Changing Dimensions of International Law:

An Asian Perspective

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Address at the

Inaugural Session of the

Xiamen Academy of International Law

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Your Excellency Judge Jiuyong Shi, Professor Cheng, Dr. Huiping, Professor Shaw, My Colleague Invitees Guest Lecturers,

Ladies and Gentlemen:

Let me take this opportunity first of all to congratulate you on the establishment of Xiamen Academy of International Law in China. This is indeed a very welcome step in the understanding and dissemination of International Law in Asia and this part of the world. For a long time we have heard that Europe and Europe alone is the place where we can learn about International Law. Indeed, International Law so far has been claimed to be a product of Europe only or countries of European blood. 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”[1] by whose consent, it used to be said, “it exists and for the settlement of whose differences it is

[1] R. B. Pal, *Yearbook of the International law Commission* (1957), Vol. 1, p. 158.

applied or at least invoked."[2] Since the world is now accepted as bigger than Europe, it is time that it is understood, studied, researched and disseminated in other parts of the world.

By establishing this Academy you have taken a big leap in this direction.

After India‘s independence, India‘s first Prime Minister and architect of India‘s Foreign Policy, Jawaharlal Nehru, during his visit to the United Nations noticed that the UN was ―dominated more or less" by certain nations of Europe and the United States with the result that the main problems discussed there were the problems of Europe and America while the other parts of the world and their concerns were generally ignored.[3] In his address to the United Nations General Assembly on November 3, 1948, he therefore said:

> ―May I say, as a representative from Asia, that we honour Europe for its culture and for the great advance in human civilization which it represents? May I say that we are equally interested in the solution of European problems; but may I also say that the world is something bigger than Europe, and you will not solve your problems by thinking that the problems of world are mainly European problems. There are vast tracts of the world, which may not in the past, for a few generations, have taken much part in world affairs. But they are awake, their people are moving and they have no intention whatever of being ignored or being passed by."

He went on tell the UN delegates:

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[2] Weslake, quoted in Pal, ibid.
[3] Jawaharlal Nehru, ―Our objectives", *Nehru"s Spæches, vol. I,*p. 257.

> ―Today I do venture to submit that Asia counts in world affairs. Tomorrow it will count much more than today."[4]

He was, of course, right, as the world is beginning to find out now. You have taken a right step by establishing this Academy and let the world know that Asian are equally interested in the study and dissemination of International law which is emerging as a common law of mankind.

We are particularly obliged to you for inviting us for the very first Inaugural session of the Xiamen Academy of International Law. I personally deem it a great honour and feel privileged to join my Chinese colleagues in trying to understand this important subject and cooperate with each other. Once the Asian states have become independent and come on their own, they can and must cooperate with each other. To again quote Jawaharlal Nehru, who most of the time spoke as a spokesman of Asia rather than India; once the domination of colonial powers was gone, he said, ―the walls that surrounded us fall down and we look at one another again and meet as old friends long parted."[5] 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

[4] Nehru, ―To the United Nations", ibid. pp. 317-18.
[5] Jawaharlal Nehru, ―Asia finds herself again", Inaugural speech at Asian Relations Conference, New Delhi, March 23, 1947, Vol I, n. 30,p 300.

> Asia can no longer be used as pawns by others; they are bound to have their own policies in world affairs."[6]

I have no doubt that the Xiamen Academy of International Law is going to play a very important role in making the world understand Asia afresh and help in the development of modern International Law which is widely accepted. As you know, attempts are also being made in some other quarters to establish an Asian Society of International Law for the same purpose. Let us cooperate with each other and coordinate our efforts.

Thank you very much indeed for all your hospitality. My wife and I are extremely grateful to you for your kindness.

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[6] Nehru, ibid.p. 301.

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Towards A New Universal International Law:

An Asian Perspective

I

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R.P. Anand

Universality of International Law a Recent Phenomenon:

There is a wide-spread assumption today that international law is equally applicable to all the states.. It is expected to make no distinction between states, east or west, north or south, rich or poor, developed or underdeveloped . It is usually defined ―as the body of rules which are legally binding on states in their intercourse with each other."[1] As the celebrated author, 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, 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:

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[1] *Oppenheim‟sInternational Law*, vol. I, *Peace (*Edited by Sir Robert Jennings and Sir Arthur Watts), 9th editon (London, 1997), p. 4.

[2] Oppenheim, note 1, p. 87.

> “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 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

[3] Oppenheim, note 1, pp. 87-88.
[4] Oppenheim, ibid, p. 88.

there was a question how far relations with their governments could usefully be based upon the rules of international society."[5]

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?

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

[5] Oppenheim, ibid, p. 89.

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. 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?

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.

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[6] Toussaint, , Auguste, *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.

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 center.

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 these material –cotton, jute, rubber, petroleum and various metals could be obtained from Asia and Africa. In most cases, heavy capitals outlays were required to secure adequate production of these 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]

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,

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[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.

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 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

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[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.*
[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.

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 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

[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 Internatonal Affairs, (1963) p. 8.*

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] Alexanrdowicz goes on to say:

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[16] Alexandrowicz, ibid.
[17] Alexandrowicz, ibid, p. 9. Emphasis in original.
[18] *I.C.J. Reports, 1960, p. 6.*

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 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 cause 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]

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[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 footnote .

[20] Alexandrowicz, ibid, p. 15.

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

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

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]

It is important to note, however, that while the classical jurists—Spanish theologians, Gentilis, 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

[22] Angie, ibid, p. 40.

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

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 collection 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]

Family of "Civilized" States:

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[24] See Nussbaum, ibid, pp. 164-185; see also Ludwik Ehrlich, ―The development of international law as ascience", *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.

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]

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[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 (Winter 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.

For the first time in history it came to be openly said that ―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]

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 member of the Family

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[31] Ibid, pp.34-35.
[32] T. J. Lawrence, *The Principles of International Law*, 7th Edition by Perry H. Winfield (Boston,), p. 50.
[33] See Anghie, n. 28, pp. 25-34.
[34] James Lorimer, *The Institutes of International Law: A Treatise of the Jural jRelations of Separate Political Communities, Vol. I* (London, 1883), pp. 101-102.

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, the great British empire builder, 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 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 that “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

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

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 the 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 terriotory or its inhabitants citizens of the colonising state. Ths 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 divison of the world in two.”[40]

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

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[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 Internaional Law of Christiantiy to the International Law of the World Citizen – Refeclections on the Formation of the Epochs of the History of International Law », *Journal of The History of International Law, Vol 3* (2001), p. 189.

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 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 of 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

[41] See Georg Schwarzenberger, *A Manual of International Law, 6th edition* (Oxon, 1976), p. 84.

> 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 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 inter-acted with the European countries for hundreds of years and had long-standing relations with them. But Turkey

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[42] Schwarzenberger, ibid.
[43] Gerret W. Gong, *The Standard of „Civilization" in International Society* (Oxford, 1984), p. 5.
[44] Gong, ibid, p. 6.
[45] Gong, ibid, p. 8.

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]

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 who exercise quasi-consular functions”.

[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), pp.

[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.

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 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

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[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.

permanent reign of control over the continent and the smaller states enjoyed less autonomy then 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]

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

Such a situation could not last for ever. 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.

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[51] See Martti Koskenniemi, *The Gentle Civilizer of Nations:The Rise and Fall of Internaional 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.

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.

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]

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

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

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”, 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:

[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

> “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]

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 must now be assumed to embrace other peoples, it clearly requires their consent no less. The creation of international law is

[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.

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 an 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

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[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.

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 that “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 world". He advises that only with “an *intercivilizational* approach" 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] Onuma, Yasuaki, “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.

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II

India and the Development of Modern International Law

India and the Development of Modern International Law

International Law in Ancient Societies and India

Although European writers, with a tremendous sense of pride, assert that modern international law is a product exculsively of the Western European Christian civilization, and that it is not more than four or five hunderd years old, there is little doubt that ancient societies like India, China, Egypt and Assyria had their own much older systems of inter-state conduct which had parallel, if not similar, rules of inter-state relations as modern internaional law. It is true, however, that these earlier systems were generally confined to their own civilizations in diffenrent geographical areas because means of travel and communications were neither so efficient nor fast. But there were occasionally inter-state trade relations, exchange of diplomats, and conclusion of agreements and treaties between countries far apart from each other. India had frequent trade relations with Western Asia, Greece and Rome since at least the first century of the Christian era. Indian states had even more frequent trade and commercial relations with the countries in the East, like Burma, Malaya, Indo-China, the Philippines and even China and Japan. Indian, Chinese and Malay ships regularly voyaged each other‘s coasts. The regularity of monsoon winds in the Indian Ocean as a reliable and pleasant source of power came to be known to Indians and Arabs from time immemorial. The north-east

monsoons, used properly by mariners, who understood the art of sailing, simplified voyages up and down the coast of Arabia, up the Persian Gulf and as far as the mouth of the Red Sea. The same monsoons enabled voyages to be made with large ships from the Indian coasts to Burma, Malaya and all the East Indies. Beyond these, other good and seasonal winds could be used to go to Indo-China, the Philippines, and China. Indian ships voyaged regularly to the Burmese coast and the Malay Peninsula and Indonesia to the East and to Persia and Socotra in the West.[1] R. Swell, the famous authority on the early history of South India, records:

> ―The Andhra period seems to have been one of considerable prosperity. There was trade, both over land and by sea with Western Asia, Greece, Rome and Egypt, as well as with China and the East. Embassies are said to be sent from India to Rome. Indian elephants were used for Syrian warfare…Roman coins have been found in profusion in the Peninsula, and especially in the South. In A.D. 68 a number of Jews, fleeing from Roman persecution, seem to have taken refuge among the friendly coast people of South India, and to have settled in Malabar."[2]

The Roman conquest of Egypt (in 30 B.C.) gave new impetus to direct maritime relations with India and led to the first Indian embassies sent to Rome. After Augustus became Emperor of Rome, several embassies from various Indian states visited Rome

[1] See O. K. Nambiar, *Our Seafaring in the Indian Ocean* (Bangalore, 1975), p. 16.
[2] Quoted in Mookerji, n. 2, p. 82.

~~fr~~equently".[3] Augustus built new and especially large ships for the Indian spice trade which he is said to have financed with the best gold and silver currency available, inaugurating a direct service between Egypt and India.[4]

There is no doubt that all of these relations were based on well known, well-recognized, and widely accepted rules of inter-state conduct.

Fabled Land of India :

Known to Europe for centuries, the fabled land of India was famous for its treasures, its products, especially textiles and silk , and even more importantly, spices. Europeans had been getting Indian products and spices through the caravan routes of the Levant. But the trade route from India to Europe became inaccessible after the establishment of Islam in the Middle East and religious wars between the Muslims and the Christians. Indian spices, especially black pepper, was in great demand in Europe and could not be brought from the Indian ports across the territories controlled by the Muslim rulers.

Pepper became the motivating factor of history and led Portugal and Spain to make intensive efforts for generations to find a sea route to India. Aromatic spices from India and the East Indies had been and were in greatest demand and yielded the largest profits to merchants and could come only from the Indian ports across the territories controlled by the Muslim rulers. The spice trade with the East was one of the great motivating factors of history. Pepper may seem insignificant today, but we are told

[3] See E. M. Warmington, *The Commerce between the Roman Empire and India* (London, 1974), pp. 35-37; Rawlinson, n. 1, p. 107.
[4] See J. Innes Miller, *The Spice Trade of the Roman Empire: 29 B.C. to A.D. 641* (Oxford, 1969), p. 14.

that ~~in~~ that age it ranked with the precious stones. Men risked the perils of the deep and fought and died for pepper.”[5] Giving the rationale for this situation, Professor G.F. Hudson explained in his learned study on *Europe and China* explained:

> “Spices which became more and more essential for European cookery could not be obtained except from India and Indonesia and most came through Persia and Egypt; this indispensable and naturally monopolistic trade came to be the chief bone of contention in the politics of the Levant and was the most powerful single factor in stimulating European expansion in the fifteenth century. The Tatar ascendancy in Persia, before the conversion of the Ilkhanate to Islam, allowed Italian traders to go direct to India and cut prices against the Egyptians, who were wont to raise them 300 per cent as middlemen between India and Europe; as a result Europeans knew where spices were produced and at what cost, so that when they were again cut off from the Indian market by a hostile Islam and by incessant wars in the Levant, they were well aware of the opportunities awaiting any power that could find a new route to the ‘Indies where the spices grow’.”[6]

It is also important to note that in the fourteenth and fifteenth centuries, Arabs were the great intermediaries of trade between Europe and India. Spice trade of the Malabar coast of India had been more or less monopolized by the Arabs and they had a number of colonies in Calicut, Cochin, Quilon and other parts on the western coast of India. From the marts of the Red Sea coast, the Venetians who had the control of the Mediterranean, carried the goods to markets in the West. Due to their skillful diplomacy,

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[5] See Panikkar, ibid.
[6] Quoted in Panikkar, ibid.

adventurous spirit and far-sighted policy, the Venetians had for a long time established a strong influence in Egypt and other Muslim areas in the Levant and had become monopolistic agents of Eastern trade in Europe.

For the two Iberian nations, Portugal and Spain, having fought endless wars with the Muslims (‗Moors' as they called them) from tenth to the thirteenth century, fight against Islam was considered as a religious duty and patriotic necessity.[7] Finding a sea route to India and taking Christendom directly to the Indian Ocean came to be adopted by the Portuguese King, Prince Henry the Navigator (1394-1460), as part of the grand strategy to turn the tide of Islam. Although religion was important, the immediate objective was, of course, the spice trade and to capture at least a part of the wealth that was pouring into the coffers of Venice as well as the Muslim treasures. This combination of greed and godliness—lust for riches and passion for God—drove the Portuguese and the Spanish relentlessly into the torrid, fever-ridden seas that lapped the coast of tropical Africa and beyond.[8] The idea of reaching India became almost an ‗obsession' for the Portuguese king, Dom Henry.

Without going into the relentless efforts of Portugal and Spain to reach India, during the course of which Columbas found America, the Portuguese reached India in 1498. After the Portuguese reached India it tried to monopolize the Indian spice trade and keep the route secret because the spice trade helped Portugal to become extremely rich in Europe. Portugal also tried to control navigation in the Indian Ocean by asserting sovereignty over the sea and trying to enforce it by its warships, equipped with cannons,

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[7] See Auguste Toussaint, n.2, p. 98.
[8] J. H. Plumb,"Introduction" to C.L. Boxer, *The Portuguese Seaborne Empire 1415-1825* (Victoria, Australia, 1969), p. xxii.

which was unheard of in the Indian Ocean. Although the Portuguese had some limited success against the Arabs, who largely controlled shipping in the Indian Ocean, they could not keep the other Europeans out.

Other European Countries Enter the Fray:

Jealous of the Portuguese monopolistic spice trade, it was not long before the secret sea-route to India became known and several other European countries organized East India Companies to pursue trade with the East Indies. It is interesting to note that it was during this early struggle between the European countires or companies for spice trade with India and the East Indies that the first book of modern internaitonal law, *Mare Liberum,* was prepared as a legal brief by a Dutch jurist, Hugo Grotius, to contest the Portuguese monopoly of Indian Ocean trade and to defend his country's right to have freedom of the seas to have trade with East Indies. It is also significant that freedom of the seas and trade was common and well-recognized inter-state law in the Indian Ocean for centuries before the Portuguese sought to enforce their fiat, and Hugo Grotius knew it and learnt from it, as he makes it clear in his famous book. Europeans, however, did not accept the Freedom of the seas doctrine propounded by Hugo Grotius, and as practiced by Asians, and continued to practice *Mare Clausum,* or closed sea, as advised by John Selden, the famous British jurist who prepared his thesis on the advice of the British Crown. It was only in the late eighteenth or early nineteenth century that freedom of the seas came to be accepted in Europe in response to the needs of the industrial revolution in Europe.

Rules of Inter-State Conduct in India :

Europeans came to India and the East Indies for trade and had East India Companies established in their countires with Charters giving them authority under their own laws to trade with Oriental rulers, sign agreements, even fight wars in protection of their interests, and make peace. All of them sought permission from local rulers to establish factories or small trading posts and fiercely competed with each other. In fact each one of them tried to have monopoly of trade in territories of the rulers with whom they signed agreements resulting in a lot of tension and ill will. All of them had their war ships and soldiers and fights amongst them, especially on the high seas, were common. Later, they used to get embroiled in local disputes as well siding with one ruler or other. It is important to remember, however, that all the Europeans and their companies lived and traded according to local laws, or rules of inter-state conduct, accepted and applicable in India and the East Indies. They sent envoys, concluded treaties with the local rulers, conducted war, and made peace, according to the widely accepted cusomary rules of Asian countries. They could not have survived without it.

Thus, when the Portuguese arrived in India they had to deal with well-established states with their own customary rules of conduct for foreign traders. Sometimes they violated the local laws and got embroiled in disputes. But they also concluded treaties with the local kings and established their factories. Similarly, the Dutch and later British arrived. The British Emperor sent diplomatic envoys to the Mughal Emperor and sought permission to trade in his territory. Since the Asian rulers encouraged foreign trade, they gave them permission to establish factories or trading posts to buy and sell goods after payment of necessary duties.

India : A Divided Subcontinent :

Although India was very rich, endowed with tremendous natural resources, and an industially advanced country in the sixteenth century, it was a vast subcontinent divided into several small and big states. All through her long history, even when India had strong and large empires ruling a large part of country, there were numerous small semi-independent chiefs and rulers who were allowed to exist and maintain their power and influence. But as soon as the Center became weak, empires disintegrated and India was divided into small states and kingdoms. It must be noted, however, that despite all the chaotic political conditons and continuous warfare, India had a well-recognized cultural unity. Moreover, Indians had developed sophisticated rules of inter-state conduct which had been clearly defined and fully explained in numerous well-respected texts dealing with law, like *Arthasastra, Manu Smriti, Narada Smriti,* and others. Even after a large part of India came to be ruled by Muslim rulers who generally came from outside, these cusomary rules were not given up. On the contrary, except for a very few invaders who attacked some parts of India to loot its wealth and left with a large booty, most of the Muslim rulers settled down in India and got absorbed into India and her culture. They married Indian women and, with the racial fusion, their dynasties became Indian dynasties They did not apply Islamic rules of inter-state conduct applicable outside India, but adopted the Indian customary rules. Muslim law or Shariat was applicable only as personal law of the Muslims. Furthermore, India was a country of hundreds of thousands of villages bound by their own village community law which did not change much by Islam.

From 1526 to 1707, India had a very large and strong Mughal Empire during which India reached new heights of prosperity. Mughals respected the instituions of

embassies, treaties and laws of war and peace. They had diplomatic and trade relations with numerous Asian countries, including Persia and Turkey. So long as the Mughal Emperor Aurangzeb ruled until 1707, the country was united and the European companies had small factories in different parts of the country, but they followed the law and behaved in a proper manner as small traders. But once Aurangzeb died, within an incredibly short period of twenty years, the country was totally disintegrated and fell into a condition of masterless disorder.

Taking benefit of the situation, the French and the English East India Companies started indulging and interfering in local disputes siding with one ruler or the other, hiring their trained troops, and grabbing afterwards. They also started exercising some authority, especially tax collection, in some territories on behalf of the local rulers or more or less impotent Mughal Emperor in Delhi. After innumerable wars between themselves and other rulers, in which they were defeated several times but always recovered, political entanglements, unscrupulous intrigues, the English East India Company not only soundly defeated the French, but in the course of a little more than 100 years, by 1818, came to occupy a large part of the country, In the meantime, they had started ruthlessly exploiting the country's resources indulging again and again in organized loot and plunder by a mercantile company and its servants. It is also important to note that although the Mughal Empire had vanished and the Mughal Emperor was powerless and only a prisoner of others, he still remained the sole source of legitimacy. All the rulers in different parts of the country, including the English East India Company, felt secure only if they received a royal decree or order, called *firman,* from the imperial power giving them authority to rule in their territory, meaning thereby that the Mughal

Emperor was still the head of a national state. In 1833, the East India Company was eliminated and the British Parliament took over the responsibility of the government in India. However, the ruthlessness of the English East India Company led to a mass revolt in the Country in 1857 which was suppressed with a very strong hand and the British Crown took direct charge of the British government in India. The British Government also took over more than 600 Princely States as part of British India, which had signed treaties with the East India Company and later the British Government, surrendering part of their sovereignty and independence and were supposed to be within British suzerainty.

It is important to mention that even during all these turbulent times rules of international law continued to apply between the independent states in India and the European companies acting on behalf of their countries. Nobody ever questioned the right of the Indian states to make war or peace, conclude treaties, send embassies, or exercise their jurisdiction within their territories. Not only Hugo Grotius, but other classical jurists of Europe, testified to this state of affairs.

India Becomes a British Colony :

With the establishment of the British rule in India, for the first time in its long history, India lost its identity and became just a part of the British Empire. India had been conquered earlier several times, but the invaders, if they did not leave immediately with their loot, were absorbed into India and they all became Indians. India had never lost its independence. It had never been enslaved. She had never been subjected to a ruling class which was, and remained, permanently alien in origin and character. The whole ideology of the British rule in India was that of a master race. India became

merely a political and economic appendage of England with all the control being excercised from outside. Not only was India exploited to the hilt but its economy was transformed to serve only the interests of her masters. From an industrialized country India was reduced to an agricultural economy producing raw materials for the British industry. The village community, which was a basis of Indian political economy, was destroyed and the British introduced landlord system depriving village community and Indian farmers of all control.

The exploitation of Indian economy largely helped Britain achieve industrial revolution. Moreover, with tremendous Indian resources, Britian extended its rule to other parts of Asia and later Africa. Under the general and overall control of India and protection of its navy in the Indian Ocean, all Europe profited and Europeans started expanding into various countries in Asia. Riches of Asian and American trade led to Industrial Revolution in Europe which, in turn, was largely responsible for the creation of huge colonial empires in Asia and Africa.

Once Europe became dominant over the crumbling and disintegrating Asian states, Europeans started feeling that they were invincible, the white race was superior, and had a *natural* right to rule over the Asian and other coloured races. They had no doubt left that they were the only « civilized » people of the world, and they must rule over the « uncivilized » and « savage » peoples living in Asia and Africa. Indeed, they started believing that they must rule over the other races and countries to « civilize » the backward peoples who were half devil and half child. This was indeed a sort of ‗sacrifice' they must make, « The White Man's burden » they must carry.

It was during this period of European domination that modern international law developed during the nineteenth century. International law was said to be applicable only among European Christian states or states of Euroean origin in America. Asian states, with whom Europeans had been having intimate trade and political relations for the last several centuries, were suddenly decalared to be outside the family of nations. In fact states outside the European Christian family of nations must be formally recognized by the European states before they could be accepted as members of the family of nations. Several Asian states on the subcontinent of India and Southeast Asia, having been defeated, had already lost their identity. But even those that survived, like Turkey, Persia, Siam, China and Japan, came to defaced and began to be treated as outside the family of « civilized » nations. « Civilization » , undefined and as understood by the Europeans, provided the legal title and determined the circle within which international law applied. Practically any conduct towards the « uncivilized » people, or aggression of their territories, was considered as valid and was accepted beyond the scope of international law. This led to what has been referred to ruler‘s law for the subjugation and colonization of Asian and African peoples.

World Wars, Establihment of International Organizations and India:

Such a situation could not last for ever. 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 Conferenes, 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. Although India was still a British colony, part of the British Empire, because of its tremendous contribution in war effort and supply of hundreds of thousands of soldiers who fought for the cause of peace, Great Britain insisted that India be invited at the Paris Peace Confereenc to sign the Peace Treaty. The purpose of Great Britain in insisting on the participation of British Dominions and India was, of course, to get more influence and votes in the Conference. Once India signed the Peace Treaty, however, India was permitted to become an original member of the League of Nations, even over the opposition of President Woodrow Wilson and several other countries. India‘s anomalous position under international law as a colony of Great Britain becoming member of the League, open only to independent or self-governing states, was too conspicuous to go unnoticed. In fact several statesmen and members of the US Congress strongly objected to India becoming a member of the League, the whole purpose of which was, they rightly said, only to provide another vote to Great Britain. Even the nationalist opinion in India was strongly against India‘s membership since it would not provide any international status to India. Although the British delegation gave an assurance at the Paris Conference that the British Government was trying rapidly to advance India into a self-governing colony, nobody trusted them.

After 1919, India began to function as a separte entity, participating in some international conferences, and signing some multilateral treaties. But all this did not satisfy the national opinion in India and they started demanding, with greater vehmence, at least a self-governing status for India. There was also a great resentment in India against the manner in which India was represented in the League and its repesentatives chosen or nominated by the Secretary of State for India in London.

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. Although India was automatically drawn into the war when Britian declared war on Germany, Indians were not in favour of joining the war effort. The Indian political leaders, while sympathetic to the cause of democracy and freedom for which the Allied powers said they were fighting, did not want to join the war without declaration of their independence. They did not feel bad when Britain lost fights and felt particularly jubilated when they were defeated by the Japanese on several fronts. They intensified the freedom movement which was strongly repressed by the British in 1942. But soon thereafter, Japan helped an Indian national leader, Subhash Chandra Bose, who had escaped from India, to form Indian National Army and in 1943, it advanced with the Japanese army to the very frontiers of India. Unrest was also spreading in the Royal Indian Navy.

Indian independence could not be withheld for too long after the war by the already weakened British Government and in the new international environment when Europe was trying to recover from a devastating war. On July 1, 1947, the British

Parliament passed Indian Independence Act agreeing to transfer power on 15 August, 1947. But as a parting gift, relying on internal division in the Indian society, Britain divided British India into two independent states, India and Pakistan. This led to uprooting of millions of people on both sides of the border, creating almost insurmountable refugee problem in the new states and creating extreme tension between them.

But even more difficult issue, which could have led to utter chaos in the country, arose when the Indian Independence Act declared that, with the lapse of the British suzerainty over some 600 and odd Princely states, covering almost two-fifth of the Indian territory, they had become independent and they were not part of the newly carved states. Although the Interim Govrnment of India immediately declared and let the international community and the United Nations know that they would not recognize the independence of any Princely state in India, the Princes and former rulers were not so amenable. The Princely states had the option, it was made clear, either to join India or Pakistan. The almost intractable problem was solved by the heroic efforts of India's new Home Minister, Sardar Vallabh bhai Patel, helped by his Secretary, and almost all the states, with a few exceptions, decided to accede to the Indian Union by 1949. But this did not end the problem of Hyderabad, the largest state, and Kashmir. India had to use force to make Hyderablad realize that it could not declare independence, and accept accession with the Indian Union. In the case of Kashmir, although the Ruler accepted accession with India, it was subjected to aggression by tribesmen from Pakistan with the help of the Pakistan army. India could have repulsed aggression without much difficulty, when the Prime Minister of Independent India, Jawaharlal Nehru, on the advice of the British

Governor-General, Lord Mountbatten, agreed to submit the issue of Pakistan aggression to the United Nations. There it got stuck and, even after three wars with Pakistan, it has still not been solved.

On the basis of its membership of the League of Nations,India became a founding member of the United Nations, even though it was still a British colony. It was invited to participate in the San Francisco Conference in 1945 for drafting of the UN Charter. Although British India sent an Indian delegation, selected by the British Goverment, and it did participate in San Francisco, the role of the Indian delegation, as that of other smaller countries, was insignificant. Moreover, the Indian national opinion was vehmently against the Indian delegation since it had been selected by the British Indian Government.

India in the United Nations :

But once it became independent, India has been a great supporter of the United Nations. Although it was a new India which emerged after independence, India was accepted as the original member of the United Nations. It was only Pakistan which was deemed a new state and had to apply for membership. India always believed in universal membership of the United Nations and helped overcome the veto of the Big Powers on the membership issue of the newly- independent countries. Prime Minister Nehru persuaded the Soviet leaders, on their trip to India in 1955, to refrain from exercising veto for admission of new members and that broke the ice and numerous newly-independent states from Asia and Africa were admitted in the United Nations. As a parting gift to their host, recognizing ―India's importance and of Nehru's role in the world", the Soviet leaders agreed to withdraw the Soviet veto and permit the entry of all

except Mongolia and Japan.[9] Under a new current of self-detmination, in which India played a fairly active role, most of the Asian-African countries acquired independence and became members of the « civilized » family of nations.

Most of Asia and later Africa had lost their indepdence once India was defeated, occupied and colonized in the nineteenth century. As India emerged as an independent state, it gave impetus and momentum to the collapse of colonialism and re-emergence of Asia and Africa. . As Michael Brecher said, ―with the loss of its imperial bastion [India], England could no longer retain its paramount influence in the Arab world" of the Middle East.[10] India, under the dynamic and progressive leadership of Jawaharlal Nehru and other enlightened leaders, like Mahatma Gandhi, Sardar Vallahbhai Patel, Maulana Abul Kalam Azad and others, played an important role in the process. But it is important to mention here specifically about the role Jawaharlal Nehru, as the first Prime Minister of Independent India, played in the formulation of India‗s policy in international relations and law. Although he was not an international lawyer, as a keen observer and practitioner of international affairs, as the Foreign Minister of India and chief spokesman of the newly-independent Asian countries, he influenced the development of international law in no uncertain degree. There is no doubt at all about his influence in the formulation of India‗s foreign policy. As Michael Breacher said :

> « In no other state does one man dominate foreign policy as does Nehru in India. Indeed so overwhelming is his influence that India‗s policy has come to mean in the minds of people everywhere the personal policy of Pandit Nehru. And

[9] Gopal, n. 39, p. 254

[10] See Michael Brecher, *Nehru—a Political Biography* (London, 1959), p. 592.

justifiably so, for Nehru is the philosopher, the architact, the engineer and voice of his country‘s policy towards the outside world. »[11]

Nehru was ―the most articulate spokesman for a deep-seated urge to reassert Asia‘s rightful place in the world community."[12] Even before India became formally independent in March 1947, Jawaharlal Nehru called the Asian Relations Conference to challenge European imperialism and to put pressure on the international community to accept Indonesia‘s independence which was sought to be re-occupied by Holland after the Second World War. He emphasized 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."[13] 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."[14]

He further stressed that India and Asia must help others to get the political freedom they deserve:

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[11] Nehru, ibid, p. 564.
[12] Ibid, p. 593,
[13] Jawaharlal Nehru, ―Asia finds herself again", Inaugural speech at Asian Relations Conference, New Delhi, March 23, 1947, Vol I, p 300
[14] Nehru, ibid.p. 301.

> “We of Asia have a special responsibility to the people of Africa. We must help them to their rightful place in human family. The freedom that we envisage is not to be confined to this nation or that or to a particular people, but must spread out over the whole human race.”[15]

The Dutch were reluctant to relinquish their control over Indonesia and India felt a special involvement in the Indonesian struggle. The Interim Indian Government, under the leadership of Nehru in September 1946, withdrew Indian troops from Indonesia where, as part of the Allied forces of occupation, they had clashed with the nationalist forces. Seeing that no solution to the Indonesian problem was imminent, two years later, Nehru organized another emergency Conference of Asian States in Delhi to bring pressure to bear upon the Dutch and the United Nations and champion the independence of Indonesia. which was sought to be re-occupied and re-colonized. Nehru called it,

> “A challenge to a newly awakened Asia which has so long suffered under various forms of colonialism. It is also a challenge to the spirit of man and to all the progressive forces of a divided and distracted world.”[16]

He warned the international community that “Asia, too long submissive and dependent and a plaything of other countries, will no longer brook any interference with her freedom.”[17]

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[15] Ibid., p. 303.

[16] Nehru, “Crisis in Indonesia”, Presidential speech delivered in New Delhi inaugurating the 18-nation conference on Indonesia, January 20, 1949, ibid. p. 324.

In fact acting as a representative of the newly-independent Asian countries, he was determined to speed up the end of colonialism and left no one in doubt that Asia was wide awake and could no longer be taken for granted. End of colonialism was his goal because he and India deemed colonialism as a permanent form of aggression under international law, which could no longer be tolerated. Law must change with the changing circumstances and could not remain static. But although India considered colonialism not merely as illegal in an age of freedom under the United Nations Charter, but immoral, Nehru was very much against the use of force for the achievement of freedom for the colonized countries unless there was absolutely no other choice. Under the mounting international pressure, Dutch withdrew and Indonesia joined the family of inependent nations in 1949, and also became a member of the United Nations in 1950.[18] India, along with 41 other countries, later moved a Declaration on the Granting of Independence to Colonial Countries and Peoples which was unanimously adopted by the General Assembly on December 14, 1960,[19]

Liberation of Goa :

Within its own territory, India had small colonial enclaves of France and Portugal. While France realized the changed international situation, and was persuaded to agree to hand over Pondicherry and its other small possessions to India in 1954, Portugal refused to accept such advice. After waiting for more than fourteen years, India had no choice but to use very limited force against Portugal to liberate Goa in 1961. While most Members

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[17] Nehru, ibid. p 325. in *Jawaharlal Nehru"s Spæches*, vol. One, (Delhi, 1949),p 300.
[18] See H. S. Josh, ―India, decolonization, and the United Nations", in S. C. Parasher, *United Nations and India* (New Delhi, 1985),p. 279.; See for more details about Dutch attempt to re-occupy Indonesia after the war, Karunakaran, n.326, pp. 219-233.
[19] See *UN Official Records of the Genral Assembly , 15 th Session, 1960, Resolution No. 1514 (XV)*

of the United Nations, especially the newly-independent states, supported India's action, some of the Western countries strongly criticized it as an aggression under the UN Charter and a violation of international law They contended that the merits of the dispute over Goa were not the issue, but the issue was the use of force forbidden by the Charter. As Stevenson of the United States, discounting the problem of colonialism altogether, said:

> What is at stake today is not colonialism; it is a bold violation of one of the most basic principles in the United Nations Charter." [20]

He went on to give the grim warning:

> "Tonight we are witnessing the first act in a drama which could end with the death of the organization. The League of Nations died, I remind you, when its Members no longer resisted the use of aggressive force… we have witnessed tonight an effort to rewrite the Charter, to sanction the use of force when it suits one's own purposes."[21]

Apart from the fact that such a warning did not sound very convincing in a world where countries, especially the big powers, give little heed to the principles of the Charter when their own interests are involved, the newly-independent states were more inclined to agree with Soviet Ambassador Zorin, who said:

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[20] *Security Council Official Records, 16th year* 987th meeting, 18 December 1961,para 75.
[21] Ibid. 988th meeting, paras 130-31.

"If the United Nations does not defend the colonial countries and peoples, but tries to defend the colonial system and the most reactionary representative of that system, then this indeed may mean the collapse of the United Nations."[22]

India refused to accept the Western contention that the use of force in Goa by India was an "aggression" under the Charter and claimed that it had acted only in self-defense against the long-standing 'aggression' of Portugal against India and its people. As India's ambassador, C. S. Jha, trying to drive home the real issue, said:

"It must be realized that this is a colonial question. It is a question of getting rid of the last vestige of colonialism in India. That is a matter of faith with us. Whatever anyone else may think… that is our basic faith which we cannot afford to give up at any cost".[23]

The newly independent Asian-African states, comprising a vast majority of the new international community, have made it clear beyond doubt that whatever the legal validity of colonialism under traditional European international law, it can no longer be accepted as valid. At the first Asian-African Conference at Bandung in 1953 they declared that "colonialism in all its manifestations is an evil which should speedily be brought to an end".[24] In 1960 the General Assembly of the United Nations declared, without a dissenting vote, that "all peoples have an inalienable right to complete

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[22] [22] Ibid. para 140. But see Quincy Wright, "The Goa Incident", *American Journal of International Law,* Vol. 56 (1962), p. 617.
[23] Ibid, 987th Meeting, 18 December 1961, para 40.
[24] *Selected Documents of the Bandung Conference (*Institute of Public Relations) (New York, 1955), p. 34.

freedom" and solemnly proclaimed –the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations." [25] In 1963, the Charter of Organization of African Unity declared as one of the objectives of the Organization the eradication of –all forms of colonialism from Africa" and the member states solemnly declared their –absolute dedication to total emancipation of the African territories which are still dependent".{Art. 3(5)} Asian and African states believe that even the use of force, if other means fail, for the elimination of colonialism is an act of –self-defense" and, being in accordance with the declared objectives of the United Nations, is not prohibited under the UN Charter.[26] There is, or should be, no doubt that old European law has come to be modified. To defend colonialism in the age of freedom is, to say the least, harping on the past European law which was always unreasonable and challengeable, and now has altogether lost its validity. International law is no longer the exclusive preserve of the Euroean countries or countries of European origin. It must change with the changing and changed times. India has always supported international law, but it could not accept « rulers' law » which accepted colonialism and racialism as valid.

Racialism Decried:

If new India and Nehru, as its representative, could not tolerate colonialism any more, they abhorred racialism even more which had been the basis of much of modern

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[25] Declaration on granting of Independence to Colonial Countries and Peoples, Res. 1514 (XV) 14 December 1960. *United Nations Review* (January 1961),.p.6.
[26] [26] See report of the Special Committee on principles of International Law Concerning Friendly Relations ad Cooperation among States, *General Assembly Official Records, 23rd Session* (New York, 1968), pp. 37-8,53,63. The Friendly Relations Declaration was later adopted by the General Assembly by consensus on 24 October, 1970. For a doctrinal study of the Declaration see V.S. Mani, *Basic Principles of International Law: A Study of the United Nations Debates on the Principles of International Law concerning Friendly Relations and Cooperation among States* (New Delhi, 1993).

international law during the nineteenth and the first half of the twentieth centuries. European civilization not only provided legal title to the position of dominating power, but also determined the circle within which the law of nations applied because it did not apply to uncivilized and semi-civilized nations of Asia and Africa. Unfortunately, racialism continued even after the independence of numerous Asian and African states in the worldwide community of states in the form of *apartheid* in a few countries like South Africa and Rhodesia. Nehru condemned this practice in unmistakable terms, especially the treatment of Indians and black people as second-class citizens in South Africa. He said:

> ―It is a matter which concerns us all. It is not merely a question of Indians or South Africans, but it is a matter of vital significance to the world. If that is to continue in the world, then there is bound to be conflict and conflict on a big scale, because it is a continuous challenge to the self-respect of a vast number of people in the world and they will not put up with it. ” [27]

India accepted and Followed International Law Rules:

Despite the clear bias of numerous international law rules because it was largely a ―ruler‘s law” during its formative years, India was 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,

[27] Nehru, ―Our Objectives”, in Nehru, Vol I, n.38, p. 265.

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”[28] by whose consent, it used to be said, “it exists and for the settlement of whose differences it is applied or at least invoked.”[29] As it 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.”[30] 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.[31] “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 an university.” Referring to the phenomenal developments in political, economic, scientific and technological fields, Nehru felt:

> “It may be said that international organization and international law have not kept pace with this advance which is posing many problems before us. We have to catch up before the gap widens, and there is always a possibility of cracking up,

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[28] R. B. Pal, *Yearbook of the International law Commission* (1957), Vol. 1, p. 158.
[29] Weslake, quoted in Pal, ibid.
[30] R.B. Pal, “Future Role of the International Law Commission in the Changing World”, *United Nations Review* Vol. 9 (September 1962), p. 31.
[31] See Anand, n. 15, pp. 45 ff.

> of disaster. This aspect of the matter is of vital significance in that the effectiveness of international law is of concern to every single individual."[32]

The Constitution of India, in Part IV relating to the Directive Principles of State Policy, which may be considered –as a commandment to the Union of India",[33] provides in Article 51:

> –The State shall endeavour to---
>
> (a) promote international peace and security;
>
> (b) maintain just and honourable relations between nations;
>
> (c) foster respect for international law and treaty obligations in the dealings of organized peoples with one another; and
>
> (d) encourage settlement of international disputes by arbitration."

Principles of Peaceful Co-existence or *Panch Sheel:*

India not only emphasized the importance of peaceful settlement of international disputes, but formulated along with China in a treaty on Tibet signed in 1954, five principles of peaceful co-existence or *Panch Sheel,* as they were called. Based on Article 2 of the United Nations Charter, these –wholesome principles", in Nehru‘s words, as laid down in the bilateral treaty provided:

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

[33] P. Chandrasekhara Rao, *The Indian Constitution and International law* (New Delhi, 1993), p.5.

(i) Mutual respect for each other‘s territorial integrity and sovereignty;

(ii) Mutual non-aggression;

(iii) Mutual non-interference in each other‘s internal affairs;

(iv) Equality and mutual benefit; and

(v) Peaceful coexistence.

If these principles were followed amongst states, he believed, ―a great deal of the trouble of the present-day world would disappear."[34] If you want peace in the world, said Nehru,

> ―It cannot be done through threats. Once you recognize…that war is no solution, and that the two major protagonists are too powerful to be dismissed one by the other, then you have to coexist, you have to understand, you have to be restrained and you have to deal with each other. If you reject coexistence, the alternative is war and mutual destruction."[35]

In Support of the United Nations:

India had tremendous faith, at least in the early years of its independence, in the United Nations. As its sposkeman, Nehru, said it was ―a great and powerful organization and it has a Charter that lays down its ideals and objectives in language so impressive that it can hardly be bettered." He emphasized that--

> « We have always been a staunch supporter of the United Nations. As a member of that august body, India has undertaken its full measure of responsibility in all

[34] Nehru, ―Agreement on Tibet", *Nehru"s Spæches*, Vol. III, pp. 262-63.
[35] Nehru, ―The South-east Asia Treaty Organization", Ibid. p.273.

> aspects of UN activities. The UN is the one hope of the world for bringing peace and freedom to humanity.”[36]

The world organization had been founded, he believed, –for the great nations as well as the small.”[37] It might not be –a perfect organization but …it was a step in the right direction, because …its objectives were right.” It might have made mistakes, and it was distressing to see that it moved away from its ideals, but that could not prove –the need for such an organization”. He felt that,

> –if the UNO ceased to function today, it would be a disaster for the world. For the world cannot afford to do without some such organization.”[38]

It could not be denied that the UN was –dominated more or less” by certain nations of Europe and the United States with the result that the main problems discussed there were the problems of Europe and America while the other parts of the world and their concerns were generally ignored.[39] In his address to the United Nations General Assembly on November 3, 1948, Nehru said:

> –May I say, as a representative from Asia, that we honour Europe for its culture and for the great advance in human civilization which it represents? May I say that we are equally interested in the solution of European problems; but may I also say that the world is something bigger than Europe, and you will not solve your problems by thinking that the problems of world are mainly European problems. There are vast tracts of the world, which may not in the past, for a few

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[36] Nehru, –United Nations in India”, *World Focus* (New Delhi, Oct.-Dec. 1997), p. 59.
[37] Nehru, –Peace or War”, *Nehru‟s Spæches*, Vol. II, p.169.
[38] Nehru, –We will not comromise”, ibid. p. 199.
[39] Nehru, –Our objectives”, *Nehru‟s Spæches, vol. I,*p. 257.

generations, have taken much part in world affairs. But they are awake, their people are moving and they have no intention whatever of being ignored or being passed by."

He went on tell the UN delegates:

"Today I do venture to submit that Asia counts in world affairs. Tomorrow it will count much more than today."[40]

India Supports Communist China's Recognition

and Representation in the United Nations:

India was the foremost champion of the recognition of the Communist Chinese Government and its representation in the United Nations. The emergence of a united and forceful China free from Western domination was a matter of satisfaction and pleasure for India. It was the second non-Communist state to recognize the government of Mao Tse-Tung. [41] Prime Minister Nehru was the most vociferous critic of the United States' policy of non-recognition policy and urged the West time and again to accept the 'facts of political life' in East Asia.[42] He helped China, supported by Chou En-lai's charm and skilful diplomacy, to emerge as an important and respected member of the Asian-African group at Bandung.[43]

India acts as a bridge between the power blocs in the United Nations:

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[40] Nehru, "To the United Nations", ibid. pp. 317-18.
[41] Burma was the first. See Brecher, n.2 p.588
[42] Brecher, ibid.
[43] See also Brecher, ibid., p.588.

Although India was totally dissatisfied with the UN role in Kashmir dispute, it did not run away from the world body. On the contrary, it played a very active and positive role in the United Nations. Non-aligned to any of the power blocs, and claiming to be on good terms with all of them, it acted as a mediator and helped reach agreements in several disputes, such as Korea, Suez crisis, Congo and Rhodesia. Even more important, for the first time in history, independent India sent its armed forces out of the country to various trouble spots not to fight any body or conquer other states,[44] but as messengers of peace, to restore peace and help the United Nations and the international community in the establishment of peace and security

India has been a great supporter of the United Nations and had tremendous faith in it, especially in the early years of its independence. It agreed to refer its Kashmir dispute to the United Nations Security Council. Despite its utter disappointment and disillusionment with the world body, because of the partisan and anti-India attitude of some of the Western countries, it never thought of running away from the world body. In fact India tried to play a very active, positive, and helpful role in the United Nations.

„Group of 77" in the United Nations:

India has also been playing a very active role as a member of the « Group of 77 » in the United Nations, and outside, in the development, modification and codification of international law. Although the earlier enthusiasm for changing international law through the UN General Assembly is no longer evident, because it has come to be realized that it is not and cannot be « world legislature », it is still the only body where smaller and weaker states of the third world can have any say and influence. It is still used by newly

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[44] See how British sent Indian armed forces –to conquer and suppress other peoples", Nehru, *Discovery of India,* n. 17, p. 448.

independent states for collective legitimization of their claims, actions and policies. So, whether it is denunciation of colonialism or racialism, criticism of unwarranted use of force against the samller and weaker states, demands for a new international economic order, calls for changes and development of oudated and outmoded rules of traditional international law, or expressions of needs for new, universal, equitable and just law for outer space, deep sea , or environmental control, intitiatives are still taken by third world countries in the General Assembly where they enjoy « legal equality » with the old and still powerful countries and, of course, numerical superiority. They are well aware that the resolutions of the General Assembly are merely recommendatory, form only what has been called soft law, and are more often than not ignored and disregarded. But this is the only forum where they can ask the strong and powerful countries to explain their conduct and the latter must respond. This is the only forum where they ask for the redressal of the old wrongs. This has been the only forum through which they have been able to bring about whatever changes have been made in international law. A United Nations in which the small countries dominate was never conceived by its founders. But this is a body in which the smaller countries can seek and get attention. And they do not want to be ignored and passed by again.

III

Family of Civilized States & Japan

III

Family of Civilized States & Japan

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.[1] 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.[2]

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

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[1] *See* Gerrit W. Gong, *The Standard of „Civilization" in International Society* (Oxford, 1984), pp. 130 *et seq*.; see how the Portuguese went to China but could not settle there and were thrown out in G. B. Sansom, *The Western World and Japan* (New York, 1951), pp. 99-105.

[2] Gong, ibid., pp. 136 *et seq*.; *see also* Daniel R. Headrick, *The Tools of Empire: Technology and European Imperialism in the Nineteenth Century* (Oxford, 1981), pp. 43 *et seq*.

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.[3] 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.[4] For centuries they looked up to China for new ideas in religion and philosophy and revered Chinese classics.[5] 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."[6] 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

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[3] *See* Sansom, note 1, p. 168. Twice, in 1274 and 1281, the Mongol Emperor tried to invade Japan but failed for want of naval competence.
[4] Sansom, at p. 106.
[5] Ibid., pp. 106-107.
[6] Ibid., p. 169.

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.[7] 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.[8] 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

[7] *See* Sansom, note 1, pp. 106, 171.
[8] *See* Hidemi Suganami, ―Japan‘s entry into international society", in Hedley Bull and Adam Watson, *The Expansion of International Society* (Oxford, 1984); p. 186.

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.[9] 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.[10]

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.[11] 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.[12]

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

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[9] *See* F. C. Jones, *Extraterritoriality in Japan and the Diplomatic Relations resulting in its Abolition 1853-1899* (New York, 1970), p. 6; Sansom, note 1, pp. 171-172.
[10] *See* Sansom, note 1, p. 171.
[11] *See* Suganami, note 8, p. 186.
[12] *See* Jones, note 9, pp. 6-7.

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.[13]

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.[14]

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

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[13] *See* Suganami, note 8, pp. 187-189.

[14] *See* W. G. Beasley, ―The foreign threat and the opening of the ports", Chapter 4 in Marius B. Jansen (ed.), *The Cambridge History of Japan*, vol. 5, *The Nineteenth Century*, (Cambridge, 1989), pp. 267-268.

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.[15]

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.”[16] 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,

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[15] *See* Jones, note 9, pp. 8-9.
[16] *See* Beasley, note 14, pp. 269-270.

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.[17] 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.[18] 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”.[19]

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

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[17] *See* Jones, note 9, pp. 10-11.
[18] *See* Beasley, note 14, p. 270.
[19] Quoted in ibid., p. 270.

a most-favoured-nation clause.[20]

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.[21]

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".[22] 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,

[20] *See* Jones, note 9, pp. 12-13.
[21] Ibid., p. 14.
[22] *See* ibid., p. 283.

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.[23]

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

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[23] *See* for a detailed and interesting account of Townsend Harris negotiations with the Japanese, Sansom, note 1, pp. 283-292; Gong, note 1, pp. 168-169; Jones, note 9, pp. 15-19.

with Japan.[24] 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.”[25]

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.[26]

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

[24] *See* Gong, note 1, pp. 169; Sansom, note 1, p. 300-301.
[25] *See* Gong, note 1, p. 169.
[26] *See* Jones, note 9, p. 21; Sansom, note 1, p. 292.

residence in Yedo and several ports were opened to foreign trade and residence.[27]

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.[28] 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.[29] 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.[30]

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

[27] Sansom, note 1, p. 295.
[28] *See* ibid., p. 297.
[29] *See* ibid., pp. 298-299.
[30] *See* Jones, note 9, pp. 23-24.

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.[31]

[31] Sansom, note 1, p. 307

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".[1] 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

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[1] Jones, note 9,., p. 47. 16

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.[2]

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

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[2] *See* Sansom, note 1, pp. 378-385.

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.[3] 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.[4]

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.[5] 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,[6] the Meiji Government preferred and adopted the emerging German

[3] *See* ibid., pp. 470-472.
[4] *See* Gong, note 1, pp. 186-187.
[5] *See* Gong, note 1, pp. 14-35.
[6] The French legal system was the one which first of all came to the attention of the Japanese when a Tokugawa official traveled to France in 1867 and praised it in his writings. They greeted the French law with enthusiasm and, in 1869, the Meiji Government ordered the translation of all five French law codes, hired an eminent French

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.[7]

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:

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lawyer to adapt these laws in Japan and to teach Japanese lawyers, but later it was abandoned. *See* Hiarakawa Sukehiro, Japan‘s turn to the West", in Maurice B. Jansen, *The Cambridge History of Japan*, vol. 5, *The Nineteenth Century* (Cambridge, 1989), pp. 473-75.

[7] *See* A.J.G.M. Sanders, ―The reception of Western law in Japan", *The Comparative and International Law Journal of Southern Africa*, vol. 28, no. 2 (March 1995), pp. 281-283.

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,[8] 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."[9]

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

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[8] He had even been unsuccessfully invited by the Government of Japan to become its legal advisor. *See*Susumu Yamauchi, ―Civilization and International Law in Japan during the Meiji Era (1868-1912), *Hitotsubashi Journal of Law and Politics*, vol. 24 (1996), p. 3.
[9] Thomas Erskine Holland, *Lectures on International Law* (London, 1933), p. 88. Also quoted in Yamauchi, note 39, pp. 4-5.

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.[10]

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

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[10] *See* Yamauchi, note 39, p. 2.

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.”[11]

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.

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[11] Quoted in Gong, note 1, p. 190.

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.[12] 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.[13] 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,

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[12] The Korean peninsula was regarded by the Japanese “as a dagger pointed at Japan‘s heart, a source of constant irritation and menace to Japan‘s security”, Hidemichi Akagi, “Japans‘s Foreign Relations, 1542-1936”, quoted in M. A. Aziz, *Japan's Colonialism and Indonesia* (The Hague, 1955), p. 5.

[13] *See* Akira Iriye, “Japan‘s drive to great-power status”, in *The Cambridge History of Japan*, vol. 5, *Nineteenth Century* (Cambridge, 1989), chapter 12, pp. 745-746.

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.[14] 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.[15]

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,

[14] *See* Mark R. Peattie, ―The Japanese Colonial Empire, 1895-1945" in Peter Duus, *The Cambridge History of Japan*, vol. 6, *The Twentieth Century* (Cambridge, 1989), pp. 224-225.
[15] Akira Iriye, note 44, pp. 766-767.

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.[16]

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”.[17] 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

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[16] *See* ibid. p. 756.

[17] *See* Sakuye Takahashi, *Cases on International Law during the Chino-Japanese War* (Cambridge, 1899), p. 2; Takahashi later wrote another book in Japanese, *The Precedent Practices of the War-Time International Law* (1904), and came to be regarded as ―the founder of international law studies in Japan”. *See* Fujio Ito, ―One hundred years of International Law Studies in Japan”, *Japanese Annual of International Law*, vol. 13 (1969), p. 25.

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- Japanaise 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 to certify that Japan had been faithfully following rules of international law in the Chino-Japanese war and their opinions that Japan was ready to join the family of civilized States. It may also be noted that Professor Westlake looked after Takahashi when he was at Cambridge and “carefully and repeatedly” perused the first draft of his book *Cases*, and gave him “the most accurate and valuable advice both

on legal and on literary points”, besides writing introduction to his work.[18]

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.”[19]

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.”[20]

Following these certificates by two eminent jurists, other international lawyers

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[18] See Takahashi, note 48, p.viii.
[19] Ibid., pp. xv-xvi.
[20] Ibid., p. vi.

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.[21] 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.[22]

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 1899[23] 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

[21] *See* Gong, note 1, pp. 185-186.
[22] *See* Fujio Ito, note 48, p. 23.
[23] *See* note 47 above and text relating thereto.

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.[24] 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.[25]

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."[26]

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

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[24] See Gong, note 1, pp. 197-198.
[25] Storry, *Japan and Decline of the West in Asia*, p. 29, quoted in Gong, note 1, pp. 196-97.
[26] Gong, note 1, p. 197.

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, dispatching as many as ten thousand soldiers, about the same number as troops sent by all the Western Powers combined.[27] Japan was rewarded by being invited to a peace conference, and for the first time Japan attended an international conference as a full-fledged member. After 1901 Japan became one of the ―Boxer protocol powers" with a right to station troops in the Peking-Tientsin region. Its newly won status made Japan an active member of the power group and politics in China with Britain willing to give Japan a role as its principal partner in Asia.

But Russia tried to counter the trend by entrenching itself in Manchuria. Russian influence had been growing in Korea after 1895, and Russia had seized the Liaotung peninsula in China in 1898. Japan wanted recognition of its special interests in Korea by all the interested powers. It was prepared to reach some understanding with Russia so that the latter would recognize Japan's special interests in Korea, in return for Japanese acquiescence to Russian interests in Manchuria. But protracted negotiations between the two countries were not successful. The Japanese were convinced that their position in Korea would be vulnerable as long as Russian influence remained predominant in

[27] See Akira Irye, note 44, pp. 773-774.

southern Manchuria.[28]

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.[29]

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

[28] Ibid, pp. 774-775.
[29] Ibid., pp. 775-777.

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.[30] 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."[31]

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

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[30] *See* Akira Irye, note 44, p. 777; Aziz, note 43, p. 6; Mark R. Peattie, ―The Japanese Colonial Empire 1895-1945", Chapter 5 in Peter Duus (ed.), note 45, pp. 226-229.
[31] *See* quoted in B.V.A. Roling, *International Law in an Expanded World* (Amsterdam, 1960), p. 27.

> 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."[32]

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."[33]

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"

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[32] L. Oppenheim, *International Law* (London, 1905), pp. 32, also quoted in Gong, note 1, p. 30.

[33] Wheaton, *Elements of International Law*, 6th edn. (1929), p. 30. *See also* Gong, note 1.

States,[34] Japan surpassed them all in suppressing its unfortunate neighbours which came under its sway.[35] 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."[36]

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.[37]

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

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[34] Japanese colonial policy was said to be ―European in origin and orientation, and its adoption by Japanese administrators and publicists had much to do with the fact that Japan entered its colonial tasks at the zenith of European colonialism. Its characteristics thus stemmed from the assumptions and predilections common to the ‗New Imperialism‘ of the late nineteenth-century Europe and derived largely from European colonial empires whose territories were geographically dispersed and racially diverse." Peattie, note 45, p. 238.
[35] *See* for a general description of Japan‘s colonial policy Peattie, note 45, pp. 244-270.
[36] *See Iwakura Ko Jikki or The Record of Duke Iwakura*, quoted in an excellent historical paper by Onuma Yasuki, ―‗Japanese International Law‘ in the Prewar Period – Perspectives on the Teaching and Research of International Law in Prewar Japan", in *Japanese Annual of International Law*, no. 29 (1986), p. 41.
[37] *See* ibid.

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."[38]

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

[38] Quoted in Aziz, note 43, p. 23.

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 1922[39] – 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".[40] 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

[39] The Four-Power Treaty was concluded between Great Britain, United States, France and Japan; the Five-Power Treaty between Great Britain, United States, Japan, France, and Italy; the Nine-Power Treaty between Great Britain, United States, Japan, France, Italy, China, Belgium, the Netherlands and Portugal. *See* Aziz, note 43, p. 26.
[40] Quoted in Aziz, note 43, p. 27.

Soviet Union, and the gradual consolidation of the Russian power in the Far East.[41]

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."

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[41] *See* ibid., pp. 27-28.

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)[42]

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

[42] See Aziz, note 43, pp. 65-66.

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.[43] 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 of international law, the Imperial Proclamation of international law, the Imperial Proclamation of War issued on 8 December 1941, with which Japan initiated the “Greater Asian War”, made no such reference to the laws of war or the need and intention of the Japanese to abide by the rules of international law. In fact, along with Nazi Germany and Fascist Italy, Japan openly challenged the existing international order by force. It showed a contemptuous attitude toward international law rules. The Japanese Government, which zealously gave instructions in international law to members of the army and navy in earlier wars against China and Russia, was no longer interested in its rules in the 1930s and 1940s.[44]

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

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[43] Besides loss of nearly half of the 231 US Army and 89 naval aircraft in Oahu, eight battleships damaged or sunk, several destroyers and other ships crippled, American casualties numbered 4,575. *See* Alvin D. Coox, “The Pacific War”, Chapter 7 in Peter Duns, note 45, pp. 342-343.

[44] [193] *See* scathing criticism of the attitude of the Japanese Government during the 1930s and 1940s by eminent Japanese scholar of international law, Onuma Yasuki , by Onuma, “‘Japanese International Law‘ in the Prewar Period – Perspectives on the Teaching and Research of International Law in Prewar Japan”, in *Japanese Annual of International Law*, no. 29 (1986), pp. 28-29.

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.[45]

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)

[45] See Onuma Yasuki, note 75, pp. 370-377.

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 ultra-nationalism 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.[46]

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,[47] 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

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[46] *See* Charles L. Kades, “Introduction: Representative Government in Japan”, *Political Reorientation of Japan, September 1945 to September 1948*, Report of the Government Section Supreme Commander of the Allied Powers (1949), p. 82-90.

[47] MacArthur suggested at the time that the Constitution had been drafted by the Japanese, over a period of five months, involving “painstaking investigation and frequent conference between the Japanese Government and his headquarters”. *See* “Political Reorientation of Japan”, note 92, p. 657; *see also* Koseki Shoichi, *The Birth of Japan's Postwar Constitution*, (ed. and transl. by Ray A. Moore), Oxford, (1997), pp. xii, 4ff.

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."[48] 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.[49]

> 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.[50] 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.[51]

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[48] Philip Alston, ―Transplanting Foreign Norms: Human Rights and other International Legal Norms in Japan", *European Journal of International Law*, Vol. 10 (1999), pp. 628-629.

[49] See Alston, ibid, p. 630.

[50] ―Japan's Commission on the Constitution: The Final Report", quoted in Alston, note 73, p. 630.

[51] Some 130 constitutions were ratified since 1970. *See* Lawrence W. Beer, ―Peace in theory and practice under Article 9 of Japan's Constitution", *Marquette Law Review*, vol. 82 (1998), p. 818.

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 Sates 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 1942. 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”.[52]

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

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[52] *See* Professor John H. Jackson, ―Western View of Japanese International Law Practice for the Maintenance of International Economic Order”, in R. P. Anand, ―Japan and International Law in Historical Perspective”, in Nisuke Ando, (ed.), *Japan and International Law: Past, Present and Future*, (The Hague, 1999), p. 353.

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."[53] The time has come for Japan to make a change and meet new challenges.

[53] See Yasuki Onuma, ―Japanese War Guilt, the ‗Peace Constitution', and Japan's Role in Global Peace and Security", in Machael K. Young and Yuji Iwasawa (eds.), *Trilateral Perspectives on International Legal Issues: Relevance of Domestic Law and Policy* (1996), p.528.

IV

Law of the Sea in Historical Perspective

IV

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Law of the Sea: Product of the European Civilization:

It is generally believed, especially in Europe, that law of the sea, like other rules of inter-state conduct of modern international law, is a product of Western European Christian civilization to which non-European countries have contributed practically little or nothing. Ignorant or ignoring the rules of inter-state conduct amongst Asian countries, it is asserted with a sense of pride that international law is a “product of the conscious activity of the European mind” and “European beliefs” and is based on European state practices which were developed and consolidated only during the last three centuries.[1] Relying entirely and almost exclusively on European history and European sources, with rare exceptions[2], most of the Western scholars affirm or confirm this opinion.

Although some of the ancient countries, like China, India, Egypt and Assyria, with quite advanced forms of civilizations, might have had certain generally accepted principles and rules of inter-state conduct, the western jurists feel that these practices “reveal little that could, even in the broader sense of the word, be considered as international law.”[3]

Freedom of the Seas: The Paramount Principle:

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[1] J.H.W. Verzijl, “Western European Influence on the Foundations of International Law” in his *International law in Historical Perspective* (Leyden, 1968), pp. 435-36.
[2] See C.H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies (16th, 17th and 18th Centuries)* (Oxford, 1967).
[3] Nussbaum, n. 6, p. 10.

The bulk and essence of maritime law during the last more than two centuries can be summed up in the simple phrase, *"Freedom of the Seas"*. What it meant was that beyond a limited area of territorial sea where the coastal state exercised sovereign jurisdiction, an area which was deemed essential for its security and protection of its other vital interests, the vast areas of the ocean were open and free which could not be appropriated and must not be controlled by any one. In these areas of what were called the ‗high seas', all states enjoyed--or at least until recently were supposed to enjoy –as Article 2 of the 1958 Convention on the High Seas declared, freedoms of unobstructed navigation, uncontrolled fishing, right to lay down and maintain submarine cables and pipelines, and freedom to fly over, and such other undefined freedoms as they might like to exercise with due regard to the similar rights and freedoms of others.

History of the law of the sea is to a large extent the story of the development of the freedom of the seas doctrine and the vicissitudes through which it has passed through the centuries. For the last nearly 200 years, it had been accepted as an undisputed principle, almost a dogma, which no one could dare challenge. Recognized and referred to as *jus cogens,* it was supposed to be in the interests of all mankind. It expressed in a sense the essence and substance of the law of the sea. All other rules relating to inter-state conduct more or less revolved around this doctrine and their validity or otherwise was to be judged and depended on the touchstone of this incontrovertible principle. Thus, even when coastal state's jurisdiction in a part of the sea close to its coastline came to be recognized as territorial sea for the protection of its security and other interests, its limits were always sought to be kept as narrow as absolutely essential to maintain this freedom in wide areas. In any case, beyond the narrow limits of territorial sea, even

limited jurisdiction for the protection of coastal fisheries was totally denied until the end of the Second World War. Contiguous zone for the protection of coastal economic, health and financial interest were either refused or merely tolerated, in the name of the freedom of the seas, by the biggest maritime Power, Great Britain, which ruled the waves for over 200 years.[4]

Origin of the Principle:

It is generally assumed, without any question, and widely asserted that it was the seventeenth century Dutch jurist, Hugo de Groot or Hugo Grotius, who propounded the doctrine of the freedom of the seas for the first time in the modern period by elaborate argument. Although it is believed that the principle was clearly accepted under Roman law and had been reduced to a legal formula according to which the sea was recognized as *"commune omnium",* or common property of all, after the disintegration of the Roman Empire it had been lost and forgotten through the centuries.[5] The ―reawakening" of the principle was brought about Hugo Grotius. As Meurer put it:

> Up to modern times the freedom of the seas slumbered the sleep of the Sleeping Beauty until there appeared from Netherlands the knight whose kiss awakened her once more.[6]

It is well-known that Grotius enunciated and elaborated his thesis relating to the freedom of the seas in his famous book *Mare Liberum or Free Seas* published

[4] See Thomas W. Fulton, *The Sovereignty of the Sea* (London, 1911) (Reprinted New York, 1976), pp. 593-603; J.L. Brierly, *The Law of Nations*, (Sixth Edition by Sir Humphery Waldock)(Oxford, 1963), pp.205-06.
[5] See Christian Meurer, *The Program of the Freedom of the Sea* (Tr. From German by Leo J. Franchenberg)(Washington, 1919), pp. 4-7.
[6] Meurer, *ibid*, p. 7.

anonymously in 1609.[7] Few works of such small size have gained such great reputation as the *Mare Liberum.* It is said to be ―the first and the classic exposition of the doctrine of the freedom of the seas".[8] Grotius wrote this remarkable book, which has earned him the title of the ‗founder‘ or ‗father‘ of international law, in order to defend his country‘s right to navigate in the Indian Ocean and Eastern seas and to trade with India and the East Indies (Southeast Asian Islands), over which Spain and Portugal asserted a commercial monopoly as well as political domination. In fact, *Mare Liberum* was merely one chapter (Chapter XII) of a bigger work, *De Jure Praedae (On the Law of Spoils)* which Grotius, as advocate of the Dutch East India Company, had prepared as a legal brief but which he had refrained from publishing.[9]

This was a period of keenest international commercial rivalry between Spain, Portugal, Holland and England, all whom were struggling to gather riches of the East. Ever since Rome made eastern products fashionable and her Egyptian subjects went out to seek them in the Indies, the European world had been possessed of the splendour of the East. Aromatic spices from India and the East Indies were in the greatest demand and yielded the largest profit. Spice trade with the East, especially pepper, then became a great motivating factor of history. As a recent writer points out: ―Pepper may not mean much to us, but in that age it ranked with the precious stones. Men risked the perils of

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[7] Hugo Grotius, *The Freedom of the Seas or The Right which belongs to the Dutch to take part in the East Indies Trade (* tr.by Ralph Van Deman Magoffin and Edited with an Introduction by James Brown Scott) (New York, 1916).

[8] W.S.M. Knight, ―Seraphin de Freitas: Critic of *Mare Liberum*", *Transactions of Grotius Society,* Vol. 11 (1926), p.1.

[9] See W.S.M. Knight, *The Life and Works of Hugo Grotius,* (London, 1925),p.79.

the deep and fought and died for pepper."[10] Spain and Portugal, the two Iberian Powers, who were the first to look for a sea route to India and the Spice Islands, claimed a legal title to half the non-Christian world each under a Papal Bull of May 4, 1493, by which Pope Alexander VI divided the world between the two and defined a line of demarcation running 100 leagues west of Azores and Cape Varde Islands and granted to Spain all lands west of it, and to Portugal all lands of it east. By a bilateral treaty of 1494 the two Powers fortified their title.[11]

Asian Traditions Ignored:

It is submitted that the contribution of Asian, African and other extra-European countries towards the development of modern international law, or their attitude, outlook and behaviour toward its rules in their international relations, is more often than not based on ignorance of their history and lack of information or understanding of their cultures and cultural traditions. Europeans generally do not want to look beyond European history, written during the colonial period, to acknowledge that when European adventurers arrived in Asia in the fifteenth century, "they found themselves in the middle of a network of states and inter-state relations based on traditions which were more ancient than their own and in no way inferior to notions of European civilization."[12] These rules of inter-state conduct might have differed, and in fact did differ, from the European state practice; but there is no doubt about their wide-spread acceptance amongst Asian States. Thanks to their liberal traditions of freedoms of peaceful navigation and international maritime trade, and permission to foreign merchants to

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[10] G.F. Hudson, quoted by K. M. Panikkar, *Asia and Western Dominace* (1954), p,25.
[11] See Panikkar, n. 15, pp. 31-32.
[12] Alexandrowicz, n.3, p.224.

establish themselves by their own laws, the Europeans got an easy foothold in Asia.[13] Whether expressed in the form of a doctrine or not, there is no doubt that the unobstructed freedoms of navigation and commercial shipping were accepted by all countries in the Indian Ocean and other Asian seas centuries before history was ever recorded, long before Grotius were heard of, or Europe emerged as a formidable force on the international stage. Besides historical records, numerous travelers' memoirs testify to this state of affairs.[14] Freedom the the seas was also a recognized rule in the Rhodian Maritime Code and was unequivocally adopted in Roman law. From the first century A.D., regular maritime commercial relations were established between Rome and several states in India and the Indian Ocean region, and they continued for nearly 300 years.[15]

On the eve of European penetration into the Indian Ocean, not only was the principle of freedom of the seas and trade well recognized in customary law of Asia, but also in some states this principle was codified and well publicized. Examples include the maritime codes of Macassar and Malacca, which were compiled at the end of the thirteenth century, based on customary practices.[16] Resisting the Dutch attempts to monopolize the maritime trade of the Spice Islands, the ruler of Macassar is reported to

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[13] Alexandrowicz, *ibid.*
[14] See *the Travels of Marco Polo (*William Marsden ed.and tr. 1948); Ibn Batutta, *Travels in Asia and Africa (1325-54)(*H.A.R. Gibb tr.); Narrative and Journey of Abd-er-Razak, A Persian Traveler and Ambassador of Shah Rukh (1442), *India in the Fifteenth Century (*R.H.Major tr.& ed.)
[15] See H.G.Rawlinson, *Intercourse between India and the Western World from the Earliest Times to the Fall of Rome (*1926),pp.9-12; see also E.H. Warmington, *The Commerce between the Roman Empire and India* (1974), pp. 35 ff.
[16] For a translation of both codes see J.M.Pardessus, *Collection de Lois Maritimes (*1895), p.6; see also Sir Stanford Raffles, ―The Maritime code of the Malays", *Journal of the Royal Asiatic Society (Straits Branch),* vol. 2 (Dec. 1879), p. 1-20.

have said in 1615 that sea was common to all and that "it is a thing unheard of that any one should be forbidden to sail the seas."[17]

Freedom of the Seas: A Casualty in Europe:

While the salutary practices of freedoms of navigation and unobstructed maritime trade continued to prevail and prosper in Asia, in Europe the Rhodian and Roman traditions of the freedom of the seas foundered in the turbulent waters of disputes and conflicts of numerous smaller states which emerged from the ruins of Rome, each vying with the other. Maritime commerce died in a "state of wild anarchy" in Europe, and even the memory of Rhodian law did not last beyond the thirteenth century. By this time, all European seas came to more or less appropriated by European states, leading to numerous disputes and almost continuous warfare. Thus, in addition to the wide claims of Spain and Portugal, Venice claimed sovereignty over the Adriatic Sea, Genoa occupied the Liguarian Sea, England dominated the undefined British seas, and Denmark closed the Baltic by closing the Sound and extended control over the northern seas.[18]

Portugal disturbs Peaceful Navigation in the Indian Ocean:

When the Portuguese arrived in India by the end of the fifteenth century, they found no maritime Powers, no warships, and no arms in the sea.The Indian Ocean had never been a theatre of any serious naval conflicts. Asians were not peaceful peoples but felt no need to fight for the sea which was but of limited use for navigation, maritime trade, and catching small quantities of fish. They were essentially land powers. The hub of Asian activities and relations, their struggles and conflicts, related to the vast and

[17] Quoted in G.J.Resink, *Indonesia: History between the Myths (*1968), p.45.
[18] See Fulton, n. 9, pp. 3-5; Pitman B. Potter, *Freedom of the Seas in History, Law and Politics* (1924), pp. 36-38.

fertile land on the largest continent of the world. The absence of armed shipping in the Indian Ocean helped tiny Portugal to control vast areas of the ocean. The Europeans were sea powers trained in the rough waters of the Atlantic and the North Sea, whose challenges hardened them into expert navigators and naval warriors. Portugal sought to apply European custom to control the vast Indian Ocean and enforce its control by its armed carracks and galleons against the unarmed Indian Ocean ships engaged in peaceful trade.Although Portugal was fairly successful in gaining a share of the Asian spice market and in disturbing peaceful navigation in the Indian Ocean, it could not wipe out the Asian maritime trade.[19] But the Portuguese monopoly of the Eastern spice trade and its huge profits aroused the jealousy of other European Powers which began to challenge Portugal‘s authority in the late sixteenth century.

Contest of Wits and Arms in Europe:

It was to contest the Portuguese monopoly, as we have noted earlier, that Grotius, taking his cue from the Asian maritime practices of free navigation and trade, propounded his doctrine in a brief he prepared for the Dutch East India Company. The company asked Grotius, who was associated with it as a lawyer, to defend the company‘s capture of a Portuguese vessel laden with Eastern spices in the Straits of Malacca in 1604. Learning as much as he could about India and the East Indies, their traditions of free trade and commerce throughout history, and the Portuguese attempts to stultify the traditional freedom of navigation to these countries, Grotius wrote *De Jure Pradae* in 1605 to defend the action. He tried to ―show that war might rightly be waged against, and prize taken from the Portuguese, who had wrongfully tried to exclude the Dutch (and

[19] See Marie A.P. Meilink-Roelofsz, *Asian Trade and European Influence (* 1962), pp. 136-72.

others) from {trade with eastern countries}".[20] His greatness lies in keenly observing the maritime customs of Asian countries, presenting them in the form of a doctrine supported by logical arguments, Christian theology, and the authority of the venerable Roman law, and recommending these views to European countries. This fact of history has been generally ignored by historians of international law. There is little doubt, as Professor Alexandrowicz said, "that Grotius either conceived or perfected his doctrine of the freedom of the seas under the influence of the maritime traditions of the East."[21]

Besides Asian traditions, Grotius relied on logic. He tried to establish two propositions: first, "that which cannot be occupied, or which never has been occupied cannot be the property of any one, because all property has arisen from occupation"; and second, "that which has been so constituted by nature that although serving some one person it still suffices for the use of all other persons, is today and ought in perpetuity to remain in the same condition as when it was was first created by nature".[22] The air belongs to this class of things, and so does the sea. Therefore, argued Grotius with disarming logic of the time: "The seas is common to all because it is so limitless that it cannot become a possession of one, and because it is adapted for the use of all, whether we consider it from the point of view of navigation or of fisheries."[23]

It must be pointed out, however, that in spite of all this learning and logic, neither Grotius nor Holland were in favour of freedom of the seas as a principle. As the Dutch defeated the Portuguese and seized the profitable trade of the Spice Islands, they sought to create their own monopoly. Grotius conveniently forgot the freedom of the seas

[20] Knight, n.14, p. 80.
[21] Alexandrowicz, n. 3, p. 229; see also ibid, p. 44.
[22] Hugo Grotius, n.12 , pp. 28 ff.
[23] Grotius, *ibid.*

principle he had propounded with such fervour and went to England with a Dutch delegation four years later in 1613 to argue in favour of a Dutch monopoly of trade with the Spice Islands. In fact he was surprised to find that his won book, published anonymously, was being quoted by the British against him.[24] Successive attempts by each European state to demand freedom of the lucrative spice trade of the East Indies, and later attempts by each of them to try to create a monopoly for itself, along with a similar game being played in the Atlantic, led to a spate of books by numerous scholars in Europe. Most or all of these works were nothing more than apologies by these writers for their countries‘ policies and interests. In this *battle* of books and wits, which continued in the din of actual war, it was not Grotius, it must be pointed out, who won, as is generally assumed. The real victor was John Selden, British scholar and statesman, whose *Mare Clausum, sen de Domino Maris Libri Duo (The Closed Sea or Two books concerning the Rule over the Sea)* written at the behest of the English Crown, remained the most authoritative work on maritime law in Europe for the next 200 years.[25]Although several other publicists countered Selden‘s arguments, all the European countries continued to follow his prescription in controlling as much ocean as their power would permit. Selden won this protracted ―battle" not by the brilliance of his arguments, but by the ―louder language" of the powerful British navy.[26]

Resurgence of the Freedom of the Seas:

It was only in the late 18th or really early 19th century that freedom of the seas came to be revived under patronage of Great Britain which had emerged as the greatest

[24] See G.N. Clark, ―Grotius‘ East India Mission to England", *Transactions of the Grotius Society,* Vol. 20 (1934), p.79; also Knight, n.14, pp. 136-43.
[25] In Enland ―*Mare Clausum* became in a sense law book." Fulton, n.9 p. 374.
[26] See Potter, n.23 p. 61.

Power of the world. The needs and demands of the industrial revolution in Europe—larger markets, sources of raw material and surplus capital which could not be invested in Europe—led to huge colonial empires in Asia and Africa. As Europeans got more interested in commercial prosperity and free trade, and ever more Europeans started travelling to these wide-spread colonies, Selden's *Mare Clausum* became an anachronism which was no longer necessary. It was more useful for them to have open and free seas in order to exploit vast unexplored areas of the world which no one nation could reach alone. Pretensions to sovereignty over the sea and monopoly of trade slowly died their natural death and England became not only the strongest champion of the freedom of the seas, but its policeman.[27] Grotius, the dejected and rejected man in his life, and a false prophet for 200 years, was acclaimed and proclaimed a hero and his, in some respects illogical, arguments came to be accepted without any questions.

Law Vague and Uncertain:

In any case, the freedom of the seas principle accepted by the Europeans had nothing in common with Asian maritime practices. Unlike Asians, who had maintained these freedoms for centuries for peaceful commercial relations, the chief purpose of their revival in the nineteenth century Europe was joint exploitation of Asia and Africa to satisfy the needs of their industries. It may also be mentioned that but for general agreement on vague freedom of the seas, implying freedom of peaceful navigation with a few agreed ―rules of the road", which benefited all Europeans, there was little agreement on other rules. Freedom of fisheries, which England come to accept only after three wars with Holland and other conflicts with neighbours, continued to a subject of serious

[27] See Sir Geoffrey Butler and Simon Maccoby, *The Development of Intrnational Law* (London, 1928), p. 53.

disputes among Europeans. There was no agreement on a uniform limit of territorial sea, or freedom of navigation through the maritime belt or straits, especially for warships. The same was true of contiguous zone and England, ever since the repeal of its own Hovering Act in 1876, continued to question the legality of such jurisdiction exercised by other states.[28] Moreover, a large part of the law of the sea relating to war, contraband, blockade and rights of neutrals was always at the mercy of belligerents which stretched their rights according to their free will and contingencies of war. Thus, during the two World Wars, the belligerents outstretched their authority over the sea on the basis of controversial doctrines they propounded, like ―ultimate enemy destination" and ―long distance blockades", and enforced them over the strong protest of the neutrals through navicerts systems of their own.[29] Thus it is important to note that, apart from a few general principles, much of the maritime law, as it developed in the nineteenth and the first half of the twentieth centuries, was controversial, uncertain, and in several respects nothing more than a panorama of conflicting rules.

Legal Vacuum:

Even more important is the fact that, beyond a limited maritime belt, the vast areas of the ocean—more than 70 per cent of the globe—remained a *legal vacuum,* an area of ―no law" beyond what are referred to as a few ―rules of the road". Freedom of the seas meant essentially non-regulation and *laissez faire* which was in the interests of the big maritime powers. This law, or rather lack of law under the freedom of the seas

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[28] See Fulton, n.9, pp. 593-603;J.L. Brierly, ―The doctrine of the contiguous zone and the dicta in *Croft vs. Dunphy*" *British Yearbook of International Law*, vol.XIV (1933), p. 156.

[29] See C. John Colombos, *International Law of the Sea,* sixth edition (London, 1967), pp. 62, 748-52; Julius Stone, *Legal Controls of International Conflict* (New York, 1959), pp. 484ff., 500 ff.

doctrine, was often used in the nineteenth century by European powers to threaten small states, to get concessions from them, or simply to subjugate them.[30] Even later, it gave them a license to use the freedom in furtherance of their immediate interests—whether for navigation, fisheries or military maneuvers—irrespective of the rights of others. The protracted and sometimes bitter fishery disputes between smaller European counties- Holland, Denmark, Norway and Iceland- on the one hand, and Great Britain, on the other, numerous such disputes on the American continent, and almost continuous protests by neutral states against violation of their freedom of navigation and trade by belligerent maritime powers, were constant reminders of the dissatisfaction of the smaller coastal states. The situation became even more serious during and after the Second World War when the maritime powers took the liberty to further stretch this freedom and enclose even wider areas of the ocean either for defeating the enemy, or for conducting nuclear and missile tests, threatening the life and liberty of all peaceful users of the seas. Protests by smaller states to such uses of the sea were almost always rejected on the ground that what was not prohibited in law was permitted, and that these were ―reasonable" measures of security and self-defense.[31]

Most of the rules of modern maritime law were based on the practice of a few dominant maritime powers. Many a time their interest differed and their practices were not uniform. The situation was tolerated not only because of the over-bearing influence of

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[30] There is no dearth of cases of trigger happy western naval commanders using naval ordnance against ―backward" peoples of Asia and Africa on the smallest excuse, or no excuse at all. It was the classic age of punitive or minatory bombardments. See for details of numerous cases R.R.Palmer and Joel Colton, *A History of the Modern World,* third edition (New York, 1965), pp. 548 ff.;615 ff.

[31] See for such defense by both the US and British Governments, Marjorie Whiteman, *Digest of International Law,* Vol 4 (WashingtonDC, 1965), pp.585 ff. 600 ff.

the European maritime power, especially Great Britain, along with France, Germany, and Russia, as well as extra-European powers like USA and Japan, which were all helped by this undefined and wide freedom of the seas, but also because the sea was of only limited importance and use. But the law even for these limited purposes was imprecise and not beyond doubt. An attempt was made to codify the law under the auspices of the League of Nations in 1930, but it failed because the big maritime powers, especially Great Britain, insisted on a narrow three-mile limit of the territorial sea, and the smaller states were deeply concerned about protecting their fisheries and other coastal interests in wider zones.[32]

Post-1945 Era: A New World:

By the end of World War II, the whole balance of forces had changed. The West European powers, which had dominated the world scene for nearly 300 years, were no longer at the center of the world stage. Out of the ruins of the world holocaust emerged the United States and the Soviet Union with enough strength to dominate the world, and to challenge each other seriously. The world, divided into two power blocs, plunge into a bitter cold war that affected all aspects of international relations and law.

With the weakening of Europe, colonialism collapsed and there emerged numerous Asian and African states which for a long time had no status and no role in formulation of international law. Comprising a majority of the new extended world society, the Asian-African states, along with the thus far equally neglected and disgruntled Latin American states—the so-called Third world as they came to be called—acquired a new influence in the divided post-war divided world society. Non-aligned to

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[32] See Jesse S. Reeves, ―The codification of the law of territorial waters", *American Journal of International Law (AJIL)* Vol. 24 (1930), p.493.

any of the power bloc as most of these countries were, they aligned themselves to take concerted action and play an important role in international legal and political structure in pursuance of their interests.

There was another development. So far the uses of the sea were few and the coastal states were mostly concerned about their security, protection of their near-shore areas for fisheries, and their commercial fleets. The tremendous advances in marine technology after World War II revealed a new world with nine times as much vegetation available in the sea as was cultivated on land. Even more important, it came to be found that natural resources and minerals in quantities beyond anyone‘s imagination were present not only in the water of the sea but also on the ocean floor and in the underlying layers. By 1945, geologists had confirmed that huge quantities of sorely needed oil and gas resources lay buried under the seabed off the shores of various countries, outside the territorial sea, and technology was making them accessible. These invaluable resources could not be left there or risked to be exploited by other distant water states, as had been the case with fisheries for centuries.

The development of technology also revolutionized fishing mechanics. Significant technological breakthroughs in the ability to detect, concentrate, and harvest fish in the high seas increased the capacity of a few technologically advanced countries to indulge in overfishing, threatening entire fishery resources near the coasts of other states. The need to protect coastal resources—both living and non-living—had become all the more evident.

Freedom of the Seas not Immutable:

Law could not remain unaffected by all these changes. Unlimited freedom of the seas, which had served the interests of a few maritime Powers in an age with limited uses of the sea, could no longer remain unchallenged or unchanged. As Professor Gidel said as early as 1950:

> The expression ‗freedom of the high seas' is in reality a purely negative, worn-out concept, nothing more; it has no meaning for us, except as the anti-thesis of another, a positive concept, which has long since disappeared.
>
> The idea of the freedom of the high seas is, paradoxically, a survival of the idea—long since dead—that the high seas are subject to dominion and sovereignty, just like any the territorial dominion.[33]

Europe had largely lost its control and hold over the law of the sea. It was no longer a law to be made by and for the European countries. Once it came to be realized that the seas was much more than a navigation route or a storehouse of fisheries which could be freely exploited under the old freedom of the seas doctrine, the old law lost its charm and sanctity. Most of the initiative and calls for change in the law came from extra-European countries. The first and most important challenge to the traditional freedom of the seas doctrine in the period following World War II came from the United States which had emerged as the strongest maritime power after the war. The twin proclamations by President Harry Truman on September 2 8, 1945, referred to developments in technology as necessitating the extension of US coastal jurisdiction to

[33] See United Nations' *Memorandum on the Regime of the High Seas* (reputed to have been prepared by the French jurist Gidel) *UN General Assembly Document No. A/CN.4/38,* 14 July 1950, pp. 2-3.

establish conservation zones in contiguous high seas areas to protect fisheries and the right to exclusive exploitation of the mineral resources of the continental shelf.[34] In both proclamations, the littoral state extended its limited jurisdiction to areas of the high seas close to its coasts, without any claim to an extension of territorial waters, and specifically declared unaffected the high seas character of the areas and the right to free and unimpeded navigation in those waters. In spite of this disclaimer, the Truman Proclamations were certainly novel claims that modified, if not grossly violated, the freedom of the seas doctrine.

The United States‘ proclamations led to numerous claims by other states not only continental shelf jurisdiction but also for protection of their fisheries. By 1958, nearly a score of countries had made such continental shelf claims. Some Latin American countries went even further. Argentine, Chile, Peru, Ecuador, Costa Rica, El Salvador, and Honduras all extended their jurisdiction or sovereignty to 200 miles to protect their fisheries from depredations by outsiders. Practically every proclamation claiming special rights to the continental shelf or fisheries contained the statement that freedom of the high seas was fully recognized and maintained. But as the 1950 UN Memorandum on the Regime of the High Seas suggested, these disclaimers could not be taken seriously.[35]

Conflicting and Diverse Claims:

There was a lot of confusion during this period about the legal validity or otherwise of all these claims about continental shelf and fisheries jurisdiction. The confusion was worse confounded by widening claims relating to territorial sea. By 1958, at least 27 of the73 independent coastal states claimed specific breadths of territorial sea

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[34] See Proclamation No. 2667, 10 Fed.Reg. (1945) PP. 12, 303.
[35] See UN Memorandum, n.38, pp.2-3.

in excess of the so-called ‗traditional' three-mile limit. These claims ranged between 5.6.12 and 200 miles. Six others, while rejecting the three-mile rule, did not specify their limits.[36]

Some countries sought to achieve the same purpose without extending their territorial waters or fisheries jurisdiction by adopting straight baselines for measuring the territorial sea joining outermost islands, islets, or rocks off their coasts. Thus Norway essentially extended its territorial seas by redrawing its baselines and enclosing vast bodies of waters, large and small bays, and countless arms of the sea making them internal waters subject to the absolute sovereignty of Norway. This method for protection of coastal fisheries from outsiders was upheld by the International Court of Justice in the *Anglo-Norwegian Fisheries* case in 1951.[37]

UN Efforts to Codify the Law:

The divergent standpoints adopted by different states since the Second World War on the territorial sea, fisheries jurisdiction, continental shelf, and other issues of the law of the sea made the already ambiguous and uncertain situation ―a confused medley of conflicting solutions."[38] To bring order in this confusing situation, the United Nations organized two conferences in 1958 and 1960 to develop and codify the law in a systematic manner. Four conventions[39] were in 1958 which, on the whole, reasserted the traditional freedoms of the sea and accepted coastal states' sovereign jurisdiction over its

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[36] See Draft synoptical table prepared by the UN Secretariat in pursuance of the Resolution of First Committee (Territorial Sea and Contiguous Zone) at its 14th meeting (March 13, 1958) UN Document A/Conf. 13/C.11; March 20, 1958; Ibid, Rev 1, April 1, 3, 1958; ibid rev. 1, Corr. 2, Apr. 22, 1958.
[37] *I.C.J. Reports,* 1951, p. 132.
[38] UN Memorandum, n.38 , p.112.
[39] Convention on the Territorial Sea; Convention on the High Seas; Convention on Fishing and Living resources of the High Seas; and Convention on the Continental Shelf.

continental shelf and exclusive right to exploit its resources up to a depth of 200 meters or,beyond that limit to wherever the depth of the superjacent waters admitted of exploitation of the natural resources. Although coastal states were permitted to extend maritime zones and adopt fish conservation measures over adjacent water, no agreement could be reached about the extent of territorial sea or fisheries jurisdiction, and the the agreement on the definition of continental shelf was vague and controversial. Another attempt was made in 1960 to reach agreement on the territorial sea, but it also failed.[40]

Many coastal states still wished, and some claimed, wider territorial sea, but were unable to move the entrenched powers, or successfully challenge their historic ‗rights‘ and change the traditional law. During the two conferences, there was a continuous struggle between numerically strong but poor, newly-independent Asian-African nations and their allies in Latin America, supported by the Soviet Group, on the one hand, and politically dominating, rich, satisfied, European and North American maritime powers, and some other small Asian-African countries under their influence, on the other.[41] While the maritime powers recounted and reassured the virtues of the freedom of the seas as a ―time honoured" principle, the dissatisfied States of the Third World thought that it was a ―time-worn" old doctrine which could still serve and be useful but only if modified and adapted according to changed needs of the changed international society. Rejecting the three-mile rule for territorial sea as a ―fallen idol", the new members of the international community said that ―agreement among maritime powers alone was not law"and that

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[40] See R. P. Anand, ―Winds of Change in the Law of the Sea: in R. P. Anand (Ed.), *Law of the Sea: Caracas and Beyond* (New Delhi, 1978), pp. 41 ff.
[41] See Arthur H. Dean, ―The Second Conference on the Law of the Sea: Fight for the Freedom of the Seas", *AJIL, Vol. 54 (1960)*, p. 752; Robert L. Friedheim, ―The Satisfied and Dissatisfied States negotiate International Law", *World Politics, V*ol. 18, pp. 20-41.

rules should be based on general state practice, not on that of a handful of states that had repeatedly been challenged and now finally rejected."[42] The Western powers were still strong enough to enforce the traditional law of *laissez faire* which favoured them The developing countries did not like this law, but could not help it.

Renewed Challenge to the Freedom of the Seas:

In a sense the 1958 Conventions had become outmoded by the time they were written. Since then the pressure to change the old freedom of the seas increased even more with a further widening of the international society. Moreover, technology soon made it feasible to exploit the vast resources of the the seabed and ocean floor, especially oil and gas, at depths beyond geological continental shelf. Indeed, exploitation became possible at any depth and countries started stretching their continental shelf jurisdiction to include the whole continental margin extending to a depth of 2,500 meters. It also came to be known that beyond the continental margin, generally referred as the deep seabed, there lay extensive deposits of manganese nodules containing manganese, nickel, copper and cobalt, all metals essential for industrial economies.

In 1967, a perceptive representative of a very small country, Arvid Pardo of Malta, informed the UN General Assembly about the inadequacies of the current international law and freedom of the seas, which could and would encourage appropriation of vast areas of the sea which were suddenly found to contain untold wealth by those who have the technological competence to exploit them. To avoid a potentially disastrous scramble for sovereign rights over the seabed, he suggested the creation of an

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[42] See U Mya Sein (Burma),Shukairy (Saudi Arabia) and Hassan (UAR), *Second UN Conference on the Law of the Sea: Official Records, Summary Records of Plenary Meetings and Meetings of the Committee of the Whole,* UN Doc. A/CONF.1918 Geneva March 17 to April 26, 1960, pp.58, 74, 102.

effective international regime for the seabed and ocean floor beyond a clearly defined national jurisdiction, and acceptance of that area as a ―common heritage of mankind" that would not be ―subject to national appropriation in any manner whatsoever, to be used and exploited for exclusive benefit of mankind as a whole."[43]

Pardo's essentially internationalist approach was heralded by many as an idea whose time had come. The General Assembly not only accepted Pardo's suggestion but established a Seabed Committee to prepare for a third UN Conference on the Law of the Sea. In 1970, it unanimously adopted a Declaration of Principles Governing the Seabed and Ocean Floor. The Assembly declared that the seabed beyond the limits of national jurisdiction was not subject to national appropriation or sovereignty but was ―the common heritage of mankind" and must be exploited for the benefit of humanity as a whole, ―taking into particular consideration the interests and needs of the developing countries."[44]

Although the maritime powers sometimes denied the legal force of these declarations of the General Assembly, there was clear indication that the new majority had started asserting itself. At the third UN Conference, organized to regulate new uses of the sea for the vastly extended international society, the new states were determined to play a more vigorous role. Over the objections of ―old guards" and defenders of the traditional law, who preferred a conference only for formulation of law for the exploitation of the seabed beyond the limits of national jurisdiction, these states wanted a comprehensive conference to review the whole international law of the sea. They wanted

[43] Arvid Pardo, UN Document A/C.1/PV.1515, NOV. 1, 1967,p.6.
[44] G.A. Res. 2749 (XXV) 25 UN GAOR Supp. No. 28, 24, UN Doc. A/8028 (1970)

to be able to ―*analyze, question and remold, destroy if need be, and create a new equitable, and rational regime for the world"s ocean and deep ocean".*[45]

Further Erosion of the Freedom of the Seas:

In the meantime, the trend to curb the freedom of the seas by extending coastal state jurisdiction for the protection of security and economic interest of the coastal states continued or even increase after 1960. By the end of 1973, nearly 35 per cent of the ocean, an areas equal to the land mass of the planet, was claimed by the coastal states. Deploring this trend, some well-meaning jurists regretfully felt that the era *mare liberum* ―may now be drawing to a close."[46] But others, like Sir Hersch Lauterpacht, pointed out that ―in so far as the original conception of the freedom of the seas, as it came to full fruition in the nineteenth century, acquired a rigidity impervious to needs of the international community and to a regime of an effective order on the high seas, ‗the loss of paramountcy' provides no occasion for anxiety."[47]

Third UN Conference on the Law of the Sea:

At the third UN Conference on the law of the sea, which met at its substantive session in Caracas, Venezuela, the new majority of the developing countries made it clear that it was only the strong maritime powers ―that profited from these undefined

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[45] C.W.Pinto of Sri Lanka, ―Problems of Developing States and their effects on the law of the sea", in Lewis M. Alexander(Ed.), *Needs and Interests of the Developing Countries* (Kingston, R.I. 1973), p. 4; seealso Lusaka Declaration of Third Conference of Heads of State or Government of Non-aligned Countries, September 1970, UN DOC. A/AC 134/34, 30 April, 1971, p. 5.
[46] Wolfgang Friedman, ―Selden Redivivus: Towards a Partition of the Seas", *AJIL,* (1971), P.763.
[47] Hersch Lauterpacht, ―Sovereignty over submarine areas", *British Yearbook of International Law, Vol. XXVII (1950),* pp. 198, 403-407.

freedoms" of the traditional law.[48] The continuing *laissez faire* on the high seas had ceased to serve the interest of international justice.[49] In seeking to establish a new legal order, the developing countries said, they would "seeking not charity but justice based on the equality of rights of sovereign countries with respect to the sea."[50] Only a new international law could establish this new order, because "between the strong and the weak, it is freedom which oppresses and law which protects."[51] The developing countries, in short, were determined, as the President of Venezuela said in opening the conference, that the sea could not be permitted to "be used in such a way that a few countries benefited from it while the rest lived in poverty, as had been done with the riches of the land."[52]

On April 30, 1982, after nine years of intense, arduous, sometimes bitter, and protracted negotiations, the UN Conference adopted "a comprehensive constitution for oceans", [53] a Convention that was said to be the most significant international agreement since the Charter of the United Nations. Without going into the details of this convention it may be pointed out that for the first time there was an agreement on a wide range of issues. For the first time in history there emerged a consensus in favour of agreed limits of territorial sea of 12 nautical miles, 24 miles of contiguous zone, a new exclusive economic zone (EEZ) extending up to 200 miles, and legal continental shelf extending to

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[48] See Vratusa (Yugoslavia), *Third UN Conference on the Law of the Sea, Official Records, Vol 1,* p. 92, UN Sales No. E. 75, V.3 (1975).
[49] Warioba (United Republic of Tanzania), ibid,p. 92.
[50] H.S.Amersinghe (Sri Lanka), ibid, p. 218.
[51] Raharijaona (Madagascar), ibid, p. 106.
[52] Carlos Andres Peres, ibid, p. 36.
[53] T. B. Koh, President of the UNCLOS III quoted in R. P. Anand, "Odd Man Out: The United States and UN Convention on the Law of the Sea", in Jon M. Van Dyke, *Consensus and Confrontation: The United States and the Law of the Sea Convention (*Honolulu, 1985), p. 73.

the end of the continental margin up to a depth of 2,500 meters or even beyond. Moreover, the seabed beyond the limits of national jurisdiction came to be reaffirmed and accepted as the ―common heritage of mankind". Although the exact meaning and content of ―common heritage" may be somewhat vague, like numerous other concepts of international law, an international machinery for the exploitation of the oceans' resources has come to be devised and accepted by an overwhelming majority of states.

While in the beginning some of the Western Powers, led by the United States, refused to sign the 1982 Convention, and Chapter XI of the Convention, relating to exploitation of the deep seabed resources had to be modified to accommodate their interests, practically all the states have come around to accepting it. The basic premise of the consensus reached at the third UN Conference on the Law of the Sea is clear and beyond doubt, namely, that in future the sea must be used for the benefit of all and not merely for the interest of a few great powers.

For the first time in centuries freedom of the seas has lost its charm and stranglehold. It has come to be modified and adapted to fulfil new needs of the new international society. Although navigation is vitally important the sea is not merely a navigation route, as it has been for centuries, but is a new area of wealth, still largely unexplored, which will the scene of the next adventure and expansion of humanity. While Europe is still extremely important, international law is no longer confined to Europe and must, therefore, serve the interests of the world-wide community of states. Freedom of the seas will still be a relevant concept, but this freedom will not be unlimited. It will be the same kind of freedom that individuals enjoy in a national

society, namely, freedom under generally agreed and widely accepted legal principles as adopted by the world-wide community of states.

V

Peaceful Settlement of International Disputes

V

Peaceful Settlement of International Disputes

Law of Jungle in International Relations:

We are living in a dangerous world indeed. In a world mired in innumerable disputes among nations and dominated by violence all around, it is indeed sad to notice that the law of jungle still prevails as the ultimate mechanism to settle disputes between nations. If we want to avoid the bloodbath of continuous warfare in our international society, we should be prepared to resolve our disputes through impartial third-party settlement, if direct negotiations between parties fail. That is one of the most important and civilized way to settle disputes. But as regards institutions and procedures for adjustment of disputes, international law has been woefully deficient – a jungle law imperfectly ameliorated by a fragmentary and hesitant progress in the direction of a legal order. The precariousness of the present situation can be visualized from the fact that whereas it is difficult to establish arbitration courts – which in any case remain ad hoc and impermanent – and the Permanent Court of Arbitration has been little used, we have an International Court of Justice, which is said to be sitting precariously at the peak of a

pyramid which has no enduring base."[1] Although, as we shall see, the jurisdiction of the World Court has been progressively extended and it has gained tremendous and well-deserved prestige and confidence by its excellent and conscientious work, it is unable to realize fully –the potentialities of its greatness", it is pointed out, because of the insecure foundations upon which its enterprise must rest.[2] It needs, it has been suggested, a more enduring base if it is to fulfil the hopes which it has engendered.[3]

Proliferation of New International Tribunals:

Although there has never been an –overall plan", there has been a proliferation of several new international tribunals during the last 50 years. Besides, several ad hoc arbitration tribunals which have been set up, and the so-called –commercial arbitrations" held under established rules such as UNCITRAL or the ICC or ICSID, or under municipal arbitration law, quite a number of other international judicial or quasi-judicial institutions have been established, such as Iran-United States claims Tribunal, and new mechanism under the auspices of the WTO.

There are too many such institutions to be enumerated. At the regional level, Europe has its European Court of Justice in Luxembourg; its Commission and the Court of Human Rights at Strasbourg; and a European mechanism for conciliation and arbitration set up within the framework of the CSCE.

Several administrative tribunals have been established to deal with disputes arising between international organizations and their staff: the ILO Administrative

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[1] See, Edwin Dewitt Dickinson, *Law and Peace* (Philadelphia, 1951), p. 113.
[2] Dickinson, *ibid*., p. 121.
[3] Dickinson, *ibid*., pp. 121-22

Tribunal; the UN Administrative Tribunal; the World Bank Administrative Tribunal; and so on.

The horror of war in Yugoslavia and Rwanda have led the UN Security Council to create two International Tribunals for crimes committed in the former Yugoslavia and in Rwanda. A permanent International Criminal Court is now established.[4]

Even more interesting today is the International Tribunal for the Law of Sea which has been established in Hamburg, Germany, under the Montego Bay Convention concluded in 1982 as part of a comprehensive system for the settlement of disputes laid down in the Convention. The Convention came into force in November 1994. Although there is a considerable overlapping in the jurisdictions of the Hamburg Tribunal and the International Court of Justice, the Law of the Sea Tribunal can deal with some important classes of disputes[5] that probably could not go before the Hague Court.

No Structured Relationship, or System

Between Different Kinds of Courts

But despite all this proliferation of Courts, there is no ―structured relationship" or ―hierarchy or system" between them. As Judge R.Y. Jennings, President of International

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[4] See, Gilbert Guillaume, ―The Future of International Judicial Institutions", *International and Comparative Law Quarterly* (I.C.L.Q), vol. 4 (October 1955), pp. 848-49.

[5] Disputes like the prompt release of vessels and crews under Art. 292 of the L.O.S. Convention and in the matter of provisional measures under Art. 290, paragraph 5, and disputes concerning the international seabed area as provided in Part XI of the Convention. See Judge P. Chandrasekhara Rao, ―The ITLOS And its Guidelines", *Indian Journal of International Law* (IJIL), vol. 38, nos. 3 and 4, pp. 371-72.

Court of Justice, pointed out, ―they have just appeared as need or desire or ambitions promoted yet another one”.[6] As a result :

> ―In this particular respect, contemporary international law is just a disordered medley. Suffice it to say that it is very difficult to try to make any sort of pattern, much less a structured relationship, of this mass of tribunals, whether important or petty. It is sometimes difficult to find out what is going on, much less to study it.”[7]

This lack of ―structured relationship” among different kinds of courts in international system, where diverse organs exercising parts of judicial system are not related to each other is, it is sometimes pointed out, a rather disturbing trend which may lead to conflicts of ―jurisdiction or contradiction in decisions increasing the indetermination rather than the determination of law”.[8] Some well-meaning scholars and

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[6] R.Y. Jennings, ―The Judiciary, International and National, and the Development of International Law”, *ICLQ*, vol. 45 (January 1996), p. 5.

[7] Jennings, *ibid*., p. 5.

[8] Georges M. Abi-Saab, quoted in R.Y. Jennings, ―The Role of the International Court of Justice”, *British Yearbook of International Law*, vol. (1998), p. 61. But cf. Shabtai Rosenne who points out that ―there is no evidence to support the view that multiplicity of international judicial institutions for the settlement of disputes seriously impairs the unity of jurisprudence (a difficult proposition at the best of times). The Convention requires ITLOS to perform tasks that are beyond the capacity of the International Court under its present Statute. If only for that reason the cautious observer will hesitate before crying redundant.” Shabtai Rosenne, ―Establishing the ITLOS”, *American Journal of International Law* (AJIL), vol. 89 (1995), p. 814; see also Alexander Yankov, ―ITLOS: Its place within the dispute settlement system of UN Law of the Sean Convention, IJIL, vol. 37 (1997), p. 304.

judges are concerned about “the dangers that international law as a whole will become fragmented and unmanageable.”[9]

<u>Jurisdiction of International Courts</u>:

Besides the problems relating to creation or establishment of different structures of peace and their relationship with each other, the most important issues relate to the jurisdiction of these courts. It is all too well-known that no state is under an obligation to submit its disputes to any third party settlement without its own consent. As the International Court of Justice has made it clear beyond any doubt that the jurisdiction of an international court “depends on the will of the parties” and that the jurisdiction exists in so far as the states have accepted it.”[10]

Leaving aside <u>ad hoc</u> arbitration and other specialized international criminal tribunals on which jurisdiction is conferred by special agreements relating to their establishment, it may be mentioned that when the Permanent Court of International Justice was established in 1920 and again when its Statute was revised and the new International Court of Justice was formed in 1945, general compulsory jurisdiction could not be conferred on the Court. The obligatory jurisdiction of the Court could be accepted either under treaties, bilateral or multilateral, or by unilateral declarations under the optional clause (Art. 36(2)) of its Statute. The optional clause constituted an invitation to States to take courage and undertake this commitment even if only for a trial period and even if only for a limited range of disputes. But the unilateral form of these declarations and complete freedom assumed by States left them free to exclude wide matters from

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[9] Jennings, *ibid*., p. 60.

[10] See, R.P. Anand, quoting numerous cases in the World Court, *International Courts and Contemporary Conflicts* (Bombay, 1974), pp. 194 ff.

coming before the Court. This also made State practice under the optional clause dependent on international confidence in the Court. After 1920, as confidence in the Court grew, many States accepted its jurisdiction. At certain time as many as 41 States out of 48 States parties to the Statute had accepted its jurisdiction under the optional clause. In 1939, 36 States had made much declarations.[11]

Permanent Court of Justice largely a "European Court":

Although the Permanent Court of International Justice had proved its worth and was the subject of general and well-merited praise at the San Francisco Conference for its decisions and advisory opinions – between 1922 and 1940 the Court pronounced 29 judgements and gave 27 advisory opinions – general compulsory jurisdiction could not be conferred on the new Court which replaced it.[12] The Permanent Court truly represented the international community of its time. It was largely a ―European Court" with a majority of European judges (with the notable exception of post-revolutionary Russia) in addition to judges from the USA, some Latin American Republics, as well as from China and Japan. The Court also reflected in its pronouncements, it is said, ―the legal outlook of the Eurocentric community, which was strongly imbued with nineteenth century positivism."[13]

International Court established with Great Hopes

[11] See R.P. Anand, *Compulsory Jurisdiction of the International Court of Justice* (Bombay, 1961), pp. 36-37.
[12] See for an interesting comparison between jurisdiction conferred on the PCIJ and the ICJ, Philippe Couvreur, in A.S. Muller, D. Raic and J.M. Thuranszky (ed.), *International Court of Justice: Its Future Role After Fifty Years* (The Hague, 1997), pp. 96-97.
[13] Georges M. Abi-Saab, ―The International Court of Justice as a World Court", in Vaughan Lowe and Malgosia Fitzmaurice (ed.), *Fifty Years of the International Court of Justice: Essays in honour of Sir Robert Jennings* (Cambridge, 1996), p. 4.

In spite of its glorious record and the respect which was attached to the name of the Permanent Court of International Justice (PCIJ) in 1945,[14] when a new international organization was formulated at the San Francisco conference, the Court was re-established under a new name, the International Court of Justice (ICJ), for political rather than juristic considerations.[15] But in its “reincarnation”, the loose connection of the old World Court with the League of Nations was replaced by the integration of the new Court into the United Nations as its “principal judicial organ” and the Statute of the Court was made part of the United Nations Charter (Art. 92). Thus all members of the United Nations became *ipso facto* Parties to the Statute of the Court (Art. 93). But though it was a new Court with a new name which came into existence in 1945, the chain of continuity was not broken, and the new Court stepped into the shoes of the old Court, with the same organization and virtually the same Statute.[16] With a satisfactory record, of PCIJ and its international composition having a body of highly competent and great jurists of the world as its judges, there is little wonder that the ICJ was inaugurated with high hopes and great expectations. As P.H. Spaak, first President of the General Assembly, said at the inaugural sitting of the International Court of Justice on April 18, 1946:

> I would not venture to assert that the International Court of Justice is the most important organ of the United Nations...but I am convinced that it is of quite exceptional importance...I am deeply convinced that peace will not be established until

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[14] See Report of the UN Committee of Jurists which said that the Court “had functioned to the satisfaction of the litigants”. *UNCIO DOC*. vol. 14, p. 822.
[15] See R. P. Anand, International Courts and Contemporary Conflicts, (Bombay, 1972), p. 64.
[16] Report of Subcommittee IV/1/A, *UNCIO DOC*. vol. 13, p. 384.

> countries have recognized the truth that there can be no civilized world nor any lasting peace, if there be not complete and absolute respect for international jurisdiction and its judgments.[17]

Although compulsory jurisdiction could not be conferred on the new Court as well because of the hesitation and strong opposition of several sovereignty-enamoured big powers, especially the Soviet Union and the United States, it was hoped that as the Court started functioning and helped in solving some controversial and difficult issues, it would engender in course of time more and more confidence in its working and greater faith in its impartiality. It was expected that the jurisdiction of the Court, which could be conferred only by the consent of States, either by *ad hoc* agreements or under treaties, [Art. 36(1)], or by declarations made under the Optional Clause [Art. 36(2)] of the Court‘s Statute accepting compulsory jurisdiction before hand in future disputes, would come to be widely accepted as had happened in the case of the Permanent Court of International Justice. Thus, as we have seen, as many as 42 out of 52 members of the Statue of the Permanent Court (or nearly 73% of the ―international judicial community") had accepted its jurisdiction under Article 36(2) of its Statute.[18] Moreover, almost all the then existing States of the world (all save Nepal, Saudi Arabia, Vatican and Yemen) took part in concluding hundreds of treaties which conferred jurisdiction on the Court.

Paying ―tribute to this remarkable achievement" of the Permanent Court, the *Rapporteur*

[17] *Year Book of the International Court of Justice* (1946-47), p. 31.
[18] See Leo Gross, ―Compulsory Jurisdiction under the Optional Clause: History and Practice:, in Lori Fisler Damrosch, *The International Court of Justice at a Cross-roads*, (Dobbs Ferry, N.Y, 1986), p. 21; Shabatai Rosenne, *The Law and Practice of the International Court*, (New York, 1965) vol. I, p. 419.

of the First Committee of Commission IV at the San Francisco Conference foresaw:

> a significant role for the new Court in the international relations of the future. The judicial process will have a central place in the United Nations for the settlement of international disputes by peaceful means... It is confidently anticipated that the jurisdiction of the tribunal will be extended as time goes on, and past experience warrants the expectation that its exercise of the jurisdiction will command a general support.[19]

Hopes Belied

These hopes were however woefully belied after 1945 in the tension-ridden bipolar world and amidst power and ideological struggle that ensued between the Communist and the non-Communist States. Although 23 countries which had accepted the jurisdiction of the Permanent Court were deemed to have accepted the jurisdiction of the ICJ under Article 36(5) of its Statute in 1945, not many more countries came forward to accept the jurisdiction of the new Court. In fact 17 countries which had accepted the jurisdiction of the PCIJ under its Optional Clause, let their declarations lapse or terminated them. In 2006, out of the 191 members of the "international judicial community" (members of the UN), only 65 States (about 34%) have accepted the jurisdiction of the International Court under Article 36(2) of its Statute.[20] These include

[19] Report of the Rapporteur of Committee IV/1, *UNCIO DOC.*913, IV/1/74(1), vol. XIII, p. 393.

[20] Since 1951, 11 declarations under the Optional Clause had either lapsed or been terminated. These declarations were made by Bolivia, Brazil, China, France, Guatemala,

16 States from Africa, 9 from Latin America, 3 from Asia and 23 from West European and other States. The then Soviet Union and the former Communist States of East Europe never accepted the jurisdiction of the Court. China withdrew its declaration in 1972 shortly after the People's Republic of China replaced Taiwan as the legal representative of the Chinese people at the United Nations. France terminated its declaration in 1974 after it refused to appear before the Court in *Nuclear Test cases*. Not only have very few countries accepted the jurisdiction of the Court but even these declarations under the Optional Clause have been made with far-reaching reservations which are found in more than 50 out of 65 declarations. These reservations include questionable self-judging Connally-type reservations concerning matters within the domestic jurisdiction of a country as determined by that country, first made by the United States and originally followed by 10 other countries,[21] and other exclusions, no less damaging.[22] Further, many of these declarations (25 of them) may be terminated by a simple notice which may take effect after a specified time or immediately.[23] Although the United Kingdom is the only permanent member of the Security Council, which at present has accepted the compulsory jurisdiction of the International Court under the Optional Clause, the United

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Iran, Israel, South Africa, Thailand, Turkey and the Untied States. See *Year Book of the International Court of Justice,* (1989-90), p. 63.

[21] Five countries have withdrawn Connally-type reservations but it is still found in five declarations (Liberia, Malta, Mexico, Philippines and Sudan) under the Optional Clause. For details and an analysis of these damaging reservation, See Gross, note 18, pp. 22 ff.

[22] Thus the United States declaration included ―Vandenbarg" reservation which excluded all ―disputes arising under a multilateral treaty unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court or (2) the USA specially agrees to jurisdiction". This reservation has been included by El Salvador, India, Malta, Pakistan and Philippines in their declarations. See *Year Book of the International Court of Justice,* (1989-90), pp. 62 ff.

[23] See J. Patrick Kelly, ―The International Court of Justice: Crisis and Reformation", *Yale Journal of International Law*, (1987), vol. 12, p. 350.

Kingdom itself terminated its declaration four times and each time added new reservations in order to avoid being arraigned before the Court.[24]

It is interesting to note that President Michail Gorbachev of the former Soviet Union called the permanent members of the Security Council to set an example by submitting to the ICJ. This aroused great interest and the Five held a number of meetings at legal advisers level with a view to drawing up a list of subjects which could be submitted to the Court in the event of a dispute. But no agreement could be reached.[25]

Compulsory jurisdiction of the Court may also be accepted through compromissory clauses in international treaties. But we find the same hesitation in accepting the Court's jurisdiction among most of the countries. There are at present about 100 multilateral and 160 bilateral conventions accepting jurisdiction of the Court.

<u>Jurisdiction of the Law of the Sea Tribunal</u>:

There is a similar lack of enthusiasm in accepting the jurisdiction of the only other permanent court which has been recently created, viz., International Tribunal for the Law of the Sea which should have a great potential in the settlement of disputes relating to the law of the sea. Since not all countries were equally enthusiastic about this new Tribunal, the 1982 Law of the Sea Convention identifies in Part XV other means of settling disputes and leaves it to States to choose between the Tribunal, the ICJ, and various forms of arbitration. At present out of 112 States which have ratified or acceded to the

[24] See C.H.M. Waldock, ―Decline of the Optional Clause", 32 *Briish. Year Book of International Law*1956), p. 269; See also Kelly, ibid.
[25] See President of the ICJ Judge Bedjaoui, in his address to the General Assembly on 11 October, 1995.

LOS Convention, 17 have made a choice of procedure under Section 2 of Part XV. The rest are deemed to have accepted arbitration as the method of settlement of disputes. Of the 17 States, 9 have chosen the Tribunal. They are Argentina, Austria, Cape Verde, Finland, Germany, Greece, Oman, Tanzania and Uruguay.[26]

Further, States are not obliged to submit to the Tribunal their disputes which they consider of vital national concern. Thus, practically all disputes arising out of the exercise of sovereign rights or jurisdiction by a State in the exclusive economic zone concerning marine scientific research and fisheries are excluded from the compulsory procedures. Moreover, a State may declare in writing that it does not accept any compulsory procedure with regard to, *inter-alia*, disputes concerning boundary delimitation, military activities and law enforcement activities in regard to marine scientific research and fisheries in the EEZ, as well as disputes in respect of which the Security Council is exercising its functions under the Charter.[27]

<u>International Court of Justice in Crisis from the very Beginning</u>:

From the very beginning the International Court of Justice was portrayed as in crisis as a result of the lack or loss of confidence by one or the other part of the international community. None of the big powers put much faith in the Court and avoided it as far as possible. If United States included self-judging Connally reservation

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[26] See Gudmundur Eiriksson, ―The Role of ITLOS in the Peaceful Settlement of International Disputes", *Indian Journal of International Law* (IJIL), vol. 37, no. 3 (Special Issue on ITLOS)(1997), p. 350.

[27] See Law of the Sea Convention, Part XV, Sections 2 and 3; see also Guillaume, n. 4, p. 855; Shigeru Oda, ―Dispute Settlement Prospects in the Law of the Sea", *International and Comparative Law Quarterly*(ICLQ), vol. 41 (October 1995), p. 863. Shigeru Oda, ―Dispute Settlement Prospects in the Law of the Sea", *I.C.L.Q.*, vol. 4 (October 1995), p. 863.

relating to domestic jurisdiction in its declaration under the optional clause which reduced the acceptance to a mere nullity, the United Kingdom revised its declaration four times within a few years, each time changing its reservations to suit its conveniences.[28] France withdrew its declaration after the *Nuclear Test* cases in 1974.

After 1960, with the acceleration of decolonization process, as numerous Asian and African countries became independent, ―the ‗crisis of the Court‘ was perceived and analysed in terms of the distrust manifested by newly independent States towards the Court."[29] Several explanations were sought to be given for this supposed distrust on the part of the Asian-African States in the judicial process and their preference for the diplomatic procedures. Besides their cultural differences and national traditions, lengthy and onerous character of the judicial procedure, under representation of the Asian-African States on the bench, and the dissatisfaction of the new States with large parts of classical international law which legitimized their subjugation and generally favoured the interests of the erstwhile colonial powers, were given as the reasons for the hostile attitude of the new States towards international adjudication.[30]

The strongest blow to the confidence in the Court, especially amongst the Asian-African States, came in 1966 when the Court, by the casting vote of the President[31] (Sir Percy Spender), after nearly six years of proceedings costing millions of dollars, more than a dozen volumes of written proceedings, almost 300 hours of oral testimony, and

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[28] Anand, n. 11, p. 39.
[29] Abi-Saab, n. 13, p. 5.
[30] See R.P. Anand, ―Attitude of the ‗new‘ Asian-African countries towards the International Court of Justice", in his *Studies in International Adjudication* (New Delhi, 1969), pp. 53 ff; Abi-Saab, n. 13, p. 5.
[31] The Court being equally divided 7 votes to 7. See *South-West Africa* Cases (Second Phase), *ICJ Reports*, 1966, p. 6.

more than 100 Court sessions, decided – or refused to decide – the *South-West Africa* cases by declining to go into their merits on the basis of a matter of ―antecedent character" which was not even argued by either of the parties. This most controversial decision – or lack of decision – frustrated and enraged politically conscious Africans, undermined the confidence of newly independent countries in the Court and its capacity to do justice and thrust the Court into an acute crisis.[32] The African States, in particular, adopted ―the cynical view that the ICJ was a white man‘s Court, dispensing white man‘s justice."[33] It also evoked an extended and critical debate on the role of the Court in the General Assembly, leading to readjustment in the composition of the Court to make it more representative of the various parts of the international community.

There was a steep decline in the work of the Court. So steep was the decline that for some time – from June 21, 1971 to August 30, 1971 – there was not a single case pending before the Court.[34] For the next nearly three years after 1971 it had little to do and ―it was the subject of some humour about there being few cases and many judges."[35]

<u>Self-Assessment and Change on the Part of Court</u>:

One of the most important consequences of this crisis was a new self-assessment, a new self-awareness and change of attitude on the part of the Court itself. While earlier the Court was reserved in its relations with the UN, after this crisis the Court missed no

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[32] See R.P. Anand, ―International Status of South-West Africa", in his *Studies in International Adjudication* (New Delhi, 1969),, p.119.
[33] Andronico O. Adede, ―Judicial Settlement in Perspective", in A.S. Muller, D. Raic and J.M. Thuranszky (ed.), *The International Court of Justice: ItsFuture Role after Fifty Years* (The Hague, 1997), p. 51.
[34] See R.P. Anand, ―Role of International Adjudication", in Leo Gross, *The Future of the International Court of Justice* (Dobbs Ferry, N.Y. 1976), p. 2.
[35] See Judge Mohamed Shahabuddeen, ―The World Court at the Turn of the Century", in Muller, Raic and Thuranszky, n. 25, p. 20.

opportunity to emphasize that it was part of the United Nations and its principal judicial organ, and put forward the law and principles of the Charter.[36] The Court also revised its rules of procedure in 1972 and 1978 to make itself more efficient.[37]

In 1971 the Court gave its advisory opinion in the *Namibia* case[38] declaring illegal the continued occupation of Namibia by the Republic of South Africa following the termination of its mandate. The Court's stock further rose in the eyes of African countries when in 1975 it gave its advisory opinion in the *Western Sahara* case.[39] In this case the Court had occasion to discuss further the principles of decolonization and self-determination and made an important pronouncement on the concept of occupation as a means of acquiring title to territory in Africa.

International Court Regains Confidence:

The Court was beginning to regain its confidence, especially the trust of the African countries. The confidence in the ICJ reached its high water mark after its final judgement on the merits on 27 June 1986 in the *Nicaragua* case. Nicaragua appeared before the Court on the basis of its own and US declarations under the optional clause and charged that the United States was –using military force against Nicaragua and intervening in Nicaragua's internal affairs in violation of Nicaragua's sovereignty, territorial integrity and political independence and of the most fundamental and universally accepted principles of international law." The Court unanimously rejected

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[36] See Abi-Saab, n. 13, p. 6.
[37] See Guillaume, n. 4, p. 851.
[38] *ICJ Reports*, 1971, p. 16.
[39] *ICJ Reports*, 1975, p. 12.

US objections and boldly held that it had jurisdiction to entertain the case on merits.[40] Over the strongest objections of the United States, which withdrew from the case and cancelled its optional clause jurisdiction, the Court gave a decision on merits holding the United States responsible for its actions, as charged by Nicaragua.[41]

This was indeed a bold decision and the Court was well aware of the political risk it was taking in deciding the dispute against the only Super Power and leader of Western group of States even if it was “upholding the basic principles of contemporary international law and the Charter in the way it did in its judgement, and which it could not help doing as a court of law.”[42]

This led to what was supposed to be a new crisis. Earlier it was said that the Third World had no confidence in the Court. But with this judgement, some people “started to contend that it is now the Western world that no longer has confidence in the Court, where it risks systematically being put into the minority.”[43] France had already withdrawn its jurisdiction under the optional clause in 1974 after the *Nuclear Test* cases. United Kingdom was the only permanent member of the Security Council which had accepted optional clause jurisdiction which itself was full of gaps and reservations. The Court had, therefore, decided the *Nicaragua case* at a very high cost, it was feared.[44]

Increase in Court's work:

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[40] *ICJ Reports*, 1984, pp. 415-19.
[41] *ICJ Reports*, 1986, p. 14.
[42] Abi-Saab, n. 13, p. 6.
[43] Abi-Saab, n. 13, p. 6.
[44] See R .P. Anand, “The World Court on Trial”, in R.S. Pathak and R.P. Dhokalia, *International Law in Transition: Essays in Memory of Judge Nagendra Singh* (New Delhi, 1992), pp. 253ff.

But these fears proved to be short-lived and unnecessary panic. The Court had indeed given proof of its impartiality, objectivity and independence. Even if, therefore, it would suffer in the volume of its work in the short run, it was bound to increase its credibility.

Furthermore, with the collapse of Soviet Union, international tension between Eastern and Western bloc decreased and cold war between them subsided. This new period was ushered in by a momentous event, the collapse of Berlin Wall on one memorable day in 1989. ―Other walls", as Judge Bedjaoui told the General Assembly in his address on 11 October 1995, ―erected in the minds of world‘s leaders and which previously constituted so many impediments to the Court‘s work" then began to fall.[45]

Charles de Visscher said, ―general and prolonged political tensions are one of the gravest obstacles to regular recourse to international justice".[46] Although tension is not altogether gone, it is much less prominent and much less debilitating.[47]

All these factors have led to tremendous increase in the Court‘s work. In fact the Court was never so busy and has never had so many cases simultaneously in its docket. There are at present 13 cases pending before the Court, many of them brought by the much-maligned Third World, who, it used to be said, did not trust the Court. Even those who were sceptical yesterday are beginning to see the Court‘s potentiality. As President Mitterand of France, some ten years after France had withdrawn its declaration under the optional clause, said in 1984 in an address in the Great Hall of the Court:

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[45] See Address by President Bedjaoui to the General Assembly on 11 October, 1995.
[46] Charles de Visscher, Theory and Reality in Public International Law (1968), p. 369.
[47] See Judge Gilbert Guillaume, President of ICJ, Address to the General Assembly, February 2000.

“[T]here can be no civil peace without judges, no peace in our international society without judges who are chosen at that level and represent the powerful moral and legal force of the Hall where all the peoples of the world forgather.”[48]

The Court is now overloaded with judicial work. Judge R.Y. Jennings, President of the Court, said to the General Assembly in his 1991 address:

“Glancing at this list of cases, we can say one thing with assurance: this is indeed now a World Court, exhibiting in its daily work that quality of universality which is also a feature of the General Assembly.I think there is every reason to believe that this new buoyancy of the Hague Court, which has been developing now for some time, is set to continue. A reason for that belief is that there is perhaps now a greater understanding among Governments of the role that an international Court can and should play in their relations with one another.”[49]

It may also be mentioned that a Legal Aid Fund was established by the Secretary General of the United Nations in 1989 to help the poor countries pursue their cases before

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[48] Quoted in Shahabuddeen, n. 27, p. 24.

[49] See quoted in Adede, n. 25, p. 62. *ICJ Yearbook*, 1991-92, p. 207. See also Judge Shahabuddeen, n. 27, p. 22ff; Highet, “The Peace Palace Heats up: The World Court in Business Again”, *AJIL*, vol. 85 (1991), p. 646.

the Court. This is an excellent move and can help some countries seek justice at the international level which many a time is beyond their reach.[50]

Encouraging Trend:

As we have seen, there has been a lot of judicial activity during the last few years. Several new international tribunals have been created. Although extensive compulsory jurisdiction has not been conferred on the Tribunal for the Law of the Sea, nor for that matter even on the International Court of Justice, the case load in the latter Court shows increasing interest of States in the judicial settlement of international disputes. There have of course been swings before in the work-load of the International Court and certainly variations will occur in the future. But an awareness seems to be increasing of the need to recourse to judicial settlement as a useful procedure for resolving disputes in a civilized way, in much the same way as individuals do within a domestic system.[51]

Limitations of the Judicial Process:

It must be realized, however, that the judicial process has its own limitations. Law is not a panacea to solve all the problems of the international society. As the Court itself said in the *Northern Cameroon*'s case that even if it finds that it has jurisdiction,

> ―the Court is not compelled in every case to exercise that jurisdiction. There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or,

[50] See Judge Shahabuddeen, n. 27, p. 23.
[51] *Free Zones* case, Order PCIJ, Series A, No. 22 (1929), p. 13. See also Shahabuddeen, n. 27, p. 23.

indeed, of both parties to a case on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity."[52]

It must be confessed that judicial procedure cannot, on the plane of mere fact, be a substitute for war. The judicial approach is limited by the fact that, given the fundamental nature of major disputes that arise in international relations and the clashes of political and economic interests, a judgement does not constitute a settlement. There is no doubt that the much-disputed line between legal and political questions is purely a subjective phenomenon of the minds and wills of the disputants. But the fact still remains that many issues will be as far from settlement after a judge has said all that a judge can properly say as they were before any such pronouncement. It must be admitted that by the very nature of international life, not all disputes can or will be submitted to the international courts. The problem is not that the courts cannot decide the disputes because of their inherent "political" nature. But the problem is that the States won't be prepared to submit disputes or to accept judicial decision in cases which involve their vital interests.[53] Professor David Forsythe correctly stated:

"The ICJ remains marginal in international relations because of the

up-stream' concern by States that their 'vital' interests not be entrusted to independent judges who will decide disputes with reference to legal rules. Even when the Court finds that the States have given their consent to ICJ jurisdiction, if

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[52] *I.C.J. Reports*, 1963, p. 29.
[53] See J.L. Brierly, "Vital Interests and the Law", *BYIL*, vol. 21(1944), p. 51. See also Louis B. Sohn, "The Jurisdiction of the ICJ", AJIL, vol. 38 (1944), p. 694ff.

the resulting judgement is bothersome enough, States from Albania to Iran, from Libya to the US will display defiance rather than compliance. That most States have complied with ICJ and PCIJ judgements means primarily that States gave their consent for World Court adjudication previously because the dispute was not seen as ‗vital'.[54]

The assertion that if general compulsory jurisdiction could be established, the problem of war and illegal force would be solved, said Judge R.Y. Jennings, rests—

―upon an egregiously mistaken assumption that wars and other resorts to force are about what international lawyers would recognize as legal ‗disputes' which would answer to the adversarial procedure of a court of justice. Some uses of force, or resort to war have indeed had legal disputes at the core of the matter – notably disputes about boundaries or entitlement to territory, both land and sea – but many again have not. Neither of the World Wars have even remotely lent themselves to so simplistic an analysis."[55]

So long as the world remains as unorganized as at present, and the security and welfare of each State are left in fact to depend upon itself alone, the world history can not be turned into a Court procedure. Similarly, when States demand a change in the law,

[54] David P. Forsythe, ―The International Court of Justice at Fifty", in Muller, Raic, Thuranszky, n. 12, p. 397.
[55] Jennings, n. 8, p. 53.

which they challenge as obsolete, a decision according to law can hardly help in solving the dispute. Indeed, the authoritative declaration of legal rights and wrongs may even impede settlement by encouraging the rigidity of one side in the controversy which might have been settled by a political compromise.[56] To again quote Judge R.Y. Jennings, who said about grave disputes which are neither simply legal nor simply political:

> ―[A] Court, in deciding the legal question in legal terms, might be
> prejudicing or indeed frustrating decisions of which it may not itself
> be in a position even to understand, other than perhaps marginally. The Court has
> no expertise or even experience in the political, military
> and strategic criteria that a political body would expect to apply to
> this kind of political decision."[57]

He added that sometimes it is better not to settle at all but to *manage* the dispute and referred to ―the successful treaty regime for Antarctica which wholly depends upon an agreement *not* to settle the underlying disputes."[58]

It has been correctly pointed out that generally ―States have mutual, vested interests in settling (or managing, or just continuing) disputes out of Court. It is because of States‘ perception of what is in their national interest, i.e. freedom of maneuver as

[56] See Anand, n. 10, pp. 231 ff.
[57] R.Y. Jennings, n. 8, p. 31.
[58] Jennings, *ibid*., *footnote*. Emphasis in original. See for a detailed discussion of this dichotomy of legal and political disputes, Anand, n. 10, pp. 230-241.

compared to submission to a workable and effective rule of law – that the ICJ has averaged only about three cases per year over the last 50 years.”[59]

Wider Compulsory Jurisdiction Helpful:

But though compulsory adjudication in comparatively ordinary, non-political, so-called “run of the mill” cases is not an effective substitute for war, that does not mean that it is not in itself a powerful constituent element of peace. While admitting that adjudication must be supplemented by approaches of a different order and that other more informal political methods of pacific settlement of international disputes must be provided, it is essential to increase the jurisdiction of the courts. Even by solving minor day to day disputes, they can help create a law habit among States and create an atmosphere of peace. By deciding these ordinary economic, business or even boundary disputes without much fanfare, they can render a most useful service, as courts do in the traditional field, because by far the greatest number of disputes relate to these matters which, if peacefully settled, can encourage smooth intercourse between States in the present inter-dependent world. It has been well said by an experienced judge:

> “After all, it is the habit of living under the law, and with habitual
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> and normal recourse to the agencies of the law, that will make violenceand aggression in defiance of the law more difficult. What we need is not just a crisis law but a law for normal existence.”[61]

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[59] See Forsythe, n. 55, p. 401.

Basically the principal function of law “is to provide clear principles and rules for the routine ordering of a society by the rule of law”.[60]

Conclusion:

Institutions and procedures for the settlement of disputes under law are at once the hope and despair of all those who reflect seriously upon relations among nations. One of the basic functions of a civilized legal order is a system of courts with jurisdiction to decide every dispute that might arise. In the international society, besides *ad hoc* arbitration courts, we have a number of courts established during the last 50 years but without any regular plan or structured relationship. We have the International Court of Justice which is truly a World Court without any regional restriction as to subject matter in its contentious jurisdiction. But it is restricted as to parties of cases which come before it. Under Article 34(1) of its Statute, “only States may be parties in cases before the Court.” Although, individuals can and do enjoy “rights” directly under modern international law, the Hague Court is increasingly cut off from a growing and very important part of international law system. Neither multilateral corporations, nor NGOs, nor even the United Nations itself can appear before the Court as applicants or respondents. This is an anachronism created in 1922 which has not been rectified. There is a dilemma. According to a former President of the World Court, if Article 34(1) of that Statute is modified, it “would probably produce a flow of cases with which the Court, with its present staff, organization, resources, could not possibly cope.”[61]

[60] Jennings, n. 8, p. 54.
[61] Jennings, *ibid.*, pp. 38-39.

Another possible remedy is of course the creation of other kinds of international tribunals and courts which has been done with a lot of enthusiasm. Although the proliferation of new, specialized and permanent courts, like the Law of the Sea Tribunal, are welcome, they all have limited jurisdiction, limited sometimes by region, sometimes by subject matter, sometimes by both. But because of their rather haphazard and unplanned growth, there is a serious danger that international law may “become fragmented as each tribunal … will tend to produce a specific variety of international law.[62]

In a developed system of courts, as we find in most States, there are legally defined relationships between courts, whether legally defined subordination or legally recognized independence. There is usually one court at the top of the hierarchy. It is suggested that “the ICJ, being the principal judicial organ of the United Nations, and moreover having a general jurisdiction over all questions of international law, would seem apt to fill this role.”[63] But we will have to solve the problems of Article 34(1) of the Statute, and its relationship with the specialized tribunals.

Although far-reaching jurisdiction has not been conferred on the International Court, nor is it likely to solve important economic or political problems involving vital interests of States, it is still by far the most successful organ of the United Nations. It is too much to expect States to accept unqualified compulsory jurisdiction immediately. The maxim “calculate the limits of the possible” should be kept in mind. The busier the Court gets, the better it is for the world society because it can help promote a more peaceful and less lawless world. It can certainly help reduce tension between States by

[62] See Abi-Saab, quoted by Jennings, *ibid.*, p. 61.
[63] Jennings, *ibid.*, p. 63.

sorting out intricate facts and clarifying complicated law in numerous disputes that arise between them. Let us remember that each day of peace is a time for the extension of law and every extension of law a reinforcement of peace.

VI

Environment, Development

and

The Developing Countries

VI

Environment, Development and The Developing Countries

A Divided World:

With the collapse of the Soviet Empire and the Soviet Union itself, the cold war, waged relentlessly since the Second World War, had subsided and there was some respite. But the world is still deeply divided. The –great divide" today is between the rich and the poor. As the former Finance Minister of Pakistan, Dr. Mehbood ul Haq pointed out:

> –A poverty curtain has descended right across the face of our world, dividing it materially and philosophically into two different worlds, two separate planets, two unequal humanities – one embarrassingly rich and the other desperately poor. This invisible barrier exists within nations as well as between them, and often provides a unity of thought and purpose to the Third World countries which otherwise have their own economic, political and cultural differences. The struggle to lift this curtain of poverty is certainly the most formidable challenge of our time".[1]

The ever-widening gap between the developed rich countries of the North and the

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[1] M. Ul Haq, *The Poverty Curtain: Choices for the Third World,* New York, (1976) p. xv.

underdeveloped, courteously called ―developing", miserable poor countries of the South has become a cliché. It is no longer a gap, it is a chasm. On one side are about two dozen or so industrialized countries (including the United States, West European community, Canada, Australia, New Zealand and Japan) whose 1.2 billion citizens live in an environment of relative abundance, with per capita income varying between 19,000 to 27,000 US dollars per annum, produce most of the world's manufactured goods, consume most of the world's resources, and enjoy history's highest standard of living. On the other are more than 120 underdeveloped nations – more than 4.5 billion people – which struggle to survive on per capita incomes ranging between 350 and 600 US dollars. In 1990, some 30 developing countries, including some of the populous countries of South Asia, had a per capita income of $ 400 or less, with a median value of about $ 200, almost one hundredth of the per capita income of the most developed countries.[2]

The simple fact is that most people in underdeveloped countries do not have enough to eat. Today, 85 per cent of the world's income goes to 23 per cent of its people – the affluent consumers. By contrast, more than 1 billion people, the absolute poor, survive on less than one dollar a day.[3] It is a bitter truth that one-third to one-half of human beings in these poor countries suffer from hunger or malnutrition. One in three children is malnourished and 20 to 25 per cent of them die before their fifth birthday. And millions who do not die lead impeded lives because their brains have been damaged and bodies stunted by nutritional deficiencies. About 3 million children die annually from diseases that could be averted by immunization. Some one billion people cannot read or

[2] World Economic Survey 1993: Current Trends and Policies in the World Economy (1993), New York: UN, p. 6.

[3] See S. Postel, ―Denial in the Decisive Decade", in State of the World 1992: A World watch Institute Report on Progress towards a Sustainable Society, New York, (1992) p. 4.

write, and more than 100 million children of primary school age are not in school. This is “absolute poverty” of “marginal” human beings, men and women barely surviving on the margin of life under conditions so degraded by disease, illiteracy, malnutrition, and squalor as to deny them basic human necessities. They are trapped in a “condition of life so degrading as to insult human dignity – and yet a condition of life so common as to be the lot of 40 per cent”, some 2.4 billion peoples of the developing countries.[4]

Millions of human beings in the Third World have just no homes. Other millions live in houses or huts in slums and tenements made of corrugated iron sheets, cardboard boxes, or such other easily destructible materials in overcrowded cities. They have no running water and no toilets. These luxuries they cannot afford. Health services are rarely within walking distance, and have to be paid for. Primary education may be available and free but often children are needed for work. There is generally no social security or unemployment pay, and so many people – some 500 million according to some estimates – are without any kind of employment.[5]

On the other hand, with the “blessings” of science and technology, the rich countries have reached a level of prosperity which the previous generations would have found difficult to imagine. In fact it has created the problem of over-affluence. The problems of “overweight society” and “overdevelopment” are as common in our age as those of underdevelopment. The fact that less than 7 per cent of the world‘s population consumes more than 67 per cent of the world‘s wealth indicates a voracious appetite for new materials and resources at the cost of the rest of the world. Most of the raw materials and minerals produced in the developing countries go to the industrialized countries.

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[4] See R.S. McNamara, Address to the Board of Governors of the World Bank, Washington, D.C., (1974) p. 2.

[5] T. Hayter, *The Creation of World Poverty,* New Delhi, (1982) p. 18.

Indeed, never in history has there been so much waste, together with so much destruction of environment, as we have witnessed during the last few decades.[6]

Legacy of the Colonial Age

There is a general and widespread feeling, not only in the underdeveloped States but even in Western industrialized countries as well, that the latter are largely responsible for the poverty of the Third World. Thus, explaining his views on the “development of underdevelopment”, André Gunder Frank points out.

> “Contemporary underdevelopment is in large part the historical product of past and continuing economic and other relations between satellite underdeveloped and the now developed metropolitan countries”.[7]

Walter Rodney also in his *How Europe Underdeveloped Africa* (1972) says:

> “The developed and underdeveloped parts of the present capitalist section of the world have been in continuous contact for four and a half centuries. The contention here is that over that period Africa helped to develop Western Europe in the same proportion as Western Europe helped to under-develop Africa”.[8]

The search for new markets motivated the European countries‘ expansion all through the nineteenth century and still does so today. After the occupation and control of India and its markets Europe undermined much of the local textile industry in Africa by

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[6] See B. Ward, & R. Dubos, *Only One Earth*, London, (1972) p. 23.
[7] Quoted in T. Hayter, n. 5, p. 38.
[8] Quoted in T. Hayter, ibid.

bringing in textiles from India, thus adding to the destruction of African commerce, mining and industry. These Indian textiles in Africa and also in America, then began to be replaced by textiles from Britain. It is well-known how the British proceeded to destroy the Indian textile industry by eliminating competition from Indian textiles through an elaborated network of restrictions and prohibitive duties. Even within India, taxes effectively discriminated against local cloth. The resulting hardship was great for the Indian weavers. Sir Charles Trevelyan declared to a Parliamentary enquiry in 1840:

> "The population of Dacca has fallen from 150,000 to 30,000 or 40,000 and the jungle and malaria are fast encroaching upon the town... Dacca which used to be the Manchester of India has fallen off from a flourishing town to a very poor and small one".[9]

Not only textiles, but the iron and steel industry were destroyed as well. The duties imposed on Indian exports into Britain were, in spite of the "free trade" policies being promoted at the time, 5 to 25 times higher than the duties that were allowed on British imports into India. The destruction was completed by physical means, where necessary.

There thus began the gradual process of the conversion of the dominated territories into markets for the products of European industry and suppliers of raw material and primary commodities. The theories of free trade and comparative advantage have held powerful sway in the West and are propounded, as a scientific explanation of reality. But Adam Smith and Ricardo, and their "neo-classical" successors, produced

[9] Quoted in T. Hayter, ibid. p. 48.

their theories on free trade only after the British had established their industrial pre-eminence. In the beginning, they not only destroyed the long-established industries of others, but protected their own from competition.

The use of force to open up new markets was common practice. China was forced to open its markets and legalize even the banned opium trade after the Opium war in 1840 when the British fleet attacked China. When towards the end of the nineteenth century, Britain‘s industrial pre-eminence was threatened by other European powers, they and Britain embarked on another process of colonization, this time mainly in Africa, in order to obtain for themselves protected markets abroad. The struggle for markets led the Europeans to fight among themselves which culminated in the First World War of 1914-18.

The inexorable conversion of the dominated areas in Asia and Africa into markets for European manufactured goods and suppliers of primary commodities and raw materials for European industries undermined not only their previous self-sufficiency in manufactures, but increasingly their ability to feed themselves. Colonies were converted into virtual plantations (or mines) producing one or two crops (or mineral products) for export to Europe for their burgeoning industries.[10]

Continuing Exploitation

One need not dwell in the past only when the Asian-African countries, under colonial domination, had no choice. Unfortunately, the exploitation of the poor countries still continues through subtle and sophisticated means and under an economic order

[10] See how introduction of monoculture in various countries of the Third World led to destruction of their economies and ruined their people. T. Hayter, ibid. pp. 53.

which is merely a continuation of the hated colonial era. Although colonialism has died a natural death, the international framework of the old order has been kept intact by the more pragmatic and self-confident colonial powers. The ―white man's burden" in respect of the impoverished, conquered and humiliated natives of the Third World still continues through the developed countries' superiority and dominant voice in the international economic system. The division of labour between developed and underdeveloped countries, imposed in the colonial era, still continue and it is difficult to escape from it. Developed countries, or rather their business interests and transnational corporations, are unwilling to share their technology. Trade secrets are jealously guarded and markets are dominated by companies of the developed countries, and it is difficult for newcomers to enter them. The prices charged for manufactured goods are largely monopoly prices, and in any case they rise steadily over time.

International Monetary System:

The international monetary system and the international economic institutions, created after the Second World War by the Bretton Woods Agreement amongst the industrialized rich countries, established the basis of progress in the industrial world while completely ignoring the needs and demands of the developing countries. The present international monetary system has been described as ―unfair, unequal, unsuitable, uncertain and inconsistent".[11] The poor nations have hardly any participation in the economic decision-making of the world. Their advice is never solicited when the big ten industrialized nations get together to take key decisions on the world's economic future.

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[11] See Keutcha (Cameroon), U.N. Doc. A/PV. 2340, 8 September, 1975, pp. 48-50. [20] M. Ul Haq, n. 5, p. 161.

Their voting strength in the Bretton Woods institutions (World Bank and I.M.F.) is less than one-third of the total; and their numerical majority in the UN General Assembly, as we shall see, has meant no real influence on international economic decisions.[12]

Poor Countries Produce only Primary Commodities and Raw Material

Underdeveloped countries, still producing mainly primary commodities and raw materials for the developed economies, have several problems. The prices for their primary commodities and raw materials fall not only in relative and sometimes in absolute terms, but they fluctuate widely from year to year; their economies are highly dependent on exports and many of them are highly dependent on the export of new, sometimes just one or two, commodities. The fluctuations in commodity prices can be dramatic and are accentuated by speculation in commodity markets in London, outside the control of the underdeveloped countries. In the mid-1970s, for instance, the price of sugar dropped from 64 cents a pound to 6 cents a pound in 18 months. Tanzania‘s sisal price dropped from 90 pounds to 60 pounds. The Brandt Report, referring to Zambia, pointed out that a boom in copper prices took the price to $ 3034 in April 1974; but it fell to $ 1290 before the end of the year. It may also be remembered that according to the Brandt Report, in the seventies, more than half the developing countries, excluding the oil-exporting countries, got more than half of their export earnings only from one or two commodities. Zambia got 94 per cent from copper; Mauritius 90 per cent from sugar; Cuba 84 per cent from sugar, and Gambia 85 per cent from groundnuts and groundnut oil.[13]

[12] M. Ul Haq, n. 1, p. 160.
[13] See World Commission on Environment and Development, (chairman Gro Harlem Brundtland) (1987).

The developed countries have always refused to discuss the problem of raw materials in an integrated scheme because they claim it is in conflict with the system of free enterprise. How —free” the system is can be seen from the fact that while heavy tariffs are levied on industrial goods imported from the developing countries (to discourage their industrialization) low duties are imposed on raw materials imported from these countries. As Dr. Mehbub ul Haq has pointed out, the rich nations are making it increasingly impossible for the —free” international market mechanism to work. The cornerstone of the free market mechanism is based, he points out, on the free movement of labour and capital as well as goods and services so that rewards to factors of production are equalized all over the world. Yet immigration laws in all the rich nations make it impossible for any large-scale movement of unskilled labour in a world-wide search for economic opportunities. Only highly skilled labour is permitted to move on a very restrictive basis which, in the form of —brain drain”, helps only the rich nations at the cost of the poor. Not much capital is permitted to cross international boundaries either because of poor countries‘ sensitivities or rich nations‘ own needs.

Farm Subsidies in the Developed Countries:

Additional barriers have been raised against the free movement of goods and services. For example, over 20 billion dollars in farm subsidies alone are paid to farmers in the rich nations to protect their agriculture, and progressively higher tariffs and quotas are enforced against the simple consumer goods exports of the developing countries. The rich thus are drawing a protective wall around their life styles, telling the poor nations

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Our Common Future, New York, p. 71.

that they can compete neither with their labour nor with their goods.[14]

The UN Commission on Environment and Development (Brundtland Commission), also pointed out in its report, *Our Common Future*, that agriculture

> ―Production in industrialized countries has usually been highly subsidized and protected from international competition. These subsidies have encouraged the overuse of soil and chemicals, the pollution of water resources and foods with these chemicals and the degradation of the countryside. Much of this effort has produced surpluses and their associated financial burdens. And some of this surplus has been sent at concessional rates to the developing world, where it has undermined the farming policies of recipient nations".[15]

Direct or indirect subsidies, which now cover the entire food cycle, according to the Commission, have become very expensive. In the United States, the cost of farm support had grown from $ 2.7 billion in 1980 to $ 25.8 billion in 1986. In the EEC such costs had risen from $ 6.2 billion in1976 to $ 21.5 billion in 1986. It is politically more attractive and cheaper to export surpluses – often as food aid – rather than store them. These highly subsidized surpluses depress the international market prices of commodities like sugar and rice and create severe problems for developing countries.[16]

Developed Countries Control Prices of Raw Materials and Industrial goods:

In fact as absolute masters of the market for the purchase of raw materials, the

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[14] M. Ul Haq, n. 1, p. 160.
[15] See World Commission on Environment and Development, (chairman Gro Harlem Brundtland) (1987). *Our Common Future*, New York, p. 71.
[16] Ibid. p. 123.

developed countries buy them at the prices they fix. Furthermore, as absolute masters of the market for manufactured goods, they sell them at the prices they desire. The result is that soap, cotton, paper, iron ore, copper, etc. – all raw materials – are bought in the developing countries for the price of a slice of bread and the products come back to them at prices they cannot afford to pay. A banana-exporting country receives only 70 cents out of $ 6.00 which represents the sale price abroad of a box of bananas produced in that country. While the prices of primary products have been historically depressed, the prices of manufactured goods have been constantly buoyant. For more than a quarter of a century before they took control of their product, the oil-producing countries received only one-tenth of each dollar paid by the oil consumers in the industrialized countries that imported oil, while the rest went into the coffers of the monopolistic companies or their governments.[17] This has resulted in what has been called the steady deterioration in terms of trade. Mathematically, the poorest must continue to grow poorer while the rich continue to get richer. There is little wonder that poor, pressured and powerless, the primary producers have been confined to the periphery of international economic relations while the wheels of power and control are turned by the industrialized States operating them at the centre. The constant deterioration in terms of trade led to a decline in the share of the developing countries from 21.3 per cent in 1960 to 17.6 per cent in 1970, while their external debt quadrupled in ten years exceeding 80 billion US dollars. Since then the economic situation of the developing countries has much worsened."[18]

Developing countries were particularly hit in the 1980s because of stagnation in world trade and falling commodity prices. According to the Brundtland Commission, "between

[17] See Al Thani (Qatar) U.N. Doc. A/P.V. 2346, 10 Sept., 1975, pp. 24-25.
[18] *Our Common Future,* n. 13, p. 12.

1980 and 1984, developing countries lost about $ 55 billion in export earnings because of the fall in commodity prices, a blow felt most keenly in Latin America and Africa".[19] Over half of all developing countries actually experienced declining per capita gross domestic product (GDP) in the years 1982-85 and per capita GDP fell, for developing countries as a whole, by around 10 per cent in the 1980s.[20]

What we need is a rational reordering of global priorities and global resources. By far the biggest share of available resources is being diverted to the most unproductive area of human activity: armaments and arsenals. Mankind is spending over a thousand billion dollars every year on the means of its own destruction. This figures out to about two million dollars per minute in perfecting our path to extinction. We need a world order which is more than a dance of death. We need a new world order which helps in saving mankind and fulfilling the human personality. But this is possible only by large-scale disarmament which has become feasible when the world is no longer divided into political groups devoted to ideological wrangling and destruction.

Developing Countries Demand Change:

Ever since their political independence in the 1940s and 1950s, the developing countries have been demanding a change in their lives. They have asserted with reason that they could not continue with their hopeless lives; that political independence without economic freedom was of little consequence; that the developed countries were largely responsible for their misery; that the economic order created after the Second World War was inequitable, unjust and unreasonable; that they must get a new economic order which

[19] Ibid. p. 36.
[20] Ibid.

was more humane and would help them in their development. But all pleadings to change the inequitable economic system, their demands for help, and their appeals for consideration went unheeded and were simply ignored. No State enjoying privileges would be prepared to give them up of its own free will. There was a clear lack of will on the part of the rich countries. The fundamental problems remained the same as during the colonial period: inequality in the terms of trade; stabilization of forces and markets for primary commodities; access to the market of the developed countries; and a generalized system of preference.

Pleas for a New International Economic Order:

Unable to get any concessions from the developed countries, who simply ignored them; by 1960 the developing countries joined hands together to put an end to the present inequitable system that tended to impoverish their entire world. They were sick of being meek and started making their demands more militantly. The ―damned of the earth", resigned and submissive until then, changed themselves into confident and revolutionary advocates of a new order learning about themselves and the earth in the course of the struggle. There was nothing fatal, they asserted, about what was modestly called the deterioration in the terms of trade. It was the operation of a deliberate system which was fundamentally bad. To put an end to this situation the international community must evolve a new system which would bring greater justice and equity to international economic relations. It was unjust, they felt, that the prices of manufactured goods fixed by the economic powers should surge ahead while the prices for the primary commodities necessary for the manufacture of those products were maintained at the same level or

were even allowed to decline by the same powers. They wanted to take steps to index the prices of the products exported by the developing countries to tie them to the prices of the manufactured and capital goods they must import. They asked for some correlation between the prices of raw materials and those of manufactured goods. The developed countries must also open their markets, they demanded, to the products of the developing countries by doing away with the protectionist barriers which led to decrease of exports by the underdeveloped countries.

Resolutions in the General Assembly:

In order to put maximum pressure on the rich industrialized countries the United Nations General Assembly, where the turbulent countries of the Third World had come to constitute a solid and virtually unbeatable majority, was used in the 1970s as a forum in the economic campaign of the developing countries. Forming a new consortium – the Group of 77 – containing actually more than 125 members, the poor countries used all the diplomatic pressure they could muster in their struggle for a new deal. They used the popular forum to declare the 1960s as the first UN Development Decade and the 1970s as the second Development Decade; organized the United Nations Conference on Trade and Development on a regular basis to focus on the needs of the developing countries; established a UN Capital Fund; and formed a Special Committee on Trade Preference. In 1974 and 1975 they called two special sessions (VI and VII) of the General Assembly to discuss their problem of raw materials and do something about it. At these sessions the developing countries spoke boldly, even bluntly, and put their demands very forcefully. They accused the rich countries of the west of wasting energy and minerals, building weapons they did not need, polluting the air and the oceans, eating too much and

contributing to the starvation of others. They got two resolutions adopted by the General Assembly (G.A. Resolutions 3201 and 3202 (S-VI) containing the Establishment of the New International Economic Order and the Declaration and Programme of Action. The first resolution proclaimed the “united determination” of the Members of the United Nations “to work urgently for the establishment of a new international economic order”, and laid down general principles on which the new economic order should be founded. The second spelt out the programme of action to be carried out for the purpose of achieving the above ideal and for bringing about the maximum possible “economic cooperation and understanding among all States, particularly between developed and developing countries, based on the principle of dignity and sovereign equality”.

Utter Failure

But despite all this pressure and all the resolutions by the General Assembly and other organs of the United Nations, all efforts by the poor countries to better their lot failed miserably. Instead of getting better their economic condition further deteriorated in the 1970s and even more in the 1980s. In 1980, as the Brundtland commission noted, the total number of poor people not getting enough calories to prevent stunted growth and serious health risks had increased by 14 per cent since 1970 and numbered 340 million in 87 developing countries. The number of people living in slums and shanty towns, the Commission pointed out, was rising not falling. A growing number lacked access to clean water and sanitation and hence were prey to diseases that arose from this lack.[21]

Industrialized countries Richer But Not Better

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[21] *Our Common Future*, n. 13, p. 29.

But along with the deteriorating conditions of the poor in the ever shrinking world society, leading to tensions and confrontations between the rich and the poor, as we have seen above, there came a realization in the late 1960s that while the rich were getting richer by exploiting the poor through an economic system which was a legacy of the colonial age, they were not necessarily getting better. In the process of getting an economically richer life, in their relentless struggle for luxuries, by introducing more and more sophisticated, massive and novel technology in their ever-expanding industrialization, they were destroying the very life-support system of the earth. The environmental consequences of industrialization and economic development, and the pollution of the air, water and land which give us sustenance was indeed a high price that they had to pay for economic advancement. It came to be widely accepted that environmental pollution was an inescapable by-product of industrial development. Life could only be sustained through a delicate equilibrium between man and nature. Blind to the need of cooperating with nature, the equilibrium seemed to be menaced by the pressure of increasing population, but even more importantly, by the strain of pollution generated by the developing technologies in large-scale industrialization. The vast use of energy and new materials, industrial effluents, urbanization and consumer habits in the developed countries were leading the industrialized countries on a course which could alter dangerously, if not irreversibly, the natural system of our planet upon which our biological survival depended. Already rivers had ―caught fire”, lakes and inland seas – the Baltic and the Mediterranean – were under threat from untreated wastes threatening marine life. The burning of fossil fuel was increasing with unforeseeable consequences for the earth‘s climate and atmosphere. Even the vast oceans were becoming far more

vulnerable to man's polluting activities than had been assumed. With too many poisons, insecticides and fertilizers running into the oceans, vast oil spills and long-life chemicals that were generated into the air or dumped into the sea, the oceans could not remain endless dumping grounds and a perpetual source of freshening winds and currents.[22] With the kind of technology that was coming into use by the industrialized countries – huge tankers with carrying capacities of 500,000 tons of crude oil, large nuclear power plants, toxic stock-piles of nerve gas and biological agents – with increasing possibilities of accidents with far-reaching consequences, some ecologists like Paul Ehrlich warned that everybody – the whole world – might "disappear in cloud of smoke in 20 years". Even if one did not subscribe to such doomsday threats, it was clear that the world could not avoid the possibility or even inevitability of a catastrophe if we did not do something about it.

Global Problem

It was realized that the problem of environmental pollution was a global problem which concerned all States irrespective of their size, stage of development, or ideology. Despite all the political and ideological divisions of the society, it was a small world indeed. There was no escape from the underlying unity and interconnection of the ocean world. The seas and oceans, like the winds above, mingled with each other, cleansed or poisoned each other, passed on each other's burdens, and made a seamless watery web. The sovereign States might proclaim their territorial controls and national independence; but airs brought in the acid rains, oceans carried toxic substances to other shores, and

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[22] See B. Ward & R. Dubos, *Only One Earth: The Care and Maintenance of a Small Planet*, New York, (1972), pp. xii-xviii, 1-12; See also R.A. Falk, *The Endangered Planet,* New York: Wade Rowland (1972), and *The Plot to Save the World*, Toronto (1972).

pollution moved from continent to continent. As Frances Cairn cross said recently:

> ―Nature is no respecter of national boundaries. Across those dotted lines on the globe, winds blow, rivers flow and migrating species walk or fly. The dotted lines may carve up the earth, but the sea and the atmosphere remain open to all, to cherish or plunder. When people in one country harm that bit of the environment they assume to be theirs, many others may suffer too. But, how, and how much, can countries make their neighbours change their ways".[23]

If United States, Russia or France tested nuclear weapons, the winds blew the fallout to other countries. As the winds and oceans flew round our little planet, Russia's Strontium–90 was as lethal as that of France, the England or the United States, and not only in their own countries. Thus it was pointed out that the danger of ―irresponsible" disposal of radioactive wastes from nuclear energy plants was perhaps more of a threat to the security of other States than was the danger of war and conquest.[24] Yet this is what is already happening. According to recent reports, ―Asia is fast turning into waste dump for the west, having received five million tons of such high-tech cargo during the last four years".[25] The rising environmental threat is reminding humanity of both its vulnerability and compulsion for common survival on a fragile planet.

Rising Expectations

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[23] F. Cairncross, ―The Environment: Whose World is it, anyway?", *Economist*, May 30, 1991, p. 5.
[24] See Falk, n. 22, p. 197; Ward and Dubos, n. 22, pp. 202-203.
[25] See S. Lal, ―Down with the Dumps", *Times of India*, Feb. 6, 1994, p. 16.

But despite all these interdependences – in biosphere and techno sphere alike – and realization that we did indeed belong to a single system and our survival depended on the balance and health of the total system, it could not escape the serious attention of all perceptive observers that our small planet Earth was deeply divided. As the UN Secretary-General, U Thant, noted: “Squalid poverty lives side by side with overabundance on our earth. We have reached the moon but we have not reached each other”.[26] While the rich countries were risking the health of their people by over consumption, and endangering the planet by over-industrialization and industrial pollutants, two-thirds of humanity was groaning under the unbearable weight of abject poverty. But that was not all. In the shrinking world society, a growing number of these poor were waking up to the realization of how the people in the rich countries were living. As the image, ways of life and consumer habits of the rich countries, impressive evidence of prosperity, not to say of opulent living, of their peoples, were transmitted to the remotest corners of the world by the transistor, the communication satellites and the world-wide TV, ambitions to imitate them naturally arose awakening new aspirations. This new awareness gave rise to what was called the “revolution of rising expectations”. The poor people knew that they did not have to be hungry; they wanted food and shelter; they wanted bicycles, refrigerators, radios, movies, and they wanted them soon. They came to realize that the only way to free themselves from long and humiliating servitude was to achieve the industrial base which was necessary to provide them with adequate fighting capabilities, at least to defend themselves. This was the road adopted in the last century by Japan, and which in the modern age was attracting countries like China, India,

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[26] U Thant, quoted in J.L. Hargroves, (ed.) *Law, Institutions and the Global Environment*, Dobbs Ferry, N.Y., (1972), p. 44.

Mexico, Brazil and others.

Poor Contribute to the Environmental Degradation

The national leaders in the developing countries, aware of the aspirations of their people, had no choice but to promise them an improving economic future. In their desperate efforts to achieve their goal, ―modernize" and develop their economies, and create affluent societies like those in North America and Europe, the side effects were seldom taken into account.[27] It may be noticed that the environmental side effects were even more serious in the less-developed than in the developed countries. Thus, it had been found that nearly every irrigation project in the developing countries had been followed by outbreaks, sometimes disastrous, of waterborne diseases of humans or of animals. Some irrigation projects, like the pervasive system of dams on the Nile, or the modern canal system in West Punjab in Pakistan had induced large-scale geophysical changes which had, in turn, reduced the agricultural potential of the regions.[28] Previously productive lands had been known to have been reduced in fertility or even completely destroyed by poorly managed irrigation systems. Problems of water-logging, alkalization, cementation of soils and erosion of slopes, had been traced to the use of irrigation in many countries. Nearly every reported instance involving the chemical control of agricultural pests in newly developed agricultural areas had been characterized by serious ecological hazards. Case histories of technological improvements in animal husbandry

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[27] See O. Soemarwote, ―Environmental Quality: Dilemma of Development", in Y.J. Wu & W.A. Clemente, II (eds.) *Environment and or Development in Asia, Hope and Frustration*, Ann Arbor, Michigan, (1972), p. 190.

[28] See B. Commoner, ―On the Meaning of Ecological Failures in International Development", in M. Taghi Farvar, & J.P. Milton, (eds.) *The Careless Technology: Ecology and International Development*, Garden City, N.Y., (1972), pp. xxii, 214.

and fisheries depicted the same picture of unexpected hazard.[29] These ecological failures, it was felt, were not the random accidents of progress but evidence that introduction of new technology into the developing countries had adverse ecological consequences which were seldom taken into consideration.[30] Thus, the poor countries, too occupied in their always unsuccessful attempts merely to survive, were contributing to the ever-growing environmental degradation.

But some economists did not hesitate to point out that the developing countries could never hope to achieve the consumption patterns of the developed countries. To raise the living standards of the world‘s existing population to American levels, the annual world-wide production would have to be increased 75 times, that of copper 100 times, that of lead 100 times, and that of tin 250 times. If a country like India were to use fertilizers at the per capita level of Holland, it would consume one-half of the total world output of fertilizers. Clearly, the parity of the developing countries with the developed ones was not compatible with the existing stocks of natural resources. It was, therefore, suggested by some observers that for the survival of mankind the poor developing countries should remain in a state of underdevelopment because if the evils of industrialization were to reach them life on the planet would be in jeopardy.[31] They were horrified to imagine the risk to human society if more than two-thirds of the ―wretched of the earth" were also to try to live like Europeans or Japanese or sought American

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[29] See R.O. Adegbaye, ―Environmental Aspects of Agricultural Development: Africa", in D.M. Dworkin, *Environment and Development,* Indianapolis, Indiana, (1976), pp. 2-7.
[30] See B. Commoner, n. 45, pp. xxii-xxiii.
[31] See criticism of such views in J.A. De Araujo Castro, ―Environment and Development: The Case of the Developing Countries", in D. Kay, & E.B. Skolnikoff, (eds.) *World Eco-Crises,* Madison, Wisconsin, (1972), pp. 240-241.

standards.[32] “The irony of the development is”, it was warned, “that to the extent it succeeds, the world situation worsens”.[33]

Stockholm conference on Human Environment

In this continuous economic struggle in which the rich countries were trying to maintain and improve their life styles which the poor were trying to imitate and catch up with, environment was neglected and suffered terrible degradation until it was realized that it could no longer be ignored. In 1972 the U.N. Conference on Human Environment was called at Stockholm to take stock of the situation. At Stockholm for the first time several well-meaning environmentally conscious individuals, like Maurice Strong, Barbara Ward and others, brought to the world‘s attention the seriousness of the problem and the dire need which dictated that the Earth must be cleansed of its foul air and water if the human species was to survive. But the poor countries reminded the rich nations that while they understood the need to protect the environment, they could not continue, or should not even be expected to continue, to linger in misery. They brought to the attention of the rich countries the distinction between the “pollution of affluence” and the “pollution of poverty” which was recognized by the Conference in its Declaration. It accepted the fact that “while in industrialized countries, environmental problems are generally related to industrialization and technological development”, in the poor countries “most of the environmental problems are caused by under-development”.[51] Although the developing countries were experiencing, in varying degrees, the

[32] Ward & Dubos, n. 22, pp. 11, 118-19.
[33] Falk, n. 22, p. 33. See also R.P. Anand, “Development and Environment: The Case of the Developing Countries”, in R.P. Anand, *Confrontation or Cooperation: International Law and the Developing Countries*, New Delhi and Dordrecht, pp. 155-58.

environmental problems that arose in the course of growth and some industrialization, and were not unconcerned about the growing menace to the human environment, they were not and could not be convinced of the logic of non-development. The two-thirds of humanity, who were barely surviving on the margin of life, could not equal the passionate alarm of the industrialized countries unless environmental issues could be equated with developmental issues. Poverty, they felt, was the greatest source of pollution. As a UN Panel of experts said in its report in 1971, in both the towns and the villages in the Third World,

> ―not merely the ‗quality of life', but life itself is endangered by poor water, housing, sanitation and nutrition, by sickness and disease, and by natural disasters. These are the problems, no less than those of industrial pollution, that clamour for attention in the context for human environment".[34]

Most of the people in the Third World were acutely aware that there were ―two worlds, two planets, two humanities", said Pakistan's Mhabub ul Haq:

> ―In your world, there is a concern today about the quality of life; in our world, there is concern about life itself which is threatened by hunger and malnutrition. In your world, there is concern today about the conservation of non-renewable resources... In our world, the anxiety is not about the depletion of resources but about the best distribution and exploitation of these resources, for the benefit of all mankind rather than for the benefit of a few nations. While you are worried about industrial pollution, we are

[34] See *Development and Environment*, Report of a Panel of Experts convened by the Secretary-General of the UN Conference on Human Environment, Fountex, Switzerland, 4-12 June 1971 (known as Fountex Report), UN Doc. A/Conf. 48/10/ Annex 1, pp. 3-4.

worried about the pollution of poverty, because our problems arise not out of excess of development and technology but because of lack of development and technology and inadequate control over natural phenomena. In the developed countries, you can afford to fuss about the adverse effects of DDT; we have to be concerned about what it means for our crops and for sustaining human lives. You can afford to be concerned about polluted beaches. We have to worry a lot about the fact that less than 10 per cent of the population in the Third World has even drinkable water”.[35]

He added that unfortunately “our two worlds, while they touch and meet, they rarely communicate. And it is that process of real communication, real dialogue, that we have to encourage today in case we have to equip ourselves to deal with the problems of this world.”[36]

At the Stockholm Conference there was a lot of concern expressed by both the developed and the developing countries for the total disregard of the environment by all the countries. For the first time the world became aware of the terrible degradation of the environment which, if it remained unchecked, would lead to the destruction of the whole world. Everybody agreed that protection and improvement of human environment was “a major issue”, needed “more prudent care”, and “through ignorance and indifference”, we could “do massive and irreversible harm to earthly environment on which our life and well-being” depended.[55] The Conference pressed for several actions for the protection of our fragile environment and adopted 26 principles recommending various measures to bring man and his activities in harmony with nature. It was also recognized that poverty

[35] Haq, n. 1, p. 82.
[36] Haq, ibid.

must be abated and the poor must be helped if the environment had to be saved (see Principles 8 to 12).

It must be stressed, however, that there was little, if any, real communication between the rich and the poor at Stockholm. It was more or less like a dialogue between the deaf, each harping on their own problems without bothering about what the others had to say. The acceptance of the body of principles, which was not an easy task, consisted of a largely unenforceable set of recommendations which were hortatory in nature and could be generally ignored as soon as the delegates reached home.

Environmental Decline and Response

Vast industrial expansion took place in the developed countries after the Second World War without any regard to the environment, resulting in terrible pollution. This was symbolized by the Los Angeles smog, the proclaimed death of Lake Erie; progressive pollution of the Meuse, Elbe and Rhine; and chemical poisoning in several parts of the United States and Europe. But by the late 1960s, growing awareness and public concern led to action by governments and industry in the industrial countries. Expenditures rose as high as 2 per cent of the G.N.P. in some of the industrial countries after the Stockholm Conference by the late 1970s. The results were mixed but with the cooperation of the industry, during the 1970s a number of industrial countries experienced a significant improvement in environmental quality. There was a considerable roll back in air pollution in many cities and in water pollution in many lakes and rivers. Certain chemicals were controlled.

But despite these achievements, the progress was limited and was confined only to a few industrial countries that were willing and could afford to take preventive

measures to reduce, control, and prevent air and water pollution. On the whole, however taking the entire biosphere as one unit, the condition was worsening. Fertilizer run-off and sewage discharges into rivers, lakes and coastal waters had increased, with terrible effects on fishing, drinking water, navigation and scenic beauty.

In the meantime, the poor developing countries were making their own contributions. Engrossed in their own problems, the rich did not have time to look at the miseries of the poor nor, in spite of all their rhetoric, did they have an inclination to help them economically. The result was further deterioration in their economic conditions. While in the industrial countries the population growth had been under 1 per cent and in some countries was approaching zero population growth, in the developing countries it had reached 3.7 billion by 1985 and was likely to grow to 6.8 billion by 2025.[37] But besides this population explosion in the developing countries which neutralized all the economic progress they made, and was ticking like a time bomb, deteriorating terms of trade, rising debt-service obligations, stagnating flows of aid, and growing protectionism in the developed market economies, caused severe external payment problems. These economic difficulties led to devastating social impacts: malnutrition, hunger and droughts, especially in Africa.[38]

If Africa had an acute debt problem, in Latin America it reached the level of a crisis. In 1985 their debts constituted roughly two-thirds of outstanding loans of banks to developing countries. Real wages fell and growing poverty and deteriorating environmental conditions were visible everywhere in Latin America. Latin American natural resources were being used not for development or to raise living standards, but to

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[37] See Brundtland Commission Report, n. 13, pp. 210-212.
[38] See ibid. pp. 72-73.

meet the financial requirements of the industrialized countries.[39]

Environmental Crises

Poverty, there is no doubt, was –a major cause and effect of global environmental problems” which were becoming all pervading, threatening life on earth.[40] Each year another 6 million hectares of productive dry land was turning into worthless desert. More than 11 million hectares of forest was being destroyed yearly and turned into low-grade farmland unable to support the farmers who settled it. In Europe, acid precipitation was killing forests and lakes and damaging the architectural heritage of nations. The burning of fossil fuels put into the atmosphere carbon dioxide which was causing gradual global warming. The –greenhouse effect” might in a few years increase average global temperatures to shift agricultural production areas, raise sea-level to flood coastal areas and even drown some island States. According to experts in the field, the consequence of this one dramatic alteration of our environment – not including the thousands of other environmental problems we face – may –stand second only to global nuclear war”. It may lead to –

> –catastrophic floods and droughts... entire species and regions of plants, forests and animals could be wiped out at rates nearly unprecedented in evolutionary history... the delicate ecological balance of oceanic conditions and biotic could be dramatically upset...; and human mortality could increase catastrophically due to temperature changes and resultant proliferation of disease and malnutrition at rates that would far

[39] Ibid., pp. 74-75.
[40] Ibid. p. 3.

exceed the speed of scientific advancement and response".[41] [42]

Other industrial gases had already depleted the planet's protective ozone shield threatening increase in the number of human and animal cancers and perhaps disrupting the human food chain. Not only was environmental degradation proceeding at an alarming rate but in the 1980s numerous economic-environmental disasters occurred. Food production per capita declined in 94 countries between 1985 and 1989. The drought-triggered environment crisis in Africa killed more than one million people, threatening another 35 million. In 1984, a leakage in a pesticides factory in Bhopal (India) killed more than 2000 people and blinded and injured over 200,000 more. Liquid gas tanks exploded in Mexico City killing 1000 people and leaving thousands more homeless. In 1986, an accident at a nuclear reactor in Chernobyl, USSR, killed at least 25 people and sent radioactive fallout across Europe which, it was estimated, might cause anywhere from 14000 to 475,000 cancer deaths.[43] Agricultural chemicals, solvents and mercury flowed into the River Rhine during a warehouse fire in Switzerland killing millions of fish and threatening drinking water in Germany and the Netherlands.[44]

Meaning of Sustainable Development

Sustainable development, which became the new slogan at the Rio Conference in 1992, means development that lasts. A basic concern is that those who enjoy the fruits of

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[41] See S.E. Holly, ―Global Warming: Construction and Enforcement of an International Accord", *Stanford Environment Law Journal*, vol. 10, (1991), p. 45; D. Magraw, ―World Climate Change: Greenhouse Effect", *Proceedings of the American Society of International Law,* 8th Annual Meeting, (1990), pp. 344-45; see also R.M. White, ―The Great Climate Debate", ibid., pp. 346-56; E. Brown Weiss, ibid., pp. 356-63.

[42] See R.K.L. Panjabi, ―From Stockholm to Rio: A Comparison of the Declaratory Principles of International Environmental Law", *Journal of International Law and Policy*, vol. 21, (1993), p. 2.

[43] Ibid. p. 236.

[44] Brundtland Report, n. 13, p. 3.

economic development today may be making future generations worse off by excessively degrading the earth's resources and polluting the earth's environment. According to the World Commission on Environment and Development, “sustainable development was meant to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs”. Sustainable development, therefore, implied limits “imposed by the present state of technology and social organization on environmental resources and by the ability of the biosphere to absorb effects of human activities”. Thus, poverty was not inevitable. The Brundtland Commission was convinced that –

> “Poverty is not only an evil in itself, but *sustainable development* requires meeting the basic needs of all and extending to all the opportunity to fulfill their aspiration for a better life. A world in which poverty is endemic will always be prone to ecological and other catastrophes”.[45]

Development cannot subsist upon a deteriorating environmental resource base; the environment cannot be protected when growth leaves out of account the costs of environmental destruction”.[46]

One thing was certain however, according to the Commission. No country could “develop in isolation from others”. Long-term sustainable growth would require, therefore, “far-reaching changes to produce trade, capital and technology flows that are more equitable and better synchronized to environmental imperatives”.[47]

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[45] Ibid., p. 8.
[46] Ibid., p. 37.
[47] Ibid. pp. 40-41.

`The Human Development Report of 1993 also insists that it is as important to address the “silent emergencies” of poverty like water pollution, land degradation and environmental diseases, as it is to focus on “loud emergencies” like global warming and ozone depletion, that usually dominate the headlines. While the old motive of fighting the cold war is dead, the new motive must be the war against global poverty because –

“this is an investment not only in the development of poor nations but in the security of the rich nations. The real threat in the next few decades is that global poverty will begin to travel, without a passport, in many unpleasant forms; drugs, diseases, terrorism, migrations. Poverty anywhere is a threat to prosperity everywhere”.[48]

Rio Conference on Environment and Development (UNCED), 1992

The Stockholm Conference had raised public awareness about our ailing planet. The Rio Summit extended this interest worldwide as television and radio carried the message to every corner of the earth. The Stockholm Conference was attended by two heads of government, Indian Prime Minister Indira Gandhi and Swedish Prime Minister Olaf Palme. The Earth Summit at Rio drew more than 100 heads of State and government. Both the seriousness of global environmental problems and general awareness about them increased dramatically, it was correctly noticed, as did “the level of human suffering due to related poverty”.[49] During two decades between Stockholm and Rio, the population on our crowded planet rose from 3.5 billion to 5.5 billion, 95 per cent of it in poor countries; the earth lost 500 million acres of trees; for the growth of food crops, the world lost 500 million tons of topsoil, an amount equal to the tillable soil of India and France combined; food production declined in 94 countries between 1985

[48] Human Development Report, 1993, pp. 4, 8.
[49] See Panjabi, n. 42, p. 222.

and 1989;

`````` Clearly, it was pointed out, the South was still subsidizing the high standard of living in the North.[50] Canada‘s Minister of Environment, Jean Charest, reminded delegates at Rio that in the past “thirty years, income disparities between the North and the South have grown from twenty times to sixty times” and commented that “this trend is simply not sustainable”.[51] The North with 25 per cent of the world population, still consumed 70 per cent of the world‘s energy, 75 per cent of its metals, and 85 per cent of its wood.[52] India‘s former Minister of Environment, Maneka Gandhi, pointed out at Rio that one Western child consumed as much as 125 Eastern children did. She concluded that “nearly all environmental degradation in the East is due to consumption in the West”.[53]

**Rio Conference Adopts Various Instruments**

To correct some of these imbalances, to coordinate actions of all States, rich and poor, on various fronts with a view to “establish a new and equitable global partnership”, and to cooperate in the achievement of sustainable development for everyone, which had become absolutely essential if the Earth, our only home, had to be saved from the impending, catastrophe, the Rio Conference adopted various instruments trying to elaborate and prescribe general rights and obligations “to meet developmental and environmental needs of the present and future generations”.[54] Besides a general Rio

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[50] See Panjabi, ibid. pp. 233, 238.
[51] Quoted in Panjabi, ibid. p. 239.
[52] See S. Begley, “Is it Apocalypse Now?” *Newsweek*, June 1 1992, p. 36.
[53] Quoted in Begley, ibid. p. 36.
[54] See P.E. Dewitt, “Summit to Save the Earth: Rich vs. Proof”, *Time*, June 1, 1992, p. 37.
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Declaration on Environment and Development proclaiming 27 principles for –the further development of international law in the field of sustainable development" (Principle 27), UNCED adopted a Convention on Climate Change, Convention on Biological Diversity, a Statement of Principles on Forests, and Agenda 21, which was more or less a Charter of demands by the developing countries. Agenda 21 became the main forum for North-South wrangling on every imaginable topic, including the spread of deserts, disposal of toxic wastes, and even the protection of women's rights. In the end, all that the delegates could agree was that some of these problems did need to be solved. But what they could not agree was the means to solve them.

Rio Achieves No Progress

If the purpose of the Rio Conference on Environment and Development, attended by more than 100 heads of State and government and thousands of delegates, was to forge a new global partnership between the rich and the poor countries, and to develop a new law of environment and development for the protection of our small planet which is under a serious threat of almost certain doom, it achieved neither. The instruments adopted in Rio were not really binding in law and were couched in such vague and uncertain language that they entailed no legal, political, or even moral obligation. That so much thundering rhetoric accompanied the formulation of declarations never meant to be legally binding both at Stockholm and Rio, merely shows extreme conservativeness, if not insincerity, of the delegates who were more concerned about their –sovereignty" and entrenched –sovereign rights" in a world which is said to have became one (see Principle 2).

The head of the Canadian delegation, Arthur Campeau, described the final

declaration as “a document suitable for bureaucrats”.[55] Sometimes generously described as “soft law” and widely acclaimed, it really led nowhere. On the other hand, Agenda 21, described as a “750 page document of unsurpassed U.N. verbosity, intended to be the world‘s programme for sustainable development”,[56] is not even likely, according to some observers, “to be read widely or perused by the general public”.[57]

Rich-Poor Dichotomy Continues

While the poor countries have been really concerned about their crushing poverty and have continued to compare their miserable lives with the lavish standards in the industrialized countries, the latter have got sick and tired of listening to these comparisons and details of their over-consumption and wastages. Thus the United States, whose consumer society was uppermost in the minds of most poor countries, contemptuously rejected at Rio any condemnation of its affluent way of living. American delegates insisted “over and over that the American life-style is not up for negotiation”.[58]

It is all too well-known that the rich countries are not prepared to abandon their privileges. They are more keen to preserve their life styles than to accept disciplines which require a lowering of their irrational levels of consumption of energy, food, paper and a hundred other things. Whatever their leaders say for the record, their deeds speak louder than their words and betray their inability to look at the ecological issues from a global perspective. As we have seen above, the condition of the poor countries – their indebtedness, their terms of trade, their population, their environment – have all

[55] Quoted by Panjabi, n. 42, p. 221.
[56] Bargain not a Whinge, *Times* (London), June 1 1992, p. 15; quoted in Panjabi, ibid. pp. 2221-222.
[57] Panjabi, ibid.
[58] See P.E. Dewitt, “Summit to Save the Earth: Rich vs. Poor”, *Time*, June 1 1992, p. 42.

deteriorated during the last twenty years. Nationalism still reigns supreme and is the single largest obstacle to international cooperation.

Moreover, as things are, no country, least of all the ones with high-tech weaponry, can be held accountable for disasters which endanger thousands of lives in neighbouring or even remote areas. Russia got away with Chernobyl and dumping nuclear waste in the sea off the coasts of Korea and Japan. France does not feel constrained for having caused many deaths in remote Pacific islands because of radiation which resulted from its repeated nuclear tests despite widespread protests. Many people may be dying because of eating fish from the seas contaminated by toxic wastes without even being able to name the guilty.[59]

It is well-known that the latest GATT negotiations, such as the Uruguay round, were largely conducted between the United States, the European Economic Community and Japan. The latest GATT agreement (sometimes referred to as the Dunkel draft) is essentially a compromise between them, irrespective of the conditions of the poor and the developing countries. The poor countries are merely dragging along whatever principles might have been recommended at Stockholm and Rio to help them. Thus, though there is a crying need for sharing the world‘s scientific resources, developing countries have found that access to western technology is neither easy nor cheap.

Progress towards What and Progress for Whom?

As early as 1908, that great perceptive Indian writer, Rabindranath Tagore, raised some doubts about the so-called ―progress" towards which we were being dragged along by the prosperous West, which are as relevant today:

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[59] *Our Common Future*, n. 13, pp. 226-28.

―We have for over a century been dragged by the prosperous West behind its chariot, choked by the dust, deafened by the noise, and over-whelmed by the speed... If we ever ventured to ask, ‗progress towards what and progress for whom', it was considered to be peculiarly and ridiculously Oriental to entertain such doubts about the absoluteness of progress".[60]

As we look at the Western countries and their people continuously struggling to have even more luxurious lives completely disregarding the environmental destruction and progressing towards an uncertain future, and a large number of poor third world countries with their aspiring millions desperately trying to follow them irrespective of the consequences and getting stuck in the thick mire of even more difficult economic and environmental problems, we, as Orientals, have those lingering doubts, progress towards what and progress for whom? We have found no answer to these questions.

[60] Quoted by G. Axinu, ―Sustainable Development Reconsidered", *Development*, Nos. 1-4, p. 120.