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戦争と平和の間ーー発足期日本国際法学における『正しい戦争』の概念とその帰結、易平著、

Sensou to Heiwa no Aida

By Yi Ping. Beijing, Torkel Opsahl Academic EPublisher, 2013, 259 pp, £17 (hardcover).

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This book by Chinese scholar Yi Ping, at Peking University Law School, critically examines the views of war among Japanese international law scholars and practitioners between the late 19th century and the early 20th century. The book is written in Japanese and is entitled *Sensou to Heiwa no Aida*. This title may be translated into English as *Between War and Peace: The Concepts and Corollaries of* '*Just War*' *in the Early Period of International Legal Studies in Japan*.

Sensou to Heiwa no Aida analyses the views of Japanese scholars on the restriction or denial of wars immediately after the opening of Japan to the West in the 19th century. From 1639 to 1854, Japan had an isolationist policy. In 1854, Japan was forced to reverse her isolationist policy due to political pressure from the United States. After arriving on the international stage, Japan tried to 'civilise' itself and sought to be treated as a 'civilised' nation as it hastened to adopt Western legal systems and cultures in the latter part of the 19th century. Japan also experienced two decades of war, which is the period studied by Yi in this book. This period begins with the Sino-Japanese War in 1894 and ends with the beginning of the First World War in 1914. During this time, Japan was also involved in the Russo-Japanese War between 1904 and 1905.

Sensou to Heiwa no Aida is divided into four chapters, in addition to the introductory chapter and the conclusion: 'The Formation of the Japanese Conception of War', 'The Conception of War in International Legal Theories (1)', 'The Conception of War in International Legal Theories (2)', and 'The Conception of War in International Legal Practices'. In each chapter, the author analyses then-existing Japanese legal consciousness regarding the restriction of war, as espoused by scholars and practitioners.

* Associate Professor at Aichi Prefectural University (Japan). This book is published in the form of an e-book that readers may access online for free on the website of the publisher. Hard copies of the book are available from major book vendors. An English summary of the monograph by the author of this book review is also made freely available: <http://www.prio.org/JPR/BookNotes/?x=13> accessed 30 March 2015.

In modern Japanese international law textbooks, the period analysed by Yi is popularly known for the dominant notion of 'Indiscriminate War'. This paradigm superseded the dominance of the 'Just War' notion (*bellum justum*) that can be traced back to medieval times. This 'Indiscriminate War' notion of the 19th and early 20th centuries was then followed, in more recent decades, by the popularising of the 'outlawry of war' notion. Discussion of the 'Indiscriminate War' concept, however, is not found in contemporary European and American textbooks.[1] After the Second World War, with the establishment of the principle of outlawry of war and the prohibition of the use of force by the United Nations, Japanese scholars began to describe the period, analysed in *Sensou to Heiwa no Aida,* as the time when the 'Indiscriminate War' notion dominated. Most Japanese scholars agree that the 'Indiscriminate War' notion implies the extralegal nature of war (*jus ad bellum*) and the non-discriminatory application of *jus in bello*.[2] It is generally understood that, by stressing the period of 'Indiscriminate War', Japanese scholars underscore the fact that the international community was committed to the development of *jus in bello* rather than pursuing just causes of wars.

Yi challenges such an over-simplified categorisation. Instead, Yi argues that the discussions conducted during that time are best described and understood using a 'Just War' conceptual framework. Yi identifies and examines different discussions about war during this period and highlights how they incorporated a 'Just War' element. She identifies three types of discussions being conducted by three groups: (1) the 'extralegal faction', (2) the 'adjudicating faction', and (3) the 'implementing faction'. Though these categories each had a 'Just War' element, Yi examines how they were manipulated during their application to justify the Russo-Japanese War (1904–1905), despite their potential to restrict war.

The first chapter examines the period in which Japan tried to establish her sovereignty by adopting textbooks on the law of nations written by European and American scholars. Yi describes how Japan adopted pragmatic and positivistic approaches to learning and using the law of nations. Yi observes that since the 1890s, most textbooks of the law of nations, translated into Japanese, held views that did not question the causes of war.

Nonetheless, Japanese international legal theories were formulated and adapted to Japan's particular situation, despite her amenable reception of Western international legal theories. Chapter one describes the biographies and academic backgrounds of a few famous Japanese international law scholars: Professors Tsurutaro Senga (千賀鶴太郎), Toru Terao (寺尾亨), Nagao Ariga (有賀長雄), Sakue Takahashi (高橋作衛), and Shingo Nakamura (中村進午). These scholars studied law in Europe and wrote primarily in the field of the laws of war, sometimes in English. Their writings show how Japanese armies respected the laws of war, especially in the Sino-Japanese War.

1 Masaharu Yanagihara, 'The Idea of Non-discriminating War and Japan' in Michael Stolleis and Masaharu Yanagihara (eds), *East Asian and European Perspectives on International Law* (Nomos 2004) 179, 180.

2 ibid 182.

The second chapter considers why the period under study came to be regarded as an era dominated by the 'Indiscriminate War' notion. Yi argues that present-day scholars have misunderstood two then-existing theories: the 'disregard of war rationale' theory and the 'war as a state' theory. Both theories still require various justifications for resorting to war, such as protecting national interests. Therefore, Yi concludes that the 'Indiscriminate War' notion is not the only possible logical derivative of these theories being discussed by Japanese scholars and practitioners at this time. Yi examines the legal discussions ongoing during this time, with the aim of identifying and explaining three categories of discussions that included 'Just War' elements. The third chapter elaborates on these three categories. The first was undertaken by the 'extralegal faction'.[3] According to this faction, wars were inherently restricted by extralegal factors such as an outrageous and apostate cause as a recourse to war. Wars may be justified when ignited for the development of the national interests and interests of the state. Here 'extralegal' means that a violation of the rights and obligations of 'international law in peace' time was not required for igniting a war.[4] For instance, Ariga, one of the proponents of the extralegal faction, presupposed that the laws of war applied in war time. *Jus in bello* restricts the way wars are conducted, for instance, with a requirement for the disclosure of reasoned causes of war upon the waging of war. In contrast, the other factions required a violation of the rights and obligations of international law in peacetime before resorting to war.[5] These factions are the 'adjudicating faction' and the 'implementing faction.' The 'adjudicating faction' viewed war as a means of arbitration, as a way of adjudicating between the warring parties, and determining a contested issue in accordance with the outcome of war. The 'implementing faction' viewed war as a means of law enforcement; therefore, the outcome of the law did not determine the lawfulness of war.

In the fourth chapter, Yi considers how these three categories, which had 'Just War' elements, were applied to the Russo-Japanese War. Yi observes that these different theories were all used to defend Japan's military operations in the Russo-Japanese War based on the right of self-defence. In the end, Japanese scholars used their respective just war theories to justify the Russo-Japanese war, although these 'Just War' theories in reality denied and restricted wars to some extent.

In the last part of the fourth chapter, Yi summarises the factors that enabled these various 'Just War' theories to be used to justify war and that obscured these theories' various distinctions. First, Yi highlights the problem of condition setting. Japanese legal

3 'Extralegal faction' is described by Yi as an argument espoused by those who do not require another state's internationally wrongful act under international law in peacetime as a precondition for launching a war. Since they thought that a cause of war was a matter of state policy, they approved and justified even a war for lucrative ends as a legal war under international law in peacetime without questioning its cause. Yi Ping, *Sensou to Heiwa no Aida* (Torkel Opsahl Academic EPublisher 2013) 103.

4 Yi Ping, 'The Contemporary Relevancy of the "Just War" Concept in the Early Years of International Legal Studies in Japan' (2013) 12 FICHL Policy Brief Series 3.

5 These factions are categorised into the 'legal faction' as opposed to the 'extralegal faction' by Yi. The 'legal faction' required legal causes of wars under international law in peacetime whenever states initiate a war. This faction is further divided into the 'adjudicating faction' and the 'implementing faction'.

scholars in those days did not set specific and objective conditions for measuring the justness of any war. Second, individuals distorted facts to fit political purposes. Yi cites as an example, Professor Takahashi (高橋作衛), who was aware that the Liatuong Peninsula was a leased territory between Russia and China, and that the latter had sovereign rights to it.[6] After the outbreak of Russo-Japanese War, however, he asserted that the Liaotung Peninsula was a territory of Russia, so that Japan could seize it.[7] The same distortion is found in the essays by Mr Ninagawa Arata (蜷川新) in which he insisted that there was a treaty on the withdrawal of troops between Russia and Japan—a treaty which in fact did not exist. Third, the Japanese international law scholars, at the time, simultaneously held positions as both scholars and public counsels for the then-Japanese government. These dual positions resulted in the contradictions in the principles and policies of Japanese scholars regarding wars before and after the Russo-Japanese war.

The final chapter summarises the monograph by concluding that '[t]he 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'.[8] Yi stresses that the purpose of the monograph is not to criticise erstwhile Japanese views of war from the viewpoint of current international law. Rather, the book strives to display a historically sensitive understanding of the 'Just War' discussions of the time and to reveal the dangerous ideas underlying its concepts.

Thus far Japanese mainstream scholars and media have studied Japanese compliance with international law during the Russo-Japanese war from the standpoint of *jus in bello* (eg Japan's proper treatment of Russian POWs). In seeking to facilitate the West's acceptance of Japan as a civilised nation, Ariga and Takahashi published books about Japan's compliance with international law during the Russo-Japanese war from the standpoint of *jus in bello*,[9] and contemporary Japanese international law scholars display non-critical attitudes toward the fact that these publications were highly praised by Westerners,[10] mainly because of the lack of information on the real situation of the POW treatment outside Japan.[11] Yi studies this period of Japan's history, however, from the standpoint of *jus ad bellum*. The book focuses on contradictions in the principles

6 See Convention for the Lease of the Liaotung Peninsula Between Russia and China Convention for the Lease of the Liaotung Peninsula Between Russia and China (adopted 27 March 1898), official translation reproduced in (1910) 4 AJIL Supp 289, art 1: 'This act of lease, however, in no way violates the sovereign rights of H M the Emperor of China to the above-mentioned territory.'

7 Yi (n 3) 196–97.

8 Yi (n 4) 4.

9 See: N Ariga, *La Guerre Russo-Japonaise au point de vue Continental et le Droit International d'après les Documents Officiels du Grand État-Major Japonais* (A Pedone and Stevens & Sons 1908); S Takahashi, *International Law Applied to the Russo-Japanese War with the Decisions of the Japanese Prize Court* (A Pedone and Stevens & Sons 1908).

10 Kinji Akashi, 'Japan-Europe' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) 724, 738–39.

11 Masaharu Yanagihara, 'Japan's Engagement with and Use of International Law: 1853–1945' in Thilo Marauhn and Heinhard Steiger (eds), *Universality and Continuity in International Law* (Eleven International Publishing 2011) 447, 458–59.

and policies of Japanese scholars towards war before and after the Russo-Japanese war. Indeed, Yi demonstrates that these contradictions were mainly caused by the vague conditions for resorting to just war and the arbitrary nature of fact-finding conducted. Such factors are still relevant to today's international law scholars and practitioners. For example, one of the factors cited by the United States and the United Kingdom to justify the use of force against Iraq in 2003 was the information that Iraq possessed weapons of mass destruction. Eventually, weapons of mass destruction were not found in Iraq, and the intelligence services of these countries came under scrutiny and criticism.[12]

A few critiques can be made about the fundamental questions considered by Yi in her book. First, it is arguable whether there was an established *jus ad bellum* between the late 19th century and the early 20th century. If the content of *jus ad bellum* is not axiomatic, then the arbitrariness of its contents and its application is almost always inevitable. Nonetheless, there had been incidents which implicated the concept of *jus ad bellum* in the 19th century and which offered opportunities for clarification, specifically the *Caroline* incident.[13] Yi highlights the *Caroline* incident as an example of necessity, in agreement with Japanese Professor Ryoichi Taoka (田岡良一), because of its lack of a premise of a wrongful act by another state. She criticises Professor Takahashi's understanding of the requirements of self-defence, that do not include the requirement of another state's wrongful act, by referring to the *Caroline* incident.[14] It is widely recognised that the aftermath of the *Caroline* incident set the precedent for the requirements of self-defence, and Takahashi's understanding may not be entirely improper especially in the early 20th century.

Secondly, as described above, Yi's focus tends to be on extralegal factors. Yi tries to uncover dangerous pitfalls of the Japanese 'Just War' concept, such as the intention of politicians to obtain *quid pro quo* from defeated nations (eg Liaodong island from China and Russia after Sino-Japanese war and Russo-Japanese war, the game of great power politics, and the pro-war propaganda underlying the 'Just War' theories). These pitfalls relate to the ethical beliefs of international lawyers in the midst of wars and provide fodder for developing interdisciplinary studies on ethics and 'Just War' theories.

Thirdly, the book does not offer a critical evaluation of the status of the civilised nation as advocated by the Western powers at that time. Such an evaluation would offer an indirect measure of the successful reception of the law of nations, both *jus ad bellum* and *jus in bello*, in Japan at the time. In the case of the Sino-Japanese War, it has often

12 Commission on the Intelligence Capabilities of the United States regarding Weapons of Mass Destruction, *Report to the President of the United States* (31 March 2005); De Onafhankelijke Commissie van Onderzoek Besluitvorming Irak (Commissie-Davids), *Rapport Commissie van Onderzoek Besluitvorming Irak* (12 January 2010). The United Kingdom's Iraq Inquiry has not published its report as of January 2015, and there is 'no realistic prospect of delivering the report before the General Election in May 2015'. See: Letter from Sir John Chilcot to the Prime Minister (20 January 2015).

13 Letter from Daniel Webster, Secretary of State of the United States, to Henry S Fox, Esq, Envoy Extraordinary and Minister Plenipotentiary of Her Britannic Majesty (24 April 1841).

14 Yi (n 3) 174.

been pointed out by Japanese scholars that the Western academic circle has praised Japan's conduct of the war.[15]

Despite all these comments, Yi's message is clear: we cannot stop thinking about the relationship between war and peace, and between law and politics. Yi's book constitutes a good starting point to critically analyse Japanese history of international law, especially to reflect on Japanese understanding of the law of nations and international law from 1894 to 1914.

15 Kinji Akashi, 'Japanese "Acceptance" of the European Law of Nations: A Brief History of International Law in Japan c 1853–1900' in Stolleis and Yanagihara (n 1) 1, 20.