3

UNIVERSALITY OF INTERNATIONAL LAW: AN ASIAN PERSPECTIVE

R.P. Anand*

I. Universality of International Law a Recent Phenomenon

International law today is supposed to be universal, applicable among all the states in equal measure in their relations with each other, and is defined "as the body of rules which are legally binding on states in their intercourse with each other."[1] It is defined and described by scholars and statesmen alike as a law which makes no distinction between nations, large or small, east or west, north or south. As Oppenheim, in its latest edition, declares: "International law does not recognize any distinctions in the membership of the international community based on religious, geographical or cultural differences."[2] Therefore, while the contemporary law makes no distinction between states and all new entities, as soon as they emerge as independent states, whether members of the United Nations or not, are accepted as members of the ever-expanding international society and are bound by its rules and seek its protection, this is only a recent phenomenon not older than the United Nations itself. Before that modern international law was supposed to be merely a product of the Western European Christian states, or states of European origin, and applicable only between them. As Oppenheim points out:

> "The old Christian states of Western Europe constituted the original international community within which international law grew up gradually through custom and treaty. Whenever a new Christian state made its appearance in Europe, it was received into the existing European community of states. But, during its formative period, this international law was confined to those states. In former times European states had only very limited intercourse with states outside Europe, and

---

* Professor Emeritus of International Law, Jawaharlal Nehru University, New Delhi, India.

1 *Oppenheim's International Law*, vol. I, *Peace* (Edited by Sir Robert Jennings and Sir Arthur Watts), 9th edition (London, 1997), p. 4.

2 Oppenheim, note 1, p. 87.

even that was not always regarded as being governed by the same rules of international conduct as prevailed between European states".[3]

Gradually, as Oppenheim goes on to explain, the international community expanded by the inclusion of Christian states outside Europe, such as the United States, which became independent in 1776, and later by inclusion of non-Christian states, like Turkey, which was admitted as a member of the international community by the Peace Treaty of Paris in 1856. But "there were numerous states outside the international community" and "international law was not as such regarded as containing rules concerning relations with such states, although it was accepted that those relations should be regulated by the principles of morality".[4] As late as the First World War, we are told, "the position of such states as Persia, Siam, China, Abyssinia, and the like was to some extent anomalous". Although there was considerable international intercourse between these states and states of Western civilization - treaties had been concluded, full diplomatic relations had been established China, Japan, Persia and Siam, had even taken part in the Hague Peace Conferences--, since they belonged to "ancient but different civilizations there was a question how far relations with their governments could usefully be based upon the rules of international society".[5]

II. International Law in Historical Perspective

As we approach international law from historical perspective, especially in the context of the role of Asian and even African countries in its origin and development, there are several questions which have been raised but not satisfactorily answered. From fifteenth century onwards, the Europeans went to Asian countries for their own needs and developed not only active trade and commercial relations, but intimate political relations as well with these independent Asian communities, especially in India and the East Indies. What rules of inter-state conduct applied between these European countries and Asian states? Without some common rules of international law, Europeans could not have survived in Asian countries. And if some rules of international law and comity did apply between them and their relations, did these rules have no influence whatsoever on the emerging international law among European countries during this period?

---

3 Oppenheim, note 1, pp. 87-88.
4 Oppenheim, ibid, p. 88.
5 Oppenheim, ibid, p. 89.

It is all too well-known that after a few centuries of their relations with the Asians, the Europeans, especially England in the first instance, became the dominant power, defeated all the other powers in India, and made it a part of the British Empire in the middle of the nineteenth century. But this took, it is important to note, not a few years, a few decades or even a few generations. It took more than three centuries for England to defeat and subdue Indian rulers. But once India was under their control, England extended its empire even further in other Asian and later African countries. After British victory, other European countries started acquiring colonies in Asia. New relations developed now among European countries and Asian states, most of which had become colonies of European powers. What happened to international law which earlier applied between Asian countries and Europe, or which had emerged and was developing among the European countries?

Most of the European international lawyers talk about the development of international law during this period and later without any reference to Asian states or their role in its development of what is called modern international law. They insist that it is a product exclusively of the European Christian civilization without any reference to Asia or Africa. There is little doubt that, the present system of international law largely developed in the context of European countries' needs and demands and struggle to have trade and commercial relations with India and other Asian countries. International law clearly and surely applied in their relations in the beginning. But once British and other Europeans defeated Indian rulers and other Asian countries, they ignored their own international law principles under one pretext or another and there was no one to question this *Victor's Justice* until Europe's authority came to be challenged by extra-European countries.

III. Commercial and Industrial Revolutions in Europe

The economic growth and enrichment that resulted from the commercial expansion of Europe was so pronounced and spectacular that it is generally referred to as the Commercial Revolution. The eastern world—India, China, South-east Asia—the Americas and later Africa, were large enough to be exploited by everybody, and together. It is important to note that, although the Dutch, French and English were often at war with each other in Europe, nationalism did not enter into their relations in the East. As Toussaint points out, "the Europeans were far less busy killing one another in the Indian Ocean during the eighteenth century than they had been in the seventeenth, *and they should be seen rather as a large international association, in which business came*

before everything else."[6] Under the general overall control of the British Empire in India and protection of its strong navy in the Indian Ocean, all Europe profited and all Europeans supported it.[7]

For Britain and France in particular, the eighteenth century was an age of phenomenal rise. The main feature of the Commercial Revolution was the increased volume of trade, which increased in the case of England by 500 to 600 per cent, and even more in the case of France.[8] There is little doubt that the riches of Asian and American trade flowing to Europe enabled the great Industrial Revolution to take place in Europe. By the end of the eighteenth century, England had conquered a huge colonial empire not only in Asia, but in America as well.

The Industrial Revolution which took place first in England, gradually spread to the continent of Europe. But Britain faced no competition until 1870 and had a virtual monopoly in textiles and machine tools. British capitalists were accumulating surplus capital and were on the lookout for investment opportunities. London became the world's clearing house and financial centre.

The needs and demands of the Industrial Revolution were largely responsible for the creation of huge European colonial empires in Asia and later Africa. Several European countries had developed substantial industries. The close relationship between the new imperialism and Industrial Revolution may be seen in the growing need and desire to obtain colonies which might serve as markets for the rising volume of manufactured goods. Several Europeanized countries outside Europe, like the United States, Canada and Australia, had also developed tremendous industries and begun to compete with the European countries for new markets. They had raised tariffs to keep out each other's products. The only alternative was to provide "sheltered markets" for each industrialized country.

The Industrial Revolution also created a demand for raw materials to feed the machines. Many of this material–cotton, jute, rubber, petroleum and various metals could be obtained from Asia and Africa. In most cases, heavy capital outlays were required to secure adequate production of these

---

6 Auguste Toussaint, *History of the Indian Ocean* (Translated by June Guicharnaud) (London, 1966) p. 170. Emphasis added.

7 Ibid, p. 175.

8 See for more details R.P Anand, *Origin and Development of the Law of the Sea: History of International Law Revisited,* (The Hague, 1982), pp. 124-127.

commodities, and these were available in Europe. These factors were largely responsible for the spread of imperialism which is defined "as the government of one people by another"[9]

IV. Development of Modern International Law

International law which had started developing among the numerous European states which had emerged after the disintegration of the Holy Roman Empire and the Treaty of Westphalia in 1648, began to be consolidated only after the Industrial Revolution in Europe. Although Hugo Grotius and his contemporary scholars, like the Spanish theologians and other classical jurists, are said to have been the initiators and founders of international law, they were "largely speculative thinkers and rationalizers" of the natural law principles and had hardly any influence on the conduct of states.[10] Amidst terrible internal dissentions in Europe and bitter rivalries in Asia, Africa and America during the seventeenth and eighteenth centuries, there was little scope for the growth of international law.

After the Congress of Vienna which met in May 1814, after the downfall of Napolean, the procedure was so arranged that all important matters were decided by the triumphant powers—Austria,Great Britian, Prussia and Russia. For about fifty years the political affairs of Europe remained nearly completely in the hands of the Great Powers which was extended to France in 1818 when she was admitted to the dominant group, turning a "tetrarchy" into a "pentarchy" called the "European Concert of Great Powers", or the "European system", and acting mainly through "congresses", they decided the fate of the small countries, intervened in their affairs, defined boundaries, exercised all manners of guardianship over states weaker than themselves, formulated rules, rendered judgments in controversies, and enforced their decisions. In the name of maintaining peace in Europe, the Concert powers enforced open dictatorship over other states without giving them any right to participate.[11] They formed an exclusive club and established themselves as founder group of the modern international society and assumed authority to

---

9 See Palmer, R. R. and Colton, Joel*, A History of Modern World*, Third Edition (New York, 1965) p. 614.

10 See G. Schwarzenberger, "Historical methods of International Law: Toward a Comparative History of International Law" in William E. Butler (Ed.), *International Law in Comparative Perspective* (Leyden, 1980), p. 228.

11 See Karol Wolfke, *Great and Small Powers in International Law from 1814 to 1920* (Wroclaw, 1961), Chapter I, pp. 9-32; see also John Westlake, *Chapters on the Principles of International law,* (Cambridge, 1894), pp. 92-101.

admit new member states or re-admit old members who did not participate in the foundation of the closed group. They claimed a right "to issue, or deny, a certificate of birth to states and governments irrespective of their existence". The result was, in the words of Professor Alexandrowicz, that,

> "Asian states who for centuries had been considered members of the family of nations found themselves in an *ad hoc* created legal vacuum which reduced them from the status of international personality to the status of candidates competing for such personality."[12]

The absurdity of such a situation was recognized even by a few European writers as well.[13] But it was glossed over or ignored by the powers that be. As Antony Anghie says, "legal niceties were hardly a concern of European states driven by ambitions of imperial expansion."[14] It may be noted that there was no theory of recognition in international law before the nineteenth. *De facto* sovereignty of a state automatically meant *de jure* sovereignty. As Alexandrowicz points out,

> "no constitutive theory of recognition ever made its appearance in any of the classics of the law of nations up to the end of the 18th century. It did not exist in the works of the Spanish writers; nor did Bodin, Gentili, Grotius (and the Grotians) or even Moser and Martens ever conceive such a theory... However, the positivists of the early 19th century destroyed this co-existence and started combining their un-universal positivism with constitutivism." [15]

Henry Wheaton was one of the first prominent writers of this period to split sovereignty into internal and external sovereignty, and maintained that a state might acquire internal sovereignty but that its external sovereignty would be dependent on recognition by states of existing family of nations. Thus was introduced the "new international 'caste' system", according to which the old Christian powers of Europe formed "the nucleus of the family of nations". They admitted the extensions of this family to North and South

---

12 C. H. Alexandrowicz, "Mogul Sovereignty and the Law of Nations", *Indian Yearbook of International Affairs,* vol. 4 1955, p. 318.

13 See Hubrich as quoted in Alexandrowicz, "Doctrinal aspects of the Universality of the Law of Nations", *British Yearbook of International Law,* vol. 37, 1961, p. 514.

14 See Antony Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law", *Harvard International Law Journal*, vol. 40, 1999, p. 38.

15 C.H. Alexandrowicz, "Some problems of the History of the Law of Nations in Asia", *Indian Year Book of International Affairs,* 1963, p. 8.

America; and some of them argued that Haiti and Liberia were the first sovereign non-European countries with a Christian but non-European population. As we have mentioned earlier, Ottoman Empire was the first non-Christian candidate state. Other states east of Turkey found themselves in the same situation. This applied not only to states which survived the collapse of the Asian state system, such as Siam or Persia,

> "but also to those countries which in the 19th century disappeared from the political map of the world such as Burma, Ceylon, Marattas, the Mogul Empire and independent Kingdoms of Indonesia. Those which vanished into oblivion had to wait until the end of the second world war." [16]

Without passing judgment on the past, Alexandrowicz reasonably questions the validity of the "positivist view on the development of the family of nations and the law of nations." Because,"if the Asian states which existed prior to the 19th century were generally acknowledged as capable of concluding treaties, maintaining diplomatic relations, waging war, making peace and participating in a spectacularly expanding world trade, limitations imposed on their legal capacity by ideological change (without their participation in such change) could not produce such far reaching results as their reduction to a sort of *extraneity*—a status which implied a serious restriction of their position in international law." [17] There is little doubt, says Alexandrowicz, that "replacement by a European Club of States endowed with power of constitutive recognition of non-members of the club outside Europe, provided a new legal pressure mechanism in the hands of the great powers". Since the International Court of Justice held a treaty concluded in 1779 by a Maratha ruler with the Portuguese as valid in the *Right of Passage over Indian Territory* case,[18] Alexandrowicz goes on to say:

> "the Maratha Empire must have been in the sphere of international existence (as expressly stated by the judges) and thus the same must be said about other Asian entities in the 18th century such as Ceylon, Burma, the Mogul Empire, the States of the Deccan and Mysore, not to mention Persia, Siam or the Ottoman Empire.[19] Those which survived in the 19th

---

16 Alexandrowicz, ibid.

17 Alexandrowicz, ibid, p. 9. Emphasis in original.

18 *I.C.J. Reports, 1960, p. 6.*

19 This did not apply to China and Japan since "they did not (with a few exceptions) maintain intercourse with European powers prior to the 19th century". Alexandrowicz, ibid, p. 15.

> century could not have been reduced to the status of candidates for admission to the family of nations and for recognition. If in fact they were re-admitted or recognized (always with emphasis on the problem of capitulations as raised by the European powers) these acts of readmission or recognition were in so far meaningless that they were simply inter-temporal adjustments caused by ideological changes."

Devoid of any legal or juridical significance, these acts of recognition and readmission might "have been rather acts of political pressure under the cloak of law."[20] Analysing the relationship between law and politics in positivist international law during this period, Antony Anghie remarks:

> "State behavior was the basis of positivist jurisprudence; but it was difficult to detect any consistent and principled behavior in the flux, confusion, and self-interest of the colonial encounter. Consequently, there was a danger that law would degenerate into expediency."[21]

In fact "coercion and military superiority combined to create ostensibly legal instruments."[22]

V. Phenomenal Growth of Modern International Law

As the diplomatic and commercial relations between nations multiplied and intensified between 1814 and 1914, the period is marked by a phenomenal growth of international law. Not only freedom of the seas and other norms of maritime law, but most of the important rules of modern international law came to be formulated and developed in the second half of the nineteenth century and later according to the needs of the European business and political interests. These rules originated and developed in treaties and customs amongst European countries, or countries of European origin in North America. Thousands of treaties, many of them multipartite or "law-making", came to be concluded after the Congress of Vienna and they assumed a more businesslike and technical character. International conferences proved to be efficacious in the establishment of international cooperation and agreements.[23]

---

20 Alexandrowicz, ibid, p. 15.

21 Antony Anghie, n.14, p. 38,

22 Angie, ibid, p. 40.

23 See Nussbaum, Arthur, *A Concise History of the Law of Nations*, (New York, 1962), pp.196-203.

It is important to note, however, that while the classical jurists—Spanish theologians, Gentili, Grotius, and others, in their teachings, had laid stress on the religious and moral precepts of the so-called 'natural law' as the authority for the conduct of international relations, precepts of the so-called 'natural law' as the authority for the conduct of international relations, with the rise of nationalism in Europe and influence of Enlightenment, the adherence to natural law gradually declined. It was replaced by positivism or positivist philosophy, relying more on the practice of states and conduct of international relations as evidenced by customs and treaties, as against derivation of norms from basic metaphysical principles. This also led to publication of numerous collections of treaties concluded by a certain country or a group of countries. Several such collections had already started appearing from the late eighteenth century.[24]

One important consequence of the positivist philosophy was the development of Eurocentrism in legal and political thinking and regionalization of international Law. The classical jurists, like Gentili, Grotius, and Freitas had emphasized the universal law of the family of nations rooted in natural law doctrine and the principle of non-discrimination law. But with the new emphasis on the practice of states, several writers started arguing that international law was confined only to the European countries. Thus, in one of the most important treaty collections in the 18th century, G. F.Martens, in his *Recueil des Traites (1791)* while including several treaties between Asian rulers and the European countries, denied the existence of a universal positive law of nations which he believed was confined to European countries. Though he admitted, "that there are nations outside Europe which cannot be denied the character of civilized nations", he was reluctant to call the law applicable to European-Asian relations the law of civilized nations.[25]

---

[24] See Nussbaum, ibid, pp. 164-185; see also Ludwik Ehrlich, "The Development of International Law as a Science", *Academie de Droit International Recueil des Cours,* vol. 105, 1962-I, p.238.

[25] See quoted in Alexandrowicz, 15, p. 514. Martens called his book *A Compendium of the Law of Nations Founded on the Treaties and Cusoms of the Modern Nations of Europe (Tr. William Cobbett)* (London, 1802). He preferred to call it "Law of Nations in Europe" to "Law of Civilized Nations, which is too vague". Martens, ibid, p. 5.

VI. Family of "Civilized" States

By the end of the eighteenth century, under the current of positivism, there had developed a "provincial outlook" in Europe.[26] In the nineteenth century, these views came to be strengthened and under a new constitutive theory of recognition, all non-European nations and peoples, as we have mentioned earlier, were reduced to mere objects of international law with no legal status and no voice.[27] Several Asian states on the subcontinent of India and in Southeast Asia, having been defeated and colonized, had already been eliminated from the family of nations. But even those that survived, such as Turkey, Persia, Siam, China and Japan, came under cloud and began to be treated as outside the family of "civilized" nations.

"Civilization", undefined and as understood by the European powers, provided the legal title and determined the circle within which the law of nations applied[28]. International law was said by Wheaton, in 1866, to be "limited to the civilized and Christian people of Europe or those of European origin,"[29] It was declared to be,

> "a product of the special civilization of modern Europe... a highly artificial system of which the principles cannot be supposed to be understood or recognized by countries differently civilized."[30]

For the first time in history it came to be openly said, "states outside European civilization must formally enter into the circle of law-governed countries."[31]To be received within the area of international law which was said to coincide with the area of civilization, was "to obtain a kind of international testimonial of good conduct and respectability; and when a state hitherto accounted barbarous desires admission, the powers immediately concerned apply their own tests."[32]

---

26 Philip C. Jessup, *The Use of International Law* (Ann Arbor, 1959), p. 20.

27 See C. H. Alexandrowicz, "Some problems of the History of the Law of Nations in Asia", *Indian Yearbook of International Affairs,* vol. XII, 1963, p. 8.

28 See for an excellent analysis of the law of this period Antony Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law", *Harvard Law Review,* vol. 40*,* no. 1, 1999, pp. 22 ff

29 *Wheaton's Elements of International Law,* 5th English Edition by Coleman Phillipson (New York, 1916), P. 14.

30 William Edward Hall, *A Treatise on International Law* (Oxford, 1880), p. 34.

31 Ibid, pp.34-35.

32 T. J. Lawrence, *The Principles of International Law*, 7th Edition by Perry H. Winfield (Boston), p. 50.

The world came to be divided into three zones or spheres: 'civilized', 'uncivilized' or 'barbarous'; and 'savage'. The first zone included existing states of Europe with their colonial dependencies in so far as they were controlled and peopled by persons of European birth or descent, and states of North and South America. The civilized states were the only ones which possessed sovereignty.[33] The second zone consisted of states which were partially recognized and included states like Turkey in Europe and the old historical states of Asia which had not become European dependencies, like Persia, China, Siam and Japan. All the rest came under the last zone who were entitled to mere "human recognition".[34] The law of nations no longer applied to semi-civilized or uncivilized peoples. They were at best to be treated according to "principles of Christian morality". "It is discretion", said Oppenheim in his famous treatise in 1905, "and not international law, according to which the members of the Family of Nations deal with such states as still remain outside that family".[35] Hall, noting that there was a tendency on the part of the non-European, "semi-civilized" states, like China, to expect that European countries would behave with them "in conformity with the standard which they themselves have set up", said that treaties concluded by them created obligations of "honour" on the part of the European states, and not reasonable expectation of "reciprocal obedience".[36]

The result of non-recognition of Asian and African states was that practically any conduct toward their peoples, or aggression of their territories, could not be questioned according to the European law of nations. As John Stuart Mill, said in 1867:

> "To suppose that the same international customs, and the same rules of international morality, can obtain between one civilized nation and another and between civilized nations and barbarians is grave error, and one which no statesman can fall into....To characterize any conduct

---

33 See Anghie, n. 28, pp. 25-34.

34 James Lorimer, *The Institutes of International Law: A Treatise of the Jural Relations of Separate Political Communities,* vol. I (London, 1883), pp. 101-102.

35 L. Oppenheim, *International Law: A Treatise, vol. I, Peace,* First Edition (London, 1905), p. 34; See also Jon Westlake, *Chapters on the Principles of International Law* (Cambridge, 1894), p. 29.

36 Hall, A Treatise, 3rd Editon, pp. 43-44; quoted in Gerret W. Gong, *The Standard of Civilization in International Law (*Oxford, 1985), p.61.

> whatever towards a barbarous people as a violation of the law of nations, only shows that he who so speaks has never considered the subject."[37]

Thus, it was pointed out "the conquest of Algeria by France was not ...a violation of international law. It was an act of discipline which the bystander was entitled to exercise in the absence of police."[38] Indeed, it was reiterated that it was for their own benefit that barbarous nations "should be conquered and held in subjection" by Europeans.[39] Referring to "colonial law" between "uncivilized areas" and the "civilized nations", a modern writer points out that there was no "common or mutual law" between them:

> "There was, instead, an extremely one-sided and precedence oriented law brought over by the European powers and the USA. The worst effects these legal double standards were felt in Africa. Africa's inhabitants were seen as unfit to rule themselves and in this respect 'powerless' i.e. without recognised legal rulers, enabling Europeans to directly establish rule, nonetheless without making these areas part of the territory or its inhabitants citizens of the colonising state. Thus model mirrors the preceding epoch and the procedure applied by Europeans in America. Thus the concept of "civilized nations" led to a factual and legal division of the world in two."[40]

VII. Standard of "Civilization" in International Law

It was basically due to the superiority of the European civilization over other civilizations, it was assumed, that Europeans had international law. With the rapid progress in European economic and military power in the nineteenth century, this sense of superiority became more and more pronounced. International law, earlier characterized as the law of Christian European nations, or Christian European nations and nations of European origin in America, or public law of Europe, now came to be defined as the law of *civilized nations* with the assumption that European civilization was the only civilization worth acceptance and projection in international law. If the

---

37 See quoted in B.V.A. Roling, *International Law in an Expanded World* (Amsterdam, 1960), p. 29.

38 Lorimer, James, *The Institutes of International Law: A Treatise of the Jural Relations of Separated Communities,* (London, 1883) p. 161; See also Lorimer, Vol. II, p. 28, for defense of war against China and Japan to compel them to open their ports for European trade.

39 See Westlake, John, *Chapters on the Principles of International Law* (Cambridge, 1894), p. 139.

40 Heinhard Steiger, From the International Law of Christianity to the International Law of the World Citizen – Reflections on the Formation of the Epochs of the History of International Law, *Journal of the History of International Law,* vol. 3, 2001, p. 189.

ignorant, 'uncivilized' countries were unable to understand the intricacies of European system and law, and were not able to provide internal or municipal law to protect the Europeans in their countries according to European standard, they could not be accepted as members of the "civilized" family of nations and must sign capitulation treaties with the European states giving up their right to have jurisdiction over the Europeans. The main purpose of this policy adopted by the European countries and the United States was, of course, to provide protection to their citizens in this period of active international trade and investment in the late nineteenth century. Instead of Christianity, it came to be insisted by most European writers in the nineteenth century that in order to be accepted as a "civilized" state, the country must have the capacity to protect life, freedom and property of aliens. Considered as "an elastic but, nevertheless, objective standard for the treatment of foreign nationals", the standard of civilization demanded that foreigners receive treatment consistent "with the rule of law as understood in Western countries",[41] this meant, according to Schwarzenberger,

> "a modicum of respect for the life, liberty, dignity, and property of foreign nationals, such as may be expected in a civilized community, freedom of the judiciary from the direction of the executive, unhindered access to the courts and reasonable means of redress in the case of manifest denial, delay, or abuse of justice."[42]

This "standard of 'civilization' became an integral factor in the changing domain and rules of international law."[43] As Gong goes on to tell us, non-European countries had to learn the hard way. Because,

> "until they fulfilled the standard's requirements, these non-European counties remained outside the law's pale and protection. Until granted 'civilized' legal status, they seemed vulnerable to the power and caprice of those countries to which the material benefits of industrial 'civilization' had come first."[44]

For the European states, the local systems of justice were completely inadequate, and there was no question of submitting one of their citizens to these systems. Europeans "insisted that 'unequal treaty', 'capitulation', and 'protectorate' systems, all with extraterritorial provisions, be maintained until

---

41 See Georg Schwarzenberger, *A Manual of International Law, 6th edition* (Oxon, 1976), p. 84.
42 Schwarzenberger, ibid.
43 Gerret W. Gong, *The Standard of 'Civilization' in International Society* (Oxford, 1984), p. 5.
44 Gong, ibid, p. 6.

the non-European countries of Africa and Asia conformed to 'civilized' standards. European extraterritoriality thus became a badge of inferiority for many of the non-European counties, a sign of their 'uncivilized' legal status."[45] A number of such treaties were concluded with the Asian countries, including Turkey and Japan, although the former had interacted with the European countries for hundreds of years and had long-standing relations with them. But Turkey was admitted into the European Family of "Civilized" States only in 1856, and then too only provisionally. It was only Japan in Asia, which 'Europeanized' itself, learnt European ways, adopted European laws, strengthened itself militarily, learnt the art of domination and colonization from the western 'civilized' states, and was admitted into the family of nations in its own right as a 'civilized state' after it defeated China in 1894 and Russia in 1904.[46]

VIII. Capitulations in India and the East Indies

It is important to mention, as we have noted earlier, that there was a widely recognized custom in India and other parts of Asia, especially in the coastal areas, according to which settlements of foreign merchants were granted substantial concessions.[47] As Professor Alexandrowicz has also pointed out in his pioneering work, *An Introduction to the History of the Law of Nations in the East Indies (16th, 17th and 18th Centuries):*

> "Foreign settlements, duly admitted by the receiving Sovereign, were allowed to govern themselves by their personal laws and habits, and they constituted a sort of miniature society within the larger community whose hospitality they enjoyed."[48]

Foreign traders generally had their separate quarters and "they were under the jurisdiction of their own heads of settlements that exercise quasi-consular functions". They were allowed to live according to their own law and habits and enjoyed freedom of religion and internal autonomy in their settlements which the local authorities did not interfere unless their actions

---

45 Gong, ibid, p. 8.

46 See R.P. Anand, "Family of 'Civilized' States and Japan: A Story of Humiliation, Assimilation, Defiance and Confrontation", *Journal of the History of International Law,* vol. 5, no. 1, 2003, pp.1-75. See specially p. 34 ff,

47 See K. A. N. Sastri, "Inter-State Relations in Asia", *Indian Yearbook of International Affairs* (1953).

48 C. H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies: 16th, 17th and 18th Centuries* (Oxford, 1967), p. 98.

affected the peace and order of the state.[49] This custom was also extended to the European traders who found it possible therefore to set foot in the territories of one or another local ruler and to open new trade relations. But says Alexandrowicz, "The privileges granted by the particular ruler to European traders were in course of time converted into 'capitulations' which became ultimately derogatory to his sovereignty." But even when the Europeans converted the 'capitulations' into instruments of exploitation and managed to make their concessions as irrevocable, according to Professor Alexandrowicz, "this legal development can hardly testify to the inferiority of civilization within the countries whose hospitality the Europeans enjoyed."[50]

Surveying the state of international society and law at the turn of the twentieth century, acute observers even in Europe found the situation rather gloomy; there was increasing use of force in the determination of the fate of the peoples. No real international society had come into existence beyond Europe and Europeans acted from a position of superiority towards others. Capitulation regimes, consular jurisdiction, and brutal colonial wars were the order of the day. Advancing "civilization" oppressed and impoverished indigenous populations in Asia and later Africa. In 1885, the dark continent was divided by the 'civilized' states between themselves without the presence or participation of any African representative. Even in Europe, powerful states had set up a permanent reign of control over the continent and the smaller states enjoyed less autonomy than ever. International law was developing "in accordance with the law of the struggle for life and the survival of the fittest."[51]Some European publicists did regard the "contemporary language of civilization as pure hypocrisy that sought only the advancement of commerce", and admitted that countless crimes had been committed in the name of civilization, but thought that "it was inevitable that the weaker races should, in the end, succumb."[52]

IX. Clash of Aspirations Leads to Conflicts and Wars

As the clash of aspirations increased amongst European countries, peace came more and more to depend on the so-called balance of power and an

---

49 See Alexandrowicz, ibid; see also R. P. Anand, *Origin and Development of the Law of the Sea* (The Hague, 1983), p. 33.

50 Alexandrowicz, n. 15, p. 11.

51 See Marti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge, 2002), pp. 98-99.

52 See Koskenniemi, n. 51, pp. 106-107, quoting several European writers, like Charles Solomon, Jeze, Engelhardt and others.

uneasy equilibrium of forces. The scramble for colonies as protected overseas markets not only led to repeated clashes in Asian and African regions, but also contributed to the forging of conflicting alliance systems.

Such a situation could not last forever. Change is beyond any law and is the law of life. The intense rivalry between European states for extension of their rule and colonization in extra-European areas, led to terrible tensions and an arms race supported by military-industrial complexes in Europe. Two Hague Peace Conferences, organized under the auspices of the Czar of Russia, to call a halt to the arms race did not help much. As clash of aspirations increased among European countries, a European "civil war" started in Europe in 1914, which engulfed the whole world and was called the First World War.

With all the terrible destruction and loss of life, which left Europe in ruins, it was felt that an international organization must be established to avert war in future. At the Paris Peace Conference in 1919, US President Woodrow Wilson was in the forefront of statesmen who suggested the establishment of a League of Nations to avoid war in future. Unable to control the avariciousness and jealousies of European states and Europeanized Japan, and hampered by the absence of the United States, the League failed miserably and Europe drifted towards the Second World War in 1939, which was even more ferocious and destabilizing.

X. Independence Movements in Asia

If quarrelling and fighting Asians could not withstand the pressure of aggressive European States in the eighteenth and nineteenth centuries, Europe could not remain unaffected by these continued bickering and wars amongst the European states. Asian peoples were also not expected to be subdued when they came to know and understand Europeans and their weaknesses from close quarters. Several Asians had gone to Europe and had been educated in their universities. They realized the injustices which had been committed on Asians which were being continued. Under the leadership of European-educated dynamic leaders, there had started strong freedom movements in Asia.

It is important to note that, before the entry of the United States in war, the British colonial empire "cracked up with amazing rapidity." The Asians sometimes wondered if this outwardly proud structure "was just a house of cards with no foundations or inner strength." As Jawaharlal Nehru in his famous *Discovery of India* said:

> "There was a feeling of satisfaction at the collapse of old-established European colonial powers before the armed strength of an Asian power. The racial, Oriental Asiatic feeling was evident on the British side also. Defeat and disaster were bitter enough, but the fact that an Oriental and Asiatic power had triumphed over them added to the bitterness and humiliation. An Englishman occupying a high position said that he would have preferred it if the *Prince of Wales* and *Repulse* had been sunk by the Germans instead of by the yellow Japanese."[53]

XI. Post-World War Society: A New World

Although the Allies won the Second World War, the world that emerged from the holocaust was a new and different world. The European powers, which had dominated the world scene for nearly three hundred years, had been pushed aside and were no longer at the centre of the world stage. Out of the ruins of the world holocaust of 1939-1945, the United States and the Soviet Union emerged to dominate the international scene and seriously challenge each other. Since then the world, divided into two groups, plunged into a 'cold war' and the most dangerous armament race.

There was another significant change. With the weakening of Europe, colonialism collapsed and, as we shall see, there emerged numerous independent countries in Asia and later in Africa which for a long time had no status and no role in the formulation of international law and, as we have seen, were considered as no more than its objects. For one thing, the erstwhile "backward" and "uncivilized" China emerged as a Great Power under the patronage of the United States. Although in 1945, of the 51 members of the United Nations, only 13 were from Asia and Africa, their number was bound to and did increase in a phenomenal manner, especially after 1955. Under a strong current of self-determination, in which India played not a mean role, as we shall see, aided by the unusual conditions of the cold war, most of the Asian-African and Pacific countries acquired independence and became members of the "civilized" international society. So that it was not long before Europe formed a small minority of this group and a vast majority of the UN membership consisted of the thus far neglected and dominated countries of Asia, Africa and other parts of the world. Needless to say, the criterion of "civilized nation" as a basis for participation in the community of nations has come to be abandoned. After the eras of "European nations", "Christian nations", and "Civilized nations",

---

53 Jawaharlal Nehru, *The Discovery of India* (New York, 1946), p, 457.

as Professor Roling has acutely remarked, we have entered the "era of peace-loving nations"[54] The family of nations in the form of the United Nations has become practically universal, open to every "peace-loving" state, "able and willing" to carry out the Charter obligations under Article 4 of the UN Charter. The democratization of the international society has become almost complete.

Asian nations are determined now to stand on their own and cooperate with each other. As India's Prime Minister, Jawaharlal Nehru, said at the first Asian Relations Conference which was organized on the eve of India's independence in 1947, that "imperialism" of Europe was over and "as that domination goes, the walls that surrounded us fall down and we look at one another again and meet as old friends long parted."[55] He asserted:

> "For too long have we of Asia been petitioners in Western courts and chancelleries. The story must now belong to the past. We propose to stand on our own legs and to co-operate with all others who are prepared to co-operate with us. We do not intend to be the playthings of the others…The countries of Asia can no longer be used as pawns by others; they are bound to have their own policies in world affairs."[56]

XII. Asian States accept International Law

Despite the clear bias of numerous international law rules because it was largely a "ruler's law" during its formative years, Asian states are all in favour of accepting its tenets. In fact none of the newly independent countries rejected international law on the ground that it was European in its origin and bias. India and other newly independent countries mostly accepted the treaties concluded by the European countries on their behalf and before their independence. All they wanted and demanded was that international law, like all law, must change with the changing circumstances. For one thing, what has been called the "geography" of international law has changed. International law is "no longer the almost exclusive preserve of the peoples of European blood"[57] by whose consent, it used to be said, "it exists and for the settlement of whose differences it is applied or at least invoked."[58] As it

---

54 B.V.A. Roling, *International Law in an Expanded World* (Amsterdam, 1960), pp. 50-51

55 Jawaharlal Nehru, "Asia Finds Herself Again", Inaugural speech at Asian Relations Conference, New Delhi, March 23, 1947, Vol I, p 300

56 Nehru, ibid.p. 301.

57 R. B. Pal, *Yearbook of the International Law Commission* (1957), Vol. 1, p. 158.

58 Weslake, quoted in Pal, ibid.

must now be assumed to embrace other peoples, it clearly requires their consent no less. The creation of international law is no more "the prerogative of countries bearing the cultural heritage of the West but the common task of all members of the international community."[59] The new majority has naturally new needs and new demands and they want international law to serve their needs and heed to their demands. The alteration in the sociological structure of the international society, it is stressed, must be accompanied by an alteration in law. "International law, if it is to be effective", said Nehru, "has to be related to the realities of international life; otherwise it becomes merely an academic exercise of some professor or pandit sitting in a university."[60]

Since the Second World War, international law is changing fast because of the tremendous developments in the international society. Law always changes, as we have repeatedly said, with changes in the society. With the accession to the entirely new "Family of Nations" and the active participation of the newly independent, but ancient, states of Asia and Africa in international relations, the exclusive club of western Christian powers forming the active community of states has broken open. But despite the horizontal expansion of the international society, our new world has become one world and a very small world. The ever-accelerating means of travel and communications have obliterated the distance between the farthest lands. Moreover, economic life has become extremely complex and involves more than ever a degree of worldwide interdependence. In a sense we are for the first time living in a 'global village'. Law cannot remain immune to all these changes. It is not possible to imprison this process of change in legal traditions, which have lost the breath of life. No wonder law has been changing fast.

There is no doubt a new law is emerging which is based on European international law but is changing with the participation of worldwide community of states. In an insightful and thought-provoking recent article, Professor Onuma remarks, "International law must constantly reorganize and conceptualize itself to rectify past wrongs and to respond to the new realities of the world. Only with such constant efforts can international law become global international law which is voluntarily accepted by peoples all over the

---

59 R.B. Pal, "Future Role of the International Law Commission in the Changing World", *United Nations Review,* Vol. 9 (September 1962), p. 31.

60 Nehru, Inaugural Address at the Indian Society of International Law, *Indian Journal of International Law,* Vol. 1 (1960), p. 6.

world". He advises that only with "an intercivilizational approaches" can the people of the entire globe "talk of *our* international law not only in the geographical sense but also in the civilizational sense."[61] We wholeheartedly agree.

---

61 Yasuaki Onuma, "When was the Law of International Society Born?- An Inquiry of the History of International Law from an Intercivilizational Perspective", *Journal of the History of International Law,* vol. 2, 2000, p. 66.