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# Introduction

Everything is to be doubted.

René Descartes, Karl Marx and Others

To doubt is a virtue.

KAIHO Seiryo, a Japanese Confucian thinker
in the eighteenth century

## From a West-centric to a Multi-centric (and Multi-civilizational) International Law

This treatise is written by an Asian international lawyer and published in the early twenty-first century. Some readers may consider this fact as a particularly important, or even symbolic, characteristic of this book. By the end of the twentieth century, no treatise or textbook of international law written by an Asian international lawyer in Asia was published by either Cambridge University Press or Oxford University Press, two major academic publishers in the world. Asians occupy more than half of humankind, and their fate and life is seriously affected by international law. Yet most treatises or textbooks of international law published by major publishers were written by international lawyers in Western Europe and the US.

Making a sharp contrast with the West-centricity of the twentieth-century world symbolized by this fact, the twenty-first century will likely be an era when some Asian nations are catching up, or even superseding, particularly in economic terms, leading Western nations.[1] This may

[1] The position of Japan, the third global economic power in GDP terms, is rather unique in this picture. It is the only Asian (and non-Western) nation that has been among the major powers for most of the period since the early twentieth century: in the prewar days as a military power, and in the postwar period as an economic power. However, except for the period of the 1930s through 1945, Japan has been a faithful follower ("a silent partner") of the major Western powers, which have been the chief architects and managers of the current international legal order. That neither China nor India will likely follow



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bring about radical change in the twenty-first century world. With this structural change, the character and function of international law may also substantially differ from the twentieth-century world, where West-centric ways of thinking and behavior prevailed. It is almost inevitable that a treatise of international law written by an Asian person in this time of change assumes some color of change or difference – compared with other major treatises of international law, most of which have been written by leading Western international lawyers.

Moreover, unlike many other Japanese international lawyers who have not dared to raise the issue of West-centricity in international law, I have certainly been critical of the prevalence of Euro-centric or West-centric ways of thinking in international law for years. I have argued since the 1980s for the need to overcome the narrowness of the West (or Euro or US)-centric approach to international law (Onuma 1983; Onuma 1993: Appendix; Onuma 1997(b); Onuma 2000; Onuma 2005; Onuma 2010). In this treatise, too, readers will find expositions, analyses and evaluations based on this critical perspective. I pursue what I consider a *more globally legitimate*, or what I call a *transcivilizational*, perspective of international law.[2]

One serious problem in the prevalent discourse in international law is West-centric domestic model thinking. Compared with domestic laws that already existed before the birth of the sovereign states system, international law is a new product in human history. Also, domestic law is much more familiar to people than international law, whether it be civil law or criminal law. Domestic law's existence is more deeply built into the minds of people than that of international law. Thus, when people think of international law, they – mostly unconsciously – tend to assume the domestic law of the (modern) state as a frame of reference. They seek to understand features and functions of international law

Japan's suit as a junior partner of the Western powers may constitute a crucial problem concerned with the (possible change of) peaceful international legal order in the twenty-first century.

[2] For example, the history of international law will be seen not only from the perspective of globalization of European international law. It will also be elucidated from a perspective of transformation of coexisting regional normative systems in the world to the globalization of European international law *through its acceptance by non-Europeans*, giving up their traditional ordering systems of the world. The fact that most of the traditional "customary" norms of international law are basically a construct of a limited number of Western states and their international lawyers, *excluding the participation of the overwhelming majority of humanity* in the lawmaking process, will also be examined in a critical manner.

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by referring to those of domestic law. This way of thought, which I call *domestic model thinking* (or approach) (Onuma 1991; Onuma 2016), is almost invariably adopted by international lawyers.

This is unavoidable to a certain extent, because theories, intellectual tools and techniques, and other ideational frameworks of domestic law are much larger and more sophisticated than those of international law. This domestic model approach, however, has serious problems. International lawyers tend to understand – in many cases unconsciously – concepts and theoretical frameworks of international law according to their assumptions about, and understandings of, their own domestic law to which they are most accustomed. This sometimes results in a confusing situation: international lawyers discuss problems of international law with seemingly common concepts and frameworks yet with different assumptions and understandings, based on their respective (and different) domestic model thinking of international law.

This problem could be avoided if all international lawyers adopted a specific domestic law and a legal theory on it as the model and carried out their studies based on this common framework. To a certain extent, this has actually been the case in the study of international law up to the present. Although this common framework has not been the domestic law and its studies of a single nation, most international lawyers have assumed the commonness of the modern domestic laws of major Western states as the model (or standard) when addressing problems of international law. A number of debates have occurred among various theories and "schools," yet they all have assumed the domestic law of modern Western nations as the model of law in constructing their theories.[3]

It is true that Western European nations and the US have actually enacted domestic laws and produced sophisticated domestic legal theories that may be copied or followed by other nations and their lawyers. This undeniable fact has supported this prominence of *West-centric domestic model thinking* in the modern science of law. In the study of

[3] For example, the prevalent discourse on law has often been referred to as "common law tradition" and "continental law tradition." As suggested by the fact that the term "continental" means "European continental," this discourse assumes a Eurocentric way of thinking. Why do lawyers only talk about these two traditions, although such "traditions" are not limited to these two? It is because the nations with either one of these traditions – the US, the UK, France, Germany, Italy, etc. – have been major powers not only in the material sense, but also in the ideational sense. Similarly, the prevalent dichotomy between the natural law doctrine and positivism is within the Western legal framework.

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international law, too, no one can deny that it is the Western European and US international lawyers that have produced prominent works and led the entire field. Lassa Oppenheim (1858–1919), Dionisio Anzilotti (1869–1950) and Hans Kelsen (1881–1973) are some of the examples.

However, from the perspective of the global legitimacy of international law and the changing power relations between Western and non-Western nations in the twenty-first century, the persistence of the primacy of West-centric domestic model thinking must be seriously reconsidered. This thinking is a part of the *West-centric ideational power structure* that has prevailed since the nineteenth century. This power structure includes the predominant status of the English (and French) language and the supremacy of leading academic and educational institutions, as well as leading media institutions such as publishers, journals, newspaper companies, television networks and Internet websites in the Western nations. People the world over have regarded ideational products of the Western nations as more advanced, which should therefore be followed by non-Western nations.

Already in the twentieth century, however, there was criticism of such an ideational structure, characterizing it as a form of cultural (or conceptual) imperialism. Not a few people in the non-Western world have been frustrated by this West-centric ideational power structure of the world. One of the motivations held by many people of resurging or emerging Asian powers such as China to challenge the current international legal order is this frustration. This is also true with many of the terrorists who want to destroy the current international legal order by any means.

In my view, even in the twenty-first century, when the material power of non-Western nations will be much greater than in the twentieth century, this West-centric ideational power structure will likely persist. It is relatively easy for a nation to catch up economically with more developed nations. It is estimated by many experts that China will supersede the US in gross domestic product (GDP) by the middle of the twenty-first century. It may be more difficult to catch up in military terms, but still, with an increase in economic power, the military power of a nation generally increases as well. In contrast, it takes much more time in ideational (or intellectual or cultural) terms for an underdeveloped nation to catch up with an ideationally developed nation and exert its ideational power over other nations.

For example, China once had enormous ideational power influencing other nations up to the nineteenth century, but its ideational power today

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is desperately small. It will take decades, or even centuries, for China to re-exert its ideational power over other nations as the US and Western European nations have done since the nineteenth century. While economic power held by resurgent or emerging major Asian nations may supersede that of the major Western nations, the supremacy of the Western nations in the ideational power structure will likely persist in the twenty-first century. This *gap between Asia-centric material power and West-centric ideational power* may become a serious disturbing factor to the international legal order, because each side may be frustrated by assuming its supremacy over the other.

One may argue that Asian nations have accepted modern Western ideas, and will likely further accept them in the process of democratization and modernization of their societies. In particular, because the soft power resources and influence of the US are so huge, Asian nations will be "Americanized" during the course of the twenty-first century. One may also cite the example of Japan, which was long the second-largest economic power, and argue that it faithfully followed the West-centric management of international society for most of the modern period. If this Japanese precedent is applicable to other resurgent or emerging Asian powers, they will not likely challenge the current international legal order. One may further argue that because China and many other Asian nations have been beneficiaries of the current international order, their demand to change the current order should be partial, not fundamental. All these arguments are well taken.

Yet even if cultural or ideational Americanization or Westernization proceeds, such Americanized or Westernized way of thinking held by resurgent Asians will be characterized by their longstanding civilizational ways of thinking. Unlike Japan, both China and India were long accustomed to their ego-centric universalism.[4] Further, again unlike Japan,

[4] After having become the second largest economic power in the early twenty-first century, China has been making strong claims, some of which seem to be difficult to legitimize under current international law. The claim over the area within what China calls "nine-dash (or dotted) lines" in the South China Sea is an example. A Chinese military official argued that China's sovereignty, sovereign rights and governing rights over the South China Sea were established more than two thousand years ago, claiming that China perfected administration of the area in the Han Dynasty in 200 BC (Wang 2014: 14). Has China begun to seek to revise the current West-centric international legal order by resorting to the idea of the Sino-centric system of world ordering, which prevailed in East Asia during the pre-modern period (see Chapter 1, Section II, 3(1) and Onuma 2010: 305–320)? Chinese dynasties were so prominent and influential for a long time and Sino-centrism is deeply rooted in the Chinese mind. It may therefore be natural, though not

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both China and India suffered seriously under colonial or semi-colonial rule for a long period of time. Because their superiority complex was quite strong, their sense of humiliation has been even stronger. Even if Americanization, Westernization or modernization of the non-Western nations proceed in the twenty-first century, these will not erase various civilizational factors. These factors include the sense of self and others, the view of the world and history, national pride, a sense of humiliation during modern times, and various kinds of memories including those of colonial rule as well as the imperialistic policies of the Western powers and Japan.

Here lies an important task of the study of international law in the twenty-first century. This task is to address this crucial problem of the gap between the West-centric ideational power structure and the emerging Asia-centric material power structure. The study of international law must find out the way in which nations – whether they are Western or non-Western – can accept the international legal order in its entirety, even though they may find some of its norms do not sufficiently respond to their values or interests. To this end, it is necessary, first, to revise excessive West-centricity both in terms of specific rules and mechanisms as well as the underlying way of thinking.[5] It is also needed to persuade resurgent or emerging Asian nations that have been frustrated by this West-centric structure of the current international legal order not to challenge it by force but to seek its revision by peaceful means. In this sense, this treatise is certainly written with *a keen awareness of the problematic features of the current West-centric*

legitimate, that China will seek to restore its relations with other nations based on its own egocentric idea of world ordering, once it becomes confident of its power after more than a century's history of national humiliation.

[5] When people refer to the prevalent understanding of international law, they almost invariably think of that of Western international lawyers. International lawyers often compare US casebooks and treatises written by British, French, German or Italian publicists, but seldom think of comparing those written by Chinese, Indian, Brazilian, Indonesian or Nigerian international lawyers. It should be noted that these nations have a far larger number of people who are affected by international law and whose ideas should be taken into account when considering the problems of international law on a global scale. The views of the people in smaller non-Western societies are even more ignored. The prevalence of the Western study of international law may be legitimized in that an academic work must be judged by its quality, not by the nationality of the author. In fact, there have been a certain number of non-Western international lawyers whose writings have been widely read and have exerted a certain influence in the theory of international law. Still, they are exceptions rather than a rule (see Onuma 2010: 179–189).

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*international legal order* and *the need to rectify them* in response to global legitimacy and the changing power relationships in international society.

## International Law as a Legal and Social Science

As the author of the book, however, I ask readers not to read this treatise solely from a perspective centering on the problem of West-centricity, transcivilizationality and changing power relations in international society. I am certainly an Asian (and Japanese) international lawyer. However, being an Asian or Japanese person is just one of many characteristics of mine.[6] I have learned more from Hugo Grotius' *De jure belli ac pacis* (Grotius 1646) than any work written or taught by Asian thinkers such as Buddha, Muhammad, Confucius or Mencius. The influence that I have received from social contract theorists represented by Thomas Hobbes, and other modern European thinkers such as Hans Kelsen, Carl Schmitt and those of the Frankfurt School is much greater than that of any Asian thinker or academic,[7] although there might be substantial Confucian and Buddhist influence, including at the unconscious level, on my thoughts. In this sense, I am just one of many modern persons whose intellectual personality has mainly been constructed by modern European civilization. Any of my analysis, argument or construction would have been impossible had I not learned from great thinkers of modern Europe. Like any other person living in today's world, I am a hybrid being, only part of which is an Asian or Japanese.

As is evident from these observations, merely criticizing Euro- or West-centrism is far from what I pursue in this treatise. What I would like to emphasize is that it is crucial for the study of international law to

[6] I have been critical of the Japanese government and society for not sufficiently confronting the issues of Japanese war guilt and the Korean minority in Japan since the 1970s (Onuma 1992; Onuma 1997(a); Onuma 1997(b) and other writings in Japanese and English on these subjects). I have been critical of suppression of human rights by governments of developing countries including Asian ones, and the "Asian values" or "Asian human rights" argument advocated by some Asian leaders and intellectuals in the late twentieth century (Onuma 1997(a) and 1997(b); Onuma 2010: Chapter 5). I have always argued that Asia is not monolithic, and have been highly critical of what I call the myth of the monolithic society of Japan.

[7] ENDO Shusaku and TAKAHASHI Kazumi, two Japanese novelists in the twentieth century may be exceptions. Endo is a Catholic novelist who consistently sought to face the problem of identity as a Japanese Catholic living in Japan, where Christianity is considered alien by most members of the society. Takahashi is also a novelist who studied Chinese literature and socio-ethical thought, Buddhism, radical socialism and Jainism.

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pay attention to the political foundation, surroundings and functions of international law. Also important is to be sensitive to changing power relations in international society that are occurring in the twenty-first century. International lawyers must appreciate their impact on the current international legal order. Without such awareness, the study of international law may become irrelevant to the realities of the world.

This problem of relevance to reality is concerned with the relationship between theory and practice in international law. When referring to practice, one should be careful that it does not solely mean the work carried out by practicing lawyers such as judges, prosecutor and advocates. Practice includes much broader areas. I have not been engaged in practicing law in the professional sense but have been engaged in human rights activities since the 1970s. I have learned from my experience as an activist and an adviser to some Japanese cabinet members, being deeply involved in the civic movement and political decision-making processes in Japan. Readers will often find my argument in this treatise that international law should not solely or even mainly be understood as adjudicative norms. International law should be appreciated as more comprehensive phenomena and processes in which it carries out diverse non-adjudicative functions.

This argument is based on my view that (1) litigation is a pathology, not a physiology of law; (2) in international society, international law cannot work effectively as adjudicative norms because it lacks a judiciary with compulsory jurisdiction over its members; and (3) it is the combination of activities of committed politicians and bureaucrats, experts, activists, journalists, media institutions, non-governmental organizations (NGOs), and many other actors including the judiciary that allows international legal norms to be realized. These observations have become possible not only from my theoretical studies. They have become possible also from my experiences as a human rights activist and an advisor to Japanese Cabinet members with professional expertise, being involved in socio-political processes. It is in these processes that I have observed and experienced that international law plays a significant role as a *justificatory, legitimating and communicative tool rather than as adjudicative norms*.

Furthermore, I have been engaged in the study of modern history and the history of ideas as well as contemporary international relations. I believe that the study of international law must clarify broad aspects of international legal phenomena that are not limited to interpreting existing rules (*lex lata*) of international law. It is true that the interpretive

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science of law is an important genre of legal science. In managing today's society, which is characterized by highly developed technology and massive-scale daily administration, sophisticated techniques of legal interpretation are needed in every field of life. International law is no exception. It is understandable, against such a background, that the study of international law during the twentieth century became more and more practically oriented. In response to actual needs coming from economic, financial, environmental and human rights activities, international lawyers pursued the interpretive sophistication of the existing rules of international law. Readers will find far more detailed and sophisticated interpretation of existing rules of international law in other major treatises of international law, whose *raison d'être* I fully endorse.

Still, the interpretive science of law constitutes just *one aspect* of legal studies. Moreover, the interpretive sophistication of law monopolized by a limited number of highly qualified lawyers has its own problem: it tends to *alienate law from ordinary citizens*. If law becomes too technically difficult for ordinary citizens to understand, they become less interested in it. This will cause a serious problem because in any society the ultimate validity and effectiveness of law depends on the *normative consciousness of its members*. Without this ultimate basis, law cannot work effectively in a society, however solidly the enforcement mechanisms of the law are established, and however sophisticatedly lawyers interpret and apply law.

The so-called enforcement mechanisms of law are not a mechanical institution. Whether it is police, military forces or other state organs, these "enforcement mechanisms" are made up of humans. If these humans consider the legal order as alienated from the prevalent normative consciousness held by society members including them, they would be reluctant to enforce the law. If most members of a society regard some law as illegitimate or unjust, such law cannot work as law in the long run. It is only because the members of a society regard law as compatible with their sense of justice and interest that law can work in the society, fulfilling various functions that are generally expected of law by these members.

As these observations suggest, the task of the study of international law is not limited to simply interpreting rules of existing international law by tacitly assuming that international law is something good and that international lawyers contribute to realizing something good by providing a correct interpretation of law. Sophisticated interpretation of law may certainly serve the common interest of a society whose

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administration would be impossible without such interpretation. "Rule of law" may undoubtedly be important, and generally far more desirable than rule of power or rule of humans (or, in reality, elites). Yet simply preaching the supremacy of law or rule of law by ignoring the content of the law – which is just in many cases, but may be unjust in some cases – can grossly mislead people.

Thus the task of the study of international law includes critical analyses and evaluation of existing international law. And this "international law" which must be critically analyzed and evaluated is not just specific international legal norms. "International law" as the subject of the study means international law in its entirety. It includes "international law" as a system to administer the global community. This international law as a working system includes the work and activity of international lawyers themselves who are involved in the international legal processes as observers, analyzers, interpreters, advisors and appliers. In other words, these international lawyers are not detached "objective" observers. They are involved either as academic scholars, as practicing lawyers, or as advisors with professional expertise to a national government, an NGO, an activist, or a victim of human right violations, thus inescapably playing certain societal functions.

## The Historical Development of the Study of International Law

The prevalent theory on the history of international law as an academic undertaking[8] has generally regarded European thinkers of natural law doctrine as the first generation scholars dealing with the problem as considered today that of international law. There have been various criticisms of this view, including the view that Indian, Chinese, Islamic and some other civilizations had international law since ancient times. Although I share criticisms of the Euro-or-West-centric traditional view, I do not agree with these kinds of critical theories. Tracing the "origin" of

[8] There are numerous works addressing this subject, but Nussbaum 1947 (rev. 1954) is still worth mentioning. Although it was published more than half a century ago and is literally a "concise" history, the quality of the work is outstanding. Another prominent (and extremely stimulating, even provocative) work is, in my view, Schmitt 1950 (2nd edn. 1974). From a viewpoint of reliability of the work as an academic undertaking, it cannot be denied that the Schmitt work is flawed in many respects. Yet it is a magnificent work of a genius in jurisprudence. Both works, especially that of Schmitt, are West-centric in the exposition and analyses. Yet both are works that must be read by anyone who is interested in the history and the historiography of international law.

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