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**Urs Matthias Zachmann \***

## Japan's Early Practice of International Law, 1870–1907

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\* Institut für Japanologie, Freie Universität Berlin, [u.zachmann@fu-berlin.de](mailto:u.zachmann@fu-berlin.de)

Il reste que ce livre sera une référence importante dans le domaine de la diffusion intellectuelle du droit international et des théories de Mancini au carrefour des XIX<sup>e</sup> et XX<sup>e</sup> siècles. Eloisa Mura approfondit son expertise dans le domaine en publiant en cette année 2018 un ouvrage qui, par la nature des sources qu'elle publie, fera sans doute le miel des spécialistes de l'histoire du droit international: *Mancini in cattedra. Le lezioni torinesi di*

*diritto internazionale del 1850–51 et 1851–52* (Pise, Edizioni ETS). Au-delà de cet intérêt, nous espérons que ce travail sera aussi l'occasion d'une réflexion disciplinaire sur le domaine en plein essor qu'est l'histoire du droit international, qui devra sans doute enrichir cette expansion de nouvelles approches intellectuelles. ■

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## Japan's Early Practice of International Law, 1870–1907\*

In his postwar reflections on the history of international law, *Nomos der Erde* (Nomos of the Earth, 1950), the staunchly Euro-centric Carl Schmitt commented on the meteoric rise of Asian nations, particularly Japan, with a curious mixture of horror and fascination:

The transition to a new, no longer Eurocentric world order began from Asia with the inclusion of an East Asian Great Power. ... In its war with China in 1894[–05] and in its victorious war with a European Great Power (Russia) in 1904[–05], Japan had demonstrated that it would abide by European laws of war. Thereby it had beaten its »reception parties« to the punch. ... At the first Hague Convention, European diplomats and jurists still believed in and celebrated the victory and triumph of their European international law. But the feet of those whom they should have been showing out the door already were standing before it. (Carl Schmitt, *Nomos of the Earth*, transl. G. L. Ulmen, New York: Telos Press 2003, 191, 231 f.)

Thus, Europe's fall from grace (and expulsion from its normative centre) began with Japan's arrival on the scene.

In his well-written and insightful *International Law and Japanese Sovereignty. The Emerging Global Order in the 19<sup>th</sup> Century*, the historian Douglas Howland analyses key events in Japan's steep trajectory that catapulted it into »international society«, starting with the enforced opening of Japan's borders in 1853/54 and reaching its erstwhile zenith in 1911, getting rid of fixed tariffs as the last infringement on its sovereignty. Within 50 years, Japan left its isolation, adopted a wholly new set of rules and practices to conduct foreign policy and, through its skilled application of force, achieved equality (at least on paper) with Western powers. China, in comparison, endured the yoke of its one-sided treaties for almost a century.

Howland convincingly argues that Japan's ascent did not proceed as traditional accounts would have it (especially the English School), that is, as the result of an inexorable expansion of the values »international society« and Japan's reactive recep-

\* DOUGLAS HOWLAND, *International Law and Japanese Sovereignty. The Emerging Global Order in the 19<sup>th</sup> Century*, New York: Palgrave MacMillan 2016, XI, 232 p., ISBN 978-1-137-57108-3

tion of international law as a »good student« of Western modernity, which deserved to be awarded full sovereign status and prestige. Rather, Japan was »always a sovereign state« from the beginning, and Japanese leaders were not »passive adopters«, but »actors to be reckoned with from day one« (4–5). Howland relates this narrative of original empowerment and agency in four main chapters (ch. 2–5), which focus on »four multilateral grounds for international legal action to Japan in the nineteenth century – four arenas in which Japan asserted to sovereignty and interacted with its peers to collectively construct what is best described as a global order« (23). These are arranged in roughly chronological order of the temporal emphases of these »arenas« of legal action throughout the history of the Meiji period (1868–1912), starting with Japan’s responses to the Franco-Prussian War (1870–71) and ending with the Second Peace Conference at The Hague in 1907 and discussions of problems resulting from Japan’s conduct during the Russo-Japanese War.

Before giving a short overview of these arenas, it should be mentioned that, although the book »responds to a serious lacuna: there is currently no comprehensive historical study of Japan’s *practice* of international law in the nineteenth century« (4), it only half closes the lacuna. This book is not a systematic treatment, but covers only select, though central, aspects of Japan’s engagement with international law during the 19<sup>th</sup> century, and readers not already familiar with Japan’s engagement with international law would benefit from more systematic and shorter historical treatises alongside, chapters such as those by Masaharu Yanagihara and Kinji Akashi in the *Oxford Handbook of the History of International Law* (2012).

Chapter two of the book outlines the early stages of Japan’s engagement with international law in the 1870s and the steep learning curve in applying it – with varying success. Japanese leaders soon realised two things. First, it was not enough to apply institutions of international law, such as neutrality in war, correctly and by the book. To succeed international legal practice needed two more ingredients, namely military power to enforce it and the political will of the parties involved to see it succeed (such as in the case of the successful liberation of indentured Chinese coolies on a Peruvian ship detained at a Japanese port). Japan lacked this kind of power until the turn of the century. Moreover, the Western powers more

often than not opposed Japan in its bid for equality and autonomy under the cover of relative levels of »civilization«. As the author once more shows, this claim to civilization was never a fixed category, but more of a moving goalpost that served to camouflage particular political agendas, especially that of upholding Western nationals’ privileges in Japan (much in the same way, incidentally, as Japan later discussed the subaltern status of its colonial peoples). However, as chapter three clearly demonstrates in relation to the problem of extraterritoriality, Japan was not altogether powerless. On the contrary, it actively and very cunningly used the many practical problems that arose from that institution, particularly when Western nationals wanted to venture into the Japan’s hinterland, to gradually improve the situation. Thus, even the recalcitrant representatives of Britain and Germany could not prevent an 1879 compromise that mitigated the worst abuses of extraterritoriality. Chapter four expands on this incremental strategy by which Japan accrued prestige and influence little by little through discussion on Japan’s engagement in institutions of »international administrative law«, such as the International Telegraph Union, the Universal Postal Union and, finally, participation in the International Sanitary Conference. This »holistic« commitment to global governance set the pattern for Japan’s international engagement that persists even today. Finally, chapter five highlights Japan’s conduct during the wars with China and Russia at the turn of the 20<sup>th</sup> century, particularly the concerted public-diplomacy activities of Japanese politicians, diplomats and international lawyers in cooperation with British lawyers to argue the propriety of Japan’s war conduct and the relative success of their legal positions during the Hague Peace Conferences.

Howland discusses these cases with great historical insight, rich detail and interesting reflections on the theoretical implications of Japan’s case. At times, one wishes for more conceptual clarity and accuracy, particularly in terms of legal doctrine and terminology. It is not clear what role the conflict of laws plays here (42–48), being of intrinsically domestic, not international nature. The statement that »it was not so much that Japan needed to develop codes of law that would harmonize its civil law with European law, but that Japan needed to develop legal forms that would be compatible with the growing coordination of a private international law among Europeans« (47) is certainly exagger-

ated, given that such coordination is rather limited even today. Also, Piggott's 1892 treatise is correctly entitled *Exterritoriality* and such should be the alternative (or cognate) term for extraterritoriality throughout (cf. 54, 60–61). »Publicists« is in fact the collective term for experts in international law (cf. 102), published or not, and Fukuzawa Yukichi called the Sino-Japanese War a »war *between* civilization and barbarism« (*bun'ya no sensō*, cf. 124). However, these are mere quibbles that do not detract from the great merit of this book.

More intriguing is the choice of events that the book focuses on. There is a strong emphasis on Japan's international legal interactions with Western powers, with the single exception of Japan's war with China 1894–95. And although the author certainly does not »sanitise« Meiji Japan's relations with its Asian neighbours – in fact, he very succinctly demonstrates how Japanese lawyers tried to do so, particularly in the case of the Port Arthur massacre, the rhetoric of which chillingly reminds of more recent apologies for war atrocities – it is a pity that Taiwan, Korea and China do not figure more prominently in these pages. After all, they bore the brunt of Japan's spectacular »successes« in applying international law, and while the Western powers only felt their pride scuffed, Japan's neighbours felt the sharp edge of international law used as a weapon. For example, contrasting Japan's own

»gunboat diplomacy« towards Korea and the resulting »unfair« Kanghwa Treaty of 1876 (which is not mentioned in the book) would temper the pathos of Japan's frequent invocations of natural law and particularly the sanctity of sovereignty against the Western powers' demands (e. g. Foreign Minister Terashima in 1873, 67).

Finally, and to return to Carl Schmitt's lamentation in the beginning, it is doubtful whether these »arenas«, although poignant illustrations of Japan's early mastery of international law as a practice, ultimately serve the book's most ambitious thesis, namely of »Japan's catalytic role in the development of a world order under international law« (20). Japan may have fulfilled this role on the *factual* level by brushing away the last remnants of the Sino-centric order in East Asia in 1895. But like China today, it was a rule-taker for most of its modern history – and a conservative one at that. It was only much later, in the context of World War Two that Japan tried to establish a normative order of its own and failed bitterly. Thus, Japan's 19<sup>th</sup>-century success with international law was still largely within the confines of good old Eurocentrism, as this book illustrates with captivating detail. Howland's book is a most valuable contribution to the »non-Western« historiography of international law. ■

**Stefan Kroll**

## Über den Antikolonialismus hinaus: ›Asiatische Perspektiven‹ auf die Pariser Friedenskonferenz\*

Das Recht nimmt keine zentrale Stellung ein in diesem Band zu »Asian Perspectives on the Paris Peace Conference and the Interwar Order, 1919–33«, dies sei gleich zu Beginn dieser Rezension in einer rechtshistorischen Fachzeitschrift angemerkt.

Was dieser Band allerdings bietet, sind äußerst vielschichtige und differenzierende Perspektiven auf einen Gegenstand, der in der Rechtsgeschichte bislang nicht nur, aber vor allem auf seine Bedeutung im europäischen Kontext hin erforscht wurde.

\* URS MATTHIAS ZACHMANN (Hg.), *Asia after Versailles. Asian Perspectives on the Paris Peace Conference and the Interwar Order, 1919–33*, Edinburgh: Edinburgh University Press 2017, 248 S., ISBN 978-1-4744-1716-7