

INTERNATIONAL LAW IN A TRANSCIVILIZATIONAL WORLD

With the resurgence of Asian nations such as China, current West-centric international law is changing in the twenty-first century. There is a pressing need to address these changes within international legal studies and overcome potential conflicts between existing and emerging powers. This structural transformation also demands a change in understanding of existing ideas and institutions in general. This book explores a “transcivilizational” approach to international law, supplementing and modifying two other prevalent perspectives: international and transnational. By considering these three layered viewpoints, this book highlights the complex phenomena surrounding the history and development of international law. The author also considers how international law operates and functions within diverse forums such as diplomatic negotiation, international organizations, and domestic political processes. This book will appeal to international law scholars and students, as well as those interested in the rise of non-Western powers and its impact on the prevalent ideas and institutions of the world at large.

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For Future Generations with Deep Respect for Past Generations



“Only with innocent eyes can one see the Light”, image by MAKIMURA Satoru representing four transcivilizational figures: Grotius, Gandhi, Confucius and Marx.

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PREFACE

This is a treatise (textbook) for appreciating international law in the twenty-first century world. The major purposes, theoretical frameworks and perspectives in writing this treatise will be provided in the Introduction. Here, I would like to invite readers to consider the meaning of the following two facts related to this book.

First, this book is written as a treatise of international law not only for students of law or those interested in law. I seek to demonstrate the overall picture of international law *actually functioning* in international and domestic societies, particularly in international and domestic political environments. I also seek to clarify the historical, cultural and civilizational background of international legal phenomena addressed in this treatise. By allocating more space to these seemingly “non-legal” aspects of and about international law, I sacrifice sophisticated arguments over the interpretation of current norms of international law. Because these arguments have been sufficiently provided by existing treatises of international law, I seek to explore other important yet insufficiently studied areas of and about international law.

I hope that by reading this book, those familiar with law or international law will reconsider its *raison d'être* in the political, cultural, historical and civilizational context in which it carries out its functions. Liberation from the assumption that international law is something good, or rule of law in international society should be sought without any hesitation is what I expect for readers of this book. *International law can be wicked*, supporting an undesirable status quo in international society, where the powerful often suppress and discriminate against the weak.

I also hope that this treatise is read by as many people as possible *who are not necessarily familiar with international law or law in general*. Those who are interested in international politics or international relations may believe that international law is irrelevant or powerless in international society, where they believe the rule of jungle prevails.

Or law, including international law, may be regarded by some as a triviality reserved just for lawyers. Again, liberating oneself from such prevalent yet groundless assumptions is what I expect for readers.

Second, this treatise is written by an *Asian international lawyer whose native language is not English*. Today, English is a “world (or international or global) language.” The number of people reading English as a foreign language is far larger than the number of native speakers of English. This reality is based on the power of the British Empire and the United States (US) in various fields of human activities since the nineteenth century. It is not based on some ethical ground. People communicate with each other in English because they regard it as more advantageous or useful than adopting other languages. *English is used not because it is ethically required or desirable to do so*.

If so, there is no reason for privileging native speakers of English. Yet in almost all areas of human activities including international law, as well as global politics, economy and media, the privileged status of native speakers of English cannot be denied. From an overall ethical perspective, this privileged relationship in language must be overcome like the inequitable relations in sex, physical condition and other basically innate conditions. Yet it will take a long time to overcome these privileged relations because they are deeply rooted in any society, and *people are generally not conscious of the problematic nature of these relations*.¹

Thus, for overcoming these privileged or inequitable relations, one should first *be aware of the problem itself*. Then, one can, and should, make efforts to overcome such an undesirable state of affairs. The efforts to overcome the privileged relations in language should include various devices and attempts made by both native and non-native speakers of English. This is like efforts to overcome longstanding male-centrism. Not only females but also males, or mainly males, who have been privileged, should make efforts to change the present inequitable situation. By accumulating constant efforts, the situation may be gradually improved.

This improved situation is not only desirable from an ethical perspective. Such a situation will bring about great *advantages not only to non-native speakers of English*, who should be able to join various kinds of human activities on a fairer basis than today. *Native speakers of English will also be able to enjoy far wider and diverse perspectives, arguments, senses and understandings of the world*. This is again like improvement

¹ Scientific and technological progress may greatly change the situation in the future, yet some insurmountable difficulties will likely persist.

through input from feminist perspectives of the world. Not only females but also many males can now enjoy far wider and freer views of the world than before, when the prevalent view was provided almost exclusively by males.

In this way, this book may appear somewhat strange to those who are accustomed to existing treatises of international law in terms of terminology and linguistic style. In terms of substance, those who expect an “ordinary” textbook of international law may be disappointed to see that this treatise devotes far more pages to the history of ideas of and about international law, political functions of norms and the system of international law, and other socio-politico-historical aspects of the world. Still, I believe this type of treatise or textbook is needed for people who are concerned with the future of global society, which, whether one likes it or not, is changing from a longstanding West-centric one to a multi-centric and multi-civilizational one.

At the season of cherry blossoms, 2016
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This treatise was born from a conversation with James Crawford, who is now a judge at the International Court of Justice but was a professor at Cambridge University when we had our conversation in 2005. As usual, I made critical remarks on the narrow-sightedness caused by what I regard as excessively West-centric tendencies in the contemporary study of international law. I also criticized it for an excessively judicially centric tendency. I emphasized the need for socio-politico-historical studies in addition to the “mainstream” positivistic studies. A textbook or treatise of international law based on such a different approach, I argued, should be published by major academic publishers such as Cambridge University Press or Oxford University Press.

The response of James was simple and straightforward. Well, you should write a textbook that can satisfy you.

It was a surprise attack. A surprise, but most legitimate, attack. I, as a Japanese international lawyer, had never thought of the possibility of writing a textbook or treatise of international law to be published by either Cambridge University Press or Oxford University Press. To me, such an undertaking was in the hands of some prominent Western international lawyer. What an awful, stereotyped, West-centric way of thinking!

In 2005, I had already published a treatise of international law in Japanese. So, I thought, I should just revise it and translate it into English. It has turned out that this was not so easy. It has taken more than a decade to publish this treatise. I completely revised the Japanese version, and nearly wrote a new book. Still, it was the conversation with Judge Crawford that gave birth to this book. Thank you, James, for your most friendly provocation!

Rewriting the Japanese textbook, or actually producing this new book, has imposed on me a far more serious burden than I had thought. From late 2013 to early 2015, I was seriously ill and could hardly work. However, I have been extremely fortunate to have wonderful medical

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doctors and their staff, who saved my life. I am most grateful to KUME Haruki, HOMMA Yukio, OUCHI Yasuyoshi, and other doctors, nurses and medical staff of the University of Tokyo Hospital, Toranomon Hospital and the Center Hospital of the National Center for Global Health and Medicine. Dr. KUME and Dr. OUCHI are still taking care of me, as I need to receive medical treatment again from April 2016.

Over this decade, I have had superb “CUP project team” members who assisted me in locating necessary materials, proofreading my drafts, making the bibliography and many other tasks. In particular, Crystal Pryor, ITO Kazuyori and ISHII Yurika (titles omitted for these names and those that follow) have worked with me to the very last moment with utmost devotion and sacrifice. SUZUKI Jun-ichi and KUBONIWA Satoshi devoted a significant amount of time to producing the bibliography.

My gratitude also goes to AOKI Setsuko, FURUYA Shuichi, KAWAZOE Rei, KIBANA Kazuhito, KIM Hae-Kyung, NAGAYAMA Daigo, OYAMA Ryuji and SAITO Tamito. They either proofread earlier versions of my manuscript and gave me useful comments or assisted me in some other way, or both. I am particularly grateful to SAITO Tamitomo and KAWAZOE Rei, whose unrelenting criticism urged me to reconsider the structure and theoretical framework of my earlier drafts.

Some of the sentences in the book are based on my writings in English, and others are translated from my writings in Japanese. The latter are endorsed by me after meticulous exchanges of views between me and translators or proofreaders. Among them, I am particularly grateful to Joëlle Bloise, Tom Derbish, KADOTA Eriko, KAYAKI Megumi, Douglas MacLean, Chrystel Marincich, NASU Hitoshi, SATO Hiromi, WAKASA Amuro and WANG Zhi-An.

As to the substance of my argument, I have requested a number of my friends to proofread earlier drafts and provide me with their comments. Among so many friends who have kindly read my manuscripts, I am especially thankful to AGO Shinichi, ASADA Masahiko, ARAKI Ichiro, Jean d’Aspremont, Edith Brown Weiss, Jutta Brunnée, Bharat Desai, HASEGAWA Masakuni, James Hathaway, Rosalyn Higgins, John H. Jackson, KAWAGUCHI Kazuko, KOGA Mamoru, KOMORI Teruo, LEE Keun-Gwan, Lauri Mälksoo, MOGAMI Toshiki, MORI Tadashi, NAKAMURA Koichiro, OKUDA Yasuhiro, Nicholas Onuf, SAKAMOTO Shigeki, SATO Tetsuo, Bruno Simma, SUGIHARA Takane, TERAYA Koji, TOYODA Tetsuya, Yogesh Tyagi, UEKI Toshiya, YI Ping, YOKOTA Yozo and YOSHIDA Osamu for providing me with a variety of useful comments.

Because this treatise is based on my studies of international law and other disciplines since 1970, when I started studying international law at University of Tokyo, Faculty of Law, I should refer to some of the scholars from whom I have greatly learned. They include Georges Abi-Saab, Richard Baxter, Hedley Bull, Lori Damrosch, Mireille Delmas-Marty, John Dower, Pierre-Marie Dupuy, Richard Falk, Peter Haggengmacher, Louis Henkin, HIRANO Ryuichi, Heinrich Jescheck, Emmanuelle Jouannet, LEE Hang-Key, LEE Zhao-Jie, Neil MacCormick, NAGAO Ryuichi, ODA Shigeru, OKUMA Nobuyuki, PARK Bae-Gong, PARK Gi-Gab, W. Michael Reisman, SAITO Makoto, SAKAMOTO Yoshikazu, Oscar Schachter, Amartya Sen, Brigitte Stern, TABATA Sigejiro, TAKANO Yuichi, TAOCA Ryoichi, Christian Tomuschat, WATANABE Hiroshi and Prosper Weil.

Among the distinguished scholars referred to above, Takano was my supervisor when I was a Research Associate from 1970 to 1973. Baxter, Falk, Jescheck, Reisman, Haggengmacher, Stern, Crawford, Lee (Zhao-Jie) and Brown Weiss invited me to Harvard Law School, Princeton University, Max Planck Institute for Foreign and International Criminal Law, Yale Law School, the Graduate Institute for International Studies, Paris University I, Cambridge University, Tsinghua University and Georgetown Law Center, respectively, either as a visiting scholar or visiting professor. MacCormick and Delmas-Marty invited me to give lecture(s) at Edinburgh University and Collège de France, respectively. In all these superb institutions, I greatly learned from colleagues by exchanging views with them.

The following organizations have generously provided me with financial grants over the years: Japan Society for the Promotion of Science, Grant-in-Aid for Scientific Research; Egusa Foundation for International Cooperation in the Social Sciences; Heiwa Nakajima Foundation; Nomura Foundation; Suntory Foundation Research Project; Takahashi Industrial and Economic Research Foundation; Kajima Foundation; and Mitsubishi Foundation.

I have been fortunate to work with Finola O'Sullivan, Lorenza Toffolon and Margaret Humbert, the most reliable and hard-working editors at Cambridge University Press. I must also express my gratitude to my secretaries at University of Tokyo, Meiji University, the Asian Society of International Law, Japan Chapter and the Georgetown Law Center. They are HIRAUCHI Yuko, KOBAYASHI Naoko, TSURUOKA Junko, YANAGAWA Nakako and Jonathan Zimmer.

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I am sorry that although I have been assisted by so many people as listed above, the quality of this treatise does not warrant their devotion, kindness and generosity. I, as the author, take responsibility for all mistakes and errors remaining in this book. Constructive criticism and candid comments would be most appreciated.

ONUMA Yasuaki

EDITORIAL NOTE

1. In this book, some terminology that native English speakers may find somewhat strange is adopted. The “human-righttization of international relations,” “sovereignization of states,” or “a transcivilizational perspective” are such examples. Readers will see reasons for this “peculiar” terminology in the Preface and other parts of this book.
2. The names of people are expressed with respect to their own culture. For example, Chinese, Japanese and Korean names are written family name first followed by the given name. To avoid misunderstanding, their family name is expressed in upper case when both family and given names are provided (for example, ONUMA Yasuaki).
3. Names of the treaties, laws, resolutions and organizations will be given with their official (English) name in their first instance, followed by their short name in each chapter. Some of them, especially those with long formal names, may be expressed in the abbreviated form from the beginning. Please refer to the Abbreviations List at the front of the book. The English translations of treaty names will be used, based on the name in the language of the official document.

ABBREVIATIONS

(Chapters in which they mainly appear in parentheses)

AIIB	Asian Infrastructure Investment Bank (7)
AU	African Union (10)
BIT	Bilateral investment treaties (7)
CDF	Comprehensive Development Framework (7)
CESCR	Committee on Economic, Social and Cultural Rights (6)
CIS	Commonwealth of Independent States (10)
DSB	Dispute Settlement Body (7)
DSM	Dispute Settlement Mechanism (2, 8)
DSU	Dispute Settlement Understanding (7)
EC	European Community (7)
ECOSOC	Economic and Social Council (3, 6, 9)
ECtHR	European Court of Human Rights (2, 6)
EEZ	Exclusive Economic Zone (5)
EU	European Union (5)
FCN	Friendship, commerce and navigation (7)
FTA	Free trade agreement (7)
GDP	gross domestic product (Intro)
GSP	Generalized System of Preferences (7)
IBRD	International Bank for Reconstruction and Development (7)
ICC	International Criminal Court (4)
ICISS	International Commission on Intervention and State Sovereignty (3, 10)
ICJ	International Court of Justice (1, 2, 3, 4, 5, 6, 9, 10)
ICRC	International Committee of the Red Cross (3)
ICSID	International Centre for Settlement of Investment Disputes (7)
IDA	International Development Association (7)
IFC	International Finance Corporation (7)
ILC	International Law Commission (4, 5)
ILO	International Labour Organization (3)
IMF	International Monetary Fund (7)

ITLOS	International Tribunal for the Law of the Sea (5)
ITO	International Trade Organization (7)
NATO	North Atlantic Treaty Organization (10)
NGO	Non-governmental organization (Intro, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10)
NIEO	New International Economic Order (7)
ODA	Official Development Assistance (6)
PCIJ	Permanent Court of International Justice (9)
TPP	Trans-Pacific Partnership (7)
UK	United Kingdom
UN	United Nations (9, 10)
UNCTAD	UN Conference on Trade and Development (7)
UNESCO	UN Educational, Scientific and Cultural Organization (3)
UNHCR	UN High Commissioner for Refugees (3)
US	United States
WTO	World Trade Organization (7)

SHORT FORM CITATIONS

Short Name	Official Name (in English)
<i>In full in first instance in chapter</i>	
1969 Vienna Convention	Vienna Convention on the Law of Treaties (1969)
Civil Liability Convention	International Convention on Civil Liability for Oil Pollution Damage (1969)
ICCPR	International Covenant on Civil and Political Rights (1966)
ICESCR	International Covenant on Economic, Social and Cultural Rights (1966)
Intervention Convention	International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (1969)
Kyoto Protocol	Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997)
London Convention	Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972)
Vienna Framework Convention (1985)	Vienna Convention for the Protection of the Ozone Layer (1985)
UDHR	Universal Declaration of Human Rights (1948)
UNCLOS	United Nations Convention on the Law of the Sea (1982)
<i>Always in short form</i>	
1907 Hague Convention	Convention for the Pacific Settlement of International Disputes (1907 Hague Convention I)
Agreement between Portugal and Indonesia	Agreement between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor (1999)
Articles on State Responsibility	Articles on Responsibility of States for Internationally Wrongful Acts (2001)

Short Name	Official Name (in English)
Basel Convention	Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989)
Berlin General Act CEDAW	General Act of the Berlin Conference (1885) Convention on the Elimination of All Forms of Discrimination against Women (1979)
Continental Shelf Convention	Convention on the Continental Shelf (1958)
Convention on Succession of State Property	Vienna Convention on Succession of States in respect of State Property, Archives and Debts (1983)
Convention on Treaty Succession	Vienna Convention on Succession of States in respect of Treaties (1978)
Cultural Diversity Convention	Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005)
European Convention on Human Rights	European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)
Friendly Relations Declaration	The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (1970)
GATS	General Agreement on Trade in Services (1994)
GATT	General Agreement on Tariffs and Trade (1947)
General Act	General Act for the Pacific Settlement of International Disputes (1928)
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide (1948)
Helsinki Final Act	Conference on Security and Co-operation in Europe, Final Act of the Conference on Security and Co-operation in Europe (1975)
ICC Statute	Rome Statute of the International Criminal Court (1998)
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination (1965)
ICJ Statute	Statute of the International Court of Justice (1945)
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965)

(*cont.*)

Short Name	Official Name (in English)
ILO Convention No. 107	Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-tribal Populations in Independent Countries (1957)
ILO Convention No. 169	Convention concerning Indigenous and Tribal Peoples in Independent Countries (1989)
Intangible Cultural Heritage Convention	Convention for the Safeguarding of the Intangible Cultural Heritage (2003)
Kellogg-Briand Pact	General Treaty for Renunciation of War as an Instrument of National Policy (1928)
League of Nations Covenant	Covenant of the League of Nations (1919)
MARPOL	International Convention for the Prevention of Pollution from Ships (1973)
Montevideo Convention	Convention on Rights and Duties of States (1933)
Montreal Protocol	Montreal Protocol on Substances that Deplete the Ozone Layer (1987)
NAFTA	North American Free Trade Agreement (1992)
Nara Document	Nara Document on Authenticity (1994)
PCIJ Statute	Statute of the Permanent Court of International Justice (1920)
Peace Treaty between Japan and China	Treaty of Peace between the Empire of Japan and the Qing Empire of China (1895)
Rio Declaration	Rio Declaration on Environment and Development (1992)
Stockholm Declaration	Declaration of the United Nations Conference on the Human Environment (1972)
Treaties of Westphalia	Peace Treaties of Westphalia (1648)
TRIMs Agreement	Agreement on Trade-Related Investment Measures (1995)
TRIPS Agreement	Agreement on Trade-related Aspects of Intellectual Property Rights (1994)
UN Charter	Charter of the United Nations (1945)
UNFCCC	United Nations Framework Convention on Climate Change (1992)
Versailles Treaty	Treaty of Peace between the Allied and Associated Powers and Germany (1919)

