

The Contemporary Relevancy of the ‘Just War’ Concept in the Early Years of International Legal Studies in Japan

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By considering the development of the concept of ‘Just War’ in Japan’s international legal studies in the late 19th and early 20th centuries, this policy brief distils my Japanese monograph ‘戦争と平和の間——発足期日本国際法学における「正しい戦争」の観念とその帰結」¹ for the wider English-language audience. At the height of the Sino-Japanese (1894–1895) and Russo-Japanese (1904–1905) wars, Japanese scholars endeavoured to construct a Japanese system of international legal studies and thought on war. By analysing the views expressed by representative Japanese scholars at that time, the monograph provides an in-depth examination of the meaning of ‘Just War’ in both theory and practice.

1. Keyword: ‘Just War’

Contemporary Japanese international law textbooks are prone to divide the evolution of the international law view of war into three phases: (1) ‘Just War’ in the Middle Ages, (2) ‘Indiscriminate War’ in the 19th and early 20th centuries, and (3) ‘Outlawry of War’ in recent decades. According to the prevailing view, the idea of ‘Indiscriminate War’, as the opposite of ‘Just War’ and ‘Outlawry of War’, was the predominant position in Japan in the late 19th and early 20th centuries. My research suggests, however, that although the ‘Outlawry of War’ had not yet taken shape at the time, the idea of ‘Indiscriminate War’ was challenged by many other perspectives rather than being the predominant outlook. The complexity of the situation at the time defies the prevailing, simplistic view.

The concept of ‘Just War’ is used here and in the above-mentioned monograph mainly as reference to a

legal perception of war, namely international law standards that assess the justness of wars. In other words, instead of simply affirming or denying the legality of wars or being agnostic towards this issue, the concept of ‘Just War’ assesses it on the basis of definite, verifiable legal norms. In this meaning, while the medieval concept of ‘Just War’ shares much with the concept discussed in this brief and my book, the former almost completely focuses on *jus ad bellum*, while the latter also addresses *jus in bello* and other elements, including the timing and manner of launching a war, limits on the use of force, specific methods of combat, and the position of war in the international legal system.

The concept of ‘Just War’ here also differs from the notions of ‘Indiscriminate War’ and ‘Outlawry of War’. ‘Indiscriminate War’ excludes the legality of waging a war from the scope of international law and only focuses on specific combat actions as well as rules of combat, which apply equally to both parties regardless of the legality of their participation in the conflict. ‘Just War’ here, however, takes into account the legality of initiating a war, which differentiate it from the concept of ‘Indiscriminate War’.

The post-World War I movement of ‘Outlawry of War’ is often regarded as the modern version of the medieval concept of ‘Just War’, but they actually differ in many respects. As its name suggests, ‘Outlawry of War’ means outlawing war with only a few exceptions, but the medieval concept of ‘Just War’, while advocating the restriction of unlawful war, also encourages war with legality and just cause.

In the same way, ‘Outlawry of War’ is also different from ‘Just War’ as discussed here. ‘Outlawry of War’ is generally against any war, it does not care about the substantive reason for initiating a war, and what mat-

1 YI Ping, 戦争と平和の間——発足期日本国際法学における「正しい戦争」の観念とその帰結, Torkel Opsahl Academic EPublisher, Beijing, 2013, ISBN 978-82-93081-66-1, 277 pp.

ters is who fired the first shot. The party initiating the war, whether or not there is legality or due cause, shall be condemned or even punished. While the concept of 'Just War' as used here has many dimensions, focusing on reviewing and regulating war from various angles rather than only on the party who fired the first shot. Accordingly, they are two different concepts.

In sum, the author uses the concept of 'Just War' as a comprehensive system of legal assessment that addresses several aspects of war and is distinct from the concepts of 'Indiscriminate War' and 'Outlawry of War'.

2. Objects of Study: Japanese International Law Scholars at the Turbulent Turn of the Century

International law has its root in European civilization. Japan started to learn from the Western world only in the mid-19th century. To study Japanese scholarly concepts of war, it is therefore important to look into the sources of their knowledge and its evolution. My monograph reviews the importation of the Western legal perspective on war during the late years of the Shogunate and the Meiji Period. Japanese scholars at this time endeavoured to construct a Japanese system of international law mainly based on Western legal conceptions. Importantly, starting from 1890, the Western perspective on war had seen a shift of focus from a natural-law-based assessment of the cause of a war to the exclusion of such assessment from the scope of international law. This change had a significant yet indecisive impact on the views of Japanese international lawyers, who adjusted the Western theories to the domestic conditions according to their understanding of international law, thereby developing their own theories of law of war.

Through positive analysis and categorization of Japanese scholarly views of war, my research seeks to explore their theoretical diversity and complexity. By considering the inconsistencies between theory and practice, my monograph also studies the actual performance of these theories in the political arena. A comprehensive and accurate description of the understanding of war in that period of history is possible only when it is analysed in conjunction with the overall cognizance of international law and international conditions at the time. This approach, however, is uncommon. The monograph thus undertakes to explore this topic from a new perspective.

Bearing this task in mind, my research has encompassed first-hand materials from the period between the Sino-Japanese War (1894) and the outbreak of World War I (1914), with an emphasis on materials from

around the period of the Japan-Russia War in 1904–1905. These materials include treaties, papers, course materials, speech scripts, newspaper texts, and articles, which were written, translated, recorded or published by Japanese international lawyers in English, French or their mother tongue. Special attention is given to renowned scholars such as ARIGA Nagao, TAKAHASHI Sakuyé, SENGA Tsurutaro, TERAU Tooru, and NAKAMURA Shingo, who were members of the international law faculties of Tokyo University, Kyoto University, Waseda University and other first-rate Japanese universities. At the same time, the work of scholars who did not specialize in international law but had been trained in this field and publicly commented on the legal issue of war, are also taken into consideration.

A careful analysis of these materials reveals a rich variety of theories on war in international law academia. These theories, however, share a yearning to restrict war, distinguishing them from unconditional support for war, mere apathy, or the so-called 'Indiscriminate War'. They represent a scholarly effort to define the legal boundary for war so as to contain its disastrous consequences, and thus exemplify the concept of 'Just War'. However, these theories are also dangerously flawed. When they were used in reality, their flaws overpowered their benign intent, and reduced them to bellows fanning the fire of war.

3. Outlook on War in the Theory of International Law: Conceptual Reflections of 'Just War'

Which shortcomings do these Japanese perspectives on war have, and how have they been reflected in practice? To gain a proper understanding, it is important to clarify some common misconceptions first, especially to review stereotyped ideas prevailing today and to rethink how they have formed since the end of World War II. My monograph discusses how later scholars' misunderstanding of the predominant position of the concept of 'Indiscriminate War' stems from a misinterpretation of the 'Disregard of war rationale' and 'War as a state' theory, two popular theories at the time.

The 'Disregard of war rationale' is today commonly understood to exclude war causes from the scope of international law. By analysing a large amount of material, however, my research has discovered that advocates of this theory either attached many reservations and restrictions to it, or developed a unique theoretical basis. The various expressions of 'Disregard of war rationale' all embody a restriction on war, although to different degrees.

On the other hand, 'War as a state' has always been related to the once popular approach of 'dualistic struc-

ture' distinguishing between 'international law in peace' and 'international law in war'. Because of the confusion, 'War as a state' has often been wrongly credited with giving rise to the concept of 'Indiscriminate War', which is commonly understood as the logical derivative of the 'dualistic structure' approach. Actually, examination shows no necessary connection between these three concepts. First, the 'dualistic structure' approach is largely unrelated to the 'War as a state' theory. Second, 'Indiscriminate war' is not the only possible logical derivative of this approach, which gives rise to at least three different types of outlook on war depending on our understanding of the structural relationship between war and peace.

Based on a detailed analysis of the three concepts, the present writer proposes three categories of war notions advanced by the most representative Japanese international lawyers at the time depending on whether they require the launching of a war to be legally supported by 'international law in peace' and, if they do, what form a war takes according to them. Those who do not require a violation of the rights and obligations under 'international law in peace' as a precondition for launching a war make up (a) the 'Extralegal Faction'. Those who do can be further divided into two groups: (b) the 'Adjudicating Faction', which views war as a means of arbitration, namely a way to adjudicate between the warring parties dependent on the outcome of the war; and (c) the 'Implementing Faction', which views war as a means of law enforcement, the lawfulness or unlawfulness of warring parties not being related with the result of the war.

The concept of 'Just War' lives in all three of these categories regardless of the differences between them. The note on the restriction of war, however, ascends from (a) to (c). Also, the regulations imposed by 'international law in peace' on the justification, the timing and manner of launching (which are prescribed by 'international law in war'), and the position of war in the international legal system also help elucidate the underlying thinking of 'Just War' in these three categories. My monograph analyses, *inter alia*, how and to what extent each category represents the concept of 'Just War', where its basis lies, how they are similar and different, the reasons for their difference, which of these reasons are positive and which are potentially damaging.

4. Outlook on War in the Reality of International Law: Collapse of the Concept of 'Just War'

Based on a detailed theoretical analysis, my monograph studies the application of these three categories of out-

look on war in the Russo-Japanese War. Almost all Japanese international lawyers at the time defended Japan's military operations in the Russo-Japanese War based on the 'right to self-defence'. Of course, before wars were categorically outlawed, the 'right to self-defence' embraced a much wider range of activity than it does today and was used on more than one occasion. Because this concept varied greatly in both intension and extension from author to author, a distinction can be made with regard to the theoretical difference between the three categories of outlook on war. The 'right to self-defence' has the widest range under category (a), is closest to 'state of necessity' under category (b), and is essentially the same as 'legitimate self-defence' in domestic legislation under category (c).

Surprisingly, the theoretical distinction between the three categories blurred when they were put into practice, especially when used to justify the Russo-Japanese War, a purpose for which some scholars went so far as to distort their theories and even the facts. Their outlook on war, at this particular point, seemed much closer to the idea of 'Indiscriminate War' than to that of 'Just War'. Of the many reasons for this phenomenon, the most important one is a considerable number of ambiguities in the elements and standards adopted for each of these theories which rendered them prone to misrepresentation when they were used to interpret relevant practices. For instance, category (c) limits the application of war only as a means of self-help when rights have been infringed and it shall be used only as a last resort. Compared with the other two categories, the representatives of (c) have the strongest anti-war tendency. Nevertheless, even they did not bother to set out the strict prerequisites for initiating a just war. TERAO Tooru, for example, argues that when a state's rights were infringed, other states may, based on the concept of solidarity among states, offer assistance to it by engaging in war, which shall be regarded as a noble act of international interference, even a reflection of international chivalry. Furthermore, he believed that, given the fact that there was no public authority that could help the infringed state to recover its rights and interests, and national is more important than individual reputation, it is necessary in a more flexible and broad approach to interpret war as the last resort without first having to exhaust all peaceful means. These ideas were proposed out of good faith and have their own rationale, but without specific prerequisites they should remain conceptual theory. They were even interpreted in a wilfully broad way to be applied as an instrument to promote war, which completely deviated from the initial purpose to limit war.

5. Reflections and Prospective: The Principle of ‘Prohibition of the Use of Force’ in Contemporary International Law

My research is not a politically correct polemic against such outlooks on war. Rather, it seeks to build internal understanding. My monograph points out the potential danger lurking in these theories as well as the lessons they provide. The late 19th and early 20th centuries are a turning point in history too complicated to condense into a clash between peace and war, or good and evil, or ideals and reality. It is easy to point a finger at the politically incorrect views of international lawyers in that age, but if we truly sympathize with the pressing international situation they faced, we discover that their acute experience of the complexity of international relations led them to view war and peace as intertwined rather than polar opposites. Their theories are flawed and prone to misuse in the game of power politics, but they consistently thought of the use and regulation of power in a particular context. While this approach might be instinctive, it still sheds light on some of the problems we face today.

Furthermore, in the days when there was not a principle ‘forbidding the use of force’, it is not unthinkable to regard war as a means to maintain order in the international society. Even today, when the principle of ‘prohibition of the use of force’ has been firmly established, the positive function of force in solving conflicts and maintaining international peace has not vanished at all. The principle has not freed us from the task of defining the legal nature and effects of wars, a task complicated by the interaction between law and power, the confrontation between might and right, and the intertwining of abstract theories with specific contexts. Under the system of the United Nations, there are some circumstances where substantive legitimacy of the use of force shall be considered, such as the enforcement measures under the collective security regime of the Charter, ‘Responsibility to Protect’, and where decisions need to be made by individual states with regard to the use of force in dealing with internal conflicts, refugees and evacuation of overseas nationals.

In sum, even today, when the principle of ‘prohibi-

tion of the use of force’ has obtained an unshakable position in international law, we should not stop considering the nature and effect of ‘Just War’. The very nature of war must be questioned constantly in the context of complicated relationships between law and force, justice and security, state values and human values, and abstract concepts and concrete realities. Important lessons can be extracted from the ways the theories of early Japanese international lawyers were misused in practice. This, the author believes, is where the legacy of history and the value of this research lie.

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