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The Idea of Non-Discriminating War and Japan

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# ***THE IDEA OF NON-DISCRIMINATING WAR AND JAPAN***

**Masaharu YANAGIHARA (Kyushu University)**

## **I . INTRODUCTION**

### **I .1. Japanese International Law Textbooks**

It is a well-known formulation in most Japanese international law textbooks that two major changes in the theoretical status of war took place. The first change was from the “just war (bellum justum)” theory in the Middle Ages and in Early Modern Times to the so-called idea of “non-discriminating war” in the latter half of the 18th century or early 19th century. The second change was a shift after WWI from the idea of “non-discriminating war” to the so-called “outlawry of war”, or restriction or prohibition of war. This notion was codified in a different way by the Covenant of the League of Nations, the Briand-Kellogg Pact, and the Charter of the United Nations.

The above characterization is found, for example, in Soji YAMAMOTO’s 1994 book entitled, *International Law*, which is usually recognized as the standard book on the subject in Japan.<sup>1</sup> Some authors such as Shigejiro TABATA, former professor of Kyoto University, made a clear contrast between the idea of discriminating war and that of “non-discriminating war”, and asserted that the “just war” theory, i.e. “discriminating war theory”, changed to the idea of “non-discriminating war”, and finally to the “discriminating war theory” in a new version.<sup>2</sup>

The concept of the idea of “non-discriminating war” is in any case now fundamental to discussion about the change of war among Japanese scholars.

### **I .2. Foreign Textbooks on International Law**

The concept of “non-discriminating war”, however, is not found in recent European and American textbooks on international law. It is also almost impossible to find the concept of

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<sup>1</sup> Yamamoto, S., *International Law* (Tokyo, 2nd ed., 1994) pp.704-6 [in Japanese].

<sup>2</sup> Tabata, S., *International Law* (Tokyo, 2nd ed., 1966) pp.370-2 [in Japanese].

“discriminating war”.<sup>3</sup> For example, let’s briefly analyze a recent(1999) textbook written by Ipsen entitled, *Völkerrecht*, the most popular book on the subject in Germany today. According to Ipsen, the “just war” theory dominated between the 16th and 18th centuries. In the 19th century war was regarded as not being within the framework of international law. The Briand-Kellogg Pact and the Charter of the United Nations then simply created a legal restriction or prohibition of war. Ipsen admits two major changes about the status of war, but uses neither the concept of “discriminating war” nor that of “non-discriminating war”.<sup>4</sup> It is essentially the same in recent textbooks such as *Droit international public* by Dinh, Dailler and Pellet(1999),<sup>5</sup> and Akehurst’s *Modern Introduction to International Law* by Malanczuk(1997).<sup>6</sup>

A conspicuous exception is Dahm’s 1961 textbook entitled, *Völkerrecht*, although his formulation is very simple. According to Dahm, the concept of “discriminating war” changed to the concept of war between “just enemy (*justus hostis*)” and finally to the notion of “discriminating war”.<sup>7</sup> It is very close to the formulation of Tabata. Dahm did not, however, use the concept of the idea of “non-discriminating war”.

### **I .3. Two Meanings of the Concept of “Non-Discriminating War” in Japan**

It is nowadays a peculiar phenomenon to Japan, and Korea as well, to explain the historical change in the theoretical status of war by using the concept of “non-discriminating war”. It should be added that remarkably there are two meanings of “non-discriminating war” among Japanese scholars. Curiously enough they do not usually recognize that such a difference exists.

The first meaning is that *jus ad bellum* (resort to war) is extralegal. John Westlake wrote in 1907, “international law did not institute war, which it found already existing, but regulates it with a view to its greater humanity.”<sup>8</sup> To the same effect writes Lassa Oppenheim in 1906, “war is not inconsistent with, but a condition regulated by, international law. The latter at present

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<sup>3</sup> In Nussbaum’s book which is still now recognized as the standard work on the history of the law of nations we can find only the passage that “the conception of the law of nature and the kindred one of just war were to all intents and purposes abandoned”. Nussbaum, A., *A Concise History of the Law of Nations* (New York, 2<sup>nd</sup> ed., 1954) p.232.

<sup>4</sup> Ipsen, K., *Völkerrecht. Ein Studienbuch* (München, 4.Aufl., 1999) S.29-36.

<sup>5</sup> Dinh, N.Q, P.Daillier & A.Pellet, *Droit international public* (Paris, 6e éd., 1999) pp. 893-8.

<sup>6</sup> Malanczuk, P., *Akehurst’s Modern Introduction to International Law*, trans.into Japanese by Hasegawa, M. (Tokyo, 1999) pp.26-8, 502-8.

<sup>7</sup> Dahm, G., *Völkerrecht* (Stuttgart, 1961), Bd.II, S.328-31.

<sup>8</sup> Westlake, J., *International Law* (Cambridge,1907), Part II: War, p.3.

cannot and does not object to States which are in conflict waging war upon each other instead of peaceably settling their difference.”<sup>9</sup> War therefore is itself not illegal and causes of war have no meaning. McNair said, “whether or not the initiation of a war was a breach of law, the rules which regulated it, once it had broken out, were the same for both or all parties”.<sup>10</sup> That means that *jus in bello* (laws of war) is applied non-discriminatingly to all warring parties.<sup>11</sup>

Almost all Japanese scholars are of the opinion that the above is the proper definition,<sup>12</sup> although there is slight disagreement on the meaning of “non-discriminating”. Some interpret “non-discriminating” as being properly within the field of *jus in bello*. *Jus in bello* should be applied non-discriminatingly between warring parties, or between warring parties and a neutrality party.<sup>13</sup> Others interpret it mainly as in the field of *jus ad bellum*. War should be allowed non-discriminatingly or without restriction to every state, because war itself is extralegal.<sup>14</sup> Thus there is a slight difference of opinion on the emphasis of “non-discriminating”. All scholars agree that war is extralegal and *jus in bello* should be applied non-discriminatingly.

The second meaning of the idea of “non-discriminating war” was defined by Shigejiro TABATA. Tabata insisted, as Hans Kelsen asserted, that it would almost deny the legal validity of international law, if an unrestricted violence of war in general were to be allowed. If we were to accept the notion that war itself is not illegal, such a conclusion would be unavoidable. Tabata asserted therefore that only war as self-help was allowed in international law between the 17th and 19th centuries. In other words only when war was the last resort of settling international legal disputes, it was legal according to international law at that time. There was, therefore, depending on the cause of war, a distinction between a legal war and an illegal war.

Tabata continued to say, however, that there was no objective judge in the international society who could make a final decision about which party was waging a war for self-help. That meant that it was impossible in fact to distinguish between a legal war and an illegal war. War

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<sup>9</sup> Oppenheim, L., *International Law: A Treatise* (London etc., 1906), Vol.II: War and Neutrality, p.56.

<sup>10</sup> McNair, Lord, “Collective Security,” *BYIL* 1936, pp.150-2.

<sup>11</sup> Hall, W.E., *A Treatise on International Law* (Oxford/London, 3<sup>rd</sup> ed., 1890) pp.64-5.

<sup>12</sup> For example, Onuma, Y., *Theory of War Responsibility* (Tokyo, 1975) p.15 [in Japanese]; Tanaka, T., “Change of the Idea of War,” Terasawa, H. et al. (eds.), *Standard International Law* (Tokyo, 2nd ed., 1993) p.454 [in Japanese].

<sup>13</sup> Matsui, Y. et al.(eds.), *International Law* (Tokyo, 3rd ed., 1997) p.277 [in Japanese].

<sup>14</sup> Ishimoto, Y., *Conversion of the Structure of International Law* (Tokyo, 1998) p.6 [in Japanese].

was similar to a “duel” between equal parties and jus in bello should be applied non-discriminatingly to both parties.<sup>15</sup>

The second meaning of the idea of “non-discriminating war” is almost the same as the first meaning in that all wars would finally be allowed and jus in bello should be applied non-discriminatingly. There is, however, a fundamental difference between the two meanings about the attitude of international law towards the initiation of war. According to the first meaning, war is extralegal and international law cannot regulate an initiation of war. On the other hand, according to the second meaning, international law can regulate it and only war as self-help should be regarded theoretically as legal.

Although we can find these two different meanings ascribed to the idea of “non-discriminating war” among Japanese scholars, very curiously, nobody has pointed out this fact. Some would argue that the second meaning of Tabata is very exceptional. Certainly it is not easy to find a faithful follower of Tabata and scholars asserting the first meaning are a vast majority. It is, however, true that the same term, idea of “non-discriminating war”, is used still now in two different ways in Japan.

#### **I .4. Purpose of This Paper**

The purpose of this paper is threefold. The first question is: when the concept of “non-discriminating war” was formulated in Japan and by whom? Why is it so popular now in Japan in marked contrast to Europe and America? Second, who was the first proponent of the idea of “non-discriminating war”? Was it Carl Schmitt? If so, what is the difference between the ideas of Carl Schmitt and those in Japan? Did Carl Schmitt assert the first meaning or the second? The third and last question is to investigate theoretical problems of the “conversion” of the idea of “non-discriminating war” into an “outlawry of war”. Were there any serious theoretical obstacles to the conversion to an outlawry of war?

## **II. CARL SCHMITT(1888-1985)**

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<sup>15</sup> Tabata, *supra* n.2, pp.92,98,364-8.

## II. 1. Die Wendung zum diskriminierenden Kriegsbegriff (1938)

It is always very difficult or impossible to determine who is the first proponent of some idea. It is also relevant to the question: who expounded first the idea of “non-discriminating war”. It is my idea that Carl Schmitt created the idea of “non-discriminating war” for the first time in 1938 in his book, *Die Wendung zum diskriminierenden Kriegsbegriff*. His basic schema is that the idea of “non-discriminating war” (nichtdiskriminierender Kriegsbegriff) and that of non-discriminating neutrality (nichtdiskriminierender Neutralitätsbegriff) changed after WWI to the idea of discriminating war (diskriminierender Kriegsbegriff) and discriminating neutrality (diskriminierender Neutralitätsbegriff). Carl Schmitt wrote that the change was not acknowledged by some scholars such as Prof. Verdross and Prof. Kunz, but that we could realize it in the message of President Wilson in 1917 and the Covenant of the League of Nations.<sup>16</sup>

The League of Nations had a monopoly to determine whether or not a war was legal. Now we had two totally different concepts: legal war and illegal war. They cannot be understood as falling into one and the same concept, “war”. A legal war and an illegal war are by nature totally different.<sup>17</sup>

Carl Schmitt saw, however, two contradictions in the process of the change into the idea of discriminating war in the League of Nations. First, there was a contradiction between the necessity of a new order and the denial of the old concept of war. The Covenant denied the old concept of war, whose basic principle was that of non-discrimination and the equality of warring parties, and introduced the new concept of war, whose basic principle was that of discrimination. It is the opinion of Schmitt that the League of Nations did not, however, succeed in providing for a new order.

The second contradiction was between the universalism and the federalism of the League of Nations. The League of Nations was not a universal organization, because the United States was not a member. Schmitt wrote that an old war, i.e. “non-discriminating war”, would no

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<sup>16</sup> Schmitt, C., *Die Wendung zum diskriminierenden Kriegsbegriff* (München, 1938) S. 37-8.

<sup>17</sup> *Ibid.*, S.1-2,41-3.

longer be waged between members of the League of Nations, but that the old concept of war should be applied outside it.<sup>18</sup>

Schmitt's schema in this book is very clear. The idea of "non-discriminating war" was changing to that of discriminating war, but a projected new order had contradictions. The great antipathy towards the policy of revenge of the League of Nations could be said to be the background of his schema. There is a problem, however, because the concepts of "non-discriminating war" and of discriminating war themselves were not clearly defined. "The Greater Space Theory (Großraumtheorie)", which was alleged to have become a new order in the world superseding the League of Nations was not asserted in this book because that theory was affirmed after 1939.<sup>19</sup>

## **II. 2. Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum (1950)**

A detailed description of the idea of "non-discriminating war" is found in his book, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*. It was published in 1950, but Prof. Quaritsch has said that most of the book was already completed by 1945.<sup>20</sup>

This book covers the whole history of the birth and development of European public law (jus publicum Europaeum), in which the theory of space and that of enemy-friend is at the core. The conversion of the idea of war is discussed in connection with this main topic.

Schmitt wrote that the medieval concept of just war was converted into the idea of "non-discriminating war" between states (nichtdiskriminierende Staatenkriege) in the 16th century. The concept of European public law emerged at the same time and dominated the period from the 16th century to the latter half of the 19th century. Just enemy (hostis justis), equal sovereigns, legitimate (rechtmäßig) war and the enclosure of war (Hegung des Krieges) were key concepts in European public law. Warring parties were just enemies of each other and waging legitimate war, because they were equal sovereigns. Just causes of war were recognized in such a war as issues of natural law and morals. War was confined between sovereigns as "just enemy" and the humanization of war rules was realized. We can find no discrimination in such a

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<sup>18</sup> *Ibid.*, S.42-52.

<sup>19</sup> See Schmoeckel, M., *Die Großraumtheorie. Ein Beitrag zur Geschichte der Völkerrechtswissenschaft im Dritten Reich, insbesondere der Kriegszeit* (Berlin, 1994) S.139- 51.

<sup>20</sup> Quaritsch, H., *Positionen und Begriffe Carl Schmitts* (Berlin, 1991) S.121.



theory of war. Such an idea of “non-discriminating war” was created and refined by Ayala, Gentili, Grotius, Zouche and Vattel.<sup>21</sup>

Schmitt wrote that the European homogeneity and the structure of space began to collapse at the end of 19th century, because of the universalization and cosmopolitanization of the world. That meant the collapse of European public law. And at the same time the meaning of war has changed from the idea of non-discrimination to that of discrimination. Article 227 of the Versailles Treaty, which provided for the war responsibility of Wilhelm II, and article 232, which provided for the war responsibility of Germany, were symbols of a new idea of war, the idea of discriminating war.<sup>22</sup>

After WWI a new paradigm was designed: abandonment of the concept of just enemy, discrimination of enemies, and criminalization of aggressive wars. This represented a change from the idea of “non-discriminating war” to that of discriminating war. Schmitt pointed out that according to the idea of discriminating war we couldn’t realize the enclosure of war and that an annihilation war, or total war, is unavoidable. That means that he put a low value on that change.<sup>23</sup> He insisted that the League of Nations was not capable of establishing a new order on the one hand and that the old order of European public law could not be maintained on the other. His conclusion was that a new “norm of the earth (Nomos der Erde)” should be projected.<sup>24</sup>

Schmitt’s formulation in this book is clear-cut. It is, however, based mainly not upon a strict interpretation of positive international law such as the Covenant and the Briand-Kellogg Pact, but upon a change of the structure of international society and international order. It is the most important point in his formulation that the change from the idea of “non-discriminating war” to that of discriminating war was regarded as undesirable.<sup>25</sup>

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<sup>21</sup> Schmitt, C., *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Köln, 1950) S.123-43.

<sup>22</sup> *Ibid.*, S.232-43.

<sup>23</sup> *Ibid.*, S.244-55.

<sup>24</sup> *Ibid.*, Vorwort & S.232.

<sup>25</sup> Schmitt’s evaluation of the Briand-Kellogg Pact is different in his works. He put a pretty important value on the Pact in his *Nomos* (*Ibid.*, S.255). He criticized, however, the Pact in his unpublished expert opinion, which had been written in August, 1945 and was published in 1994 after his death. Schmitt, C., *Das internationalrechtliche Verbrechen des Anfriffskrieges und der Grundgesetz “nullum crimen, nulla poena sine lege”* (Berlin, 1994) S.58. He seemed to lay particular stress in this expert opinion on the point that aggressive war had not been regarded as war crime, because its purpose of this expert opinion was to defend the client against war crime.

### III. TAKEO SOGAWA(1911-96)

#### III.1. “Nature of International Conciliation”(1944)

The next issue is when the idea of “non-discriminating war” was asserted in Japan and what kind of a connection with the theory of Carl Schmitt it had.

Niemon OHUCHI, former professor of Osaka University, published a very short article titled “Discriminating war and non-discriminating war” in 1941. The name of Schmitt was not mentioned in this article, but the influence of Schmitt is obvious at a single glance, although the concept of discriminating war is not the same. According to Ohuchi, the idea of “non-discriminating war” meant that international law made no reference to a cause of war and that no discrimination was made between warring parties. He wrote that a distinction between a legal war and an illegal war was drawn by the Covenant and the Pact. The third party was now required to assume a discriminating attitude towards the illegally warring party and wage a “discriminating war” against it.<sup>26</sup>

This article did not, however, evoke any response among Japanese scholars. Three years later in 1944 Takeo SOGAWA, former professor of Keijo (Seoul) University, wrote an article on international arbitration. He cited Schmitt’s 1938 book and explained very briefly the change of war after WWI. Sogawa wrote that a decisive discrimination of warring parties would be made in one and the same war and that the idea of non-discriminating neutrality had disappeared. This was, however, all that he wrote in 1944. He didn’t make any mention of the idea of “non-discriminating war”.<sup>27</sup>

#### III.2. “’Conversion of the Idea of War’ in Carl Schmitt”(1953)

Sogawa published an article titled “’Conversion of the idea of war’ in Carl Schmitt (1)” in 1953. He analyzed very keenly the normative notion of war of Hans Kelsen and the positivistic notion of war of Hersh Lauterpacht in that article and came to the conclusion that neither could explain the change in the idea of war after WWI. Sogawa regarded the theory of Schmitt as appropriate, which was able to account for the structure of war from a viewpoint of

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<sup>26</sup> Ohuchi, N., “Discriminating War and Non-Discriminating War,” *Gaikojiho*, LCVII-2 (1941), pp.38-45 [in Japanese].

<sup>27</sup> Sogawa, T., “Nature of International Conciliation,” *Hogakukaironso*, XV-1 (1944), p.54 [in Japanese].

the structure of international society and international order.<sup>28</sup> Sogawa did not, however, publish the part two of this article, which was planned to deal thoroughly with the war theory of Schmitt. After Sogawa had died in 1996, I heard from an acquaintance of him that he had a draft of the part two. The reason why he did not publish at last the second part is not clear now. Probably the reason is that there would have been a contradiction between the high evaluation of Schmitt's theory and the unacceptability of Schmitt's contempt for the idea of discriminating war. Sogawa tried to understand Schmitt's formulation about a change of the idea of war in its correct meaning and to evaluate it very highly on the one hand. On the other hand Sogawa could not agree with Schmitt on the evaluation of discriminating war, which was provided for by the Covenant and the Briand-Kellogg Pact. Sogawa had a very strong hatred of war and regarded the "outlawry of war" as desirable. This basic stance is clearly in conflict with that of Schmitt.

Unfortunately Sogawa did not publish the part which would treat directly and thoroughly the war theory of Schmitt, but his article created a sensation among some Japanese scholars at that time.

#### **IV. SHIGEJIRO TABATA(1911- )**

##### **IV. 1. International Law (Tokyo: Yushindo, 1955)**

It was Shigejiro TABATA who dealt explicitly with the idea of "non-discriminating war" for the first time in Japan and popularized it. He might have been greatly enlightened to this idea by Sogawa's 1953 article. It is usual in Tabata's textbooks that he does not cite the literature to which he refers. Tabata first discussed the idea of "non-discriminating war" in his textbook, International law, in 1955, in which he didn't cite any article of Sogawa, let alone Schmitt's book. It is, however, inferable from the year of publication of Tabata's textbooks that he drew inspiration from the article of Sogawa. Tabata published a textbook in 1951, in which he described that a very important change of the idea of war has been taking place slowly, but perceptively after WWI. He didn't, however, use terms such as the idea of "non-discriminating war" or that of discriminating war at all in that textbook.<sup>29</sup> It was the same with the third edition

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<sup>28</sup> *Id.*, "'Conversion of the Idea of War' in Carl Schmitt (1)," *Hogaku*, XVII-2 (1953), pp.74-101 [in Japanese].

<sup>29</sup> Tabata, S., *International Law* (Tokyo, 1951), vol.I, p.15 [in Japanese].

of that textbook, which was published in 1953.<sup>30</sup> It was only a new textbook in 1955 that Tabata used those terms for the first time, a little after Sogawa had published the article on the idea of war in 1953.<sup>31</sup>

Japanese terms for the idea of “non-discriminating war” are another evidence of that inference. Tabata used in the textbook of 1955 as Japanese terms corresponding to the idea of “non-discriminating war” “hisabetsu-senso-kan” in some parts<sup>32</sup> and “musabetsu-senso-kan” in other parts<sup>33</sup>, which have the same meaning. Tabata used those two terms unconsciously in that textbook. He used only the term “musabetsu-senso-kan” in the subsequent textbooks. The term “hisabetsu-senso-kan is very similar to that of Sogawa: “hisabetsutekina-senso-kannen”.

More important is the content of his idea of “non-discriminating war”. Tabata wrote that “just war” theory was changed into the idea of “non-discriminating war” in the 18th century, and then the latter into the idea of discriminating war after WWI. He explained that according to the idea of “non-discriminating war” we could not distinguish between a just party and an unjust party in war and that two warring parties were therefore treated equally.<sup>34</sup> Tabata did not accept important concepts of Schmitt such as European public law, just enemy, and enclosure of war, but only the idea of “non-discriminating war” as war between equal and non-discriminating parties. A distance from the theory of Schmitt became more decisive and undeniable in his textbook the next year.

#### **IV. 2. International Law (Tokyo: Iwanamishoten, 1956)**

Tabata published a totally new textbook, International Law, from a different publisher in 1956. This book was evaluated as the most controversial and influential among Japanese international law textbooks after WWII.<sup>35</sup> It is said that there are three stages in the research of international law in Japan. In the first stage the main task was direct translation of European and American literature. It was in the second stage, when an independent interpretation of the logical framework of international law was attempted by Japanese scholars themselves. The textbooks

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<sup>30</sup> *Id.*, *International Law* (Tokyo, 1954[3<sup>rd</sup> printing]), vol.I, p.15 [in Japanese].

<sup>31</sup> *Id.*, *International Law* (Tokyo, 1955), vol.I, pp.13-4, vol.II, pp.108-16, 242-6 [in Japanese].

<sup>32</sup> *Ibid.*, vol.I, pp.13-4, vol.II, pp.242,246.

<sup>33</sup> *Ibid.*, vol.II, pp.108-16.

<sup>34</sup> *Ibid.*, vol.I, pp.13-4, vol.II, pp.108-16.

<sup>35</sup> See, for example, Terasawa, H., “Book Review: Tabata’s International Law,” *Kokkagakkai-zasshi*, LXXI-5(1957), p.107 [in Japanese].

of Ryoichi TAOKA, and of Kizaburo YOKOTA, both of which were published in 1955, were of the highest level in this stage. Then the new textbook of Tabata in 1956 signified the advent of the third stage. It was in this stage that a proper appreciation of the historical essence and structure of international law was aimed at.<sup>36</sup> The main purpose of his textbook was to clarify a peculiarity of Modern European International Law in its historical context and to examine its validity in the present-day world, or “in the multicultural world”.<sup>37</sup>

A change of the idea of war played a critical role in his historical analysis. The change itself is the same with the textbook in 1955: just war theory, the idea of “non-discriminating war”, and the idea of discriminating war. A decisive difference is the content of the idea of “non-discriminating war”. The idea of “non-discriminating war” in the textbook in 1956 has the second meaning, which I explained in the Introduction. To present it again briefly, there was a distinction between a legal war as “self-help” and an illegal war, with regard to cause of war. There was, however, no objective judge in the international society who could make the final decision about which party was waging a war for self-help. That led to the conclusion that it was impossible in fact to distinguish between a legal war and an illegal war. All wars waged allegedly for self-help were therefore admitted as legal.

Such a new version of the idea of “non-discriminating war” is completely different from that of Schmitt, although the term itself is the same. Tabata has formulated his original concept of the idea of “non-discriminating war”, by taking into consideration some ideas of Schmitt, Sogawa, C.A.Pompe’s 1953 book, *Aggressive War: An International Crime*, and Vattel’s 1758 book, *Droit des gens*. Tabata placed highest value on the theory of Vattel as the founder of modern international law. The absence of judges above individual states and sovereign equality are according to Tabata Vattel’s most basic principles. It is Tabata’s notion that these principles brought about the idea of “non-discriminating war” in his meaning.

There is another utterly different point between Tabata and Schmitt. Tabata evaluated highly the change from the idea of “non-discriminating war” to that of discriminating war. According to the idea of discriminating war after WWI, both “war” as self-defense and “war” as

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<sup>36</sup> Ishimoto, Y., “Book Review: Tabata’s International Law,” *Horitsujiho*, XXIX-1 (1957), p.59 [in Japanese].

<sup>37</sup> Tabata, S., *International Law* (Tokyo, 1956) pp.1-118 [in Japanese].

enforcement by international organizations were admitted as legal. It tried to modify totally a basic structure that all wars allegedly waged in the name of self-help were admitted as legal. A so-called “outlawry of war” had been materialized progressively by the Covenant of the League of Nations, the Briand-Kellogg Pact and the Charter of the United Nations. The movement towards restricting war had been greatly forward pushed in such a way. Tabata reckoned the process as “progress”.<sup>38</sup>

Tabata admitted that the outlawry of war was not yet perfect, because an organization to judge whether a war was a self-defense or not was not well equipped with the power to judge independently of an individual state. He suggested to establish an international system to control self-defense, or even to entrust the defense of states unreservedly to an international organization and to prohibit war as self-defense totally, although he admitted that the possibility of realizing his suggestion was very small at the present stage.<sup>39</sup>

Tabata’s original idea of “non-discriminating war” and that of discriminating war was basically maintained not only in a short article titled “the idea of discriminating war and the idea of non-discriminating war”, which Tabata issued almost thirty years later in 1984,<sup>40</sup> but also in his various textbooks, of which the latest one was published in 1991.<sup>41</sup> It is the idea of “non-discriminating war” in the second sense in Japan, a notion that is totally different from that of the original proponent of that idea, Carl Schmitt.

## V. YASUO ISHIMOTO(1924- )

### V. 1. Idea of “Non-Discriminating War” in the First Sense

It is Yasuo ISHIMOTO, former professor of Osaka Civic University, who formulated the idea of “non-discriminating war” in the first sense. He had demonstrated earlier in 1952 article that “revolutionary” changes came about in various aspects of international law after WWI and that the most conspicuous one was the outlawry of war. He didn’t use the term, idea of “non-

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<sup>38</sup> *Ibid.*, pp.359-72.

<sup>39</sup> *Ibid.*, p.372.

<sup>40</sup> Tabata, S., “Idea of Discriminating War and Idea of Non-Discriminating War,” Japanese Association of Peace (ed.), *Idea of Peace* (Tokyo, 1984) pp.137-54 [in Japanese].

<sup>41</sup> *Id.*, *International Law* (Tokyo, 1991), vol.II, pp.177-79, 291-94 [in Japanese].

discriminating war” in that article.<sup>42</sup> This term is found in his 1958 book, *Neutrality in a Historical Perspective*, Japanese epoch-making research about the birth and development of neutrality. He made very short mention of the idea of “non-discriminating war” there.<sup>43</sup>

He explained more extensively the idea of “non-discriminating war” in an article “so-called *de facto* war” in the same year. Citing J. Westlake, Ishimoto wrote that international law did not institute war, which it found already existing, but regulated it with a view towards greater humanity before WWI. In other words an act to go to war was not an object of legal regulation in the classical international law. There was only *jus in bello*, which regulated war after it had occurred. This was essentially the laws of warfare and of neutrality. An outlawry of war was realized after WWI. Like Tabata, he praised that change highly.<sup>44</sup>

Ishimoto made it clear in his 1998 book that Sogawa’s 1953 article, which should be considered as his masterpiece, had a great impact and inspiration on Ishimoto and that he decided to write an article on *de facto* war.<sup>45</sup> He cited Schmitt’s theory directly in a 1964 article on the legal status of war.<sup>46</sup> We can infer from these facts that Ishimoto had taken the articles of Sogawa and of Schmitt into consideration when he analyzed a change in the idea of war. The term itself is the same as that of Schmitt, but the substance of the idea of “non-discriminating war” is totally different from that of Schmitt. The reason why Ishimoto asserted the idea of “non-discriminating war” in the first sense would probably be because it mainly related to his major topic of research: neutrality. As he himself admitted, the idea of “non-discriminating war” in the first sense was a more suitable theory to neutrality.

It is certainly a perplexing fact that Ishimoto’s idea is not the same as Tabata’s. Ishimoto praised highly Tabata’s 1956 textbook in his 1957 book review.<sup>47</sup> Tabata’s idea was not, however, referred to in his books or articles on war and neutrality at all. Ishimoto created his own conception of the “non-discriminating war”, which is not only different from Schmitt’s, but also from Tabata’s.

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<sup>42</sup> Ishimoto, Y., “How Neutrality Emerged ? (1),” *Kokusaihogaikozasshi*, LI-5 (1952), p.31.

<sup>43</sup> *Id.*, *Historical Research of Neutrality* (Tokyo, 1958) p.18 [in Japanese].

<sup>44</sup> *Id.*, “So-called *de facto* War,” *Challenge of Contemporary International Law* (Tokyo, 1958) pp.281, 301 [in Japanese].

<sup>45</sup> *Id.*, *supra* n.14, p.314.

<sup>46</sup> *Id.*, “Legal Status of War,” *Jurists*, CCC(1964), p.411 [in Japanese].

<sup>47</sup> *Id.*, *supra* n.36, pp.59-61.

## V. 2. War as “Extralegal”

I have written that many Japanese scholars of international law are siding with Ishimoto’s idea of “non-discriminating war”. It has become common among them that the idea of “non-discriminating war” is to reckon war as an “extralegal” phenomenon. The term “extralegal” is found in a 1936 article by A.D.McNair. He wrote that war “was extra-legal rather than illegal. Whether or not the initiation of a war was a breach of law, the rules which regulated it, once it had broken out, were the same for both or all parties.” McNair himself did not use the term, idea of “non-discriminating war”.<sup>48</sup> His term “extralegal” and Schmitt’s term, idea of “non-discriminating war”, were thus connected among Japanese scholars.

Both the idea of “non-discriminating war” in the first sense, which is now popular in Japanese textbooks, and that in the second sense, which still occupies an important status among Japanese scholars, were created in the 1950s and were developed and elaborated in Japan. Both of them are totally different from the theory of Carl Schmitt not only in their content, but also in their function of assessing the value of change after WWI. They don’t have any ideological meaning like the theory of Schmitt, who denied the system of the League of Nations and had a definite plan to transfer to the new order, “Greater Space Theory”.

## VI. SIGNIFICANCE OF THE IDEA OF “NON-DISCRIMINATING WAR” IN JAPAN

### VI. 1. “Conversion” of the Idea of War between WWI and WWII

It is a point of discussion whether we had a “conversion” of the idea of war between WWI and WWII. It depends upon an interpretation of the Covenant of the League of Nations and the Briand-Kellogg Pact. It is true that some European and American scholars denied that such a conversion had taken place. Schmitt criticized A.Verdross and J.L.Kunz in his 1938 book for denying the conversion and adhering to the old idea of “non-discriminating war”.<sup>49</sup> That means that there were some scholars who asserted that an outlawry of war was not yet realized by positive international law. Verdross wrote, for example, in his 1937 book that war was permitted only when a state had a just cause as enforcement of international law and that a judgment

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<sup>48</sup> McNair, *supra* n.10, pp.150-2.

<sup>49</sup> Schmitt, *supra* n.16, S.37-8.



whether war was just or unjust could be made only by states. He admitted that the Briand-Kellogg Pact prohibited certainly war as instrument of national policy, but he interpreted in a broader sense that the right of self-defense was reserved by the Pact: “defense of rights (Verteidigung von Rechten)”.<sup>50</sup> E.Borchard wrote in his 1941 article in the American Journal of International Law that to regard an alleged “violator” of the Kellogg Pact as “aggressor” and to commit warlike acts against it was not yet a legal obligation.<sup>51</sup>

On the other hand McNair placed a high value on a “big new factor added by the Kellogg-Briand Pact” in his 1936 article. He wrote that war itself was not illegal until some years ago, but that all this had changed for the greater part of the world. “Most international lawyers have realized that change for some time and have been expounding it, but the majority of laymen had not grasped the change until quite recently, and many of them are reluctant to admit the change even now.” He concluded that a resort to armed force for the settlement of an international dispute had become an illegal act.<sup>52</sup>

A majority of European and American scholars certainly realized the “conversion” of the idea of war, but there were still some scholars of importance who did not admit the conversion. An important point of divergence was the interpretation of self-defense in the Briand-Kellogg Pact. Whether the right of self-defense was limited to the territory of a country, and whether it could be used not only against an armed attack but also against a violation of rights were controversial questions. It should be noted that this controversy implied a more theoretically fundamental problem, which might not have been recognized by a majority of scholars at that time.

## **VI. 2. Meaning of a So-called “Outlawry of War”**

If we would accept that a change in the idea of war took place and an “outlawry of war” was attained between the wars, there should arise at once the following theoretically crucial problems. What kind of problem would arise depends upon what kind of change was understood to have taken place.

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<sup>50</sup> Verdross, A., *Völkerrecht* (Berlin, 1937) S.192-3, 197-8.

<sup>51</sup> Borchard, E., “War, Neutrality and Non-Belligerency,” *AJIL*, XXXV (1941), pp.618- 25.

<sup>52</sup> McNair, *supra* n.10, pp.152-4, 158.

If we believe that the idea of the extralegality of war was dominant before WWI, we are required to acknowledge a conversion into the idea that *jus ad bellum* could be ruled on under international law. In other words the idea that international law did not institute war was changed to the idea that the initiation of a war is a target of international law. It would be certainly easy to find “practical” reasons for the change. McNair wrote in 1936 that the “Great War of 1914 to 1918, by reason of the area affected by it, the destructive character of the instruments employed in it, and the intensity of suffering on the part of combatants and non-combatants alike, produced a revulsion of feeling against war greater than that which usually follows the close of a war”.<sup>53</sup> Many were driven to hold the view that in no circumstances the use of armed force can be justified. It has been pointed out as well the movement of “Outlawrists” in the United States such as Salmon Levinson, or Charles Clayton Morrison who won great successes in helping to realize the outlawry of war and bring about the change.<sup>54</sup>

Sogawa wrote in 1953 that the legal stability of the international rights of states was openly denied according to the idea of the extralegality of war, but that a fatal and strong suspicion about the legal character of international law, attached tenaciously to it, was finally dispelled by a restriction or prohibition of war.<sup>55</sup>

Certainly it would be desirable and “progressive” in human history in the sense that a goal to prohibit war was allegedly achieved. It would be, however, far from clear why such a change in the idea of war could be theoretically possible. Reasons why war was extralegal had been twofold: the sovereign equality of states and the absence of a central authority above states. Lauterpacht wrote in 1935 that “as States are sovereign, and as consequently no central authority exists above them able to enforce compliance with its demands, war cannot, under the existing conditions, always be avoided”.<sup>56</sup> Were those two situations greatly changed when an outlawry of war was allegedly attained? Who could judge objectively which state is waging an outlawed war? A system to resolve the fundamental problem had not yet been established.

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<sup>53</sup> McNair, *supra* n.10, p.154.

<sup>54</sup> Onuma, *supra* n.12, pp.70-6.

<sup>55</sup> Sogawa, *supra* n.28, pp.92.

<sup>56</sup> Lauterpacht, H., *Oppenheim's International Law* (London, 5<sup>th</sup> ed., 1935), vol.II, p.172.

If we understand the change from the idea that only war as self-help was permissible, or from the idea that states had an unlimited right of war had taken place, a theoretical explanation of the change would be far easier, because war itself would have had been deemed target of international law. The answer would be that international law was changed to prohibit a resort to war for the settlement of disputes, or that an unlimited right of war was now restricted by international law in a way compatible with the sovereignty of states.

It would be again difficult to find a theoretical solution, were we to accept Tabata's opinion that only war as self-help was permissible, but that all wars would be permissible because of an absence of a judge above states. The problem of who would judge the outlawry of war would be a serious obstacle according to such an opinion. Tabata took notice of the problem and suggested its solution in his 1956 textbook, as I mentioned earlier. The establishment of an international system to control by an individual and subjective judge of each state was the first solution for him, or a even more advanced solution was to leave the defense of each state totally to international organizations and to prohibit absolutely the use of force by individual states. He acknowledged, however, that those solutions would be unrealistic in the present-day international society.

It was Ryoichi TAOKA, former professor of Kyoto University, who had a greater understanding of this problem than the rest of the Japanese scholars writing between the wars. He wrote in 1932 that the Briand-Kellogg Pact prohibited all wars except cases explicitly reserved by exchanged notes of states, but that the Pact did not provide a "substitute" for the prohibition of war, i.e. sanction by the international community against a violator of the Pact. He concluded that the Pact could not help but to be labeled as "bad law inconsistent with an ideal of law" until a collective sanction of the international community could be organized.<sup>57</sup> He wrote again in 1973 that an attempt to restrain an outbreak of war itself had been unfortunately unfruitful because conditions which are deemed necessary for the abolition of war from the viewpoint of legal theory, such as the devise of adequate agencies of enforcement and an obligation of international arbitration, had not yet fulfilled.<sup>58</sup> We should remember that Quincy

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<sup>57</sup> Taoka, R., "Meaning of the Briand-Kellogg Pact," *Hogaku*, I-2 (1932), pp.32-4 [in Japanese].

<sup>58</sup> *Id.*, *International Law III* (Tokyo, 2<sup>nd</sup> ed., 1973) p.305 [in Japanese].

Wright wrote in 1924, even before the Briand-Kellogg Pact, that jurists have set about the task of controlling war and have been met by the problems: (1) of devising criteria of responsibility for beginning war, (2) of devising criteria for determining justifiable acts of self-defense, and (3) of devising adequate agencies of enforcement.<sup>59</sup>

This fundamental problem of international law is still unsolved at present. Jurists have been required to break a bottleneck in controlling and prohibiting all uses of force by states. It is an arduous, heavy, and challenging task for international law and international jurists in the 21st century.

### **VI.3. Right of Self Defense**

The right of self-defense in the Briand-Kellogg Pact was politically of great importance, especially to Japan. Japan did not raise any official reservation regarding this issue in the Pact. The Japanese Government stated, however, in the Privy Council on June 26, 1929, that Japan could exercise the right of self-defense when her important interests were affected even though those important interests are outside the territory of the Japanese Empire, and that therefore no reservation regarding Manchuria and Mongolia was necessary in connection with the Pact.<sup>60</sup> The note of Great Britain to the United States on May 19, 1928 was a good guide to the statement of Japan. Great Britain expressed there a reservation of “certain regions of the world the welfare and integrity of which constitute a special and vital interest for our peace and safety”. She made it clear that their “protection against attack is to the British Empire a measure of self defense”.<sup>61</sup>

This issue was thoroughly discussed in a confidential investigation drawn in May, 1929 by the Division of Asia, Japanese Ministry of Foreign Affairs. The Division of Asia conducted this investigation because this issue was especially important for Manchuria and Mongolia. This investigation concluded that Japan could exercise the right of self-defense in three cases. The first case was the dispatch of Japanese troop in order to protect Japanese people in Manchuria and Mongolia. The second case was the protection of Japanese special interests there, which were allegedly especially important to Japan for the sake of history, economy and national

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<sup>59</sup> Wright, Q., “Changes in the Conception of War,” *AJIL*, XVIII (1924), pp.767.

<sup>60</sup> Yanagihara, M.(ed.), *Documents of the Briand-Kellogg Pact* (Tokyo, 1997), vol.II, pp.709-13 [in Japanese].

<sup>61</sup> *Id.*, *Documents of the Briand-Kellogg Pact* (Tokyo, 1996), vol.I, pp.154-5.

defense. Moreover, maintenance of law and order in Manchuria and Mongolia constituted the third case. The Japanese Government, the cabinet headed by Giichi TANAKA, launched a new policy of maintaining law and order in Manchuria and Mongolia and opening those regions to economic activity internationally. It was written in that investigation that the third case should be also recognized as exercise of the right of self-defense because Japan had a special status there and there was a similar statement like the Monroe Doctrine of the United States and that of Great Britain.<sup>62</sup>

A broad interpretation of the right of self-defense given by the Japanese Government was known to the world, although this investigation was confidential. The Chinese Minister to the United States told to the Secretary of State on June 24, 1929 about China's anxiety about Japan's broad interpretation. The attitude of the United States towards the interpretation of the right of self-defense was, however, not consistent. Kellogg, Secretary of State, explained in an address delivered at the American Society of International Law on April 28, 1928 that the right of self-defense is "to defend its territory from attack or invasion". On the other hand he responded in a hearing before the Committee on Foreign Relations, United States Senate on Dec.7, 1928, that "the right of self-defense is not limited to territory in the continental United States".<sup>63</sup> W.R. Peck, Assistant Chief of the Division of Far Eastern Affairs of the United States, wrote in his memorandum on July 19, 1929 to reply to the above Chinese Minister's question that the right of self-defense is not limited to territory of its own country. His memorandum was based upon the statement of Kellogg in the hearing and the notes of the states concerned.<sup>64</sup>

#### **VI.4. Conclusion**

Most Japanese scholars writing between the wars were of the opinion that a change in the idea of war was not yet realized even by the Briand-Kellogg Pact. A typical example of that opinion was Sakutaro TACHI, former professor of the University of Tokyo. He wrote in his 1931 textbook that it was impossible to prevent a war by the Covenant or the Pact.<sup>65</sup> In a revised 1944 edition he pointed out that the Covenant and the Pact had a purpose to prohibit war,

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<sup>62</sup> *Ibid.*, pp.361-6 [in Japanese].

<sup>63</sup> Yanagihara, *supra* n.60, p.1018.

<sup>64</sup> *Ibid.*, pp.756-60.

<sup>65</sup> Tachi, S., *International Law in War* (Tokyo, 1931), Introduction, pp.2-4 [in Japanese].

but that they caused the frequency of armed measures of injuring an enemy, which were not regarded as war in a legal sense.<sup>66</sup> He had in mind the Incident in Manchuria in 1931 and the Sino-Japanese Incident in 1937, both of which were regarded not as war, but as incident short of war, or de facto war. It was not pretended any longer that the “Pacific War” was not a war, but an “incident”.

Some Japanese scholars asserted “International Law in Greater Asia (Daitoa-Kokusaiho)” on the model of Schmitt’s Greater Space Theory. Kaoru YASUI, former professor of the University of Tokyo was a prominent proponent of that theory. He did not, however, adopt the change in the idea of war of Schmitt, although he took a negative attitude towards the restriction or prohibition by the Covenant and the Pact.<sup>67</sup>

One conspicuous exception was Niemon OHUCHI, who published an article titled “Discriminating war and non-discriminating war” in 1941. I explained earlier that the influence of Schmitt upon it is obvious at a single glance, although the concept of discriminating war is not the same. Ohuchi had written in the textbook, *International Law*, in 1939 that the nature of war itself underwent a “big change” after WWI. He asserted that war used to be the ultimate measure to resolve international disputes, but now states were prohibited to resort to war for dispute resolutions.<sup>68</sup> A distinction between the idea of “non-discriminating war” and that of discriminating war would have been easily acceptable to him.

This article did not, however, evoke any response among Japanese scholars before WWII. It was in the 1950s when two different kinds of an idea of “non-discriminating war” were asserted by Tabata and Ishimoto in Japan. Neither of them was, however, the same as Ohuchi’s, nor Schmitt’s. The idea of “non-discriminating war” became popular among Japanese scholars after the 1950s, without clearly designating a distinction between two different kinds of that idea.

The idea of “non-discriminating war” in Japan had a very important role when we study the writings of Japanese scholars between the wars. This idea made it very clear that a fundamental change of the idea of war had occurred between the wars. Both kinds of the idea of

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<sup>66</sup> *Id.*, *International Law in War* (Tokyo, 2<sup>nd</sup> ed., 1944) p.12 [in Japanese].

<sup>67</sup> Yasui, K., *Basic Idea of the Greater Space Theory in Europe* (Tokyo, 1942) p.48 [in Japanese].

<sup>68</sup> Ohuchi, N., *International Law* (Tokyo, 1939) pp.173-8 [in Japanese].

“non-discriminating war” regarded the fundamental change as proper and desirable. That is a marked contrast to most Japanese scholars' writing between the wars that admitted no fundamental change of the idea of war and took a broad interpretation of the right of self-defense in the Briand-Kellogg Pact, thus placing a low value on it.

Merits of the idea of “non-discriminating war” in Japan after WWII should not be underestimated because we can clearly see a drastic change in the evaluation of the Covenant of the League of Nations and the Briand-Kellogg Pact by scholars writing between the wars and those after WWII. The latter acknowledge a gradual, but consistent progress of restricting and prohibiting war from the period between the wars to the present-day world. Nobody can deny the important role of that idea in Japan in bringing about the drastic change. It should, however, be kept in mind that each of two meanings of the idea of “non-discriminating war” in Japan are totally different from Carl Schmitt's not only in content but also in their function to evaluate the change in the status of war between the wars. Ironically at the same time, the term might conjure up a tarnished image of Schmitt as ideologue of the Nazis.