

Changing Dimensions of International Law:

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Family of Civilized States & Japan

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England, A Paramount Power in India in the Nineteenth Century:

By the nineteenth century, after defeating and displacing the Portuguese, the Dutch and the French not only in Europe but also in Africa and the Americas, Britain not only got a foothold in India, but came to occupy large parts of it. With the expulsion of other European companies, especially French ones from India, the British Government was drawn increasingly into a policy of territorial occupation. Eventually a British “paramount power” empire emerged in place of the last major Indian empire of the Moguls. Once installed in Delhi, with almost unlimited human and material resources, the British were encouraged and empowered to expand into the rest of South and South-east Asia and beyond to East Asia. This also encouraged other European countries to follow the British lead and expand to other areas or dominate other countries of Asia.

Europeans Go to East Asia

It was during this period of European expansion and Asian decline that the British and other western traders made up their minds to push towards East Asia to trade with China and Japan. It is important to note that compared to Asians, Europeans were much better sailors, were adept at maritime warfare with strong gunboats equipped with heavy guns, while Asian States were generally land powers who had never used warships or guns on the ships and were unable to compete with them on the sea. Several attempts had been made earlier by Western countries like Russia, Portugal, Holland, and Britain to open their trading posts in China but these had failed.¹⁹ As a dominant European power, the British were particularly irked by the Chinese reluctance to trade with Europeans except on their own terms which were considered humiliating by the Europeans. They had developed a craving for Chinese tea and also wanted other Chinese products like silks, porcelain, and objects d'art of China. The tea trade caused a serious drain of gold and silver to China and the British had little else to offer, for China was more or less economically self-sufficient. Rebuffed by the Chinese in their attempts to settle in China and to establish trade relations with them, the British forced China to open its doors by attacking her in what is known as the Opium War

in 1839 and concluding the Treaty of Nanking in 1842, coercing China to accept contraband opium as a legitimate item of trade. Several other European countries and the United States followed Britain and signed numerous treaties with China settling themselves in what were known as treaty ports and started their trade relations.

Japan's Distinct Development before the Nineteenth Century

Geography has played a leading part in Japanese history. Lying off the mainland of Asia, the geographical isolation of the Japanese archipelago produced an early delineation of its frontiers and boundaries, thereby protecting and nurturing a distinct Japanese identity. Japan is separated from the southern tip of Korea by over a hundred miles of rough water. Japan was, therefore, always protected from armed invasion by her distance from the continental seats of power in China. All through its recorded history until modern times it was never seriously threatened so long as the Western maritime powers did not reach East Asia. The Chinese were usually preoccupied with their land frontiers and never persisted in a policy of expansion across water. Thus the civilization of Japan was formed and developed in comparative seclusion and this has given it a special character. But from the earliest times, Japan's relationships with China and Korea, sometimes peaceful, sometimes hostile, were continuous. Though the

Japanese civilization owes a great deal to China, they contracted and adopted it willingly and under no pressure. To China they turned for the very foundations of their organized national life, adopted the Chinese written language and studied Chinese method of government. They welcomed Chinese teachers who brought to them the treasures of learning and religion. Chinese monks, doctors and craftsmen came in large numbers and were treated with distinction and respect and given special privileges. For centuries they looked up to China for new ideas in religion and philosophy and revered Chinese classics. But the Japanese also preserved much of their native quality. It has been pointed out that “no nation has been more ready to consider new teaching, and yet none has been more tenacious of its own tradition.” A few castaway Portuguese were the first to reach Japan in 1542 and were received in a friendly manner by the Japanese. It was not long before the first arrivals were followed by missionaries and traders who had little difficulty in establishing friendly relations with the people and their rulers. In 1549 Francis Xavier with several of his companions landed in Japan (at Kagoshima) where he was well received and given permission to preach. By the year 1600, the amount of Christian converts had risen to 300,000 and promised further increase. It is important to mention that Japan was ruled at that time by the Tokugawa family which had succeeded, after a

long period of war, in reducing to submission the powerful feudal lords who had become his vassals or 'Daimyo', as they were called. The central administration of Japan, called the 'Bakufu', was headed by a 'Shogun', which in the ancient times was the title of the Emperor's *ad hoc* military deputy, but which had come to mean the supreme feudal lord formally authorized by the Emperor to rule Japan. The office of Shogun was hereditary in the House of Tokugawa which had its central administration in Edo, renamed Tokyo in 1868, and the period when the Tokugawa Family ruled from 1603 to 1868 is known in Japanese history as the Edo Period.²⁷ The Shogunate, or Bakufu as known in Japanese, was essentially a military dictatorship exercising powers delegated to them by the throne over which it had no choice, and these powers were assumed by each successive Shogun. The Emperor was given fairly adequate revenues but no administrative function was left to him.

Period of Isolation in Japan

It may be noted that besides the Portuguese and the Spaniards, the Dutch and the English were given trade facilities in Japan in the early 1600s and they were all competing and quarreling with each other. But as the number of Christian converts increased, the missionary activities of Catholic States, like Spain and Portugal, provoked hostility and there were isolated

persecutions in different parts of Japan. Fearing the sinister designs of the Christian missionaries and their countries, the Tokugawa authorities decided to expel the dangerous aliens and exterminate native Christians. The Dutch were allowed to remain because they were clearly hostile to the Spaniards and the Portuguese and, since they eschewed all missionary activity, were thought by the Japanese not to be Christians at all.²⁹ In 1638, the Tokugawa regime adopted a policy of national seclusion and decided not only to exclude aliens but prohibit the Japanese from going abroad or building ships capable of making long voyages. The main purpose of this self-imposed seclusion was primarily to eliminate the effect of Christian missionaries.³⁰

At the beginning of the seventeenth century, there were four European nations which had relations with Japan: the Portuguese, the Spanish, the English, and the Dutch. The first two were expelled by the Tokugawa seclusion edicts, while the third temporarily withdrew on account of lack of profit. When in 1673 the English attempted to resume trade, the Bakufu's seclusion policy had become too rigid to allow them to return.³¹ Various attempts by France, Russia and also the United States to persuade Japan to reopen commercial relations, all proved fruitless until 1853, as we shall discuss later.³²

For more than 200 years, while Japan remained outside the growing Western

influence, it was never completely cut off from the so-called outside world. The Dutch and the Chinese had been granted an exemption from the prohibition on foreign contacts. They were both allowed to continue very restricted trade at Nagasaki port, and this also provided the Japanese with a valuable window on what was happening in the outside world. Japanese policy of seclusion and unconditional repulsion of foreigners did cause hardship and problems for the Western sailors, particularly the Americans, who were the most frequent victims.

The United States Takes the Initiative to Open Japan

The United States, after the acquisition of the Pacific seaboard, felt that there might be great economic opportunities for trade between California and China. Already substantial American trade with Canton was being conducted from the East Coast via the Indian Ocean which the Americans wanted to expand. Moreover, after about 1820, a large number of American whaling vessels had started appearing off the coast of Japan. But these ships could not call at the Japanese ports for water, coal and other supplies because of Japanese isolation laws. Further, occasional Japanese ill treatment of the shipwrecked sailors caused resentment in the United States which wanted to put some pressure on Japan to overcome these difficulties.³⁵

The Opium War with China and the more extensive opening of China ports seemed to the Americans and the British to make the opening of Japan

both inevitable and easier. In 1846 an American naval officer, Biddle, was sent to Edo Bay to test the waters, but the Japanese firmly rejected his overtures, reaffirming their policy of national isolation, and he withdrew frustrated. The Americans were determined, however, to take benefit of the opening of the Pacific route to them and to increase their China trade. Japan was directly on line from San Francisco to Shanghai and had supplies of coal, mined near Nagasaki. In 1851 they decided to send a naval commander, with a letter from President Millard Fillmore addressed to the Emperor of Japan, to secure for the Americans the right to buy coal for steamers on the passage between California and China; proper protection for shipwrecked sailors; and permission for ships to dispose of cargo at one or more Japanese ports.

Commodore Matthew C. Perry with his squadron of four warships reached the Edo Bay on 8 July 1853. It may be mentioned that although the *de jure* sovereign of Japan was the Emperor, or Mikado, the descendant of gods, for centuries *de facto* sovereignty was exercised by the Shoguns, the military leaders. In theory, the Emperors remained the ultimate sovereigns, who had delegated executive and administrative power to the Shoguns. In practice, they were mere puppets in the hands of their over-mighty vassals.

This state of affairs was not understood by foreigners at the time of Commodore Perry's mission. The prevalent view, taken by the Dutch, was that there were two Emperors in Japan, one supreme in matters spiritual, the other in temporal affairs. Perry and subsequent Western envoys supposed that the potentate at Yedo, whom they knew as the Tycoon, was equivalent to an Emperor or King, whose decision would be final in all ordinary matters of State. They knew vaguely of a second ruler in the interior, but his power, so it was assumed, was limited to things ecclesiastical and they thought little of him.³⁷

Commodore Perry insisted on handing over the President's letter at Kurihama with all appropriate formality and under the guns of his anchored ships. He refused to go to Nagasaki to receive a reply, as the Japanese urged. In a letter of his own he told the Japanese that although "as an evidence of his friendly intention" he had brought only a small squadron on this occasion, he intended, "should it become necessary, to return to Yedo in the ensuing spring with a much larger force."³⁸ There was no open threat but he left the Japanese under no illusion that he was prepared to use force. He decided it would be wiser to withdraw to the China coast for a while, rather than give the Japanese a chance to keep him waiting for their reply, and

sailed for the Luchu Islands. On 12 February 1854, he reappeared, this time with six ships, and moved up the Bay of Yedo to Kanagawa. His mission was already causing a new orientation in the internal politics of Japan causing a civil strife in the country. For all its power, the Bakufu was helpless before the “black ships of the barbarians”. That it knew, yet dared not openly acknowledge.

The Shogun received instructions from the Emperor, the representative of the gods, to expel the barbarian, which it could not dare to act upon. When it made treaties with him instead, the Yedo administration put itself in the fatal position of appearing to act unpatriotically and in a manner prejudicial to the safety of the country. But they had no choice. Publicly announcing the Emperor’s wish to have the foreigners driven away, the Bakufu proceeded to conclude a “Treaty of Peace, Amity and Commerce” with Commodore Perry on 31 March 1854, that gave Perry the substance of what he sought.³⁹ The ports of Shimoda and Hakodate were to be opened to American ships to replenish their stocks of coal and provisions; arrangements were made for the just treatment of shipwrecked sailors; a provision was made for the appointment of a United States consul at Shimoda, and an ill-defined right was given to US traders to purchase goods

at open ports. There was no provision for the permanent residence of US citizens but a most-favoured-nation clause was included which secured to the United States any future privileges granted to other nations.⁴⁰ Although it was not in the full sense a commercial treaty, it was the beginning and, as Perry said in his report, Japan was “opened to the nations of the West”.⁴¹

The Japanese are said to have congratulated themselves for conceding so little by this Treaty of Kanagawa, but did not realize they had opened the door for foreign penetration. Britain followed closely behind and Admiral Sir James Stirling arrived in Nagasaki on 14 September 1854, and negotiated a convention with the Japanese authorities to prevent the Russian warships from using the ports of Japan as bases for raids on British shipping during the ensuing Crimean War. The ports of Nagasaki and Hakodate were opened to the British ships for repairs and securing supplies, but no reference was made to trade or residence of British nationals. But the agreement included a most-favoured-nation clause.⁴²

Four months later, Russian Admiral Poutiatine concluded a treaty at Shimoda by which three Japanese ports were opened to Russian ships for repairs and supplies. Russians were given the right to trade at some of the

ports, were given the right to station a consul, and for the first time the principle of extraterritoriality was clearly stated and the Russian consul given jurisdiction over Russian nationals living in Japan. The next agreement was concluded with the Dutch by which the latter secured full personal freedom, the privileges of extraterritoriality, and were to share in whatever privileges might be accorded to other nations in the future.⁴³

The US Consul Arrives

The first treaties had given only very limited rights to foreign commerce and the Japanese hoped and wished that the foreigners would not come back with new demands. There was one uncomfortable clause in the 1854 US-Japan Treaty, providing that the United States might appoint agents to reside at an open port if either government deemed such an arrangement necessary, although the Japanese authorities, relying on the Japanese text, thought that this meant “if the Japanese Government thought it necessary”.⁴⁵

In August 1856, the Japanese were taken by surprise when an American warship brought an unassuming but determined American consul, Townsend Harris, who carried a letter from the President, which he intended to present to the Shogun in person, with a purpose to extend the scope of the 1854 Treaty. The Japanese authorities implored him to go away urging that there was no need for his services, and if he stayed, other foreign consuls would

also come. He encountered baffling obstructions and could not fulfil his objective until 1857 when the Japanese heard from interpreters in Nagasaki that, because the Chinese Government had failed to carry out treaty obligations, a British squadron, with assistance from French and Americans, had attacked and burned Canton. The Dutch Commissioner in Nagasaki, quoting the example of China, also sent a warning against the evasive and dilatory behaviour of the Japanese officials. Through persistence, and by playing on Japanese fears of British and other Europeans' actions in China, Harris secured a convention on 17 June 1857, which opened Nagasaki to the United States, provided for full diplomatic and consular privileges, permanent residence of Americans at Shimoda and Hakodate, permitted the appointment of an American Vice-Consul at Hakodate, private import and export transactions, subject to an agreed tariff, and freedom of religion and extraterritorial jurisdiction. He was also received for a personal audience with the Shogun on 7 December 1857, and thereafter negotiated a formal Treaty of Amity and Commerce which was duly signed on 29 July 1858, on board the USS Pawhattan.

Unequal Treaties

The Netherlands, Russia, Great Britain and France followed the

American lead and signed new treaties within a few months. Shortly thereafter, Portugal, Prussia, Sweden, Norway, Spain, Austria-Hungary, Hawaii and Peru joined in signing treaties with Japan.⁴⁷ Either specifically or by virtue of a most-favoured-nation clause, all these treaties provided for appointment of diplomatic agents, consuls-general, consuls, and for the exercise of extraterritorial rights in criminal and civil matters, along with a fixed custom tariffs at very low rates.

These provisions and the fact that none of the treaties were for a specified duration, caused a lot of heart-burning in Japan within a few years and led to an outburst of anti-foreign sentiment in Japan. No wonder the Japanese perceived the treaty powers to be “foxes of the same hole” and were concerned that they would subjugate Japan, as they had China, by means of “unequal treaties.”⁴⁸

In the capital Kyoto, there was a widespread anti-foreign feeling and much hostility against the Bakufu Government which had signed these conventions. The Shogun was faced not only with the disagreeable problem of dealing with foreign envoys but also with the growing opposition among his own countrymen. Some were animated by blind hatred of the “ugly foreign barbarians” and angry because the Shogun had timidly abandoned the seclusion policy at their bidding. Others feared the renewed influence of

Christianity.⁴⁹

The only express wish of the throne was that the foreigners should be kept as far away as possible and not be allowed in the provinces near the capital. But while maintaining his objections, the Emperor gave an ambiguous and qualified consent to the treaties which came into force in July 1859. Foreign diplomatic envoys at once took up residence in Yedo and several ports were opened to foreign trade and residence.⁵⁰

With all these treaties in place and the arrival of foreign envoys there was tension in the air. The Shogunate was openly committed to one policy, the Emperor to another, and the opinion in the country was bitter and divided. A clash was inevitable because evasion and concealment was no longer possible. The foreigners were present on the Japanese soil, the ships were there in the harbours, and it could not be pretended that they had not come to stay.⁵¹ In this atmosphere of hostility there were several attacks with swords on foreigners and even some murders between 1860 to 1863. The secretary of the US legation was murdered in Yedo, the British legation was attacked twice, and the menace of assassination hung over every foreigner in the country.⁵² With its rapidly declining power, the Shogunate was helpless in preventing these outrages. In 1862, the British Government

demanded indemnity for attack on a British party of four resulting in grave injuries to some and the death of one of them. On the non-fulfillment of its demands a British squadron bombarded and destroyed the town of Kagoshima on 11 August 1863.⁵³

The Meiji Restoration

The Emperor was extremely unhappy with this state of affairs. It was clear by now that the foreigners could not be expelled and the expulsion policy was futile. The foreign powers for long suspected the dual authority in Japan but did not understand the relationship between the court and the Shogunate. They were now realizing that the centre of power was moving to Kyoto. Although the Emperor had ratified the treaties, the court was not happy at the turn of events. The Shogunate was losing its face and power and, after a brief civil war, the whole country submitted to the Emperor's rule without delay. The Meiji era began on 25 January 1868. The name of Yedo was changed to Tokyo (Eastern capital) and in that city the Emperor's residence and the seat of government was established in March 1869. The new government no longer encouraged or tolerated anti-foreign activities, but the sentiment of hatred did not go away immediately.⁵⁷

Period of Humiliation

This was a period of utter humiliation for the Japanese. The Tokugawas were shown to be unable to govern Japan because they failed to protect Japan from encroachment of the “barbarians”. The power was restored to the Emperor and the anti-Tokugawa factions rallied round the slogan, “Revere the Emperor; Expel the Barbarians”. It was argued that only through unification of the country under the leadership of the Emperor could Japan rebuild her strength to repel the Western powers.

The foreigners, of course, could not be expelled. In fact they were beginning to exercise privileges much beyond what the Japanese thought was necessary or reasonable. Japan’s inability to protect foreigners led to deployment of British and French detachments. These brought new problems and resentments. Various ports, e.g. Kanagawa, Nagasaki and Hakodate had been opened to foreign residence since 1858-1859. Edo, renamed Tokyo, and Osaka were opened between 1859 and 1863. Western men – Europeans and Americans – who came to Japan in 1859, drew their experience from China and thought themselves of superior societies.

Unequal provisions and superior military capability reflected in unequal elements in these treaties, led to a strong feeling in Japan that these were unjust treaties. These unjust and unequal treaties created a deep-seated

“feeling that they (the Japanese) were dishonoured as a nation so long as they permitted the [extraterritorial] system to continue”. The achievement of equality by the revision of the unequal treaties and the achievement of security became the primary Japanese goals. To achieve these goals, they knew, Japan must first become a “civilized” power. The rallying cry of “Expel the Barbarians” died down because it was no longer useful or proper.

Japan adopts Western Ways:

The new Meiji Government encouraged the adoption of western ways, their customs and institutions, to assimilate the material and practical features of occidental life which were supposed to be the true foundation of a powerful modern State. For the next two decades, there was almost a craze for western things and western ideas which is sometimes described by some Japanese historians as a “period of intoxication”. There was an anxiety among the authorities to show to Western nations that the Japanese people had adopted and assimilated enough of western culture to justify their claims to be treated as member of a civilized modern State. They wanted the Western powers to agree that the Japanese constitution and laws were enlightened and her standards of public and private behaviour were so high that Japan could be considered a worthy member of the international community. The Meiji Government was convinced that the sooner they

could display to the western world a recognizable and faithful imitation of western society, the sooner would the unequal treaties be revised. This was the controlling factor in Japanese political life until it was achieved in 1894.⁶³

Although in the beginning the Japanese were totally dependent on foreign teachers and technicians, it was not long before Japan succeeded in transplanting Western industrial techniques and in training enough talented men to become surprisingly self-sufficient in a relatively short period of 15 to 20 years. Even western clothing became compulsory for government officials in November 1872, and Japan adopted the solar calendar instead of the lunar calendar. Besides formal learning, the foreigners living in Japan provided the Japanese with opportunities to become acquainted with several aspects of western life by observing foreign life styles and daily activities.⁶⁶ The Japanese learnt European languages, adopted European manners and clothes, learnt European customs. By 1873, it is interesting to note, watches, gold chains, umbrellas, western hats, jackets, trousers, and shoes were all being used by the elite. Even western literature, philosophies, politics, religion, architecture, painting and music were being studied and emulated.⁶

Adoption of Western Laws and International Law

Japan, like China and some other Asian countries, had been forced to accept unequal, inequitable and humiliating treaties, and forced to relinquish tariff autonomy and concede extraterritoriality, to westerners, in part, because, it was thought, that they

were not able to guarantee some basic rights, like life, dignity, property, travel, commerce and religion, to foreigners in their countries and were not even familiar with the obligations of modern international law, including the law of war.⁶⁸ To obtain equal status with the West, the early Meiji Government thought it essential to compile legal codes similar to those possessed by the European countries. After a brief flirtation with the Napoleonic Codes,⁶⁹ the Meiji Government preferred and adopted the emerging German codes. In 1881 it was decided that the country's first constitution would be modeled on the Prussian Constitution of 1850, a conservative document which could hardly be called democratic. Japan's first constitution was promulgated in 1889 and came into force in November 1890. After the adoption of the German-inspired constitution, the German-inspired codes (civil code, commercial code, criminal code, civil and criminal procedure codes) followed as a matter of course. By 1900 Japan had acquired a legal system which looked very German indeed. More relevant and to the point for the Japanese Government, it satisfied the western demands for modernization.⁷⁰

Japan's Introduction to International Law

But even more importantly and more intensely than the national legal system, the Japanese started learning and adopting international law. The foreigners from the West had forced Japan to open up the country using their "tools of civilization", or warships, and announced their requirements based on international law. The first American Consul General in Japan, Townsend Harris, while negotiating the draft Treaty of Amity and Friendship with the

commissioners of Shogunate, had started advising the Japanese to follow the rules of international law in their dealings with the western countries..

International Law applied only to Christian States of Europe and America:

It is important to note, however, that while Japan was getting keen to learn international law, European powers began to maintain that international law was not the law applicable among all the nations of the world, but applied only amongst Christian States of Europe and America. Thus Thomas E. Holland, Professor of International Law at Oxford, who later had been given the title of Grand Commander of the Rising Sun by Japan,⁷⁷ in his book on *Lectures on International Law* (London, 1933), said that international law “grew with the mental growth of the Nations of Europe”, all of whom had the Christian religion. Although it was “a purely Christian institution”, to avoid the conflict between the Protestants and Catholics, it founded its system on *Jus Naturae*. Therefore, its application was not restricted to nations professing Christian faith, but “its applicability is a question of Civilization than of Creed.” He explained that Christian nations and their colonies “have attained a level of civilization perhaps not higher than but at any rate different from that attained by the other races of mankind” and, therefore, “International Law, like many other products of

their civilization, is too refined to be applicable, as a whole, very far beyond their limits.”⁷⁸

Japanese Determination to Westernize

Overawed, as the Japanese were, by the western countries, they did not have the courage to refute these views, nor could they get angry. All they could do was attempt to modernize, or rather ‘Westernize’ themselves, so that Japan could become a member of the European club of international law, or the ‘family of civilized nations’, to be able to associate with the European nations on an equal basis. They remembered the Opium War of China, its cause and result, and felt the danger of imperialism and colonization. The only way to maintain her independence seemed to be to imitate Europe in almost every area. They feared that unless they made the nation stronger in military and economic terms, Japan might fall under the aggressive colonization of the Western Powers. They had become well aware that only members of the ‘exclusive club’ of international law, i.e. European nations, could and would decide on the admission of Japan into that club.⁸⁴

Japan’s first and foremost diplomatic objective in the beginning of the Meiji era was the revision of the unequal treaties for which international law was supposed to be immensely important. Knowledge and mastery of this law

was necessary for negotiating revision of these treaties. But to achieve revision of the treaties, Japan had to demonstrate that it was a “civilized nation.” Compliance with the rules of international law would provide evidence thereof. Therefore, to understand and master international law was absolutely important. The Japanese Government not only encouraged translation of major text books from Europe and America, but were eager to employ European and American experts in international law as legal advisors. It even encouraged the establishment of Japanese Association of International Law as early as 1897 when the number of international law experts were extremely limited. The Association started publishing the *Japanese Journal of International Law* as early as 1902. It is important to note that even in the Occidental nations, which were supposed to be the founders of international law and had been practicing it for more than two centuries, academic associations began to be established and journals began to be published around the same time. Thus the International Law Association was established in Europe in 1875 and the American Society of International Law in 1906. The *Revue generale de droit international public* was published for the first time in 1894 and the *American Journal of International Law* in 1907. It just shows the seriousness of the Japanese to learn international law. The Foreign Minister of Japan, Inouye, declared it

clearly in 1887::

“The only independent countries left in the east are Japan and China. All countries in the West have schemes for engulfing the east by force and we must devise plans for defense against them. To do this we must set up a new ‘civilized State’ here ... We need to build up a European civilization here on a par with that of European civilized States.”

Japan Learns Imperialist Ways

The Japanese were adamant. Not only did they copy the European laws and regulations, adopted European social customs and even dress, learnt European languages, accepted without any question international law made by and only for the European countries, strengthened its army (following Germany) and navy (following the British model), basically on European lines, but they also started following “European” policies of expansion in their relations with the other “uncivilized” peoples of East Asia and its own neighbours. In 1875, only seven years after the Meiji Restoration, Japan began her career of imperialist adventures and annexed Kuriles. Two years later the Bonin Islands were acquired. In 1879, the Ryukyu Islands were incorporated into Japan under the name of Okinawa. The Volcano Islands adjoining the Bonin Islands were taken over in 1891. Japan next looked at the only direction it could go, dictated by geography

and history, namely, the Asiatic mainland where the European powers had already begun to divide China, the decadent empire in the nineteenth century. Her eyes first of all fell on China's tributary, Korea.⁹² Beginning in the 1880s, there was an increasingly aggressive Japanese involvement in Korea to undermine both the Chinese influence on the peninsula and the authority of the stubbornly traditional Korean Government. In 1875, it even dispatched three gunboats to Korean waters. When one of them was fired on, it retaliated by bombarding the coastal batteries. Later, it sent an embassy headed by a Japanese high official, accompanied by three warships, and like the Perry expedition, forced Korea to conclude a treaty in January 1876 which was similar to the treaties that Japan had been forced to negotiate during the 1850s. The Korean Treaty stipulated that the kingdom was "an independent nation", thereby putting an end to its tributary relationship with the Chinese empire. It also provided for opening of three ports for Japanese trade as well as Japanese consular jurisdiction in Korea.⁹³ The parallel with the Perry mission is obvious. There is no doubt Japan had learnt its lessons well which it was going to continue to practice.

During the next two decades, as Japan gathered more military and naval strength sufficient to confront China which until then had Korea in its sphere

as a tributary State. Japan got more and more involved in the internal political power struggle in Korea, trying to undermine Chinese influence and the authority of the Korean Government. When the collision finally came in 1894, precipitated in part by Korea's efforts to honour China's ritual demands, Japanese armies quickly drove the Chinese out of Korea, crossed the Yalu River, and occupied the strategic Liaotung peninsula. By February 1895, they had seized Weihaiwei on the Shantung peninsula. Although the outright annexation of Korea was neither planned nor necessary and would have risked the active opposition of Russia, Japan did expect acquisition of some new territory to enhance its imperial prestige.⁹⁵ By the terms of the Sino-Japanese peace treaty concluded at Shimonoseki in April 1895, China was to recognize that Korea was an independent State, cede the Liaotung peninsula and Taiwan to Japan, pay Japan an indemnity of 200 million taels (about 300 million yen) in seven years, open up four treaty ports, grant Japan most-favoured-nation status as well as the right to navigate the Yangtze River, and give the Japanese the right to engage in manufacturing in China. The war and the resulting peace not only gave Japan an equal status with the Western Powers in China, but established its reputation as a great power, and earned it the respect that they had coveted for so long from Europeans and Americans. It also gave Japan as a bonus the indemnity payment to

enable it to continue with its industrialization programme.

Japan comes to be accepted as a “Civilized” State:

It is important to note that as Japan strengthened itself militarily and started behaving with China and Korea, just like the Western Powers, in an imperialistic manner, it began to be recognized as a member of the family of “civilized” States. On 16 July 1894, a few days before it went into war with China, it achieved its goal of concluding with Britain a new treaty providing for the abolition of extraterritoriality in five years in return for the opening up of the country for “mixed residence”, which did not contain any provision for the appointment of foreign judges in cases involving foreigners. The acceptance of this treaty after thirty years of intensive efforts symbolized the growing status of Japan as a modern State in the eyes of the Western countries.⁹⁷

The Chino-Japanese War and International Law

The Japanese leaders were convinced of the sacred mission of the progressive civilization and, therefore, even the way of waging war itself had to be civilized. The Meiji State, in order to prove that it had become a “civilized nation” and was capable of becoming a member of the family of nations, tried to observe the “civilized” international law. The Chino-

Japanese war, which, they said, was “a war between civilization and barbarism”, appeared to them to be the first test to show their progress for becoming a member of the family of nations.

Japan formally declared war against China on 1 August 1894, and said that it would conduct the war “consistently with the law of nations”.¹⁰¹ Japan did not want to give the European powers a pretext to intervene in the war but wanted them to follow the rules of neutrality, although neither China nor Japan had so far been recognized by them as members of the family of “civilized” nations.

Besides using the declaration of war with China as a propaganda tool, to show the Western countries that it was carefully following international law rules, Japan went a step further and sent distinguished international lawyers with the Japanese army and navy as legal advisers who were expected to legally deal with cases on the frontlines during the conduct of war. Ariga Nagao, Professor of the Imperial Military Staff College, went to the battle fields with Governor-General Ohyama; and Takahashi Sakaye, Professor of the Imperial Naval Staff College, was appointed legal adviser to the Imperial Navy and he joined the flagship Matsu-shima and advised Admiral Ito who commanded the Japanese fleet. Both professors carefully kept notes and described the process and cases during the war in their

respective books in French and English which they were encouraged to publish after the war. Ariga published *La Guerre Sino- Japonaise au point de vue du Droit International* in Paris in 1896. Takahashi went to Cambridge University and prepared a book under the general guidance of the wellknown Professor John Westlake. He published his book, *Cases on International Law during Chino-Japanese War*, at Cambridge in 1899, and requested Professor Westlake to write an Introduction and Professor T. E. Holland, Professor of International Law at Oxford University, to contribute a Preface to his book. These were like testimonials by the two distinguished British international lawyers

All this praise and sychophancy of the Western civilization and countries and their representatives had the desirable effect. In his Introduction, Westlake raised the question as to how far international law, recognized between the States of Christendom, applied “between them and Mahometan or other Oriental States”. But significantly he added:

“Japan presents a rare and interesting example of the passage of a State from the Oriental to the European class. By virtue of treaties already concluded with the leading Christian states of Europe and America she will shortly be freed from the institution of consular jurisdiction, and in her recent war with China she displayed both the disposition and in the

main the ability to observe Western rules concerning war and neutrality.”¹⁰⁷

Professor Holland also certified, in his Preface, that “the war was conducted on the part of the Japanese with an anxious desire that forces should conform to the highest standards of loyalty and humanity”. To secure this object Professor Ariga had been attached to the troops on land, and Mr. Takahashi was sent to advise the fleet. “Under his guidance”, said Holland, “great pains were taken to observe in all questions of naval capture the best traditions of European Prize Courts.”¹⁰⁸

Following these certificates by two eminent jurists, other international lawyers followed suit and appropriate editions of Wheaton, Phillimore, Hall, Oppenheim, and others, all recognized Japan’s inclination and ability to follow Western international practices concerning war and neutrality.¹¹¹ A number of comments and reviews of Takahashi’s book on Chino-Japanese war also appeared in academic magazines and newspapers which were also published by Takahashi as appendages to his book once more.¹¹²

Japan was on its way to becoming a member of the “civilized” family of nations. By the Aoki-Kimberley Treaty concluded between Japan and Britain on 16 July 1894, Britain was the first power to relinquish

extraterritoriality in Japan as of 1899¹¹³ when the new Japanese legal codes became fully operational. The other powers followed suit in signing similar treaties. The US Senate approved a new treaty in February 1895; Germany agreed in April, Russia in June of the same year; and France in August 1896.

Japan Forced to Retreat

Although the Chinese had no choice but to accept after their ignominious defeat, albeit reluctantly and after prolonged negotiations, Japan's harsh demands at Shimonoseki in 1895, alarmed three Western powers, Russia, France and Germany, at the quick tempo of Japanese expansionism in China which they found to be against their own vital interests in China and they decided to intervene. Determined to preserve as much of China as possible for their own exploitation, they decided to intervene and presented their "friendly counsel" that Japan retrocede the just-obtained Liaotung peninsula to China. They collectively threatened military action if Japan did not accept their "advice". Japan had no choice but felt betrayed that their efforts to become a "civilized" equal had been for nought. The warning of some of their people of cunning and deceit of "foxes from the same hole" had proven true.¹¹⁶ They were forced to conclude that, in the end, only force mattered in international relations. Indeed, as one

Japanese historian has pointed out, in order to understand the Japanese nationalism in the twentieth century it is important to comprehend the bitterness and sense of humiliation that swept the country in the wake of the Triple intervention.¹¹⁷

When these powers started claiming ports in China in the same territory where they had prevented Japan from occupying, i.e. Weihaiwei, Port Arthur, and Kiaochow, “their blatant hypocrisy rubbed salt into old Japanese wounds.”¹¹⁹

Imperialism at that time coincided with rapid industrialization which was deemed to be essential to become a modern State and achieve great-power status. Industrial production, primarily cotton and silk textiles, but also iron and steel, grew rapidly in Japan after the Sino-Japanese war doubling between 1895 and 1900. So also, the shipbuilding industry was given impetus by naval construction, the government subsidizing shipyards to construct merchant ships to be used in the expanding opportunities of Korea and China. Japanese growing stature led to signing of the Anglo-Japanese alliance in 1902 which was a recognition of Japan’s status as a major power.

Japan Joins the Imperialist Powers

This encouraged Japan even further to behave like the other “civilized” Western States in following imperialistic policies. It tended to rely more and more on force than on law. In 1900-1901, Japan joined the Western Powers

in the international expedition to China to suppress the Boxer Uprising and participated in the subsequent conference with the Ch'ing authorities to restore order. In this anti-foreign uprising in China, Japan played the role of a protector of western interests in China,

The Japanese were prepared to take the risk of waging a war against a big and mighty European power even if it involved taking a big risk and borrowing a huge amount in London and New York to wage the war. But it did challenge and declared a war against Russia. It is important to note that the Russo-Japanese war was essentially an imperialistic war, fought between two powers over issues outside their national boundaries, at the expense of Korea and China who had no say in the matter.¹²⁶

The brilliant victory of the Land of the Rising Sun over the Muscovite giant in the 1904-1905 war enabled Japan to achieve the status of a world power. Its gains were indeed significant. At the peace conference in Portsmouth, New Hampshire, by the so-called Treaty of Portsmouth, concluded on 5 September 1905, Japan acquired Southern Sakhalin as well as Russia's leaseholds to Port Arthur and Liaotung Peninsula, which it had to return to China in the face of the Triple intervention after the Sino-Japanese war of 1894-1895. Russian railway and coal mining rights in south Manchuria and important fishing rights in certain territorial waters of Siberia

on the Pacific were also ceded to Japan. China was obliged to accept the treaty arrangements that had applied to Manchuria and consented to transferring to Japan the Russian lease on Kwantung Province – the Liaotung peninsula – now called Kwantung Leased Territory. Russia furthermore acknowledged Japan's paramount political, military and economic interests in Korea and undertook not to obstruct measures Japan might deem necessary to take there in order to protect its interests. With the last obstacle having been removed, Japan took the unilateral step in Korea to turn it into a protectorate and later, in 1910, annexed it and made it a colony to be ruled as an integral part of the Japanese empire.

Not a single outside State protested against the Japanese action in Korea or peace settlement. Japan had, by late 1905, emerged indisputably as a major power.¹²⁹ Having shown its mettle in its wars against China and a white European power, Russia, and defeated them, there was no more doubt about Japan's entry into the family of "civilized" nations.

The chief criterion or standard of "civilization", the Japanese came to understand well, was power. The connection was too apparent to escape the notice of a Japanese diplomat who said: "We show ourselves at least your equals in scientific butchery, and at once we are admitted to the council

tables as civilized men.”¹³⁰

Neither a European nor a Christian nation, Japan became the first non-European country to gain full international status and recognition as a “civilized” State by fulfilling the as yet undefined standard and conditions of “civilization”. But within a few months of the Japanese victory over Russia, Oppenheim specified three conditions for a country to be recognized as a member of the Family of Nations:

“A State to be admitted must, first, be a civilized state which is in constant intercourse with members of the Family of Nations; Such a State must expressly or tacitly consent to be bound for its future international conduct by the rules of international law; and Those States which have hitherto formed the Family of Nations must expressly or tacitly consent to the reception of the new member.”¹³²

Explicitly stated for the first time, these criteria were also reiterated by Wheaton in the sixth edition of his famous *Elements of International Law* in 1929. Stating that “the gradual extension of relations among States has enlarged the field within which international law is applicable”, Wheaton said that “the extension necessarily involves three factors”:

“The State to which international law is to be extended must have a

form of civilization which renders it able to apply the rules of that law, and it must be in communication with the States already enjoying it; It must further be prepared to accept the rules of that law as binding upon it; and The other States must agree to accept the new member of the Family of Nations.”¹³³

Japanese Exploitation of its Colonies, Taiwan and Korea

For nearly half a century Japan exploited Taiwan as an imperial power. In short, learning the art of domination and colonization as well from the Western “civilized” States,¹⁴⁰ Japan surpassed them all in suppressing its unfortunate neighbours which came under its sway.¹⁴¹ The Japanese Government and publicists sought to justify these actions on the basis of international law. Professor Onuma explained this bitter truth. “For Japan”, said Onuma, “the process of learning international law was, at the same time, the process of becoming a colonial power. Really, there is truth and irony in the statement that Japan was an honor student in learning modern Western civilization.”¹⁴²

Japan, it is important to note, had accepted European international law not because it was committed to the values and philosophy underlying this law, but because it was too weak to challenge the Western powers. But the Japanese did realize soon enough the truth about the abuse of international

law by the strong nations. Once Japan became a Great Power and found Western international law limiting its ambitions, it did not hesitate to use force to change it and violated international law with impunity.¹⁴³

Having been admitted into the “family of civilized nations”, Japan soon fell foul of it. The influence of traditional militarism proved stronger than any emerging democratic movement in Japan.

Twenty-one Demands on China

On 18 January 1915, six months after the beginning of the World War, the Japanese Government presented to China the infamous Twenty-one Demands as a draft treaty, divided into five groups, which were to be accepted by China. There is no doubt, as the Chinese President said, that Japan wanted “to take advantage of this war to get control of China.”¹⁴⁸

By the time the war ended in November 1918, Japanese armed forces controlled a large part of Siberia, the hinterland of the Sinkiang Province of China, and the German-held territories in Micronesia. Even after the withdrawal of the American troops in January 1920, Japan continued to occupy the Maritime Provinces and Northern Sakhalin. The imperialist expansion was simultaneously marked by an increase in economic power. The war had provided Japan with a virtual monopoly of foreign trade with

China, the Netherlands Indies, Australia and even India.

At the Paris Peace Conference in 1919, Japan largely succeeded in safeguarding her newly-acquired status in East Asia on the basis of secret agreements of February and March 1917 by which England, France, Italy, and Russia had promised to support Japanese claims.

Japan Forced to Roll Back

Although Japan had become a predominant power by the close of the First World War, a colossus of East Asia, the rapid expansion of the Japanese power caused a serious alarm to the Western Powers, particularly the United States, whose interests seemed to be at stake. The Japanese were despised by the Asians ruthlessly ruled by them. And its position neither won adulation nor the admiration of the Western Powers, but indeed their antagonism and strong disapprobation. Japan was forced to renounce her forward policy on the Asian mainland in the face of strong and combined opposition of the new international order formed under the leadership of the victorious powers, especially Great Britain and the United States. At the Washington Conference of 1921-1922, designed mainly to apply brakes to the Japanese policies which she had followed since the Twenty-one Demands of 1915, Japan was made to become party to several Washington treaties – the Four-Power Treaty of 13 December 1921, the Five-Power and

Nine-Power Treaties of 6 February 1922¹⁶⁷ – which had the effect of erecting a legal barrier to the expansion of Japanese imperialism. By the Four-Power treaty the Anglo-Japanese alliance was abandoned and was replaced by the Anglo-American bloc, thus devising a new balance of power in the Far East.

The Japanese felt humiliated. Japan was subdued and for the next few years Japan observed a policy of, as A.J. Toynbee said, “commercial expansion and political goodneighbourliness”.¹⁷¹ But in the field of foreign relations, Japan’s position was becoming unfavourable. The United States Restriction of Immigration Act of 1924, which was imitated by several of the British Dominions, came “as an overt political humiliation”. The decision of the British Government in 1925 to establish a first class naval base at Singapore was a further blow to Japanese aspirations. Even more serious were the rise of strong Chinese nationalism of the whole of China with the help of the Soviet Union, and the gradual consolidation of the Russian power in the Far East.¹⁷²

For those Japanese who could not satisfy their ambitions at home, Manchuria was a new frontier where they could fulfill their dreams and make a fortune. When Japanese- American relations deteriorated as a result

of the immigration problem in California, the Japanese Government adopted a policy of concentrating Japanese immigration in Manchuria and Korea. The number of Japanese increased in Manchuria from 68,000 in 1909 to 219,000 in 1930.

The central Government of China appealed to the League of Nations to recover Manchuria through pressure by the great powers. The League of Nations' Lytton Commission, which visited the scene in the spring of 1932, fully fathomed the situation inside Manchuria. Expecting the Commission's report to be unfavourable, the Japanese army tried to stir public opinion by promoting a movement to recognize Manchuria's independence. In March 1933, having been defeated by a vote of 42 to 1 in the League Assembly on the acceptance of Lytton Commission's report, Japan withdrew from the League of Nations "deliberately choosing a path of isolation".

Japan Moves Deeper into China

Emboldened by the utter failure of the League of Nations as well as the Western Powers to impede the Japanese advance, Russia's apparent indifference in the Far East, ineffectiveness of the United States' policy of "non-recognition of Manchukuo", and above all, the menacing rise of Hitler in Europe, diverting the Western Powers from their interests in East Asia, all led Japan to re-assert her position as the predominant power in Eastern Asia.

In 1934, it reiterated the Japanese “Monroe Doctrine for Eastern Asia.”

Determined as Japan was to occupy China, it used the incident at the Marco Polo Bridge on the outskirts of Peiping on 7 July 1937 as a pretext to start an all-out war against China. On 27 September 1940, Japan formally signed the Triple Alliance by which Japan undertook to recognize and respect “the leadership of Germany and Italy in the establishment of a new order in Europe” (Art. I) and both Germany and Italy, in return, promised to “recognize and respect the leadership of Japan in the establishment of a new order in Greater East Asia” (Art. II). The three powers agreed “to cooperate in their efforts on aforesaid lines” and “undertook to assist one another with all political, economic and military means if one of three Contracting Powers is attacked by a power at present not involved in the European war or in the Chinese-Japanese conflict” (Art. III)

With the outbreak of war in Europe in 1939, two of the major colonial powers in southeast Asia, *viz.* France and the Netherlands, had been overrun by the Germans and a third, Great Britain, seemed on the verge of collapse. Japan did not want to miss this “golden opportunity”. By the summer of 1940 it got the first chance to move into the northern part of Indochina. A second chance came with the outbreak of war between Germany and the Soviet Union in the summer of 1941, and it occupied southern Indochina.

Imperial Proclamation of War

By the end of November Japan believed that war was unavoidable against the Anglo- Saxon States. While the United States was still seeking Japan's withdrawal from Indochina on 6 December 1941, Japanese air and naval forces launched a big attack on Pearl Harbor in Honolulu on 8 December turning it into "blazing chaos", inflicting a tremendous loss to American life and property.¹⁹² Gone were the old days of scrupulously following international law rules concerning the declaration of war. Unlike the Sino-Japanese and Russo-Japanese wars, when the declarations of war clearly referred to those wars being conducted strictly in compliance with the rules

Since Japan still decided in April 1945 to continue the hostilities, it had to face relentless air attacks by American bombers on the home islands. Japanese cities, congested and flammable, were devastated by incendiary raids. Conventional bombing in Japan is said to have killed as many people as did the two atomic bombs which hit Hiroshima and Nagasaki on 6 and 9 August 1945. By the summer of 1945, allied pressure on Japan, from air and sea, grew so severe that it amounted to near-strangulation of the economy.

Worse still, on August 9, the Soviet Union declared war on Japan and the Red Army invaded Manchuria.

As Japan was arguing about the conditions for its surrender, the second atomic bomb, often called “the unnecessary bomb”, dropped on Nagasaki on 9 August killing or injuring approximately 80,000 to 100,000 people. On 10 August, the Emperor decided to surrender. Disarmament of the loyal armed forces and indictment of its citizens as war criminals were indeed painful to contemplate. But Japan had to bear the unbearable.

Japan Occupied

On 14 August 1945, Japan accepted the Potsdam Declaration initially agreed upon by three allied powers, the United States, the United Kingdom and China, and later joined by the USSR, defining terms for Japanese surrender. It is interesting to note that no such terms of surrender were defined in the case of Germany, although both cases are usually understood as unconditional surrender without distinction. The instrument of surrender was in the nature of a preliminary peace treaty, expected to be concluded in the near future,

It is also important to note that, in the case of Germany, it was

occupied jointly and administered directly by each of the allied powers. The administration of occupied Japan was, however, in accordance with the Potsdam Declaration, under the sole authority of the Commander-in-Chief (later, the Supreme Commander for the powers) and was exercised indirectly because in occupied Japan, the Japanese Government remained in existence though it was not really free. Thus, the occupation of Japan was not only operative on a large scale, but its whole purpose was to undermine the political, social and economic structures of the occupied territory.

The Tokyo War Crimes Tribunal

The Potsdam Declaration, in Article 10, required prosecution and punishment of Japanese war criminals responsible for conducting an illegal war of aggression and for the violation of numerous rules of war. After the end of World War II, two tribunals, unprecedented in the history of international law, were instituted at Nuremberg and Tokyo. The Tokyo trial, in which major Japanese war criminals were prosecuted, lasted for some two and a half years from May 1946 to 12 November 1948. All of the 25 Japanese prosecuted were declared guilty of committing crimes against peace, and/or conventional war crimes, or crimes against humanity, and punished for their crimes. In spite of serious criticisms of the Nuremberg and Tokyo trials as nothing more than “victor’s justice”, because they applied *ex*

post facto law by recognizing individuals as subjects of international law, introduced new categories of war crimes which had not been recognized in traditional international law and which were technically unwarranted under the formal principles of justice and due process of law, there were only muted comments in Japan.

A New “Peace Constitution” for Japan

After the defeat of Japan, the allied powers, in order to make as sure as humanly possible that Japan was never able to wage a war again, wanted to abolish, as the Potsdam Declaration said, “militarism and ultranationalism in all its forms in Japan”, disarm and demilitarize Japan with a continuing control over its capacity to wage war, and strengthen “democratic tendencies and processes in governmental, economic and social institutions” in Japan. Although they declared that they did not intend to impose on Japan a form of government not supported by the freely expressed will of the people, they “desired” that Japan should have a government based on principles of democratic self-government. After the surrender, Japan had been occupied by the victorious allied powers. But they had no intention to annex or destroy the country. The existing government was left in power to operate under, and subject to, the control of the occupant. It was, therefore, for the Japanese Government to accomplish political and economic reforms

to ensure a peaceful Japan once the military forces had withdrawn.²⁰⁵

To give Japan a new government, which the allied powers thought appropriate, a new constitution of Japan was drafted in February 1946, by the staff of the occupation authority under the direction of the US Army General and SCAP, Douglas MacArthur. Contrary to the initial attempts to portray the outcome as the result of a lengthy process of consultation between Japanese leaders and General MacArthur and his colleagues,²⁰⁶ the 1946 Constitution, which contains an elaborate bill of right in the form of Chapter II on “Rights and Duties of the People”, was essentially a foreign imposition reflecting minimal local output. It was said to have been “initially drafted within seven days in February 1946 by a handful of American officials (in the Government Section of the headquarters of the Supreme Commander for Allied Powers), who had no particularly relevant legal or political expertise, and drew very heavily upon the US Constitution.”²⁰⁷ MacArthur subsequently approved it and secretly discussed it with a few government officials before it was presented to the Diet. Extensive debates were held in the Diet but it made little change in the draft which was promulgated by the Emperor’s mandate on 3 November 1946, and it became effective on 3 May 1947. It has been rightly pointed out that the 1946 Constitution presents a classic case of foreign transplant breaking entirely

from the past.

The overwhelming opinion of all commentators is that the Japanese constitution has been a success story. It has never been amended. Even when consideration was given to a far-reaching review of the Constitution in the 1950s and 1960s, the main imported principles, including the bill of rights and judicial review, were supported by the majority of the eminent members of the relevant Commission.²⁰⁸ Nor has it been possible to revise other important provisions relating to armed forces, as we shall see below. What has become gradually institutionalized is one of the world's most stable and peaceful and democratic States with a constitution as its most widely trusted and respected national institution. Out of some 180 single-document national constitutions of the world, Japan's is one of about 20 ratified before 1950.²⁰⁹ As finally adopted by the Japanese Diet, the Preamble of the Constitution proclaimed:

“We, the Japanese people, [are] resolved that never again shall we be visited with the horrors of war through the action of the government ... [We] ... desire peace for all time and ... an honoured place in an international society striving for the preservation of peace ... free from fear and want.”

Article 9 then clearly laid down:

- “1. Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat of use of force as a means of settling international disputes.
2. In order to accomplish the aim of the preceding paragraph, land, sea and air forces, as well as other war potential, will never be maintained. The right of belligerency of the State will not be recognized.”

Echoing the language of 1928 Kellogg-Briand Pact relating to renunciation of war, and Article 2, paragraph 4, of the Charter of the United Nations, for the first time in modern history, an independent country renounced through its constitution its sovereign right to wage war and use force in the settlement of its international disputes, and even stipulated that it would never maintain armed forces as well as other war potential. Accepted of course under compulsion at that time, Japan has proved true to its words. During more than half a century, it has not used force, it has not fired a single shot against any one, and has adopted a policy of pacifism, which is itself an original and distinct contribution to the theory and practice of international relations.

While peace with the Axis powers except Germany and Japan had

been completed by 1947, peace with the latter two nations got entangled in the growing split within the allied nations. When the Japanese were getting restive about the conclusion of peace treaty, the Korean war broke out on 25 June 1950. The Peace Treaty between Japan and the allied powers was eventually concluded on 8 September 1951, at San Francisco, but only with the Western Powers. The Soviet Union and the People's Republic of China did not participate in the conclusion of this treaty. Under these circumstances, the Peace Treaty could not entail the withdrawal of the US forces from the Japanese territory. To resolve the inconsistency of continued stationing of US forces and making peace with Japan, the Treaty of Mutual Cooperation and Security between Japan and the United States was concluded which came into effect simultaneously with the Peace Treaty.

It is sometimes said that Article 9 has contributed to restricting the size of the increase of the Japanese military forces by focusing public opinion and strong movements in support of the Constitution. The Constitution of Japan has no provision for the declaration of war or on command and control of the armed forces. Japanese military expenditure has been relatively low (about one per cent) compared to its GNP, and Japan has maintained three principles on non-nuclear weapons, namely, not to have,

not to produce, and not to introduce nuclear weapons.

But despite all these limitations, there is little doubt that Japan's SDF has already become a formidable force. With an annual expenditure of some 16,465 million dollars (in 1993 alone), Japan ranks sixth in the world. The SDF has more than 237,000 personnel, 1200 tanks, 164 warships, and 1,096 war planes, all of them with sophisticated equipment considering Japan's tremendous technological development.

Summation:

Separated by a stretch of a little over 100 miles of rough water from the mainland of Asia, Japan developed in comparative seclusion but was still largely influenced by the Chinese culture and civilization throughout its history. While preserving their native quality, Japan owes a lot to the Chinese and never had any qualms about learning from outside. Japan had continuous relations with its neighbours and even with the Portuguese, Spaniards, Dutch and the English from the sixteenth century onwards. However, fearing the evil designs of Christian missionaries, they adopted a policy of almost total seclusion from the outside world for more than 200 years, except the Dutch and the Chinese who were permitted to continue their restricted trade in Nagasaki.

This seclusion policy was rudely shaken by the arrival of the American Commodore Perry in 1853 with his squadron of four "black

ships”, who wanted to have limited trade relations with the Japanese to replenish the stocks of coal and provisions for the American ships on their journey to and from the Chinese ports, and protection for the shipwrecked American sailors who might be in distress. The local Tokugawa ruler, or Shogun, had no choice but to accept the American demands. The Bakufu Government of Japan could not face the “black ships of the barbarians” when Commodore Perry reappeared with six ships in February 1854, and even against the advice of the Emperor who wanted the barbarians to be thrown out, concluded a treaty of peace, amity and commerce in March 1854. Once Japan signed this treaty, it opened its doors to foreign penetration and it had to conclude several unequal treaties with numerous European countries opening its ports for trade, providing for appointment of diplomatic agents and consuls for the exercise of extraterritorial rights in criminal and civil matters, and fixing custom tariffs at very low rates.

Aggrieved and angry, the Japanese spent the next few decades trying to get rid of these unequal treaties. The Bakufu Government, the once powerful local Japanese authority which concluded these treaties, and its head, the Shogun, lost their face and power and, after a brief civil war, the Emperor’s authority was restored and the country submitted to his rule.

The Japanese understood well that the only way to revise these

humiliating treaties was to join the family of the so-called *civilized States*, which could be done only if they *civilized* themselves and *Europeanized* or *westernized* themselves to join them at the same level. The new Meiji Government encouraged the adoption of western ways. The Japanese, always eager to learn from abroad, adopted the western life with a vengeance. They sent their missions and students to various European countries and the United States, learnt European languages, adopted European manners and clothes, framed new legal codes based on European laws and promulgated a new constitution.

Even more important and vigorously, the Japanese started learning and sought to adopt rules of European international law in the hope that they would be accepted as an equal member of the civilized international community. But while the Japanese were enthusiastically and energetically learning international law, the European powers began to maintain and assert that international law applied only amongst Christian States of Europe or States of European origin. The Japanese were not prepared to give up their efforts to achieve their goal. They continued their vigorous efforts to learn international law, established a Japanese Association of International Law (in 1897), and started their own *Journal of International Law* (in 1902) as the European countries were beginning to do.

Even more than that, they strengthened their armed forces on European lines and started following “European” policies of intervention and expansion in their relations with their neighbours in East Asia. All these aggressive policies of Japan had the desired effect on the western powers and Japan was beginning to be recognized as a “civilized” State worthy to be admitted in the European family of nations. After 1894, “unequal treaties” began to be revised, abolishing extraterritoriality in Japan.

Although Japan was forced to retreat from some parts of China by three Western Powers, Russia, France and Germany, after the so-called Triple Intervention in 1895, because Japan was beginning to tread on their toes and infringe their rights to exploit China, it was not long before Japan was back on track. In 1900-1901, it joined the Western Powers to suppress the Boxer Uprising in China and became a member of the power group to exploit China. In 1904-1905, it challenged and declared a war against a big white European power, Russia, to wipe out the Russian influence in Korea. Once it defeated Russia, there was no more doubt about Japan’s entry into the family of “civilized” nations.

Japan continues Imperialistic Policies:

As the first non-western nation to emerge as a great power, Japan was looked upon as a model and inspired anti-colonial movements in Asian

countries, as far as India. The Japanese victory also proved that the Europeans were not invincible. It gave rise to Pan-Asian feelings and a hope that Japan, as the first successful non-European nation, would help its Asian neighbours achieve their independence.

But that was not to be. Having enjoyed the fruits of power as an imperialist power, which had also helped it to become a member of the family of “civilized” States, Japan was not prepared to give up its imperialistic policies. The First World War gave it an opportunity to expand its hold over China even further. Taking cognizance of the fact that Britain, France, and other European countries were preoccupied with war, and to take benefit of the predicament of Germany, whose role in the three-power intervention after the Sino-Japanese war of 1894-1895 it had not forgotten, Japan declared war against Germany to side with the allied powers. Without much problem or fight, Japan took over Germany’s colonial territories in Asia and the Pacific. This whetted Japan’s lust even more. Six months after the beginning of the war, it presented to China its Twenty-one Demands to tighten its control over China, which the latter had no choice but to accept. Although Japan retracted from some of these demands under strong pressure from the United States, the war gave it an opportunity even to expand into Siberia as part of the joint allied intervention in the Russian Revolution.

Japan sought to keep all these areas, especially in China, at the Paris Peace Conference (in 1919) and later, under the pretext of the so-called Japanese Monroe Doctrine and its special rights and interests in China, and the need for its security. It also raised its own imperialist slogans, such as “Pan-Asia” or “Asia for the Asiatics”, to claim its “special position” in China and Korea, and a position of leadership in the Far East. Although Japan got large chunks of Chinese territory at the Paris Peace Conference, it was forced to give up some of these areas and accept a balance of naval power with the Western Powers, especially the United States and Great Britain, in the Washington Conference 1921-1922, and the treaties concluded there, much to the discomfort and annoyance of Japan.

Though Japan had emerged as the colossus of the Far East, it had caused serious alarm in the Western capitals, and it was disliked and even despised by the Asians it ruthlessly ruled. While it was recognized as a big power and a permanent member of the Council of the League of Nations, it could not persuade the European powers and the United States to include the principle of equality of States or individuals in the Covenant of the League of Nations. Over and above that, the United States passed a law prohibiting immigration of the Japanese to the United States. Japan had agreed to stop on its own emigration of Japanese to the United States, but such a law

discriminating against the Japanese was humiliating. However, the United States was not prepared to change its policy.

Japan was not satisfied with the situation. It wanted more space to exploit economically and to settle some of its growing population, as the European colonial powers had done. It sought to do this by establishing a new Chinese State of Manchukuo, completely under the control and supervision of Japan.

The Western Powers were very much against the creation of a new State in Manchuria under Japanese influence. The League of Nations appointed a commission which visited China and gave a report against Japan. In defiance of the international opinion, Japan decided to leave the League of Nations and continue its adventures in China.

After leaving the League of Nations and defying the Western Powers, Japan was prepared to confront them with its new plans and dreams of Greater East Asian Co-Prosperity Sphere under the domination of Japan and free from European colonialism. "Asia for Asians", declared Japan. In fact some Japanese had wild dreams under what is known as the Tanaka Plan of occupying not only China, but all other south-east Asian States, like Indonesia, Malaysia, Philippines, Singapore, Thailand, and even Burma and India. They even dreamt of defeating Europe and, ultimately, the United

States.

Determined to occupy the whole of China, Japan used the so-called Marco Polo Bridge incident in July 1937 to start a full-fledged war against China and later blamed the United States, Britain, France, and the Soviet Union for helping China and prolonging the war. On 27 September 1940, it formally signed the Triple Alliance with Germany and Italy recognizing each others' spheres of leadership. Convinced that the United States was the main hurdle in its plans for expansion, having already given it the "ultimatum" to withdraw from China and Indo-China, and that the US, along with Great Britain, represented the most serious threat to Japan's preservation, Japan attacked the United States at Pearl Harbor in Honolulu on 8 December 1941. Joining the Axis powers, it went to war against the United States and Great Britain, without bothering to make a formal declaration.

Simultaneously, it occupied Thailand, invaded Malaya, took over Singapore and the British and Dutch Borneos within a few days and attacked the Philippines, destroying much of American strength there. Hongkong, Bali, Lombok, Timor, Java, all fell in Japanese hands even before 1 March 1942, and Japanese forces marched towards Burma and India.

Japan helps in the collapse of the European Colonialism:

These early Japanese victories were welcomed by the Asian countries which were struggling for their independence. These developments weakened the European colonialism and helped a lot in the ultimate collapse of the Western colonialism and the emergence of Asian States as independent countries. With the conquest of the Indies by the end of 1942, the end of European and American empires seemed imminent. Although Japan overextended itself and could not maintain its winning spree against the sustained allied efforts and the tremendous power of the United States, the Japanese early and phenomenal success helped Asians to regain their confidence and independence.

Japan Defeated:

By the beginning of 1943, the Pacific war took a sharp turn. Japan suffered a lot for its foolhardiness and was the first victim of two atomic bombs in August 1945, which brought untold sufferings on Japan at a time when it was already on the verge of collapse. It could not continue the war after this devastation, and had no choice but to surrender. But after the war, China emerged as one of the five Great Powers and a founding member of the United Nations. India became independent. Indonesia, which had been occupied by Japan during the war, was reoccupied by the allied powers. But,

in the new wave of independence, and under pressure from newly independent States like India, Pakistan, Thailand, the Philippines and others, it could not be permitted to be re-colonized by the Netherlands and emerged as an independent State. Japan suffered an ignominious and terrible defeat, but helped, even if unintentionally, Asians gain their independence and become members of the “civilized” family of nations.

Japan adopts Pacifist Policy:

Having suffered a devastating defeat, Japan was a different State altogether after the war. Horrified by its miserable fate, after three million of its citizens had been killed and its economy almost totally shattered bringing near-starvation conditions, Japan realized that it was on the wrong path. Occupied by the allied forces, headed by the Supreme Commander of Allied Powers, General MacArthur, Japan was constrained to adopt a new “Peace Constitution”. Under the new constitution, adopted after a lot of discussion in the Japanese Diet but with no apparent change, Japan renounced “war as a sovereign right” of the nation and declared that in future it would never employ “the threat or use of force as means for settling international disputes.” It went further and declared in Article 9 that to achieve these aims, “land, sea and air forces, as well as other war potential, will never be maintained. The right of belligerency of the State will not be recognized.”

Japan has so far proved true to its words. Though no longer under any pressure, it has not amended its constitution even after a far-reaching review by its Commission on the Constitution, and thorough studies by its numerous constitutional lawyers. In fact it has proved to be the most trusted and respected national institution. The “Peace Constitution” has contributed to postwar Japan becoming a pacifist nation. It has never used force to protect its interests. However, Japan did set up a Self-defense Force (SDF) that the Japanese scholars, and later the government, felt was permitted under Article 9 of the Constitution. Although the Supreme Court of Japan has consistently avoided judging the constitutionality of SDF, it is generally felt by the Japanese that the maintenance of military power within the limits of self-defense is permitted, a view which has come to be endorsed and supported by the Supreme Court in the *Sunakawa* case. It is another matter that Japan’s SDF has already become a formidable force. Although Japanese military expenditure has been about one per cent of its GNP, with annual budget of more than USD 16,465 million (in 1993 alone), Japan ranks sixth in the world. This large military build up of Japan has led, according to some Japanese scholars, to contradiction between reality and constitutional requirements. But the need and demand for the revision of the Constitution to clearly permit Japanese self-defense forces has never gained much

support.

So deep-rooted is the new wave of pacifism in Japan that a strong debate has been going on amongst Japanese scholars and statesmen whether under its constitution Japan can and should participate in the United Nations' ever-expanding peace-enforcement and peace-keeping activities. Despite all the pressure from its friends and allies, like the United States, Japan has been extremely reluctant to send its Self-defense Forces abroad on UN missions. Thus, although Japan made a massive contribution of USD 13 billion to support the coalition forces in the Gulf crisis, it could not participate in the UN operations and send its SDF to the Gulf because of strong opposition in the Japanese Diet. It was only in 1992, that after a heated debate, a Law Concerning Cooperation in Peacekeeping and other Operations (Peacekeeping Law) was enacted in the Japanese Diet to permit Self-defense Forces to go abroad on limited UN missions. Thereafter, Japan sent some limited forces to participate in UN missions in Angola, Cambodia, Mozambique, El Salvador and Rwanda in 1992-1993.

Japan emerges as a Great Economic Power:

In the early 1950s, Japan had entered into a security pact with the United States. Thereafter, protected under the US umbrella, and tremendous initial help by the United States, which also opened its vast market to them,

the Japanese adopted the path of peace and concentrated on economic reconstruction of their devastated economy. It has excelled in its economic development so much that it has emerged as the second largest economy in the world. Having achieved tremendous success in peace, Japan is, and should be, now prepared to go even further and help other developing Asian and African countries, struggling to achieve economic development in a world dominated by the developed Western countries, most of whom have achieved far greater standards of development. However, the general perception so far, mostly in Japan itself, is that, despite its past history and background, having achieved tremendous economic progress, Japan is extremely “westernized”, a member of the rich men’s exclusive group, and following similar economic policies. Indeed, there is said to be hardly any difference “between the approach of Japan in international law and that of the West”.²³⁸

There is no question Japan can play a leading role in the development of a new international law of co-operation which is not individualistic and not merely a law of coordination only amongst independent sovereign States. In the utterly interdependent international society in the new small world, we need a new law of cooperation and help. Japan can play a leading role in this development. It has the resources, it has the technology, it has the

expertise, it has a new prestige, and most importantly, it has the will and inclination to help and develop a new atmosphere of co-operation. Japan, along with some other States, must get its due place in the United Nations. But it must also shed its hesitation to play its real and new role as a leader in the international community for the development of a new law of co-operation. Instead of dwelling on its past deeds it can learn from its own history and lead in helping its neighbours in their development more actively. It has been pointed out by a few Japanese scholars that “since the middle of the nineteenth century, the Japanese had concentrated on catching up with the West and paid little attention to the lives and fates of the non-western peoples in general.”²³⁹ The time has come for Japan to make a change and meet new challenges.