku/

28 ZACHMANN, *supra* note 1, 81, with further references.

29 AKASHI, *supra* note 1, 734 f.

30 Cf. ŌNUMA (1986), *supra* note 1, 33; ŌNUMA (1990), *supra* note 1, 48.

31 AKASHI, *supra* note 1, 735 f.

32 YANAGIHARA, *supra* note 5, 452 f.

33 For this, see in more detail ZACHMANN, *supra* note 1, 69–78.

Diaoyu islands in 1894. It justified intervention in Korea during the first Sino-Japanese War (1894–1895) as “humanitarian” with the objective to establish and recognize Korea’s independence (from China), only to declare Korea ten years later a failed state and therefore in need of “protection” and, eventually, colonial rule.³⁴ Finally, Japan deliberately used the law of war as an instrument to “sell itself” as the more civilized nation during the war with China and, again and even more elaborately, in the Russo-Japanese War (1904–1905).³⁵

It were these two wars that provided the decisive “stimulus” – as the Japanese international lawyer Masao Ichimata put it³⁶ – for the professionalization of international law as a discipline in Japan. Thus, as mentioned above, the year 1895, the same year of the triumphant victory over China, saw the establishment of the first chair of international law at Tōkyō Imperial University. From 1901, the chair was held by Sakutarō Tachi (1874–1944), permanent advisor of the Foreign Ministry and most influential international lawyer of Japan until the time of his death. In 1899, Kyōto Imperial University was founded, and with it came the second chair in international law.³⁷ Even more significantly, the professional organization of international lawyers in Japan that still exists today was founded in 1897 on the instigation of the then foreign minister Jutarō Komura.³⁸ The original purpose was to help the Japanese Foreign Ministry to cope with the new legal problems arising from the peace treaty with China (1895) and related treaties, but also to provide a forum for a scientific community capable of dealing with newly arising situations. This came in handy during the Russo-Japanese war, and it is well known that Japanese international lawyers went with the troops to monitor their compliance with the law of war and, in the case of Nagao Ariga and Sakuei Takahashi, to publicize Japan’s lawful conduct in English- and French-language studies of the war afterwards.³⁹

Japan by and large seemed successful with this strategy. In July 1894 it concluded its first new and more equitable treaty with Britain. Others were to follow and came into effect in 1899, abolishing the odious institution of consular jurisdiction. Considering that these new treaties were tantamount to “certificates of civilization”,⁴⁰ Japan had been awarded this recognition within less than forty years after having concluded the “unequal treaties” (and almost fifty years before China was accorded the same recognition). Moreover, in 1895, with the annexation of Taiwan, Japan became the only non-western

34 See A. DUDDEN, *Japan’s Colonization of Korea: Discourse and Power* (Honolulu 2005).

35 ZACHMANN, *supra* note 1, 72–76; see also D. HOWLAND, *Japan’s Civilized War: International Law as Diplomacy in the Sino-Japanese War (1894–1895)*, in: *Journal of the History of International Law* 9.2 (2007); R. VALLIANT, *The Selling of Japan: Japanese Manipulation of Western Opinion, 1900–1905*, in: *Monumenta Nipponica* 29.4 (1974)

36 ICHIMATA, *supra* note 1, 33.

37 ZACHMANN, *supra* note 1, 82.

38 ICHIMATA, *supra* note 1, 126–143.

39 AKASHI, *supra* note 22, 19–20; ITŌ, *supra* note 22, 23 f.

40 ZACHMANN, *supra* note 1, 61, with further references.

colonial power in East Asia. Finally, in 1902, it concluded a military alliance with Britain, only to defeat Russia three years later. Thus, in 1905, the renowned international lawyer Lassa Oppenheim concluded that Japan by now had advanced to full membership in the Family of Nations.⁴¹

However, despite these triumphant “successes”, a certain bitterness and disappointment with international law made itself heard among Japanese intellectuals and the public during the late Meiji period.⁴² From very early on, they accused western powers of double-dealing and applying a double standard towards Japan, mourning the fact that Japan was too naïvely following the rules of international law for its own good. These sentiments became especially vocal in cases of adjudication, whether consular or international, in which Japanese were involved and seemingly suffered (racial) discrimination. Such was the case in the so-called *Normanton* Incident of 1886,⁴³ in which all Japanese passengers of a freighter drowned and the British captain was let off with a relatively light punishment, or in the “Japanese House Tax” Case (1902–1905) before the Permanent Court of Arbitration.⁴⁴ The latter case is often seen as a watershed in the attitude of Japanese international lawyers, as the “shattering disillusionment” from its loss allegedly led to a lasting aversion against international arbitration and a “lurking suspicion born in the mind of Japan in the manipulative aspect of international law”.⁴⁵ Interestingly, a reading of the actual case does not reveal a particularly biased or even arbitrary decision in favour of Germany, France and Britain. The dispute at any rate was attributable to diverging opinions on property law among the two European arbitrators and the Japanese arbitrator.⁴⁶ The same imbalance between decision and its perception has been observed in the cases of consular jurisdiction, such as the *Normanton* Incident (the punishment for the captain could have been the same in Britain at the time).⁴⁷

Arguably then, the Japanese perception of western bias and double standard in international law was therefore less grounded in the specific cases and rather the product of cumulative experience with the high-handed actions of these powers towards Japan (and

41 L. OPPENHEIM, *International Law* (1905), as quoted in YANAGIHARA, *supra* note 5, 459.

42 For this, see also U. ZACHMANN, *China and Japan in the Late Meiji Period: China Policy and the Japanese Discourse on National Identity, 1895–1904* (London 2009) 39–54.

43 ZACHMANN, *supra* note 1, 59; on this and related cases, see R. CHANG, *The Justice of the Western Consular Courts in Nineteenth Century Japan* (Westport, Conn., 1984).

44 On this case, see S. SAKAMOTO, *Meiji sanjūhachi-nen no hikari to kage* [1905, a year of light and shadow], in: Kokusai-hō Gakkai (ed.), *Kokusai shakai no hō to seiji* [Law and politics in the international society] (Tōkyō 2001) 188–191.

45 OWADA, *supra* note 1, 357; see also YANAGIHARA, *supra* note 5, 461 f; Lee, *supra* note 3, 424 f.

46 The case is accessible on the archive pages of the Permanent Court of Arbitration (http://www.pca-cpa.org/showpage.asp?pag_id=1029). The case was basically about whether Japan could levy an isolated tax on houses, although it had already exempted the *properties* on which these stood from future taxes.

47 See CHANG, *supra* note 43.

East Asia in general). When, for example, the Tripartite Intervention of Russia, France and Germany forced Japan to retrocede the Liaodong Peninsula in 1895, but entered a “scramble for concessions” in China only three years later in 1898, with Russia taking Port Arthur on the Peninsula and Germany occupying Shandong on the Chinese coast across, the Japanese public and many intellectuals were shocked by the sheer hypocrisy of their actions and felt doubly victimized, despite the objectively rather comfortable position and successes which Japan had achieved by then in East Asia.⁴⁸ It has been argued in relation to its foreign policy that Japan from the Meiji period onward suffered a certain imperialist neurosis, a “siege mentality” which always saw itself as a victim in the defence against western powers and which often stood in stark contrast to the objective facts.⁴⁹ The same “neurosis” and distrust, as we can see, spread into Japanese attitudes towards international law.

Concluding the brief overview of this phase, we may go back to the initial questions as to the character of international law on Japan during this phase and Japan’s contribution to its development. To begin with the latter, the case of Japan clearly demonstrated that the competent use of international law had ceased to be the domain of western powers and that international law therefore also had shed its last vestiges of being a merely “European public law”. If the same law governed relations even between completely non-western parties, such as Japan and China, such a claim became untenable. The example of Japan thus made a significant contribution to international law becoming “universal” (a phenomenon which was *not* welcomed by all, as it threatened the “unity of the legal order”).⁵⁰ Moreover, the case of Japan certainly forced the western powers to reappraise their practice of according (limited) recognition to non-western states and thereby to clarify their standards upon which this was done.⁵¹ One could argue that these were but indirect contributions to the development of international law in which Japan took no immediate part of formulating the principles upon which it was tested. This may be true to the same extent that Japan’s reception of international law during this phase was “passive”, Eurocentric and positivistic. Considering the political situation, Japanese international lawyers were in no position to be anything else. Even so, it should be mentioned that there was actually no considerable time gap between the professionalization of international law in Europe and Japan, which took place at around the same time in the late nineteenth century (in some respects, such as the founding of professional or-

48 ZACHMANN, *supra* note 42, 55–88.

49 H. CONROY, Lessons from Japanese Internationalism, in: *Monumenta Nipponica*, 21.3/4 (1966).

50 ZACHMANN, *supra* note 1, 13–25; see also KROLL, *supra* note 18, 119. – Carl Schmitt’s *Nomos der Erde* (1950), for example, saw the roots of all the evils of modern international law in its becoming “universal” beyond its original scope of Europe.

51 GONG, *supra* note 19, 25 f.; M. KOSKENNIEMI, *The Gentle Civilizer of Nations: the Rise and Fall of International Law 1870–1960* (Cambridge 2002) 98–178.

ganizations, Japan was even faster than Europe).⁵² Thus, the characterization of being “positivistic” also loses its sting somewhat, since positivism was the common scientific standard of the legal discipline in Europe as well as Japan. However, if “positivistic” is being understood as “uncritical” of western ideas and concepts⁵³ (as the word is often understood even today in the Japanese literature), this certainly does not hold true even for the initial phase of reception, as we have seen above. In fact, the alienation and inner distance we can observe towards foreign politics and international law in the late nineteenth century was one of the lasting and most problematic legacies of this phase, as we shall observe presently.

III. JAPAN’S ATTITUDE TOWARDS INTERWAR DEVELOPMENTS, 1905–1931

The ambivalence observed above continued during the next phase and very much caused the Japanese perspective of new developments in international law during the interwar period: On the one hand, we can observe an overwhelming urge to “belong” to the international community and, more exclusively, among the concert of great powers. Japan had achieved this position at great sacrifice of money and soldiers and was intent to maintain and, if possible, further consolidate its privileged position. Japanese politicians and the public therefore eyed any developments which seemed to threaten this upward trajectory with suspicion and the usual distrust that these were but another hypocritical ploy of the western powers to “sweet-talk” Japan and other non-western powers into relinquishing their rights and acquiesce to the *status quo* in favour of the western powers. Path dependence and inner distance therefore were very strong traits of Japan’s attitudes towards international law during the interwar period and informed Japan’s rather lukewarm support of the new developments. This relatively negative attitude can still be felt today in comments on the interwar period by Japanese international lawyers, who characterize the period between 1905 and 1931 as “the age of pseudo-equality” and explain the frustration which Japanese felt about their status as the main reason why Japan did or could not keep up with the dramatic changes in international law at the time and finally rejected these after 1931 altogether.⁵⁴

Generally speaking, one reason why Japanese at the time felt distant to the new developments in international politics and law lay in the fact that Japan was, indeed, geographically and emotionally distant from the “Great War” which triggered these new developments in Europe. For Europe, the war was certainly the watershed which divided the twentieth century from the classical imperialism of the nineteenth century and

52 For Europe, see KOSKENNIEMI, *supra* note 51, 3 f.

53 Cf. YANAGIHARA, *supra* note 5, 453.

54 YANAGIHARA, *supra* note 5, 462; YANAGIHARA, *supra* note 1, 498; AKASHI, *supra* note 1, 739 f.

opened up a whole new chapter of “new diplomacy”.⁵⁵ For most Japanese, however, the First World War was a “European war” (*Ōshū sensō*) which served Japan merely as a “golden opportunity” to seize the German possessions in Shandong and Micronesia and confront China with the so-called “Twenty-one Demands”.⁵⁶ The interwar period for Japan therefore began with the end of the Russo-Japanese War in 1905, and nothing dramatic occurred thence which would have forced Japanese politicians and international lawyers to rethink the principles of diplomacy and order on which they had been raised and which they had applied so successfully, namely the balance of power, secret diplomacy in bilateral negotiations, the free decision to wage war and territorial cessions as the result of peace treaties, etc.⁵⁷

The “new diplomacy” of the European interwar period ran counter to these principles and was characterized especially by the move towards multilateral institutions and the discrimination and finally outlawry of war.⁵⁸ The following section will therefore focus on the two major developments in these directions, namely the founding of the League of Nations in 1920 and the outlawing of war by the Kellogg-Briand Pact (1928). The reactions of the Japanese government and international lawyers to these new institutions will provide an illustration of their ambivalence to international law during the interwar period in general.⁵⁹

Japan, having joined the war on the side of the allies, was invited as a victory power to the Paris Peace Conference in 1919. However, as mentioned above, Japanese war actions had been limited and self-serving. Already in November 1914, the local campaigns came to a halt and the Japanese government began preparing for peace with Germany which, however, had to wait for another five years. The objectives for peace negotiations did not change much over these years, namely to secure the new acquisitions in Shandong and Micronesia for perpetuity. These were also the prime directives for the Japanese mission that travelled to Paris in 1919.⁶⁰ However, in the meantime, the rules of the “Great Game” had changed in the West, and Wilson’s Fourteen Points which he declared in January 1918 were the most iconic expression of this changed atmosphere. The Japanese government at first sought to ignore the declaration, but was greatly

55 See M. STOLLEIS, *Der lange Abschied vom 19. Jahrhundert* [The long good-bye from the nineteenth century] (Berlin 1997) 5.

56 T. BURKMAN, *Japan and the League of Nations: Empire and World Order, 1914–1938* (Honolulu 2007) 8; F. DICKINSON, *War and National Reinvention: Japan in the Great War, 1914–1919* (Cambridge, Mass. 1999) 33–36.

57 BURKMAN, *supra* note 56, 15, 19, 30; DICKINSON, *supra* note 56, 246, 249.

58 W. GREWE, *Epochen der Völkerrechtsgeschichte* (2nd ed., Baden-Baden 1988) 685–690.

59 For a more detailed analysis of Japanese interwar attitudes, see ZACHMANN, *supra* note 1, 85–157.

60 N. SHIMAZU, *Japan, Race and Equality: The Race Equality Proposal of 1919* (London 1998) 33–51.

alarmed when it threatened to provoke unrest in Korea in the spring of 1919.⁶¹ Moreover, it was especially troubled by the proposal of a “general association of nations [...] under specific covenants” (point 14 of Wilson’s declaration), as even the most liberal and “internationally minded” politician such as Kijūrō Shidehara feared that this would greatly disadvantage Japan. Thus, he complained:

If such a conference at the round table would come into existence, it is a foregone conclusion that we, with people like me sitting among the delegates with baffled faces and barely able to participate in the discussion, will suffer disadvantages. It would be extremely inconvenient [*meiwaku shigoku*], if Japan’s fate should be decided at such a multilateral conference. If possible, I would rather not have such an arrangement [the League of Nations]. But as it seems that it will be accepted, we have no choice, but adjust to these developments and carefully re-evaluate our situation.⁶²

The Japanese government thus put up a brave face and became a founding member of the League of Nations in 1920, and a very active member at that, with a permanent seat in the council. However, while it was a member, the Japanese government well understood to protect its interests in East Asia by a somewhat idiosyncratic interpretation of the Covenant. Thus, it assumed that the Covenant had been made upon the tacit understanding that it would not affect Japan’s “special interests” in Northeast Asia, particularly Manchuria, and for this adduced Article 21 of the Covenant which made similar concessions to the so-called Monroe Doctrine. Moreover, while Japan was chairing the Council during the Corfu Incident in 1923 (in which fascist Italy occupied Corfu as a reprisal for the killing of an Italian and demanded reparations from Greece), both France and Japan sided with Italy for completely self-interested reasons. Thus, an internal paper argued, like Italy on Corfu or France in the Ruhr region, Japan at some point in the future might be confronted with the same situation in China. It therefore interpreted the rules of the Covenant in such a way that reprisals which merely forced the other party to “reconsider” did not constitute an act of war, and thus basically rendered the war-limiting mechanisms of the Covenant meaningless.⁶³

Japanese international lawyers by and large reflected the ambivalent position of the government and the public. True, there were influential liberal intellectuals such as Sakuzō Yoshino and Tanzan Ishibashi, or international lawyers, particularly Kisaburō Yokota, who wholeheartedly welcomed the founding of the League and even began to dream of a “world government” and the absolute primacy of international law in a state-like international community.⁶⁴ These voices represent the liberal intellectual and political current of the 1920s which is now known as the “Taishō democracy”. However, in

61 E. MANELA, *The Wilsonian Movement: Self-Determination and the International Origins of Anticolonial Nationalism* (Oxford 2007) 97 f.

62 SHIDEHARA HEIWA ZAIDAN (ed.), *Shidehara Kijūrō* (Tōkyō 1955), 136 f.

63 ZACHMANN, *supra* note 1, 100–102.

64 For Yokota, see ZACHMANN, *supra* note 1, 114–119.

the same way as this phrase should be considered more aspirational than factual and certainly does not reflect the dark undercurrents of the time – the systematic eradication of left-wing elements in Japanese society – there was also a darker and much more widespread sceptical attitude among Japanese international lawyers towards the League of Nations. Sakutarō Tachi's comments on the League are most revealing and representative of this attitude. Thus, as mentioned, Tachi was the permanent legal advisor of the Foreign Ministry and as such accompanied the Japanese delegation to Paris. However, in his writings – which should be considered as the official position of the government in the domestic discourse on the subject – Tachi consistently downplayed the significance and relevance of the League of Nations. Consequently, he insisted that the League of Nations was not a “state above states” (*kokka ijō no kokka*) or a legal subject elevated above states, but that it was merely an association of sovereign states (*shuken-koku no ketsugō*). Moreover, Tachi clearly expressed his doubts that a purely procedural protection of peace (meaning the *status quo*) would succeed without a “thick”, material definition of peace that would also address the power imbalance inherent in the current world order:

Peace in the world cannot be maintained just by means of a Covenant alone, but it must rest on the belief of the nations in the [real material] advantages of peace. [...] No nation will be persuaded by pretty words alone. Yet, it will be a difficult task to make all the nations of the world understand the advantages of peace and let them shoulder the burdens of the League of Nations willingly, as long as in peacetime there are nations which monopolize enormous natural resources, exclude other nations from these completely and deny them a share of the so-called “spot in the sun”, or if some nations make it their mission to persecute other nations for their difference in race, language, culture or thought.⁶⁵

It is quite obvious that the nations which Tachi accused of egoism and bias were Britain and the United States. Tachi's article, published in 1918, thus corresponds in tone and argument perfectly with a notorious essay entitled “A Call to Reject the Anglo-American Centered Peace” written by the young Fumimaro Konoe (later prime minister during the Asia-Pacific War) published in the same year.⁶⁶ Moreover, both articles reflect the pervasive “siege mentality” described above which saw Japan, despite all its achievements, in the position of the constant loser and victim bullied by the western powers. This sentiment intensified during the post-war period even further. Thus, the accusation of racial discrimination most likely targeted the exclusionary immigration policy of California (in 1924 extended nationwide) and British Commonwealth nations; it seemed confirmed by the rejection of Japan's proposal of a racial equality clause in

65 S. TACHI, *Kokusai renmei* [The League of Nations], in: *Gaikō Jihō* 329 (1918), 14.

66 ZACHMANN, *supra* note 1, 103–105; see also E. HOTTA / F. KONOE, “A Call to Reject the Anglo-American Centered Peace,” 1918, in: Saaler / Szpilman (eds.), *Pan-Asianism: a Documentary History* (Lanham 2011) vol. 1, 311–317, with a partial translation of the article.

the Covenant in 1919.⁶⁷ Moreover, the arms limitation ratio in the Washington Naval Treaty (1922) seemed a typical case of denying Japan a “spot in the sun” by allowing Japan only thirty per cent of the combined forces of Britain and the US. Notwithstanding the fact that a larger ratio would have crippled the Japanese budget and crushed its ailing economy, Japanese ultranationalists took such “insults” as an occasion to lay siege upon the Japanese state and assassinate a number of prime ministers, until the political elite capitulated and effected Japan’s transition into a military autocracy after the last democratically elected prime minister was killed in 1932.

The Kellogg-Briand Pact of 1928 received a similar sceptical treatment by the Japanese government, the public and international lawyers.⁶⁸ When U.S. Secretary of State Kellogg, French foreign minister Briand and representatives of thirteen other powers, including Japan, signed the Pact during a solemn ceremony in Paris on 27 August 1928, the text under which they signed their names was deceptively simple. Article 1 condemned taking “recourse to war for the solution of international controversies” and Article 2 promised that the signatories would never seek the resolution of disputes by other than peaceful means. The Pact said nothing about possible sanctions or mechanisms in case of a power violating its obligations. Moreover, little did it reflect the results of the preceding negotiations between the powers, namely that self-defence still remained the “inherent right” of sovereign states as it is today (Article 51 UN Charter). However, this merely shifted the contentious issue from war to self-defence. Finally, Britain made a reservation to the Pact to the effect that it would not tolerate interference on the basis of this Pact in “certain regions” in which it had “vital interests”, in the same way as the US had on the American continent. The press accordingly dubbed this reservation the “British Monroe Doctrine”.⁶⁹ The U.S. at first made no reservation to this effect. In 1929, the Committee on Foreign Relations of the Senate, however, argued that the Pact in its “true interpretation” would not preclude the right to self-defence according to the U.S. Monroe Doctrine.⁷⁰

The Japanese government, as usual, kept a low profile during the negotiations and did not raise any objections or concerns other than the formulation “in the names of their respective peoples”, as it infringed upon imperial sovereignty. However, internally, there were again great concerns that the Pact may be disadvantageous to Japan, especially since the situation in China seemed critical, and military conflict not wholly unlikely. Due to the so-called “Northern Expedition” of the Guomindang, the Tanaka Cabinet in 1927/28 alone sent two missions to Shandong for a protracted period in time. Moreover,

67 SHIMAZU, *supra* note 60.

68 For a more detailed analysis, see ZACHMANN, *supra* note 1, 121–157.

69 R. FERRELL, *Peace in Their Time: The Origins of the Kellogg-Briand-Pact* (New Haven 1952) 180 f.; M. YANAGIHARA (ed.), *Kokusai-hō senrei shiryō-shū I: Fusen jōyaku* [Sources on cases in international law I: the Kellogg-Briand Pact] (Tōkyō 1996) vol. 1, 154 f.

70 YANAGIHARA, *supra* note 69, vol. 2, 1053–1056.

in June 1928, only a couple of months before the signing of the Pact, officers of the Kwantung Army blew up the train which carried the warlord Zhang Zuolin from Beijing back to his stronghold in Manchuria.

Given the tense situation on the continent, a Pact that curtailed Japan's military options seemed disadvantageous at first sight. However, the urge to "belong" was still strong enough to override this concern and persuade Japanese politicians that Japan must not remain outside of the Pact. Instead, Japan resorted to the accustomed practice to assume a tacit reservation that the Pact would not affect Japan's "special interests" in Manchuria and Mongolia, in the same way as Britain and the US claimed for their own "regions". Thus, in the decisive cabinet conference, Tanaka's closest advisor Kaku Mori argued against a formal reservation to this effect, as it would limit Japan's options and also raise suspicion in western public opinion. Japan should wait and claim the British and US Monroe Doctrine as precedent only when it was politically opportune.⁷¹ Eventually, Japan communicated this reservation only through informal channels to the governments of the great powers.⁷²

The Japanese public responded to the Kellogg-Briand Pact with the accustomed mixture of idealism and cynicism. It praised the idea of a pact to outlaw war as such, but denounced the actual Kellogg-Briand Pact as a weak and, more to the point, hypocritical "show act" of Britain, France and the US, whose exceptions and reservations were to blame for the ineffectiveness of the Pact.⁷³ It is most telling about the nationalistic mindset of the Japanese public at the time that at the same time it acknowledged Japan's "special rights" as a most natural exception to the Pact and never seemed to be aware of the inherent contradiction of its position.

Japanese international lawyers opposed the Pact less for its ineffectiveness and lack of sanctions than for its unrealistic intentions. Again, Sakutarō Tachi voiced the reservation that it would not suffice to just outlaw war by a single stroke of codification. Such a pact would eventually prove "auto-destructive" as no party could realistically adhere to the promise to settle conflicts only peacefully, as long as there were no proper and satisfactory mechanisms to do so.⁷⁴ However, the most trenchant critique came from Ryōichi Taoka (1898–1985), a young lawyer from Kyōto University, who at the time was teaching at Tōhoku University. Taoka, who later transferred back to Kyōto University, is often credited with "overcoming" the uncritical positivism of the 1920s (meaning the idealism of representatives of the "Taishō Democracy", such as Kisaburō Yokota) by also taking the social and historical function of legal institutions into consideration when interpret-

71 ZACHMANN, *supra* note 1, 140 f.; YANAGIHARA, *supra* note 69, vol. 1, 195 f.

72 YANAGIHARA (*supra* note 5, 463) claims that the Japanese interpretation of the Kellogg-Briand Pact was "known to the world", but this was exactly what the Japanese government tried to avoid; see ZACHMANN, *supra* note 1, 142.

73 ZACHMANN, *supra* note 1, 144–146.

74 ZACHMANN, *supra* note 1, 150 f.

ing the law.⁷⁵ Taoka applied this method to the Kellogg-Briand Pact.⁷⁶ Unlike the general public in Japan, Taoka saw no fault in the many reservations which the powers had made to the Pact, as they were largely within the confines of the text. In fact, what Taoka objected to was that the reservation concerning self-defence did not go *far* enough and that it did not include self-help against violations of rights other than armed attack as well. Thus, Taoka argued that currently, the outlawry of war would even promote and encourage violations of law by other means than armed attack such as, for example, boycott of goods or attacks on foreign nationals (as happened, or allegedly happened, in China), because the state whose rights had been violated now had no resort to defend itself. Thus, Taoka argued in the same manner as Tachi that as long as the international community did not provide for means of international adjudication that helped to solve conflicts peacefully, the outlawry would remain an unrealistic *bel ideal*.

Considering that Japan itself had considerable reservations towards international jurisdiction since the Yokohama House Tax Case and was the only country that objected to compulsory adjudication under the League of Nations,⁷⁷ such a critique seems somewhat one-sided and, again, hypocritical. One could even argue that the repeated references to the lack in institutions of peaceful change were never meant seriously and merely served to defend the *status quo* of classical international law and its primacy on national sovereignty against the new developments in international law. Again, this stands in strange contrast with the outwardly very active participation of Japan in international constitution. Japan, for example, regularly sent judges to the Permanent Court of International Justice and even had Mineichirō Adachi serve as its president (1931–1933) shortly before Japan withdrew from the League.⁷⁸

However, ultimately one has to take this as the typical expression of a tension which reached its peak during the years of the so-called “Taishō Democracy”: the tension between outward co-operation with the western powers and the inward reservations towards its hegemonic order. The fact that Japanese politicians, the public and the experts were fairly unanimously of this mentality and never acknowledged that the double-standard with which they accused the western powers might apply in a similar way to Japan, only hints at the profoundness of this disenchantment with the new developments of international law. The tension finally broke in the 1930s, when the interwar world order came apart as a whole, and the latent Japanese animosity towards it finally came out in the open, as we shall see. However, the attitude of Japanese law experts underwent a surprising reversal within this context.

75 MATSUI, *supra* note 1, 8.

76 For more details, see ZACHMANN, *supra* note 1, 155–157.

77 YANAGIHARA, *supra* note 1, 495.

78 YANAGIHARA, *supra* note 1, 494.

IV. THE PROJECT OF A “GREATER EAST ASIAN INTERNATIONAL LAW”, 1931–1945

The period between 1931 and 1945, which started with Japan’s occupation of Manchuria and ended with its unconditional surrender and defeat at the hands of the allied powers, is often seen as a period of aberration, as Japan diverged from its accustomed course of faithful compliance with the existing international order and began to challenge the *status quo*.⁷⁹ Outwardly, this was certainly the case, as the most famous incident, Japan’s withdrawal from the League of Nations as a result of the Manchurian Incident, illustrated.⁸⁰ Moreover, when Japan could not contain the “China Problem” and stumbled into full-scale war with China in 1937 and, further along the tragic arc of conflict, declared war upon the US and its allies in 1941, it sought to justify this development with a “New Order in East Asia” and an international law to support it, the so-called “Greater East Asian international law” (*Dai-tōa kokusai-hō*).

However, it should have become apparent in the preceding section that such a challenge of the western *status quo* did not come as a surprise, as the motivation and intention had been there all along, and that at least *inwardly*, this challenge was not such an aberration from the previous course. Moreover, if it is being said that Japan’s success in the reception of international law during the previous period “dealt a salutary blow to the Euro-centric world-view of the time”,⁸¹ as it challenged the supremacy of the western powers, the same could be said even more so of Japan’s “New Order in East Asia”, although certainly not that it was salutary. Yet, even regarding this latter point, recent evaluations seem rather undecided and merely indicate that the “real meaning [of the Greater East Asia Co-Prosperity Sphere] is still now in dispute”.⁸² The central question in this section then is what function the “Greater East Asian international law” had in wartime Japan, whose interests it served and whether it was really intended to challenge the *status quo*. Moreover, on a related issue, the question is how it was possible that Japan, despite its commitment to international law as such, could commit such massive transgressions at the time, and whether this was part or an expression of the “challenge”.

As could be guessed from the preceding section, when Japan’s Kwantung Army in September 1931 staged a bomb attack on the railway tracks near Mukden (Shenyang) and, under the pretext that this had been an attack by Chinese forces, struck back and occupied Manchuria, the wider argumentative foundation for such action had been already laid.⁸³ The immediate justification was self-defence, which according to the Kellogg-Briand Pact was legitimate, not only against the attack on the South Manchurian Railway tracks itself but also against a series of alleged attacks and discrimination against

79 OWADA, *supra* note 1, 370.

80 On both, see I. NISH, *Japan’s Struggle with Internationalism: Japan, China and the League of Nations, 1931–3* (London 1993).

81 LEE, *supra* note 3, 423.

82 YANAGIHARA, *supra* note 1, 498.

83 For a detailed discussion, see ZACHMANN, *supra* note 1, 159–203.

“Japanese settlers” in Manchuria (mostly Koreans who had been pushed over the border by Japanese settlers in Korea themselves). However, on a wider scale, in an increasingly volatile situation on the continent, the occupation of Manchuria served to protect “Japan’s special interests” in the region, and the establishment of the puppet regime of Manzhouguo under the nominal rule of Emperor Puyi in 1932 lent Japan’s claims to a Japanese “Monroe Doctrine” a concrete expression. Interestingly enough, the Japanese government was still reluctant to use these arguments publicly at the time and during the discussion at the League of Nations tried to argue for the existence of Manzhouguo as a product of “people’s self-determination”.⁸⁴ As is well known, neither the League of Nations acknowledged Manzhouguo nor did the U.S., whose Secretary of State declared that it did “not intend to recognize any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris” (Stimson Doctrine).⁸⁵ Again stylizing itself as the victim of China’s and the western powers’ machinations, the Japanese delegation withdrew from the League of Nations in 1933.

Japanese international lawyers by and large followed the line of the government, and only a very small number, such as the Tōkyō University professors Kisaburō Yokota and Kaoru Yasui, raised objections against the heavy-handed actions of the army in Manchuria and the debilitating effect this had on Japan’s international relations.⁸⁶ Yokota’s public protest even provoked a scandal in the media, as he dared to argue that occupying the whole of Manchuria for such a minor incident as happened in Mukden was certainly excessive and that it was a matter of course that this should be brought before the League of Nations.⁸⁷ Subsequently, Yokota received death threats from ultranationalist radicals and was even warned off by his colleagues not to return while visiting a conference in Shanghai. This illustrates the immense pressure by peers and the public to which Japanese international lawyers were already subjected at that time.

When war broke out, first with China in 1937 and finally with the western powers in 1941, the government somehow sought to rationalize and contain this development with the declarations of the “New Order in East Asia” (*Tōa shin-chitsujo*) in 1938 and the

84 ZACHMANN, *supra* note 1, 180; the Japanese government in this case was advised by its in-house counsel Thomas Baty. However, it could be argued that, whatever merits Baty otherwise had in the employment of Japan, his line of argument in the Manchurian Incident was outdated and certainly did a disservice to Japan’s international credibility. See also P. OBLAS, *Naturalist Law and Japan’s Legitimization of Empire in Manchuria: Thomas Baty and Japan’s Ministry of Foreign Affairs, Diplomacy and Statecraft*, 15.1 (2004).

85 Cited in W. MENG, *Stimson Doctrine*, in: Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 4 (Elsevier 2000) 691.

86 For Yasui’s early critique of Japan’s foreign policy, see ZACHMANN, *supra* note 1, 253 f.

87 On this affair, see YOKOTA, *Watakushi no isshō* [My life] (Tōkyō 1976) 121–130; ZACHMANN, *supra* note 1, 191–196.

“Greater East Asia Co-Prosperity Sphere” (*Dai-tōa kyōeiken*) in 1940, respectively.⁸⁸ In the sense that the latter was much more expansive than the “New Order” and, at its maximum, encompassed a region spanning from Siberia to Australia, the declarations mirror the escalation of the Asia Pacific War itself. International law was, of course, another tool of ideological warfare, and the government was intent in securing the co-operation of Japanese international lawyers in this project. Thus, in December 1941, exactly with the beginning of the Pacific War, the professional association of international lawyers in Japan, the *Kokusai-hō Gakkai*, filed for changing its status into that of a foundation, thereby effectively becoming a think tank for the Ministry of Foreign Affairs.⁸⁹ In its new remit, the association declared that it would devote itself, among other things, to the “investigation and exploration of the international law that governed the relations between the states and peoples which belong to the Greater East Asia Co-Prosperity Sphere”.⁹⁰ Henceforth, regular study groups (*kenkyū-kai*) were set up to discuss specific aspects of the New Order, namely the “Committee for East Asian International Law” (*Tōa Kokusai-hō I'inkai*). Moreover, a new series was established with the renowned publisher Yūhikaku under the title “Greater East Asian International Law” (*Dai tōa kokusai-hō sōsho*) to disseminate the results of the joint research project.

Although virtually every Japanese international lawyer of some academic standing was part of the study groups (being civil servants, they could hardly refuse to participate without losing their position or more), it was the younger generation of academics that contributed most actively and creatively to the project of an “East Asian international law”. Among these the contributions of Kaoru Yasui (Tōkyō University) and Shigejirō Tabata (Kyōto University) deserve special attention.⁹¹ Although of a completely different temperament and academic environment, both had in common that they had been deeply influenced by Marxist thought in their student days and applied its fundamental claim of the social, political and economic conditionality of the “superstructure” to the field of international law. Thus, like Ryōichi Taoka, they sought to overcome the positiv-

88 For translations of these declarations, see SAALER / SZPILMAN (ed.), *supra* note 66, vol. 2, 167–174, 223–228.

89 See Y. TAKENAKA, *Kokusai-hō-gakusha no 'senjo kōsō' – 'Dai-tōa kokusai-hō' kara 'Kokuren shinkō' e* [The ‘postwar concept’ of international legal scholars – from the ‘Greater East Asian Law’ towards a ‘United Nation creed’], in: Nihon Kokusai Seiji Gakkai (ed.), *Shūsen gaikō to senjo kōsō* [Postwar diplomacy and postwar concepts], Kokusai Seiji 109 (1995), 70–83; Zachmann, *supra* note 1, 227–232.

90 As cited in ZACHMANN, *supra* note 1, 229.

91 For autobiographic accounts of their wartime years, see K. YASUI, *Michi – Yasui Kaoru sei no kiseki* [The way – Yasui Kaoru, trails of his life], ed. „Michi“ Kankō I'inkai (Tōkyō 1983); S. TABATA, *Kokusai shakai no atarashii nagare no naka de: ichi kokusai-hō gakuto no kiseki* [Amidst new currents of the international community: The life of an international law scholar] (Tōkyō 1988).

ism and self-proclaimed universality of western international law by a critique of its historical and political foundations.⁹²

The sources of inspiration for this anti-positivistic stance were manifold, but mostly originated from milieus where similar projects were pursued, namely the Soviet Union and Germany. Kaoru Yasui, who was dangerously open about his sympathies for the Soviet Union, was also the most active in introducing Soviet thought on international law to the Japanese public, especially the writings of Evgeny A. Korovin and Evgeny Pashukanis. Moreover, Yasui is notorious for the publication of the inaugural volume of the new Yūhikaku series under the title *Ōshū kōiki kokusai-hō no rinen* (Fundamental concepts of the European international law of large spaces, 1942), a large portion of which was devoted to the concept of “Großraum” of German jurist Carl Schmitt. After the war, Yasui was purged from Tōkyō University for this publication as a sympathizer of Nazi thought. However, it should be noted that Schmitt’s Großraum concept was arguably the most influential inspiration for most Japanese international lawyers at the time and was widely discussed in their circle (e.g. in Shigejirō Tabata’s writings as well).

What the “Greater East Asian international law” would have eventually looked like is hard to guess from the few preliminary studies which were published during the war, since the project was aborted in late 1944 when the political elite came to realize that the war was lost and prepared for a new post-war order under the domination of the “United Nations”.⁹³ Thus, due to its rudimentary development, it is no great surprise that assumptions about the nature of the “East Asian law” greatly diverge: on the one hand, because of its heavy borrowing from foreign models, it is argued that the law was largely derivative by nature and, consequently, the verdict of Euro-centrist passivism is upheld.⁹⁴ On the other hand, it is said that “international law in the Greater East Asia Sphere intended an absolute abandonment of the old concept of European international law”.⁹⁵ Neither of these assumptions is correct when looking at the real *intentions* of the “East Asian international law” project from the perspective of the international lawyers who participated in it.

It is true that western models were a strong inspiration for Japanese international lawyers at the time. However, more important is *to what purposes* these sources were strategically adapted in the Japanese context: Thus, Kaoru Yasui, for example, used the downfall of Evgeny Pashukanis during the Stalinist purges in 1937 to illustrate the pernicious and ultimately self-destructive effects of political intervention.⁹⁶ Shigejirō

92 MATSUI, *supra* note 1, 15–16.

93 Cf. U. ZACHMANN, *Asianismus und Völkerrecht: Japans sanfter Übergang von der Groß-ostasiatischen Wohlstandssphäre zu den Vereinten Nationen, 1944–1956* [Asianism and international law: Japan’s easy transition from the Greater East-Asian Co-Prosperity Sphere to the United Nations, 1944–1956], in: *Comparativ: Zeitschrift für Globalgeschichte und vergleichende Gesellschaftsforschung* 18.6 (2008).

94 AKASHI, *supra* note 1, 741.

95 YANAGIHARA, *supra* note 5, 467.

96 ZACHMANN, *supra* note 1, 251–253.

Tabata deftly used Carl Schmitt's defense against his radical critics in Nazi Germany to warn against ultranationalist positions in Japan which likewise would forego an international order based on law for a hierarchy solely based on racialist premises.⁹⁷ Finally, the following passage should amply illustrate that, contrary to the assumption that the new law intended an absolute abandonment of the old, Japanese international lawyers were relatively conservative or even defensive and favored a gradualist rather than drastic approach to international law:

People during a period of transition often assume a radical attitude which naïvely rejects all phenomena of the past without sufficiently investigating the fundamentals of their validity. Such an attitude can be also observed among those who advocate an international law of the Co-Prosperity Sphere. [...] Before we can talk about the creation of a new international law in East Asia, we first have to clarify the reasons why we should destroy the principles of international law which have governed international relations in the past and demand a new order. [...] Without first analyzing the old international order, it becomes a mere matter of faith and not of theoretical reflection whether one agrees with the new international law or not, and there is no room anymore for lively discussion.⁹⁸

Although in its more immediate purpose the new law served to justify Japan's hegemony in the "Greater East Asia Co-Prosperity Sphere",⁹⁹ there was also a very strong defensive and, at times, even subversive element to it. This defensive attitude can be understood only within the context and in opposition to the ultranationalist fervour of the general public and its ridicule, or even rejection of western international law during wartime. Thus, whereas the general public during the Manchurian Incident (1931–1933) still debated the legitimacy of Japan's actions on the grounds of international law, no such respect was paid to international law seven years later, when the Asia-Pacific War broke out in 1937. The public debate by then had become thoroughly militarized, and there was little understanding for legal niceties. Thus, when a minor incident between Britain and Japan in 1940 elicited a huge outcry in the Japanese public, a newspaper tellingly described the negotiations between Japan and Britain as "a dialogue between fish and birds which, no matter how long they last, will always be at cross-purposes".¹⁰⁰ Ultranationalists openly ridiculed international law and considered its existence under the "auspicious rule of the benevolent emperor" as superfluous, if not outright sacrilegious. Even intellectuals hitherto known for their liberal outlook came to see international law as a relative thing that might not altogether be suitable to Japanese customs.¹⁰¹ Japanese international

97 ZACHMANN, *supra* note 1, 239–242.

98 S. TABATA, *Tōa kyōei-ken kokusai-hō e no michi* [The path towards an international law of the East Asia Co-Prosperity Sphere], in: *Gaikō Hyōron* 23.1 (1943) 11 f.; see also ZACHMANN, *supra* note 1, 236 f.

99 Cf. ZACHMANN, *supra* note 1, 242–248.

100 Cited in ZACHMANN, *supra* note 1, 268.

101 ZACHMANN, *supra* note 1, 268–270.

lawyers in this situation tried to defend international law against its critiques and, by doing so, their profession and discipline. However, considering the progress of war and Japan's conduct in the theatres of war, this became more and more difficult and the position of international lawyers became increasingly dissociated from reality.

There can be no doubt that the general low esteem of international law in Japan at the time in general, and in the army in particular, led to war crimes of a horrendous scale, such as atrocities against the civil population, enforced labour, sexual slavery, experiments on prisoners, abuse and maltreatment of POWs, etc.¹⁰² The Japanese government, as before, tried to uphold the fiction that it fought a war “by the book” of the law of war. It had not declared war upon China in 1937 and treated it as an “incident” (*jihen*), but this was more for strategic reasons, which according to the government would not preclude the application of the law of wars “factually”. Moreover, the declaration of war against the U.S. and its allies in 1941 did not contain, as previously, a pledge to international law, but this could be seen as being implicit in the declaration itself. A good example of the official rhetoric is the Geneva Convention Relative to the Treatment of Prisoners of War of 1929: although Japan had not signed the Convention (ostensibly because of the moral hazard for its own soldiers), it declared that it would apply it in an “analogous way” to the case of American POWs.¹⁰³

Again, Japanese international lawyers served to uphold the fiction. Sakutarō Tachi in his last writings before his death in 1943 advocated the concept of “factual war” and the analogous application of the law of war; Ryōichi Taoka developed legal standards for the aerial bombings of cities and subtly criticized the Japanese bombings of Chinese cities in 1937; Kisaburō Yokota, through a very formalistic argument, finally tried to dispel the notion that Japan was already fighting a “total war” that ignored the boundaries between military and civilian.¹⁰⁴ However, especially the last case makes clear what contortions of logic were necessary to uphold the fiction in the face of reality. This fiction sooner or later would have collapsed altogether if the war had not ended luckily but tragically in August 1945.

V. CONCLUSION

Returning to our reflections at the outset of this study on the relative success of Japan's reception and use of international law and how to evaluate it, it should have become obvious in pursuing the full arc of the development between 1853 and 1945 that Japan's

102 J. DOWER, *War without Mercy: Race and Power in the Pacific War* (New York 1986) 42–48.

103 H. FUJITA, *Sensō-hō kara jindō-hō e: Senkan-ki Nihon no 'jikkō'* [From the law of war to humanitarian law: The ‘practice’ in interwar Japan], in: Kokusai-hō Gakkai (ed.), *Nihon to kokusai-hō no 100-nen* [100 years of international law in Japan], vol. 10: *Anzen hoshō* [Security] (Tōkyō 2001) 158; ZACHMANN, *supra* note 1, 265.

104 ZACHMANN, *supra* note 1, 272–278.

success was a mixed one and has to be judged differently from different perspectives: From a political and strategic point of view, Japan's adoption and application was successful for most of its imperialist period, namely between 1853 and 1931, as it served to re-establish Japan's equality vis-à-vis the western powers as the only non-western power in East Asia at the time, even catapulted it into the select circle of "great powers" and helped to maintain its position until Japan chose the path of regional isolationism in 1933. Therefore, International law in this context originally had a purely functional role, as a signal of "civilization" and co-operation towards the western powers, and as an argumentative weapon of expansion towards its East Asian neighbours. Considering this functional role, it is therefore not surprising that Japanese experts and politicians took the law and applied it "by the book" as they found it, i.e. in a positivistic manner. It did not serve Japan's interests to criticize international legal practice until 1919, nor would it be realistic to expect that Japan had the power to change it, even if it wanted to. However, it is also for the same reasons that Japan was inwardly reluctant to go along with the changes of international law in the 1920s, as multilateral institutions and the outlawry of war served its purposes less than the "classical" law. It is merely for reasons of prestige and fear of abandonment that Japan would go along with these developments until 1933.

From an academic or theoretical point of view, Japan's engagement with international law during this period thus seems unoriginal and derivative. The only "achievements" which could be attributed to Japan, namely the demonstration that international law was not a "western" domain and the modification of the standards of application to non-western powers, are more of an indirect nature which merely reflect Japan's political and military success. However, it would be misunderstanding the development of Japan's reception of international law if its positivism were to be confused with lack of criticism. As shown, feelings of estrangement and inner reservations co-existed with the apparent compliance right from the start and were carefully nurtured by successively felt slights and discriminations on the political side. These did not necessarily were based on objective reality, and at times the incongruence of Japan's international position and self-image as a victim at the hands of western powers (and China) bordered on hypocrisy. However, the incongruence founded a tradition of critical studies of international law in Japan which especially addressed the political, economic, social and historical conditionality of "universal" international law. Thus, a "post-colonial approach" *avant la lettre* was fully developed in Japan long before this became fashionable in contemporary academia. It is also the reason why international law as a "social science" is an accepted approach in Japan and why critical and historical studies of international law are exceptionally strong in Japan still (albeit not of Japan's own history).¹⁰⁵

105 E.g. MATSUI, *supra* note 1; Y. ŌNUMA, *A Transcivilizational Perspective on International Law: Questioning Prevalent Cognitive Frameworks in the Emerging Multi-Polar and Multi-Civilizational World of the Twenty-First Century* (Leiden 2010).

Historically, the critical study of international law in pre-war Japan had its heyday during the “period of aberration”, 1931–1945. It is for this reason that this period does not serve as a comfortable model for “challenging the hegemony of the West in East Asia”¹⁰⁶ for contemporary powers, because it began unwisely and ended catastrophically, with horrendous suffering in between. But more importantly, the experience of Japanese international lawyers during wartimes exactly does *not* support attempts to challenge the existing normative order with an alternative international order, as they clearly demonstrated the its impossibility and warned against an irrational iconoclasm that would uncritically seek to destroy the normative *status quo*.

Thus, from an objective point of view, Japan’s historical experience with international law only gives a good illustration of the observation that non-western perspectives, or “Asian” challenges to “western” universalism, are more often than not just the vestiges of yet another particularism that seeks to interpret or “overcome” the *status quo* of normative order towards specific political ends.¹⁰⁷ Moreover, the experience of the Japanese international lawyers demonstrates that, if equity has to be sought “outside positive law [...] for an up-dated legal order among states”,¹⁰⁸ this will be possible only on the basis of a rational dialogue and investigation of the existing law and its historical foundations.

SUMMARY

Japan takes a special place in global history as the only non-western power among the great powers which shaped the course of world politics during the late nineteenth and early twentieth century. Within less than half a century, Japan rose from a peripheral power in the shadow of China to the hegemonic power in Northeast Asia and was accepted as equal power (at least on the formal level) into the hitherto all-European family of nations. As such, it also played a significant role in the development of the modern international legal order as it is today. Japan’s accession to the hitherto all-European concert of powers in 1905 demonstrated that the competent use of international law was not the exclusive domain of western powers anymore and that international law had shed its last vestiges of being a merely “European public law” and become a truly universally applied law. And yet, studies of the reception of international law in Japan, which largely focus on the early period between 1853 and 1905, often conclude their analysis with a mixed appraisal of the process, as they characterize it as being overly passive, Euro-centric and “positivistic” (a word of negative connotation in the Japanese context) and therefore merely derivative. An alternative interpretation, however, places Japan at the vanguard of a revisionist movement that challenged the hegemony of west-

106 See, for example, LEE, *supra* note 3, 441.

107 B. SAUL, J. MOWBRAY, I. BAGHOOMIANS, *supra* note 3, 126.

108 Cf. S. YAMAMOTO, *supra* note 9, 123.

ern international legal discourse and sought to establish an autonomous order in East Asia in the second phase of its engagement with international law between 1905 and 1945. This discourse ties in with the so-called “Asian values” debate and postmodernist criticism of international law in recent times. However, both narratives, as the inherent contradiction indicates, are misleading in their representation and analysis of the role which international law played in modern Japanese internationalist relations. This article aims to present a more coherent and consistent picture of international law in Japan by pursuing the whole trajectory of its reception and application in Japan’s foreign politics, from the opening up of the country in 1854 until the final demise of Japan’s imperial project in 1945. It argues that western international law during the initial phase of its reception had a purely functional role, as a signal of “civilization” and cooperation towards the western power, and as an argumentative weapon of expansion towards its East Asian neighbours. As such, it served its overall purpose well, as Japan managed to renegotiate the odious “unequal treaties” twenty-five years after the last was concluded and by 1905 had established itself as the hegemonic power in Northeast Asia. Considering this functional role, it is therefore not surprising that Japanese experts and politicians took a passive, Euro-centric and “positivistic” attitude towards the law. It did not serve Japan’s interests to criticize international legal practice until 1919, nor would it be realistic to expect that Japan had the power to change it, even if it wanted to. However, it is also for the same reasons that Japan was inwardly reluctant to go along with the “Wilsonian” changes of international law in the 1920s, as multilateral institutions and the outlawry of war served Japan’s purposes less than the classical law. It is merely for reasons of prestige and fear of abandonment that Japan would go along with these developments until 1933. Moreover, it would be erroneous to confuse Japan’s apparent “positivism” with a lack of criticism in general. Feelings of estrangement and inner reservations co-existed with the apparent compliance right from the start and were carefully nurtured by successively felt slights and discriminations on the political side, whatever their claims to reality. This estrangement engendered a tradition of critical studies of international law in Japan which specifically addressed the political, economic, social and historical contingency and particularity of “universal” international law. This approach had its heyday during the war years between 1931 and 1945, when Japan actively challenged the political status quo of the international order and tried to carve out its own autonomous sphere in East Asia. However, contrary to expectations, international lawyers, although advising the Japanese authorities and justifying Japan’s aggressive policy with their arguments, were not its most ardent supporters, but argued from a defensive and losing position. Faced with the challenge of inventing an “East Asian International Law”, they warned against an irrational iconoclasm that would uncritically destroy the normative status quo and argued for a gradual evolvement of normative concepts on the basis of the existing order. Thus they tried to defend the law and their profession against a rising tide of criticism and contempt of international law in the public, with diminishing success. The frequent violations of international law in

the theatres of war gave testimony to the eroding forces of “total war” that undermined their position and would have swept them away if surrender had not intervened in 1945. However, it is also for this reason that Japan’s reception of international law does not serve as an historical example of “challenging the normative hegemony of the West”, as more recent commentators would have it with a view to other rising powers, but rather as a warning reminder of the necessity of rational and constructive negotiation of concepts of normative order today.

ZUSAMMENFASSUNG

*Japan nimmt eine besondere Stellung in der Weltgeschichte ein, indem es als einzige nicht-westliche Macht unter den Großmächten die Geschicke der Weltpolitik im 19. und 20. Jahrhundert mitbestimmte. Als solche spielte es auch eine bedeutende Rolle in der Entwicklung der modernen Völkerrechtsordnung. Innerhalb weniger Dekaden stieg Japan von der Position einer peripheren Nation im Schatten Chinas zur Hegemonialmacht in Ostasien auf und wurde – zumindest formal – gleichberechtigt in die Gemeinschaft der Nationen aufgenommen. Dieser Aufstieg zeigte überdeutlich, dass der souveräne Gebrauch von Völkerrecht nun nicht mehr nur eine Domäne der westlichen Mächte war und dass das Völkerrecht damit endgültig die Grenzen eines *ius publicum europaeum* hin zu einem „Weltrecht“ überschritten hatte. Untersuchungen der Rezeption des westlichen Völkerrechts konzentrieren sich im Wesentlichen auf dieses frühe Kapitel der Rezeptionsgeschichte, sind jedoch bei aller Anerkennung der Erfolge Japans erstaunlich verhalten in der Bewertung der Rezeption selbst. So wird diese von vielen als zu passiv, eurozentrisch, „positivistisch“ (ein Merkmal mit eher negativer Konnotation in Japan) und epigonal kritisiert. Ein alternativer Interpretationsentwurf sieht Japans Völkerrechtsrezeption zwischen 1905 und 1945 als Vorläufer einer revisionistischen Bewegung, die die normative Vormachtstellung des Westens in Frage stellt und eigene Ordnungsvorstellungen verfolgt. Dieser Diskurs steht in Zusammenhang mit der jüngeren Debatte um sogenannte „Asiatische Werte“ und der postkolonialen Kritik an Völkerrecht in jüngster Zeit. Beide Argumentationsstränge sind jedoch, wie ihre innere Widersprüchlichkeit zeigt, irreführend hinsichtlich der Rolle, die das Völkerrecht in den Außenbeziehungen Japans spielte. Dieser Aufsatz möchte daher ein umfassenderes und zutreffenderes Verständnis dieser Rolle ermöglichen, indem es die Geschichte der Rezeption und Anwendung von Völkerrecht in Japan seit Anbeginn im Jahre 1853 bis zum Ende Japans als Imperialmacht im Jahre 1945 nachzeichnet und noch einmal die Frage nach ihrem kritischen bzw. konstruktiven Potential für die allgemeine Völkerrechtsentwicklung stellt. Zusammenfassend zeigt sich, dass das Völkerrecht in Japan anfangs eine rein funktionale Rolle innehatte, insofern seine Observanz gegenüber den westlichen Mächten einen hohen Grad an „Zivilisiertheit“ signalisieren sollte und gegenüber den ostasiatischen Nachbarn als argumentative Waffe einer aggressiven Imperialpolitik diente. Japan hatte mit dieser Strategie auch Erfolg und konnte die verhassten „unglei-*

chen Verträge“ bereits 25 Jahre nach Abschluss des letzten Vertrages revidieren und sich nach 1905 als Hegemonialmacht in Ostasien etablieren. In Anbetracht dieser Funktion ist es daher kaum verwunderlich, dass japanische Völkerrechtler und Politiker eine eher passive, eurozentrische und „positivistische“ Haltung gegenüber dem Recht einnahmen. Eine offene Kritik an der Völkerrechtspraxis vor 1919 hätten Japans Ziele eher gefährdet und wäre, selbst wenn ein solcher Wille dazu bestanden hätte, angesichts der Machtverhältnisse auch weitgehend wirkungslos geblieben. Aus den gleichen Gründen betrachteten japanische Politiker jedoch die liberalen Entwicklungen des Völkerrechts in der Zwischenkriegszeit eher als Bedrohung der japanischen Sonderstellung in Ostasien und schlossen sich dieser nur mit äußersten inneren Vorbehalten an. Dies gilt für den Völkerbund ebenso wie für das Verbot des Angriffskrieges durch den Briand-Kellogg-Pakt, und nur äußeres Prestige und die Furcht vor Isolation bewegten Japan, diesen beizutreten. Zudem wäre es irreführend, den „Positivismus“ japanischer Völkerrechtler als Ausdruck eines Mangels an Kritik schlechthin zu verstehen. Kritik und Reserviertheit gegenüber dem westlichen Völkerrecht existierten seit Beginn seiner Rezeption und nahmen mit jeder subjektiv empfundenen Zurücksetzung Japans in der Weltpolitik noch zu. Diese Entfremdung brachte eine Tradition der „kritischen“ Völkerrechtswissenschaft in Japan hervor, die insbesondere die politische, wirtschaftliche, soziale und historische Bedingtheit des angeblich „universalen“ Völkerrechts in Augenschein nahm. Seine Hochzeit hatte dieser Ansatz in den Kriegsjahren von 1931 bis 1945, als Japan aktiv den status quo der internationalen Ordnung herausforderte und eine eigene normative Ordnung in Ostasien zu begründen suchte. Allerdings waren japanische Völkerrechtler wider Erwarten, auch wenn sie die kontinentale Expansion argumentativ unterstützen, nicht deren glühendsten Befürworter, sondern argumentierten aus einer defensiven Stellung heraus. Angesichts der Herausforderung, ein „Ostasiatisches Völkerrecht“ erfinden zu müssen, warnten sie eher vor einer radikalen und irrationalen Abkehr vom normativen status quo und traten für eine graduelle Entwicklung neuer völkerrechtlicher Konzepte auf Grundlage des kritischen Studiums klassischen Völkerrechts ein. Sie suchten damit ihr Gebiet und ihre Profession gegen die zunehmenden Angriffe und Spott in der japanischen Öffentlichkeit zu verteidigen, allerdings mit geringem Erfolg. Die häufigen Verletzungen humanitären Rechts in den Schauplätzen des Krieges zeugen von der zersetzenden Kraft des „totalen Krieges“, der ihre Argumente zunichte machte und sie selbst überrollte hätte, wenn nicht die Kapitulation im Jahre 1945 dieser Entwicklung Einhalt geboten hätte. Aus diesem Grund jedoch dient die Völkerrechtsrezeption Japans auch nicht als historisches Beispiel für eine „Herausforderung der normativen Hegemonie des Westens“, sondern eher als warnendes Beispiel für die Notwendigkeit eines rationalen und konstruktiven Diskurses um normative Konzepte internationaler Ordnung heute.

