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AÚ SERVICE DU DROIT INTERNATIONAL

Les 150 ans de l'Association de droit international

TO THE BENEFIT
OF INTERNATIONAL LAW
150 Years of the International Law
Association

Sous la direction de Catherine Kessedjian, Olivier Descamps et Teodolinda Fabrizi

One Hundred Years of the ILA Japan Branch

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INTRODUCTION

The footsteps of the ILA Japan Branch over the past one hundred years reflect the history of modern Japan itself. Its establishment in 1920 was symbolic of Japan's rise in world politics. While its activities were suspended during the war time after 1941, the Japan Branch was reconstructed in 1955, which was also symbolic of Japan's return into the international community. The contributions of the Japan Branch culminated in its hosting of the ILA Tokyo Conference in 1964, and, fifty-six years later, the Kyoto Online Conference in 2020, which coincided with the Branch's centennial.

By tracing the history of ILA Japan Branch, we can learn how the academics of international law in Japan coped with the changes of the political environment over time. There were both bright and dark days. The members of the ILA Japan Branch today are determined to maintain its good tradition to the next one hundred years, and beyond.

I. JAPAN'S ASSIMILATION OF 'WESTERN' INTERNATIONAL LAW

Not until the arrival of the 'black ships' from America commanded by the Commodore Matthew Perry in 1853 did the Japanese learn of the existence of modern international law. They came to realise its significance when Japan, forced to abandon the seclusion policy it had pursued for more than two hundred years, took the historic step of concluding the Japan-US Treaty of Friendship the following year, under the threat of arms. While it was primarily the disparity in power between Western nations and Japan that produced subsequent unequal treaty relations with the United Kingdom, France, Russia,

and twelve other Western powers, Japan's ignorance of international law and lack of diplomatic skill led to the imposition of certain burdens that might well have been avoided.¹

The revision of these treaties became the national goal of the new government established after the Meiji Restoration of 1868. The road to successful revision was by no means easy, and the Meiji government's painstaking efforts to attain treaty revision were unsuccessful at least five times. Through bitter experience, however the Japanese gradually acquired knowledge and skill in legal manipulation in order to achieve their objective. As a prerequisite to gaining full membership in the international community, Japan had to demonstrate to the world that it was a 'civilised nation' and a law-abiding country. Thus, during the Sino-Japanese War of 1894-1895, Japan carefully adhered to the international rules of war. Experts in international law accompanied the expeditionary forces and the fleet in order to give advice on the conduct of warfare, and a book on this topic was published in French after the war by Nagao Ariga, professor at the Military Academy.2 This certainly enhanced Japan's reputation as a 'civilised nation' Against such a background, the Japanese Society of International Law (JSIL) Kokusaiho Gakkai) came into being in 1897.3 In any event, the strong motive force of nationalism fueled the revision movement, which ultimately attained success in the form of new treaties concluded on equal footing with the West, but only after Japan's victory in its 1904-1905 war against Russia.

After the Russo-Japanese War, the Japanese attitude toward international law began to change. Having developed into an imperialistic power itself, Japan tended to rely more on force than on law. According to the then influential theorist Yukichi Fukuzawa (1835-1901), 'one hundred volumes of international law and numerous treaties of amity are not worth a single canon.' He also advised that Japan should follow the course of *Datsua Nyuou* (Extrication from Asia and Assimilation into Europe), meaning that Japan's international status depended on the degree of Westernisation to be attained by extricating the country from Asia, and, more precisely, by sacrificing neighbouring Asian nations

for the benefit of Japan. The disappointing negative decision of the Permanent Court of Arbitration (PCA) on the *Japanese House Tax* case in 1905⁶ was also determinant in Japan's departure from compliance with international law.

It should be noted that the law-abiding attitude during the first five decades after the opening of Japan and the power-oriented attitude of the following four decades were largely two sides of the same coin. From the outset, international law appeared to be a strong and sophisticated system of outside pressure (gaiassi) that Japan could not manipulate or refuse to accept. Their early experience instilled in the Japanese people a sense of frustration and a feeling of being victimised by international society of the time. Therefore, the law-abiding attitude of that period did not actually result from a readiness to commit Japan to the basic values of modern international law; rather it was based upon 'patience and tolerance' (gashin shotan) with a view to obtaining the privileged status of a 'civilised nation' as quickly as possible, until Japan was admitted to the club of Western countries; once recognised as a major power, Japan found it less necessary to adhere to the principles and rules of international law. The latent hostility toward, and frustration with, international law gradually became overt.

It was about this time, however, when Dr Thomas Baty (1869-1954)⁷ came to Japan as legal advisor of the Japanese Foreign Ministry, and brought to the Japanese academics a fresh, and perhaps an alternative, idea on international law, *i.e.* by adopting a different way of interpretation and application of international law, and where necessary, by rendering international law fair and more equitable to non-Western countries such as Japan through codification of international law, as shown below.

II. ESTABLISHMENT OF THE JAPAN BRANCH IN 1920

The Japan Branch of ILA was established in December 1920. It was based on the suggestion by Dr Thomas Baty. He had earned doctoral degrees from both Cambridge and Oxford, and served as honorary secretary of the ILA from 1906 to 1916. He came to Japan at the invitation of the Japanese Government in 1916.

¹ Shinya Murase, 'The Most-Favored-Nation Treatment in Japan's Treaty Practice during the Period 1854-1905', 70/2 American Journal of International Law (1976) 273, reproduced in Shinya Murase, International Law: An Integrative Perspective on Transboundary Issues (Sophia University Press, 2011) 321.

Nagao Ariga, La Guerre sino-japonaise au point de vue du droit international (Paris, Pedone, 1896). For the same purpose, Ariga published, after the war with Russia of 1904-1905, La Guerre russo-japonaise au point de vue continental et le droit international (Paris, Pedone, 1908).

³ The establishment of JSIL in 1897 preceded by nine years that of the American Society of International Law (ASIL), established in 1906.

⁴ Yukichi Fukuzawa, Tsuzoku Kokkenron [On Popular Sovereignty] (1878), in Zenshu [Collected Works], vol. 4 (Tokyo, Iwanami, 1959), at 637 [in Japanese].

⁵ Ditto, Datsua-ron [Treatise on Extrication from Asia], fiji Shimpo [newspaper] (16 March 1885) [in Japanese].

⁶ George G. Wilson, The Hague Arbitration Cases (1915), at 40-63. Since the Japanese officials and scholars of international law had been so certain of their victory in this case before the judgment was rendered, they were not able to accept it without airing their accusation that the PCA might not be fair to 'non-white people'. See Shinya Murase, 'Japan and International Law', in Shinya Murase, op. cit. n. 2, at 311-319.

⁵ Shinya Murase, 'Thomas Baty in Japan: Seeing through the Twilight', 73 The British Yearbook of International law (2002), at 315-342, reproduced in Shinya Murase, op. cir. n. 2, at 389-418.

⁸ Baty was very critical of traditional, authoritative interpretation of international law, and he did not hesitate to show his hostility toward the British establishment in law. See ibid., at 392-394. That is probably why he failed to get a permanent teaching position in Cambridge and Oxford, and ultimately accepted the invitation from Japan.

It was still relatively a bright period, called the 'Taisho Democracy', when he arrived in Japan.

Along with his duties as legal advisor to the Japanese Foreign Ministry, Baty was very active in engaging with the academics in Japan. Having served as honorary secretary of ILA, it was natural for him to strongly recommend the establishment of an ILA Branch in Japan. He gave a talk on ILA at the JSIL annual meeting in 1919 and encouraged its members to join the efforts for the establishment. In consequence, the ILA Japan Branch was established on 13 December 1920 at the inauguration meeting held at *Chuo-tei* Restaurant, Tokyo, that was attended by some twenty-five founding members, who were all leading experts in international law and diplomacy. Nagao Ariga, Thomas Baty, and six others were named as members of the Council, and among them, Baty, Sakutaro Tachi (professor at the Imperial University of Tokyo) and Tadao Yamakawa (chief of the Cabinet Legislation Bureau) acted as directors. There was no president. It was decided that the annual membership fee was six Japanese yen, which included the registration fee sent to the ILA Headquarters (12 shillings 6 pence per member).

The Japan Branch is the third oldest of all the ILA branches after the Netherlands Branch (1910) and the German Branch (1912), and its foundation was followed by the establishment of branches in the United States (1921), Sweden (1922) and Poland (1923).

Baty gave vigorous assistance to the Japanese group of scholars who participated in the project for codification of international law, the League of Nations initiative that began in 1924. Under the combined auspices of JSIL and the ILA Japan Branch, a committee was formed for the codification of international law, which eventually elaborated nine separate draft conventions. They were sent to the League, and at its Assembly meeting in 1928, Professor Henri Rolin, as rapporteur of the codification project, expressed his particular appreciation for the contribution made by the Japanese group, and also for those of the Harvard research group. Having won the recognition from the world organisation, the whole Japanese community of international lawyers was

immensely proud of its achievements, and was deeply grateful for the assistance of Dr Baty, without whose efforts the project would not have been so successful.

However, as Japan became more and more militaristic in the 1930s, the Japanese international law academia became disunited, with the majority of scholars supporting the government policy. When the Japanese army invaded Manchuria (North-East China) in September 1931, Professor Kisaburo Yokota of the Imperial University of Tokyo denounced the military action, stating openly that it could not be justified under international law as an act of self-defence. Because of this assertion he suffered intense harassment by the military up until the end of World War II. Baty was, on the other hand, performing his duties as Japan's legal advisor faithfully, trying to defend what was impossible to defend, thus offending the British government. Baty believed that the United Kingdom had no right to intervene as Japan was doing what the former had been doing to the Middle East and Africa. In preparing his opinion for the defence of Japan's policy on Manchuria, however, Baty was not informed of the true facts. He based his findings on the distorted facts given to him.

During the war years of 1940-1945, the Japanese government campaigned for the idea of *Daitoa-Kyoeiken* (Greater East Asian Coprosperity Area), by which, for instance, a proposal of establishing a 'United Nations for Asia' might be contemplated. Thus, within the JSIL, the Committee of International Law for Greater East Asia was established in 1942 for promoting the ideology in the academic circle, which was notably led by Kaoru Yasui (1907-1980), then assistant professor of the Imperial University of Tokyo, who severely attacked the traditional legal positivism. Many international lawyers in Japan followed this movement, with Professor Kisaburo Yokota being virtually its sole opponent. Solve the professor Kisaburo Yokota being virtually its sole opponent.

The ILA as a whole became inactive during the war years and, similarly, the activities of the Japan Branch were at a standstill during that period. All the old documents and records of the ILA Japan Branch were burnt away by the bombardments in Tokyo in 1945.

Dr Baty resigned as legal advisor of the Japanese Foreign Ministry when the war broke out between the UK and Japan in 1941. He remained in Japan during the war. After the war had ended, Baty wanted to return to Britain, but his application for the renewal of his British passport was rejected by the British embassy in Tokyo.

Sec 20/1 Kokusaibo Gaiko Zasssi [Journal of international Law and Diplomacy] (1921), at 124-126. See also Masao Ichimata, Nihon no Kokusaihongaku wo Kizuita Hitobito [People who Established International Legal Studies in Japan] (Tokyo, Nihon Kokusai Mondai Kenkyujo [Japan Institute of International Affairs], 1973), at 139-140.

Article 1 of the original Rules of the Japan Branch of 1920 provided as follows: 'The purposes of the Branch is the research and consideration of subjects relating to international law in keeping contact with the International Law Association and to take measures which are considered to be useful for making close relationship with academic societies of international law in foreign countries.' The ILA Japan Branch was in close relationship with the JSIL, with the core members of the Branch and the JSIL overlapping. Article 2 of the Rule of the Branch provided that the Branch members were admitted among the JSIL members.

¹¹ Some critics in Japan fear that the ongoing initiative by China on 'One Belt, One Road' may be taking a similar course as an expanded version of the Greater East Asian Coprosperity Area.

¹² After the war, Yasui had to leave the University of Tokyo. Though he had been an ultra-rightist before the war, he quickly turned to be a 'Marxist' international lawyer after the war, being awarded with the Lenin Peace Prize by the Soviet Union in 1958. His integrity as a scholar was widely questioned.

Concerned about Baty's situation, Mr Arthur Jaffé, the secretary general of the ILA in London, inquired of the British Foreign Office on 9 December 1946. Mr Davidson of the Foreign Office replied to him in a letter dated on 31 December 1946:

'I am directed by Mr Secretary Bevin (of the Foreign Office) to inform you that Dr Baty continued in his employment with, and received his salary from, the Japanese Government throughout the late war. A number of articles highly inimical to the allied interests were published under Dr Baty's name... Dr Baty's case has been carefully considered by His Majesty's Government and, with the concurrence of the Home Secretary, it has been decided that, in view of his advanced age and his general academic and pacifist outlook, Dr Baty should be allowed to remain in Japan in spite of his treasonable conduct. Dr Baty is however deemed to have associated himself with Japan both before and particularly during the late war to an extent which is tantamount to the abandonment of his British connexion, and the Head of the United Kingdom Liaison Office in Tokyo has accordingly been instructed to withhold British passport facilities and other British protection from him...'13

It was grossly unfair to treat Baty as an 'unprotected subject' by the British Government. It was totally wrong to consider him having received salary from the Japanese Government during the war, as he had severed all official relations with it. It was certainly within his right to enjoy the freedom of expression to write his opinions even if they were sometimes harsh to his own country. 14

He was reappointed as the legal advisor to the Foreign Ministry of Japan after the San Francisco Peace Treaty became effective in 1952. He died in Tokyo on 9 February 1954, one day after his 85th birthday, strongly hoping that the ILA Japan Branch would be reconstructed. His hope would be realised one year after his death.¹⁵

III. POST-WAR JAPAN AND INTERNATIONAL LAW

Following the end of World War II, Japan made a fresh start in international life, strictly adhering to the rules of international law. Thus, the new Constitution adopted in 1946 declared in its preamble that '[w]e, the Japanese people, [...] determined that we shall secure for ourselves and our posterity the fruits of

13 I. W. O. Davidson to Arthur Jaffé, The British Foreign Office (31 December 1946), FO 369/3552.

peaceful cooperation with all nations [...] desire peace all time [...] to preserve our security and existence, trusting in the justice and faith of peace-loving peoples of the world. We desire to occupy an honoured place in an international society striving for the preservation of peace.' Article 9 provides that '[a] spiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.' Article 98, paragraph 2, provides that 'the treaties concluded by Japan and established laws of nations shall be faithfully observed.'

Japan's genuine commitment to the tules of international law in the postwar period has not only been expressed in the Constitution but has also been manifested in the actual practice of its foreign affairs. In 1954, two years before gaining UN membership, Japan became a party to the Statute of the International Court of Justice (ICJ), and in 1958, Japan joined those states that accept the compulsory jurisdiction of the Court without any substantive reservation.¹⁶ It may be noted that as soon as Japan was admitted to the UN in 1956, Professor Kisaburo Yokota was elected to the UN International Law Commission (ILC). Professor Yokota is known to have been courageously opposed to the military policy during the pre-war days. Having closely followed Hans Kelsen's Pure Theory of Law, reason why he was sometimes called the 'Kelsen of Asia', he was proclaiming the supremacy of international law over domestic law. Judge Kotaro Tanaka was elected to be a judge of the ICI in 1961 and served until 1970. Having developed the theory of 'World Law' in the 1930s, Tanaka was also known to have been a pacifist Catholic and a strong opponent to Japan's prewar military regime.17

IV. THE RECONSTRUCTION OF JAPAN BRANCH IN 1955

In January 1954, just before Bary passed away, Shigeru Kuriyama (1886-1971), then ambassador to Belgium, attended the International Legal Conference held in New Delhi organised by the ILA Indian Branch, ¹⁸ and discussed the question of the reconstitution of the Japan Branch with Mr Harvey Moore, ILA honorary secretary general. The discussion resulted in the reestablishment of the Japan

¹⁴ Masao Ichimata, Ko Thomas Baty Hakushi no Shogai to Gyoseki [Life and Work of the late Dr Thomas Baty], 53/1-2 Kokusaiho Gaiko Zasshi [The Journal of International Law and Diplomacy] (1954), at 94-95. It is strongly hoped that Dr Baty's honor will be restored in the United Kingdom in some appropriate way.

¹⁵ On 9 April 2004, the Japan Branch held the Commemorative Seminar for Dr Thomas Baty 'Contributions of Dr Thomas Baty and Their Reappraisal' at the University of Tokyo. See http://www.ilajapan.org/doc/baty_e.pdf (accessed 20 July 2021).

¹⁶ This was used by Australia to establish the Court's jurisdiction for the Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, 31 March 2014, ICJ Reports (2014) 226.

¹⁷ The respect of the rule of law in the international community has been the strong tradition of the post-war Japan, which has been succeeded by the judges of the ICJ from Japan after Tanaka, namely, Judges Shigeru Oda (1976-2003), Hisashi Owada (2003-2018) and Yuji Iwasawa (2018-present).

¹⁸ Leslie C. Green, 'Note', 3/3 The International and Comparative Law Quarterly (1954), at 484-489.

Branch in 1955, and Kuriyama was elected as president of the Branch. The number of the members of the Branch was then 65.

The ambition of President Kuriyama was to host an ILA's biannual meeting in Tokyo, and he succeeded in 1964. It was the first ILA conference ever held in Asia. The Japan Branch hosted the 51st Biennial Conference, which was held in Tokyo from 16 to 22 August 1964. It was a great success, with a total of 567 participants, including 419 foreign participants, representing 34 countries. 19

Kuriyama continued to serve as president of the Japan Branch until 1970, when Professor Yokota, who had been the chief justice of the Supreme Court of Japan, succeeded the position as president of the Japan Branch, which he occupied until 1993. Kuriyama and Yokota were truly the backbones of the post-war Branch activities.

The budget of the Japan Branch was affluent for some three decades thanks to the huge fund that President Kuriyama had collected. However, need to raise funds was felt strongly in the 1990s. Ambassador Takeso Shimoda, who took the presidency of the Branch in 1993, embarked on vigorous fund-raising, in which he was ably assisted by Professor Sueo Ikehara, the long-time secretary general and vice-president of the Branch.

One of the main activities of the Japan Branch has been to publish the Japanese Annual of International Law (JAIL) since 1957.²⁰ Professors Yuichi Takano, Sueo Ikehara and Soji Yamamoto served as editors of the Annual for a long time. The name of the journal has been changed to Japanese Yearbook of International Law (JYIL) since its volume 51, in 2008.²¹

Professor Yasuo Ishimoto, who assumed the presidency of the Branch in 2000, suggested that the Branch should organise an annual research conference. Before that period, the research activities of the Branch were limited to sporadic, small meetings organised by Japanese members who were involved in the work of ILA committees, and the meetings to report on the biennial ILA conferences by those who attended them. Since the early 2000s, the Branch organises annual conferences each year in March, devoted to in-depth research presentations and discussions. The sessions are open to non-members such as graduate students.

In terms of the number of members, the Japan Branch, with its 342 members (including twelve corporate members), ²² is now one of the biggest ILA branches. ²³ When an international committee is set up by the ILA, it is now customary for the Japan Branch to establish a parallel committee within the Branch to support the work of the international committee. Japan Branch members are involved in most of the ILA international committees as well. However, their contribution to the work of the ILA has been rather modest. ²⁴ It is hoped that there will be more active participation by the Japanese members in the future.

While the academic standard of international studies in Japan is generally very high, it is regretted that the writing of the Japanese scholars are mostly in Japanese, and that their contributions are not recognised internationally. Besides, it seems that the subject of international law is not considered as important as it used to be in law school education in Japan in recent years. This is partly because of the change of the national bar examination system. Japan has introduced the American-style law school system after 2006, and though public international law is still one of the elective subjects among other fields of law such as tax law, labour law and environmental law, it is only one per cent of the applicants who choose international law, as most students prefer other subjects that they consider more 'useful' when they start working as practising lawyers. Furthermore, since 2012, the examination for diplomatic service, in which international law has been traditionally placed as one of the most important subjects, has now been abolished, and has been integrated into the general public servants' examination. Now, it is possible for one to join the diplomatic service without having necessarily studied international law. Such a deplorable situation needs to be rectified, and it is hoped that the ILA Japan Branch can work on promoting international law in proper legal education in Japan.

V. THE SECOND ILA CONFERENCE IN JAPAN

The Japan Branch was requested to explore the possibility of holding a second biennial conference in Japan. The request was made informally by Lord Slynn, then chair of the Executive Council of ILA, even since the late 1990s.

¹⁹ The record book of the Conference including photos is available at http://www.ilajapan.org/doc/tokyo_1964.pdf (accessed 20 July 2021).

²⁰ Number 1 was issued in 1957, and the Annual was continued to number 50 in 2007. The name was changed in 2008, as the Yearbook, starting from volume 51.

²¹ As to the history of the Annual and Yearbook, see Keiichiro Niikura, Koichi Morikawa, 'The Development and Future of the Japanese Yearbook of International Law: From Japanese Perspectives to International Academic Forums', 50 Netherlands Yearbook of International Law (2019) 211. The contents of the Japanese Yearbook (Annual) of International Law are available at http://www.ilajapan.org/doc/contents.htm (accessed 20 July 2021).

²² Professor Kazuhito Nakatani as Secretary General of the Japan Branch, Information on the Branch is available at: http://www.ilajapan.org/doc/english_top.htm (accessed 20 July 2021).

²³ The Japan Branch is the second-largest branch after the British Branch (451 members), larger than the German (332), French (329) and American (328) Branches.

²⁴ Japan Branch members have joined the majority of the ILA international committees and study groups, and some of them have actively contributed to their work. However, the ILA international committees for which Japanese members served as officers were quite limited: Committee on Legal Principles relating to Climate Change (Shinya Murase as chair), Committee on Intellectual Property and Private International Law (Toshiyuki Kono as chair) and Committee on Reparation for Victims of Armed Conflicts (Shuichi Furuya as co-rapporteur).

The Japan Branch accepted this invitation to host the conference in Kyoto in 2014, fifty years after the first ILA conference in Tokyo, in 1964, and started its preparations. However, due to the huge earthquake and tsunami that hit the eastern part of Japan on 11 March 2011, the Japan Branch had to request to postpone the Kyoto Conference. The present writer explained the situation in the Executive Council meeting held in May 2011 in London. All the delegates accepted and supported the proposal of postponement to 2020. It was indeed an emotional moment for the present writer, overwhelmed by the kindness and friendship extended by the representatives of other branches. The American Branch agreed to host the conference in 2014, the South African Branch in 2016, and the Australian Branch in 2018, two years ahead of the original schedule.

With all the preparations for the 79th Biennial ILA Conference in Kyoto originally scheduled from 23 to 27 August 2020 at the Kyoto International Conference Center; however, it had to be an online conference due to Covid-19, and was re-scheduled for 29 November to 13 December 2020. The online conference was attended by 489 members worldwide, including 93 members from Japan. On the opening ceremony on 29 November, Lord Mance as chair of the Executive Council of the ILA referred to the contributions of Dr Thomas Baty, who led to the establishment of Japan Branch one hundred years ago. At the closing ceremony given on 13 December, which was exactly the centenary date of the establishment of the Japan Branch, Judge Shunji Yanai, as president of the ILA and of the Japan Branch, also made reference to Dr Baty.

CONCLUSION

The present writer personally believes that academic associations of international law, that is, inter-national law, should be either national (such as JSIL and ASIL) or global (such as the ILA, the *Institut de Droit international* and The Hague Academy of International Law), rather than regional. Regional association such as the European Society, the Asian Society and others may be useful, but, pursuing regional perspectives in interpretation and application of international law, they may also have the danger of leading to fragmentation of international law. In this sense, a global association like the ILA should be further promoted.²⁵ The 'federal' structure of the ILA, comprising national branches and international committees and study groups overseen by biannual

global meetings, is perfectly fitting with the structure and characteristics of international law. There is therefore every reason that experts of international law should promote the ILA.

The members of the Japan Branch owe a great deal to the ILA, and it is hoped that they will continue to contribute to the work of the ILA in the years to come.

²⁵ When I represented the Japan Branch at the Executive Council meeting in London in the early 2000s, I often stressed the need to have the Chinese Branch be established. This does not mean that the Taiwan Branch, whose contribution has been significant, should leave the ILA.

On the contrary, both branches could co-exist, as there is already the Hong Kong Branch. Without the Chinese Branch on the mainland, the ILA cannot truly be a global association.