

REVIEW OF PROFESSOR TAKESHI MINAGAWA'S
KOKUSAIHO KENKYU WITH SOME GENERAL
OBSERVATIONS ON HIS CONTRIBUTION TO
THE SCIENCE OF INTERNATIONAL LAW

TETSUO SATO

I

Professor Takeshi Minagawa, former-president of the Japanese Association of International Law, died on March 3, 1984 at the age of 63.

The purpose of this paper is twofold: to offer a brief overview of the various works of Professor Minagawa,¹ and to review his recently published book *Kokusaiho Kenkyu* (Studies in International Law, Yuhikaku Publishing Co., Ltd., Tokyo, 1985, Pp. 331, iii, ¥6,600) containing eight of his articles. This was published posthumously under the auspices of the editing committee composed of several scholars who learned international law under Professor Minagawa. As a review, this could only be very modest; it is an introduction rather than a critical analysis.

II

Professor Minagawa was born on August 18, 1920 in Tsuruoka City of Yamagata Prefecture. He graduated from Tokyo University of Commerce (the present Hitotsubashi University). After five years of governmental service, working for the Navy and the Ministry of Foreign Affairs, he taught international law at Kobe City University of Foreign Studies (1948-64), Sophia University (1964-67), and Hitotsubashi University (1967-84). Since 1967, he was a member of the Council of the Japanese Association of International Law, and president of the Association from 1979 through 1982. He was also a member of the Council of the Japanese Society of World Law since 1978.

Professor Minagawa's approach to international law is firmly based in two groundwork areas of study: the Italian doctrines of international law dating back to Anzilotti, and the jurisprudence of international courts through which to ascertain the concrete contents of international law. In his works, constructed within a carefully thought-out logical framework and enriched with an accurate analysis of the jurisprudence of international courts,

¹ The biographical calendar and the list of works of the late Professor Minagawa are found in Number 5, dedicated to him, of Volume 92 of *Hitotsubashi Ronso* (The Hitotsubashi Review) (1984).

we can find a balanced harmony of theory and proof. This could be characterized as the academic style of Professor Minagawa.

Professor Minagawa's initial interest was, in his thirties, devoted to legal problems of international organizations, and he wrote several important articles concerning, *inter alia*, the quasi-legislative power of the International Labor Conference, the advisory opinions of the International Court of Justice in the *Conditions of Admission* case and the *Competence of the General Assembly* case, and the problems of representation in the United Nations. It seems to have been almost at the same time, however, that he began to devote the major part of his time to the study of the jurisprudence of international courts, which became his principal field of study.

Professor Minagawa's study of international adjudication covers two fields. One is the procedural aspect of international litigation. *Kokusai-sosho Josetsu* (Introduction to International Litigation, 1963) was a pioneering work in this field in Japan. In this painstaking work based upon the jurisprudence of international courts, Professor Minagawa analyzed such problems as concept of international litigation, optional clause, concept of international dispute, interim measures of protection, preliminary objections, rule of the exhaustion of local remedies, counter-claims, and intervention. His analysis of the problem of concept of international dispute was later deepened in his excellent article "Various Aspects of Dispute in International Litigation—Chiefly with Reference to Morelli's Construction" (*Hitotsubashi Journal of Law and Politics*, Vol. 9 (1981), pp. 1-15.).

The other field is the jurisprudence of international courts. Professor Minagawa's position is that the judgments and advisory opinions of international courts would constitute, if not a formal source of international law, the highest degree of evidence as to how international law actually regulates on certain issues. In *Kokusaiho Hanrei-yoroku* (Manual of Cases on International Law, 1962), he extracted the portions of decisions upon such issues of substantial and procedural aspects as having general applicability and arranged them in a proper way, so that the book constitutes a very convenient manual of the jurisprudence of international courts. *Kokusaiho Hanrei-shu* (Cases on International Law, 1975) is a collection of important judgments and advisory opinions of the Permanent Court of International Justice and the International Court of Justice, translated into Japanese and arranged according to the main issue of each case. These judgments and advisory opinions are given concise comments on many points and the translation into Japanese from the authoritative language (English or French) is strictly accurate. This is a voluminous and extremely laborious series which deserves high respect for both of intellectual and physical effort. He continued this effort to the last, these works being published in *Kokusaiho Gaiko Zassi* (the Journal of International Law and Diplomacy).

Another of Professor Minagawa's contributions to the study of international law in Japan is the critical introduction of various Italian doctrines. Before his work, little was known about them in Japan except for those of Anzilotti or a few others. In those works, done in and after his forties, Professor Minagawa introduced Italian international law doctrines abundant in originality, properly analyzing the works of such scholars as Perassi, Morelli, Sperduti, Balladore Pallieri, Monaco, Quadri, Sereni, Ago, etc.

For the sake of convenience, Professor Minagawa's various articles could be classified into four categories. The first is fundamental problems of international law covering the relationship between international law and national law, *jus cogens*, recognition of State,

domestic jurisdiction, etc. The second is peaceful settlement of international disputes covering such problems as concept of dispute, optional clause, principle of reciprocity, role of the International Court of Justice, etc. The third is legal problems of international organizations, mentioned above. The fourth includes such other problems as delimitation of continental shelves, the Takeshima dispute, political refuge, Calvo clause, current topics (e.g., return of Okinawa, and Japan-U.S. Security Treaty), etc. Several articles were rewritten in English "with some additions, modifications and developments."²

It must also be noted that, in addition to translating a couple of foreign works, Professor Minagawa edited three textbooks of international law with his colleagues. In his final lecture entitled "Peace-Cooperation and International Law,"³ at Hitotsubashi University on February 3, 1984, he dealt with the general framework of contemporary international law, with particular reference to, *inter alia*, the principles of sovereign equality, self-determination, and non-intervention, embodied in "The Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations." And he added some comments on the principle of good faith, the unacceptable claim that the end justifies the means, and the fundamental problem of peace and justice.

III

Kokusaiho Kenkyu contains eight articles—four selected from the first category, one from the second, and three from the fourth mentioned above. The criterion in selecting them is explained by the editing committee as "to present the organized framework and characteristics of Professor Minagawa's international law doctrine," thus focus being placed upon those articles which deal with fundamental theories of international law in general and those which reveal the characteristics of his approach. The present reviewer must emphasize that those well thought-out articles do not permit easy summary, and that, therefore, the summarized contents below are simplified at the sacrifice of their persuasiveness.

1. *International and National Law*

In dealing with the relationship between international law and national law, contemporary Italian doctrines have, while still maintaining the fundamental concept that each of these legal orders is original and independent, introduced the techniques of so-called "reference" or "returning (*rinvio*)" as to the combination of these legal orders, and, further-

² English articles are, in addition to the one on the concept of dispute already mentioned, as follows: "Operation of Reciprocity under the Optional Clause," *The Japanese Annual of International Law*, No. 4 (1960); "International Law," *The Japanese Annual of Law and Politics*, No. 9 (1961); "*Jus Cogens* in Public International Law," *Hitotsubashi Journal of Law and Politics*, Vol. 6 (1968); "The Question of Defining Aggression," *Hitotsubashi Journal of Arts and Sciences*, Vol. 10, No. 1 (1969); "The Principle of Domestic Jurisdiction and the International Court of Justice," *Hitotsubashi Journal of Law and Politics*, Vol. 8 (1979); "International Validity of the Calvo Clause—Pursuing the Ratio Decidendi of Certain Arbitral Awards—," *Hitotsubashi Journal of Arts and Sciences*, Vol. 20, No. 1 (1979); "The Nature of the Continental Shelf Rights in International Law," *Hitotsubashi Journal of Law and Politics*, Vol. 10 (1981); "Essentiality and Reality of International *Jus Cogens*," *id.*, Vol. 12 (1984).

³ The lecture was published after his death in the Review referred to in note 1.

more, examined the problem of "adaptation" of national law to international law. The purpose of the article is to introduce the fundamental position and assertions of the Italian doctrines on this point with some explanation.

First of all, an introductory remark is made that the Italian doctrines clearly admit the supremacy of international law in the sense that States must observe norms of international law, which is completely distinct from "derivative subordination" of national law to international law. It is the latter that the Italian doctrines reject. According to Perassi, if the norms of a certain legal order are to be established through the normative procedure the law-producing power of which is derived from a law-producing norm proper to the same legal order, this legal order is original and independent of other legal orders. Conversely, if the legal value of the fundamental norm concerning law-production is derived from another legal order, it is derived from and subordinate to that other legal order.

According to the theory of the supremacy of international law to national law, national law is only a body of subordinate norms whose legal validity depends upon international law, and it constitutes a part of international law. Under this assumption, the legal validity of a subordinate legal order depends on the superior legal order. Accordingly, it cannot be accepted that international law gives legal validity to norms of national law that are incompatible with the former, so that norms of the latter cannot, when conflicting with the former, acquire legal validity even in their own sphere. In consequence, international law must operate in such a manner as to make those national norms null.

From actual legal experience, however, we cannot ascertain such a response on the part of international law. International law imposes, in such a case, upon the State concerned the duty to exclude the legal norms in question from its national law. This means that the legal value of national norms depends upon the national legal order, irrespective of conformity with international law. Arguments might be made that the norms of national law conflicting with international law can only be temporary phenomena and that there exist national constitutional norms assuring the conformity of national law to international law. But they do not prove the derived and subordinate character of national legal order, because the national norms conflicting with international law can only be abolished through the proper procedure of national law, and because the constitutional norms to that effect are themselves part of national law. The only reasonable conclusion deduced from the fact that a legal order does not, by itself, nullify the norms of another legal order conflicting with it, is that the validity of the second legal order is not based upon the first legal order.

Professor Minagawa, after giving brief observations upon "returning," devotes extensive treatment to the problem of "adaptation," particularly the adaptation procedure in the Italian legal order.

In the Italian legal order, various types of adaptation procedure of national law are divided into "ordinary procedure" which is a legislative act (statute, decree) and "special procedure," which is further divided into "procedure of automatic adaptation" and "procedure of treaty-execution order." Procedure of automatic adaptation is effected by Article 10 of the Italian Constitution of 1948, which provides that "Italian legal order shall be in conformity with the generally recognized rules of international law." If international legal norms, however, do not include sufficient elements to deduce national legal norms from themselves, the legal norms of this kind need another procedure. Order of execution is an act issued to each treaty with the customary phrase, "Full and entire execution is given

to the treaty. . . .”

Professor Minagawa, after dealing with some more theoretical arguments against the Italian doctrines, summarizes their contribution to the problem of relationship between international law and national law in two respects. (1) Italian doctrines excluded the essentially centralistic conception of international law. At the present stage of international society, the power to govern human beings is reserved to States to the highest degree so that the function to ensure the effectiveness of international law continues to be decentralized. Cooperative relationship between international law and national law develops upon the assumption that both of them recognize the originality and independence of the other. (2) They completed the study of techniques for harmonizing international law and national law on the substantial level. Adaptation of Italian national law to general international law by virtue of Article 10 of the Constitution is automatic in the sense that it does not need any particular State act, immediate in the sense that adaptation takes place when the international legal norms come into existence, complete in the sense that it introduces all the necessary modifications, and continuous in the sense that any modification of international legal norms would bring about the corresponding modification of national legal norms. Adaptation of national law to treaty law is made by an act called “order of execution,” which is issued to each treaty. This is to be ensured by the following three principles: (a) presumptive interpretation in favor of harmony between international law and national law. (b) *lex posterior generalis non derogat priori speciali*, (c) a constitutional provision stipulating that treaty shall prevail over statute. In the Italian legal order, (a) and (b) are frequently invoked, but (c) is controversial.

2. *Recognition of States in International Law: Introductory Remarks on the Theoretical Development in Italy*

It has been one of the most difficult questions how a newly emerged State entity acquires an international personality and what significance and effect is given to the act of recognizing this new State. Most contemporary Italian doctrines seem to reject the so-called constitutive view, although they do not reach the same conclusion by the same reasoning and criteria. The purpose of the article is to clarify the trend of Italian doctrines with regard to how to understand the nature, structure, and effect of the act of recognition of State.

First of all, reference is made to some preliminary points on which Italian doctrines almost invariably agree in this regard. (a) International personality (international subjectivity) is a legal capacity depending upon international law and not a natural capacity derived *ipso facto* from the simple existence of a State. (b) International law and national legal order each constitutes respectively an original and independent legal order (so-called dualism). As a corollary, a proposition that connects an international personality of a State with a personality of a State under national law is rejected. (c) There is a controversy over whether an *ad hoc* norm giving a international personality to a State exists or not. Secondly, it is noted that the State in the sense of international law must possess the three qualifications of effectiveness, autonomy, and sociability (capacity of entering into relations with other States).

Professor Minagawa examines various doctrines as to how States acquire the international personality, one by one, adding some critical comments. Here we only summarize

briefly those doctrines, and without his comments. (1) Primary Accord (Anzilotti): A new State acquires an international personality only through the primary accord of recognition between itself and each existing State, and the recognition has the essence of a normative act upon which the initial formation of a new State's international personality depends. (2) Unilateral Discretionary Act (Cavaglieri): Recognition constitutes a unilateral manifestation of will by existing States, each of which has the discretionary power to give an international personality to a new State. (3) Supplementary Act (Biscottini): A new State entity with certain characteristics would, independent of recognition by existing States, enjoy a certain limited legal status, and the full international status can be acquired only through recognitions by them. (4) Act of Constitutive Ascertainment (Kelsen): Recognition in the legal sense is the act ascertaining that the community to be recognized is a State in the sense of international law. (Lauteracht): To recognize a political community as a State is to declare that it fulfills the conditions of statehood as required by international law, and, if these conditions are present, the existing States are under the duty to grant their recognition to it. (5) Act of Pure Ascertainment (Perassi, Morelli, Venturini, Balladore Pallieri): International legal order gives an international personality to an entity which fulfills the conditions of personality by addressing certain norms immediately to it. A new State, thus, automatically acquires an international personality. (6) Political Act (Quadri, Sperduti): If the recognition of a new State is neither a normative act, a discretionary act, nor an ascertaining act, it cannot be a legal act, but a political act. Professor Minagawa agreed, elsewhere,⁴ with this view of Sperduti that recognition is the decision by an existing State to transfer a passive legal-social relationship between itself and a new State to an active one, and is, therefore, "an act of foundation of the international social life."

3. *Jus Cogens in Public International Law*

In the national legal order legal rules, especially rules of private law, are divided into the categories of *jus cogens* and *jus dispositivum*, but it has been a question of controversy whether such a distinction can also be applied to rules of international law, and in particular, to what extent international law recognizes the rules having the character of *jus cogens*. Examples given in this respect, e.g., a treaty permitting the act of piracy or reestablishing the slavery, appear to concern merely "*une pure hypothèse d'école*." It is doubtful how far the concept of *jus cogens* has penetrated into the juridical conscience of States. It may fairly be presumed that the concept of *jus cogens*, even though it may exist in the law of nations, is only germinal and inchoate.

First of all, international *jus cogens* is defined as a body of rules that restrict the law-creating aptitude of international agreements and deprive them of any possibility of infringement or derogation, thus constituting the objective limit of efficacy of international agreements. The question of *jus cogens* is considered with reference to the following three points.

The first point is whether rules of customary international law are characterized as rules of *jus cogens* in its specific sense that agreements in contravention of them are *ipso jure* invalid. The predominant view places custom and agreement in the same rank as a source of law, so that, in case a special or contrary agreement exists, customary rules yield

⁴ It was in one of his textbooks of international law (*Enshu Kokusai-ho* (Exercise in International Law, 1977), pp. 75-86.).

to it. The status of *jus cogens* cannot, for respective reasons, be properly assigned even to some fundamental principles which might be alleged in this respect, e.g., the freedom of the seas, international rule concerning the piracy, and a treaty placing the contracting State in such a condition as not to be able to maintain the internal public order.

The second point is whether there is any limit of general applications which deprive agreement of law-creating capacity insofar as it conflicts with the prior treaty. This problem is raised in the case where the parties to the later agreement do not include all the States that are parties to the prior treaty. The judicial experiences of the Permanent Court (the *Oscar Chinn* case and the *European Commission of the Danube* case) show that conflicts between treaties are normally adjusted by the relative priority of conflicting legal norms, not on the basis of the nullity of the later treaty, and that this adjustment is, in an appropriate case, supplemented by the principle of State responsibility which entitles a State to demand reparation for non-performance. Even the following cases would not be considered to be exceptions: a treaty expressly forbidding any deviation from it by concluding a later treaty; a treaty creating a special type of obligations, i.e., "integral" as opposed to "interdependent"; a multilateral treaty creating an international regime.

The third point is whether the law-creating aptitude of international agreements is subject to the requirement of conformity with public morality. The vague proposition that an immoral treaty is void would seriously jeopardize the stability of treaty relations. For the purpose of argument, however, if the problem should be posed in a somewhat academic manner, i.e., the validity of treaties having immoral objectives, though not actually contrary to rules of international law, the answer is: "Presumably, an international tribunal will not declare the treaty as null and void merely on the ground of immoral elements. In the event of profound divergence between the treaty and morality, however, it is for the tribunal itself to decide whether to apply it in the actual case." Moral considerations that are pertinent in this respect must have crystallized into the recognized standard of international behavior—(a) established as a principle of general law (e.g., the prohibition of slavery); (b) recorded in the resolutions of international assembly (e.g., the policy of apartheid); (c) embodied in the multilateral treaties of humanitarian character (e.g., prevention and suppression of traffic in women, forced labour, or trade in narcotics).

What are reliable criteria in order to test the character of *jus cogens* of international legal norms? The *prima facie* criteria should be sought in the mode of existence of international legal rules: (a) a rule of positive law, not a rule of natural law; (b) a rule of general international law; (c) the material aspect of rules—in this connection, attention should be focused not on the individual interest of States, but the general interest of the world community, and also the types of international *jus cogens* may be tentatively classified into three: preeminently ethical norms, rules of international social law, rules of a political public order.

The establishment of international rules of *jus cogens* will ultimately depend on the attitude of the community itself. In contrast with the traditional international legal system where the legal relationship of international responsibility is exclusively established between the active and the passive subject of a wrongful act, a new trend has emerged as manifested in: (a) creation of the United Nations, which can administer the more integrated interests of the world community; (b) appearance of the concept of criminal responsibility; (c) formal inclusion of the concept of *jus cogens* in the codified law of treaties.

Finally, some comments were given to the formulation of the provisions concerned in the Vienna Convention of the Law of Treaties.

Professor Minagawa reexamined, in the article "Essentiality and Reality of International *Jus Cogens*," what is the essence of international *jus cogens* and how it actually operates on the inter-State level, referring to recent writings and jurisprudence of the International Court.

4. *The United Nations and the Principle of Reserved Domain*

The purpose of the article is to examine the operating manners and aspects of the principle of reserved domain in connection with the various activities that the United Nations performs through its organs.

With respect to general international law, several points should be kept in mind. Under general international law, intervention is dictatorial interference, not interference pure and simple. A State's domain of legal freedom does not enjoy any more special protection than the prohibition of dictatorial interference. Thus non-dictatorial interferences such as simple criticism, protests, expressions of hopes, and recommendations, are not illegal, although they might be unfriendly and impolite in the light of international comity. A State's domain of legal freedom is the area of activities not actually regulated by international law, thus being a historical and relative concept only to be negatively defined.

In the part analyzing the Covenant of the League of Nations, first of all, the problem is put in its proper perspective. General international organizations such as the League of Nations and the United Nations, whose purposes are general and political, perform various functions and activities which are generally not regulated in a precise and detailed manner. Much room for discretion is left for the organs in appreciation of conditions and limitations of their activities. The organizations act as political organisms. In this situation, adjustment and delimitation of the scope of their activities and that of member States' activities is presented as a problem of how an undisturbed area of activities should be guaranteed to States so far as they stay independent.

Article 15(8) is an exception to the general conciliatory powers given to the League of Nations by Articles 12-15. The advisory opinion of the PCIJ in the case of *Nationality Decrees Issued by France in Tunis and Morocco* explained that, in brief, matters of domestic jurisdiction introduced by Article 15(8) were those not actually regulated by international legal norms, and that as regards such matters, each State is sole judge, the League being unable to make a recommendation. Here it should be noted that the fundamental purpose of a general international organization is the maintenance of international peace and security, and that political disputes are the principal subjects for conciliatory activities by the League Council. Article 15(8) would mean that a State in dispute could stop the proceeding of conciliatory activity by forcing the Council with political functions to make a legal determination on this point, only because the dispute was related to a matters of its domestic jurisdiction. Grave doubt is expressed by Professor Minagawa whether Article 15(8) could be compatible with the very *raison d'être* of a political international organization in charge of maintaining international peace.

With respect to Article 2(7) of the Charter of the United Nations, various interpretations—broad and narrow—are placed to the material scope of "matters which are essentially within the domestic jurisdiction of any State." Professor Minagawa made a critical analysis of those interpretations proposed by Waldock, Monaco, Morelli, Verzijl, Verdross and Ross,

and agreed mostly with Sperduti that not only international law, but extra-legal principles, i.e., "principles of international social ethics" positively recognized among the States, may function to delimit matters of domestic jurisdiction which should be left to the unfettered discretion of each individual State. Professor Minagawa proceeded on this line and also drew attention to such points for relevant criteria on this matter as "some measure of international obligation" imposed by the Charter itself concerning economic and social problems (Articles 55 and 56) and the administration of colonies (Chapter 11), "international community standard," proposed to be applicable even in a judicial case (Dissenting Opinion of Judge Jessup in the *South West Africa* case), and the purposes to be pursued by the Organization which prohibit acts disenabling their achievement and also guide teleological interpretations of relevant provisions.

As to the procedural point, i.e., how the merits of a difference over whether the matter is or is not within the domestic jurisdiction are to be resolved, and particularly in whom resides the competence of deciding this difference, it is pointed out that the confusing discussion in this regard may be due to the malposition of the question. In contrast with legal litigation, applicability of Article 2(7) in a concrete case is not subject to previous and binding decision of a preliminary character before proceeding to the discussion and examination on the merits of the question.

Finally, Professor Minagawa examined the same problem in connection with the judicial activities of the International Court of Justice. With respect to whether Article 2(7) applies *ipso jure* to the exercise of contentious jurisdiction by the Court, he agreed with the negative view principally because the jurisdiction of the Court is derived from the consent of States to be given independently of the Charter and the Statute. With respect to the advisory jurisdiction, the answer is affirmative because it is conferred immediately and directly by the Charter and the Statute. As to the declarations accepting the compulsory jurisdiction of the Court which, however, contain reservations of domestic jurisdiction, Professor Minagawa devoted an extensive analysis to those reservations excluding "disputes with regard to matters which are essentially within the domestic jurisdiction of a State as determined by that State." His final conclusion was that such will be of doubtful utility, if it intends thereby to win the judgment of upholding the objection to the jurisdiction of the Court, since, contrary to the intention of its framer, the exclusion clause is pseudojurisdictional in its principal effect.

5. *Political Refuge and International Law*

Professor Minagawa discusses two topics in this article: asylum under international law and non-extradition of political offenders.

With respect to asylum under international law, territorial asylum is distinguished from extraterritorial asylum. The freedom of a State to give territorial asylum is derived from territorial sovereignty, being only restricted by treaties. A State is under no obligation to give territorial asylum to certain categories of individuals either. On the other hand, extraterritorial asylum cannot be based upon territorial sovereignty, constituting a grave infringement upon the State sovereignty upon whose territory it is given. Diplomatic asylum, for example, is not derived from the immunity given to the premises of the mission. A legal (treaty) basis for the right to give it, if any, must be clearly and strictly proved. A strict judgment in the *Asylum* case by the International Court of Justice upon "urgent case"

(Article 2 of the Havana Convention) as a basis for giving diplomatic asylum to be derived from the fundamental understanding which regards diplomatic asylum as an entirely exceptional institution distinct from territorial asylum.

With respect to non-extradition of political offenders, it is asked whether there is an established rule of general international law to the effect that political offenders *must not* be extradited.

First, the explanation that political offenses are ordinarily not crimes under the requisitioned State because political offenders aim at realizing the same political system as that of the requisitioning State, can be a reason for the requisitioned State to refuse the request by the requisitioning State, but this does not prove that the requisitioned State must neither extradite nor punish political offenders. Also, if it is derived from a reasonable doubt of a just administration of law in foreign tribunals, non-extradition, in the end, aims at assuring a normal proceeding in the foreign tribunals. Here international order would leave States to cooperate upon principles of respective national order, but it could not be considered as assigning super-State—going beyond the limits of treaties and national laws—functions to States which, in turn, accept them as such.

Secondly, there are various arguments concerning the exact meaning and scope of the concept “political offenses” which plays a decisive role in the principle of non-extradition of political offenders. Also the practice that interpretations and applications of the provisions excluding political offenders are, in principle, made by the requisitioned State in accordance with its national law, could be a resisting element against the rule becoming a general rule, since *opinio juris communis* is expressed in reciprocity.

Thirdly, it is pointed out, *inter alia*, that to establish clearly a State’s power for non-extradition has some positive significance.

Upon the above considerations, Professor Minagawa comes to the conclusion that there is no secure ground for considering a rule of general international law *prohibiting* the extradition of political offenders to be established.

6. *Takeshima Dispute and International Jurisprudence*

A dispute over the territorial sovereignty of Takeshima, an island located almost in the middle of the Sea of Japan between Japan and Korea has not been settled. Since both States claim their sovereignty over this island by invoking legal grounds, this is a legal dispute to be settled in accordance with international law binding on both States. Despite Article 59 of the Statute, the International Court of Justice would, when it has confirmed the existence of and clarified the content of certain international criteria as logical grounds for its decision, regard itself confined to apply, if necessary, *de facto* the same criteria in later cases. This is proved by jurisprudential experiences. The purpose of the article is to analyze this dispute in the light of the concrete criteria of international law for the settlement of territorial disputes clarified in the relevant international jurisprudence.

Among several types of territorial disputes such as the *Eastern Greenland* case, the *Island of Palmas* arbitration, and the *Minquiers and Ecrehos* case, the Takeshima dispute seems to belong to the last type, in which the Court based its decision upon the relative appraisal as to which party had presented more convincing evidence. The Court also set the critical date permitting the submission of evidence upon the day when the dispute over sovereignty arose in a concrete manner.

With respect to the rules of international law to be applied as criteria for the settlement of territorial disputes, it must be pointed out that international law prevailing since the nineteenth century requires that a State should have, in addition to the intention and the will to act as sovereign, some actual exercise or display of such authority, as was pointed out by Judges Anzilotti and Huber. In most of the territorial disputes, settlements were based upon the comparative determination of relative strength of the opposing claims to sovereignty over the territory, and this boils down to proving the fact of State activity exercised thereupon. This fundamental criterion could be applied in several manners: (a) presumptive evidence is not sufficient but evidence directly related to possession of the territory concerned is decisive; (b) the title derived from discovery cannot prevail over the definitive title based upon the exercise of State activity; (c) the title of discovery, when contested by another State on the basis of its continued exercise of State activity, must, in order to prevail, be proved to be completed by the definitive title connected with the exercise of sovereignty; (d) the appraisal is a relative matter depending upon such elements as whether the territory concerned was *terra nullius* or not, and whether there was a competing claim by another State.

Professor Minagawa attempts an impartial analysis of the legal grounds claimed respectively by Japan and by Korea, and comes to a conclusion in favor of Japan. It is also noted that the Japanese proposal, in addition to the diplomatic protests and in response to the illegal activities by Korea regarding the island, to submit the dispute to the international Court of Justice, with which Korea refused to comply, would have the effect, for a long time, of preventing Korea from acquiring the title by illegal possession.

7. *International Validity of the Calvo Clause—Pursuing the Ratio Decidendi of Certain Arbitral Awards—*

The Calvo clause is defined as “a stipulation in a contract between an alien and a government whereby the alien agrees not to call upon his State of nationality for protection in any issue arising out of the contract” (Jimenez de Arechaga). The aim of Professor Minagawa is to reconsider the basis of international validity of the Calvo clause, pursuing the *iter* of judgment by the Claims Commissions in the *North American Dredging Company* case (1926) and the *Mexican Union Railway* case (1930). These are often mentioned as the “leading case” or the “*décision-type*” on this question, and in both of these cases the Commissions held that the Calvo clause was internationally valid and, as such, applicable in the said cases in terms of the preclusive effect within a limited scope, although it did not recognize the full efficacy of the clause for all purposes of diplomatic or judicial action.

The following points are seriatim considered: (1) permissibility for an alien to waive invocation of the diplomatic protection by the State of his nationality; (2) disjunctive operation of the Calvo clause in conjunction with the local remedies rule and compromissory clause; and (3) relevancy of the manifestation of will or conduct of a private person within the framework of international reclamation.

As to the first question, to which the Commissions answer in the affirmative, it may be argued that, in the absence of a positive international rule conceding a private person a potency to restrict the exercise of diplomatic protection by a State, relinquishment by him of the benefit of protection would not produce any encumbrance to his own State. It is recalled in this connection that there exists a well-settled international rule requiring the

exhaustion of the remedies offered by municipal law, which contemplates positive actions of a private person as relevant juridical fact, although the question still remains open whether the manifested will or conduct of a private person is deprived of any pertinency on the international level.

As to the second point, despite the fact that the conventions which organized the Claims Commissions and conferred jurisdiction on them, stipulated explicitly for the non-application of local remedies rule to the claims, the Commissions rejected the claims on the score of non-exhaustion of local remedies simply because the proper application of the negative provisions was limited to claims "rightfully" presented by the claimant to its own Government. Criticism on several points could be directed against this conclusion and propositions concomitantly formulated. In any case, given the Commissions' finding, it follows that the Calvo clause serves to overcome a general waiver of the requirement to exhaust local remedies contained in the compromis.

As to the third point, Professor Minagawa recapitulates the Commissions' reasoning as follows: (1) it concerns a claim which is essentially of a private character; (2) the principle of good faith should be respected by any court of law; and (3) non-application of local remedies rule does not automatically heal the *vitium* adherent to a private claim. The problem is how to articulate these propositions to frame ad hoc rule operating in the special domain of diplomatic protection.

It is first of all emphasized that a State asserts its own rights in the exercise of diplomatic protection (the *Mavrommatis* case). It is equally urged that a State is entirely unfettered in its exercise (the *Barcelona Traction* case). Viewed in this light, a private individual is posited merely as a de facto beneficiary within the operational scheme of diplomatic protection.

These would seem, however, to represent a vestige of the historical period when the individual-national was deemed as a mere "appurtenance" of a State. A pronounced tendency of "humanization" of international law having developed, it is clearly stated that the actual conduct of diplomatic protection has been increasingly influenced by that tendency, though not attended with the transformation of normative contents, more and more weight having been attached to the protection of private interests as such. Some additional observations would be duly made with respect to the "individualization" of diplomatic protection.

First, it is necessary to discard any preconceived idea that the interests of States are solely taken into account for the purpose of international protection. The theory that a State has been injured through injury to its national is problematical as it may be balefully invoked so as to warrant a swelled right of intervention being enforced on the part of a creditor State vis-à-vis a debtor State on the mere ground that it has been injured independent of the concrete position of a private claimant. This is the very situation which the Calvo clause intends to forestall. Secondly, a discretionary power of a State in the exercise of diplomatic protection does not exclude the possibility that waiver, laches or lack of sincerity on the part of a private individual may be taken into consideration as an internationally relevant fact (as is shown by some examples). Thirdly, however, if a local State does not afford the adequate judicial protection to the rights of a foreign national, a State of his nationality may diplomatically or otherwise intervene, irrespective of the intention of the injured person.

Professor Minagawa is of the opinion that the Commissions' conclusion should be sustained for the following reasons. First, the preclusive reservation embodied in the Calvo clause is limited *ratione materiae* to disputes concerning the matters pertaining to contracts. Secondly, the claim as contemplated is not by its nature that of a State. Lastly, the tribunal would be entitled to apply the principle of good faith as the general principle of law restraining the Government's conduct qua protector of its nationals in the case where the claimant used a Calvo clause to procure a contract without any intention of even observing its provisions and the non-application of local remedies rule would condone such an evasive attempt, releasing a private claimant from obligation of conduct in good faith. Accordingly, ad hoc application of the Calvo clause can be in no wise mechanical regardless of the actual circumstance; hence it is a question to be decided in each particular case.

Finally, Professor Minagawa gave a negative answer on several grounds to the question whether the Calvo clause can be invoked to preclude totally the diplomatic interposition of the Government with regard to the contractual issues.

8. *The Present-day Role of the International Court of Justice*

Professor Minagawa's basic position with respect to the Court is that "its traditional modality of existence and functioning must be maintained and should be protected from various pressures and challenges." He agrees with Brierly in emphasizing its value as a symbol of the reign of law, as a standing refutation of the principle that in the last resort every State ought to be the judge of its own conduct.

From his thoughtful observations on the various aspects of the Court, only several points will be noted here.

The Court is composed of a body of independent judges who are qualified in the highest degree in their professional ability. As the Court is a judicial organ composed not of States but of individuals, the basis of its trust and authority depends upon how fair, just, and reasonable its judgment can be. Thus the primary consideration in electing each judge is the ability and qualifications as an individual (cf. Article 2 of the Statute). Reference is made to the representation of the main forms of civilization and of the principal legal systems of the world (Article 9), and it is submitted that political considerations might be inevitable in the elections by the General Assembly and by the Security Council, which are both political organs. It would be against the letter and the spirit of Article 9, however, to identify this article with a criterion of "equitable geographical distribution" defined as stipulating "political qualifications." The apolitical character of the Court must be emphasized in connection with its functions and role. In spite of the attempts to justify political considerations by reasons such as that the Court would not only apply but also develop and modify the existing law, it must be pointed out that it is a "court of law," that the Court's assistance to the development of law should be "à la manière judiciaire," and that the Court has always been cautious and reserved in this regard. As to the claims that the distribution of the seats should be changed in favor of the Afro-Asian and the Soviet-bloc States, it is noted that, although they are not unreasonable to some extent, excessive claims along this line (such as the "troika" pattern) would induce a correspondingly harmful response from other States and destroy the common interest of the international society to be developed.

With respect to the functions and jurisdiction of the Court, it must be kept in mind that international courts are only a means to be established and used under certain circum-

tances by the parties if they are willing, and that the basis of the courts' jurisdiction is an agreement among the parties. The task for the Court is to adjudicate in accordance with law (*secundum jus*), and the Court's position has been that it cannot direct the adjustment of interests based upon the considerations, not of law, but of "political expediency," that its task is to interpret and apply, but not to create and modify, law, and that it gives importance to the text of a treaty and tries to establish the intention of the parties as expressed therein in its interpretation.

Professor Minagawa also gave some observations upon political disputes, which, by definition, cannot be settled by existing international law. The settlement through decision *ex aequo et bono* (Article 38(2)) cannot be expected much, since this procedure is to be used to attenuate the rigidity, or fill in the unanticipated lacunae, of treaties without disregarding the texts — "decision *praeter legem*." The right course in settling political disputes is for the parties to negotiate and reach an agreement upon compromise, which is a norm embodying the adjustment of conflicted interests.

After the general remarks on diplomatic negotiation, conciliation, and recourse to judicial settlement, Professor Minagawa comes to the analysis of the "optional clause" of Article 36 and reservations. In this connection, the problem of ambiguity and incompleteness of international law as a cause of negative attitudes by States is taken up. Although it might be suggested that States dislike the compulsory system because they think it dangerous to give too much power to some individuals, this alleged danger could not be verified in the judicial experiences. The Court has been sensitive to the limit proper to the judicial functions, and we could trust the Court's consistent attitude of "judicial caution" as a matter of general tendency.

It is contended by the Afro-Asian States that the traditional international norms were created by a limited number of western States without the participation of developing States and in disregard of their interests. However, they do not seem to reject all the norms, but to select some to be bound, as their objective is to establish their status as sovereign, independent States. It would need time and patience to induce them to recognize the significant and useful role of the Court. The same line of contention is put forward by the Soviet-bloc States. The road is not smooth, but the more frequent use of the Court by other States would, no doubt, strengthen the judicial system in the long run.

It is also claimed that a legislative procedure for peaceful change, which would consider, recognize, and adjust the new demands and interests of States, is indispensable. It must be emphasized, however, that peaceful change is more a matter of balanced perspective and practice than that of technique in the international field, since it is primarily achieved by agreement, and reaching this agreement could be more difficult than reaching an agreement for legal settlement of disputes.

Law ultimately aims at justice, but it does so by achieving its immediate objective: order, system, regularity, and certainty. In the international field, a regular and constant application of international law, which would set a certain limit upon States' self-interests and auto-interpretations, would be the source of justice to be realized for the entire society. The Court is able to promote a more concrete order in the legal relations among States by adjudicating upon questions of international law and accumulating the concrete judgments based upon objective facts and conflicting legal arguments. Thus our immediate objective is to increase the number of cases to be referred to the Court by promoting the practice of

including a compromissory clause admitting the compulsory jurisdiction of the Court in treaties.

HITOTSUBASHI UNIVERSITY