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CIVILIZATION AND INTERNATIONAL LAW IN JAPAN DURING THE MEIJI ERA (1868–1912)*

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I. *The First European Law*

The law that the Japanese first encountered and tried to learn was neither civil, commercial nor constitutional, but international law. There was one reason for this. It was the situation at the time of confrontation. That time was the end of the Edo era. The Tokugawa government had chosen the policy of isolation since 1639. It was in 1853 that the American naval expedition of Admiral Perry awakened and shook Japan suddenly. According to a scholar of Japanese modern history, "the degree of panic of the Japanese people was so enormous that we cannot imagine it now. Japan had no information of foreign countries. Foreigners had been recognized as barbarous enemies and animals. Yet those foreigners forced Japan to open up the country using their tools of civilization and announced their requirements based on international law. Then they repeated international law. The foreign authorities of the Tokugawa government began to study international law facing such difficulties. They had some books of international law written by Wheaton, Phillimore etc. at an early stage[1]".

The Japanese called international law "Bankokukouhou" (the public law of all the nations) at first. This expression derives from the word in the Chinese translation (1864) of Wheaton's "Elements of International Law" (first edition 1836), which was published by a commission of scholars appointed by Prince Kung on the advice of W. A. P. Martin[2]. Now the Japanese word for international law is "Kokusaihou" ("Kokusai" means inter-nations, "hou" means law). It was Minosaku Rinshou who invented this word in his translation of Woolsey's "Introduction to the Study of International Law" (first edition 1864) in 1873. Since then the Japanese have used "Kokusaihou" in the meaning of international law.

Wheaton's Chinese translation was reprinted by Kaiseisho (the official school of the Tokugawa government) at Kyoto in Japan in 1865. One copy of the reprint edition seems to

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[1] Osatake Takesi, Kokusaihou yori Mitaru Bakumatsu Gaikou Monogatari (The Story of the Foreign Affairs in Japan at the End of Edo Era), Tokyo, 1926, p.1.

[2] George Grafton Wilson, Henry Wheaton and International Law, in: Henry Wheaton, Elements of International Law (The Literal Reproduction of the Edition of 1866 by Richard Henry Dana, Jr.), Oxford, 1936, p.16a.

have been presented to the contemporary and last Shogun Tokugawa Yoshinobu. Not only the authorities and officials of the Tokugawa government, but also keen intellectuals and the leading opponents of the Edo regime were very eager to read it. Nisi Amane who studied at Leiden University, published "Hollander Vissering's Bankokukouhou" in 1868, which was a summary of the lecture on international law by Simon Visseling. In the same year Mr Uriu published the Japanese translation of only a part of Wheaton's "International Law" directly. Bankokukouhou (international law) enjoyed a high reputation at the time. The Emperor who had been in the centre of anti-alien policy, declared the opening of Japan to foreign intercourse based on international law. He notified the consuls in Japan "to conduct the foreign policy according to the public law of the universe (Udai no kouhou)" in January 1868. In the next month Sanshoku (three main ministers of the Emperor) added in a postscript that "His Majesty...decided to keep the traditional constitution of the Empire and use Bankokukouhou from now on"[3].

However, according to Osatake, while Japan was becoming keen on international law, European Powers began to maintain that international law was not the law among all the nations in the world. They apparently showed their true colours by maintaining that international law known as Bankokukouhou by the Japanese was understood to be valid only among the Christian nations. Osatake describes the following:

> "It is a more serious problem than the anti-Japanese movement. Nevertheless, even impartial scholars openly stated it as a just theory imprudently. The Japanese unexpectedly did not become angry at this. They thought the time had already changed and this theory could be just because international lawyers in the civilized nations maintained it. Of course even Japanese intellectuals doubted its justness to some extent. Still, they were not courageous enough to refute it coldly and fearlessly. They had no evidence against the European theory. Even the ruling statesmen of Japan advocated westernization and assimilation to become Europe's equal. Therefore, Japanese scholars had to obey the European theory. This was the situation in the middle of the Meiji era.[4]"

There is an interesting point in this "situation in the middle of the Meiji era" when we think about the history of international law and modernization of Japan. It was the idea behind the situation that Japan had to become a member of international law and modernize itself. It was the idea behind the situation that Japan had to become a member of the European club of international law (the family of nations) to be able to associate with the European nations equally. Otherwise, Japan would never abolish the consular jurisdiction in Japan. Besides, Japan could not be under the protection of international law. She felt in danger in the time of imperialism and colonization. The leaders of Japan well remembered the Opium War and its cause and result. The only way for her independence seemed to be to imitate Europe in almost every area. Especially the westernization of the state system, the military, economics and education were important. This was also crucial in becoming a member of the family of nations. For Japan believed that only the members of the club of international law, namely European nations, could decide on the admission of the entry of Japan.

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[3] Kunaichou (The Imperial Household Agency), Meiji Tennou Ki (The Chronological Records of the Meiji Emperor), Tokyo, 1973, pp.546 and 626.

[4] Osatake Takesi, op. cit., pp.3–4.

However, if Europe monopolised international law because of its Christianity and non-European nations were required to be Christian, it could have been impossible for them to become the members of the club of international law. Yet even imprudent European scholars did not require Christianity as the qualification for membership of the European club of international law. The most important criterion was not Christianity but "civilization". The international law Japan encountered in the 19th century was also the result of European civilization. Japan had to face the severe pressure of European Powers at the time of imperialism. It was one crucial problem of modern Japan, especially for her existence, to become a member of the family of nations. This article deals with the historical meaning of the relationship between civilization and international law focusing on Meiji Japan.

II. *European Legal Theories Concerning Civilization in the Nineteenth Century*

There were some international lawyers in the 19th century who asserted the exclusiveness of international law based on the European characteristics of international law. They were rather common. First we will look at Thomas Erskine Holland (1835–1926) as an example. He was a Professor at Oxford and an authority on international law. He had some connection with Meiji Japan. The Meiji government awarded him the title of Grand Commander of the Rising Sun and invited him to become its advisor though unsuccessfully. There was a book post-humously published containing many interesting "Lectures on International Law" in his works. He dealt with the "Orbit of International Law" as "a geographical, or, rather, ethnological question" in its Lecture IV. He says as follows.

International law has developed in claiming "a common ancestry" of Greek and in "the consciousness of a common allegiance to the Holy Roman Empire and to the Roman Pontiff". It continued developing "with the progress of ideas in the same group of Nations" even at the time of Absolutism. "It grew with the mental growth of the Nations of Europe". The common element of these Nations was "the fact that they all had the Christian religion". One important question appears from this fact. Is International law "a purely Christian Institution" or not?

His answer was clear. Admittedly a great deal of Christian morality has formed the composition of international law without doubt. Yet, avoiding the conflict between Protestants and Catholics, it founded its system on Ius Naturae. Therefore, its application is not restricted to only the Nations professing the Christian faith. "Its applicability is a question rather of Civilization than of Creed".

Accordingly the present restriction of its application to Christian Nations is "accidental rather than essential". Christian nations and their colonies "have attained a level of civilization perhaps not higher than but at any rate different from that attained till recently by the other races of mankind". This difference is very big. Namely "their International Law, like many other products of their civilization, is too refined to be applicable, as a whole, very far beyond their own limits".

The nations within the limits organize the Family of Nations. They are the following.

(1) The European Powers (including their Colonies).

(2) The former Colonies, which have become independent of the European Powers, e.g. the United States, Mexico and the South and Central American Republics.

(3) The Ottoman Empire, admitted under Article 7 of the Treaty of Paris, which provided that:" The Sublime Porte is admitted to participate in the public law and concert of Europe[5]".

He continues. The question whether international law can be applied is not "to be presumed but to be proved". Japan was the example. Japan succeeded in withdrawing the extraterritorial jurisdictions in 1899. "Her respect for International Law was abundantly proved during her war with China, and, on a larger scale, during her war with Russia (February, 1904, to September, 1905)". China, Persia and Siam profess "an admiration for the International Law of the West and would be glad to be thought to have accepted it". It is hardly to say they were not admitted into "the outer courts of the charmed circle". Yet this does not mean there is an applicability of international law as "the whole system" to them. It needs "scrutiny of the facts"[6].

The main points are itemized as follows.

(1) International law was born and established in Europe.

(2) International law is extremely European.

(3) The European characteristics of international law are not Christian but of "civilization".

(4) Any other country is "admitted" into the family of nations like Japan, when she is recognized as a nation having respect for international law.

(5) It is the members of the European family of nations that admit a new country to the club of international law.

In fact, as I will write later, this theory was not perfectly dominant in both academic and practical circles. It was only an influential theory. However, many leading international lawyers showed similar opinions concerning this matter in spite of the differences. For example, there is W. E. Hall (1835–94). He also treated this subject quite frankly.

Hall's "A Treatise on International Law" (first edition 1880) was an authoritative textbook of international law until around 1930. It starts with a definition of international law: "International law consists in certain rules of conduct which modern civilized states regard as binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement".

Following his definition the subjects of international law were only "modern civilized states". In other words the validity of international law was restricted to them. He described the limitation of the sphere of international law using the concept of civilization.

> "It is scarcely necessary to point out that as international law is a product of the special civilization of modern Europe, and forms a highly artificial system of which the principles cannot be supposed to be understood or recognized by countries differetly civilized, such states only can be presumed to be subject to it as are inheritors of that civilization.[7]"

On the contrary, "states outside European civilization must formally enter into the circle of law-governed countries. They must do something with acquiescence of the latter, or of some

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[5] Thomas Erskine Holland, Lectures on International Law, London, 1933. p.88.

[6] Ibid., p.89.

[7] William Edward Hall, A Treatise on International Law,8th ed., Oxford, 1924, p.47.

of them, which amounts to an acceptance of the law in its entirety beyond all possibility of misconstruction". Naturally even Hall recognized European states would be obliged "partly by their sense of honour, partly by their interests, to be guided by their own artificial rules in dealing with semi-civilized states". But he confessed he did not expect China would be able to secure obedience even to the elementary Europeans rules of war "for a considerable time to come".

It is worth mentioning here the additional sentences added by Pearce Higgins, the editor of the new editions (since 1917) of Hall's textbook. He still thinks much of the observance of international law in the meaning of European civilization and the recognition of the members of the family of nations. According to him, "the right of Japan to rank with the civilized communities for purposes of international law, so questionable when the first edition of this book was published, has long since been clearly established". The reason was definite. "During the course of hostilities against China, in that year and again in 1900, she adhered to the recognized laws of war". The Anglo-Japanese Treaty of 1902 set "the final seal on the recognition" of Japan[8].

Hall, an authority on international law ranking with Holland, maintained the same theory on the nature of international law too. Also in his theory international law was particularly European because it was a product of European civilization. Non-European nations had to accept it totally and obey it without any objection. They could be admitted to the family of nations by its members. Apparently Higgins also viewed Japan's success in entering the club from the same standpoint.

They were not exceptional. According to C. W. Jenks, Kent, Wheaton, Phillimore, Hall, Westlake, Oppenheim, Anzilotti, Fauchille, Holzendorf, Bello, River and F. de Martens, an outstanding group of scholars commonly had the same concept of an exclusive family of nations although the degrees of emphasis were different[9]. Wheaton, for example, wrote: "Is there a uniform law of nations? There certainly is not the same one for all the nations and States of the world. The public law, with slight exceptions, has always been, and still is, limited to the civilized and Christian people of Europe or to those of European origin. This distinction between the European law of nations and that of the other races of mankind has long been remarked by the publicists. *Grotius* states that *jus gentium* acquires its obligatory force from the positive consent of all nations, or *at least of several*[10]".

However, a professor of international law at Edinburgh University, James Lorimer, expressed this idea most clearly and plainly. He affirmed as follows:

> "As a political phenomenon, humanity in its present condition, divides itself into three concentric zones or spheres—that of civilized humanity, that of barbarous humanity, and that of savage humanity. To these, whether arising from peculiarities of race or from various stages of development in the same race, belong, *of right*, at the hands of civilized nations, three stages of recognition—plenary political recognition, partial political recognition, and natural or mere human recognition...
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> The sphere of plenary political recognition extends to all the existing States of Europe,

[8] Ibid., p.49.

[9] C. Wilfred Jenks, The Common Law of Mankind, London, 1958, p.69.

[10] Henry Wheaton, Elements of International Law (The Literal Reproduction of the Edition of 1866 by Richard Henry Dana, Jr.), Oxford, 1936, p.15.

with their colonial dependencies, in so far as these are peopled by persons of European birth or descent; and to the States of North and South America...
The sphere of partial political recognition extends to Turkey in Europe and in Asia, and to the old historical States of Asia which have not become European dependencies—viz., to Persia and other separate States of Central Asia, to China, Siam, and Japan.
The sphere of natural, or mere human recognition,extends to the residue of mankind; though here we ought, perhaps, to distinguish between the progressive and non-progressive races.
It is with the first of these spheres alone that the international jurist has directly to deal; ...He is not bound to apply the positive law of nations to savages, or even to barbarians, as such;[11]"

Lorimer continues frankly. We have had the bitter experience in Turkey's case. Europe extended "the rights of civilization to barbarians". Yet they have proved to be incapable of doing its duties. They "possibly do not even belong to the progressive races of mankind". However, even Lorimer did not deny the possibility of admittance of non-European uncivilized nations. He says: "Should the Japanese, on the other hand, continue their present rate of progress for another twenty years, the question whether they are not entitled to plenary political recognition may have to be determined".

Recognition was for Lorimer the problem called "the basic principle of international law".

III. *Opinions on Civilization in Meiji Japan and International Law*

The theory of Lorimer is obviously extreme. Nevertheless, this kind of theory itself was not regarded as an impermissible wild argument during the last half of the 19th century. Even in Japan some excellent intellectuals maintained similar opinions. Fukuzawa Yukichi, the representative of those opinions as well as public opinion in Meiji Japan, expresses such view in his "Bunmeiron no Gairyaku (Outline of the theory on Civilization) in 1875.

"I wrote in the last chapter that the importance of matters was relative. Therefore the letter of Bunmeikaika (civilization and enlightenment) is also relative. When we discuss civilizations in the world, we think it the world opinion that the highest civilization is of European nations and the United States; Asian countries such as Turkey, China and Japan are recognized to be semi-civilized nations and the other African and Australian are said to be barbarous. Only European nations pride themselves on their civilization. Even the semi-civilized peoples obey this distinction, and put up with the classification of semi-civilied nations. They dare not pride themselves on their states and rank with European civilized nations.[12]"

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[11] James Lorimer, The Institutes of the Law of Nations, Edinburgh & London, Vol.I, 1883, pp.101–2.
[12] Fukuzawa Yukiti, Bunmeiron no Gairyaku (Outline of the Theory on Civilization), Fukuzawa Zenshuu (Complete Works of Fukuzawa) Vol.4, Tokyo, 1925, pp.10–11.

Fukuzawa only wanted to express the existing state of the contemporary world calmly. Yet his realization of it was nearly the same as Lorimer's classification. Fukuzawa had described his understanding eight years before Lorimer published his book. Fukuzawa took the standpoint of European intellectuals in the 19th century. He grasped history and civilization from the European point of view. His "Outline" was deeply influenced by Guizot's "Histoire de la civilisation en Europe depuis la chute de l'Empire Romain jusqu'à la Révolution Français, 1828" as Fukuzawa himself confessed clearly. It was popular in those days to discuss civilization and the supremacy of European civilization. One is John Stuart Mill. Comte and Spencer also did it. Being very keen thinker, Fukuzawa thought he had to show the common sense of European theorists to the Japanese public.

Fukuzawa praised European civilization with some reservations. He only recognized its relative supremacy. In European civilization "there are many defects. War is the worst thing in this world but Western states always go to war. Although robbery and murders are the great wrongdoings of men, there are many robbers in Western countries. There are people seeking powers uniting parties and complainers losing their powers. Still more in the field of international relations Machiavellism penetrates into every sphere[13]".

Civilization was for him "the thing that makes human bodies comfortable and human minds refined". Therefore, by his definition civilization and violence were incorporated with each other. His theory of civilization comprised some elements of criticism of European civilization. However, Fukuzawa did not dare to look into the subtle relationship between civilization and violence. If he had done, he would have failed to reach the end of his book "which aims at European civilization". Because progressive armed force and its use were not inconsistent with, but compatible with the civilization of 19th-century Europe. They were an important element of it. This seems to be the reason Fukuzawa aimed at Western civilization in his book. He felt deep anxiety about the critical situation of Japan. He intended to adopt Western civilization as a whole including its military aspect and to make Japan oppose the Western Powers. But Fukuzawa dared to omit the military aspect of civilization in its definition. We can understand his thinking by this omission.

However, Fukuzawa distinguished between the ultimate and the "present" civilization. He restricted his dispute to "our present civilization". He stressed that Japan had an extremely serious aim. It was "to distinguish Japan from the others and to let her keep her independence". The present civilization was a necessary tool in attaining this end. "Namely the only way of keeping the independence of Japan cannot be found out but in civilization. My motive for recommending the Japanese to adopt Western civilization is only one. It is to give the capability of maintaining independence to Japan. Consequently the independence of Japan is our aim and the civilization of our nation is a means for this aim". First, "considering the relations among all the nations of the world there are only two relationships in the intercourse of nations. One is in peace time they buy and sell with each other and fight to make their own profits. The other is to kill each other with their weapons. In other words it is possible to say the contemporary world is a combination of commerce and war". Wars are necessary to protect the independence of one country and to increase its rights.

Fukuzawa affirmed wars on the condition of "under the present civilization" in this way.

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[13] Ibid., p.12. cf. Maruyama Masao, "Bunmeiron no Gairyaku" wo Yomu I (Reading "Outline of the theory on Civilization", Tokyo, 1986, pp.93ff.

Wars became one important element of civilization. Japan could go to war, without incorporating civilization, progressing from a semi-civilized condition to civilization. Thus he insisted in fighting against China without hesitation before and during the Chino-Japanese War. The war against China was for him an action in accordance with the present civilization. Besides it was the action of civilization. He put the Chino-Japanese War in the history of civilization and called it "a war between civilization and barbarism". He created a notion that Japan represented civilization and China represented barbarism. In an article in his newspaper Fukuzawa stressed this point of view.

> "Japan wanted to stimulate Korea to reform herself toward civilization. Japan hoped to help Korea's independence and for Korea to support herself. However, the Chinese opposed this movement to civilization and tried to interfere with it. Moreover China expressed her will against Japan by force and opend hostilities with Japan first. Japan was forced to declare war on China. This was the cause of this war. Admittedly this was a war between Japan and China, but in reality a war between civilization and barbarism. Its result would decide the future of civilization. Accordingly the Japanese who recognized themselves as the most progressive people of the East must be ready to fight not only for their country but also civilization in the world. Japan should attack and defeat China definitely. It is necessary for the Japanese to fight against China until she surrenders herself to civilization.[14]"

This kind of logic was common among Japanese intellectuals. Even Uchimura Kanzou, who was famous for introducing Christianity into Japan and opposed to the Russo-Japanese War as a keen pacifist later, tried to justify the Chino-Japanese War in support of progress and civilization. He affirmed the war against China was "a righteous war". He called this war "the Corean War". For Japan interfered in Korea, whose independence was in jeopardy, on Korea's behalf because of Japan's "sacred right of neighbourhood". Further he stated another reason of the righteousness of this war. This war was a conflict between a smaller nation representing a newer civilization and a larger nation representing an older civilization, just as Greece versus Persia, the England of Queen Elizabeth versus the Spain of Phillip II. It was a historical necessity.

To Uchimura Japan stood by "the upward progress of the human race". Japan had its historical mission. He says:"The Corean War is to decide whether Progress shall be the Law of the East, as it has long been in the West, or whether Retrogression fostered once by the Persian Empire...and now by the Manchurian Empire of China, shall possess the Orient for ever. Japan's victory shall mean free government, free religion, free education, and free commerce for 600,000,000 souls" in Asia. This had to be a "holy war[15]".

Many Japanese leaders were convinced of the sacred mission of the progressive civilization. Therefore, also the way of waging war in a wide sense had to be civilized. For example, mentioning that the Chinese living in Japan began to return to China in the increasing tension between Japan and China, Fukuzawa stated his opinion as follows:

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[14] Idem., Tadatini Pekin wo Tukubesi (Attack Peking Immediatly), Zoku Fukuzawa Zenshuu 4, 1933, pp.176–7.

[15] Uchimura Kanzo, Justification of the Corean War, Kokumin no Tomo (A friend of the nation), Vol.25, 1894, pp.116–23.

"I guess the Chinese are afraid that once the war between both countries starts, Japan will certainly recognize them as her enemy and treat them cruelly regardless of sex and age. They thought they would be in danger if they stayed in Japan. However, this anxiety is an imaginary fear. They should never be anxious about that matter. According to the custom of civilized nations it is only navies and armies who fight against each other. It is usual that no harm will be inflicted on any civilians by enemy soldiers unless they fight against them spontaneously. The supposition that only soldiers fight in wars and civilians never take part in this fighting itself is the good custom of civilization. We must realize this custom.[16]"

According to Fukuzawa even soldiers help the injured without the discrimination of friends and foes. Much more it is the most barbarous and shameful action if we kill and torment the foreign civilians in Japan without any reason. The logic of Fukazawa is consistently "civilization". Yet this logic was based on one principle of modern international law (the modern law of war). Restricting fighters in war to navies and armies and exempting civilians from the public enemy were its basic principles founded by J. J. Rousseau (1712–78) and accepted by international law. Rousseau stated the principles like this: "War is not, therefore, a relation between man and man, but between State and State, in which private individuals are enemies only by accident, not as men, nor even as citizens, but as soldiers; not as members of the fatherland but as its defenders. Finally, each State can have only other States, and not men, as enemies, since no true relationship can be established between things of different natures[17]".

The Meiji state, desiring to become a civilized nation, tried observing this civilized international law. It wished to show its capability of being a member of the family of nations. The Chino-Japanese war expressed as "a war between civilization and barbarism" by Fukuzawa was its most suitable stage.

IV. *The Chino-Japanese War and International Law*

1. Law-abiding Japan

European civilization has a peculiar characteristic that wants to control even the barbarous hostilities of war under certain rules of war. Nineteenth-century Europe held this as being civilized at least. The reason the law of war was the basic element of international law until the end of the second world war originated with this idea. This idea was quite difficult for the Japanese to understand. For there had been neither the tradition of the law of nature nor the thought of common rule of law observed among rivals. However, the political and intellectual leaders of Meiji Japan tried introducing and observing international law mainly for practical reasons. They believed that Japan would be recognized as a civilized nation if she

[16] Idem., Kyoryuu Sinkokujin no Hogo (Protection of the Chinese Living in Japan from Any Attack by the Japanese), ibid., p.161–2.

[17] Jean-Jacques Rousseau, On the Social Contract, or Principles of Political Right, The Collected Writings of Rousseau (ed. by Roger D. Masters and Christopher Kelly), Vol.4, London, 1994, pp.135–6.

fought against China in obeying international law thoroughly. The Chino-Japanese war appeared for them to be the first test for being a member of the family of nations.

Japan formally declared war against China on lst August 1894. The declaration stated clearly that Japan would fight to follow international law as far as possible. :"We hereby declare war against China, and We command each and all Our competent authorities, in obedience to Our wish and with a view to the attainment of the national aim, to carry on hostilities by sea and by land against China, with all the means at their disposal, consistently with the law of nations.[18]"

Following international law meant two things for Japan. One was not to give any pretext of intervention to European Powers. The other was to get the reputation of a civilized nation. Both were linked with each other. Although Japan's modernization was progressing, she was still a minor country. China was recognized as a potentially great power. The war for Japan was too risky. Japan had to concentrate all her power on the war against China and could not afford to deal with any intervention by a third power. Japan was still in fear of colonization or semi-colonization by Western countries. Theoretically there was a possibility that they would intervene between Japan and China regardless of international law if neither was recognized as a member of the family of nations. An article in the Saturday Review of 11th August 1894 described such an opinion: "There was no legal war.... The Code of International law does not apply to barbarians, who have nothing of civilization beyond a chatter of words and supply of deadly weapons[19]". If Japan and China had been barbarous countries and not entitled to the rights of international law, Western Powers could have intruded into them neglecting their duties of neutrality. For this reason Japan hastened into a Treaty with Great Britain providing for the cessation of extraterritorial privileges after five years. This treaty led Japan to some status in the club of international law, for it showed the British Empire treated Japan as a subject of international law. The treaty was concluded on 16th July 1894. Japan finally decided to fight against China at this moment. On 23rd July of this year Japanese troops seized the palace in Seoul, Korea. On 25th July a Japanese squadron attacked a Chinese convoy. Japan had already entered the second stage of her planned war against China. Japan tried conducting herself in a law-abiding way as a civilized nation. The phrase promising the carrying on of hostilities, "consistently with the law of nations" in the Japanese declaration of war, above all, aimed at the prevention of the interventions of Western Powers, particularly by force.

The other purpose of declaring the observance of international law in the declaration of war was a propaganda device affirming the civilized status of Japan. Japan wished to enter the club of civilization to keep her independence and to increase her rights as a nation. Japan had realized she had to follow international law completely to be admitted to the family of nations. This attitude was in accord with the influential European theories of international law. We can find her success of this intention in a lecture delivered in 1895 by Professor Holland.

T. E. Holland commented on "the great war in the Extreme East" in this lecture and dealt with it "in so far as it has illustrated the rules of International Law". First he described his theory concerning the orbit of international law. We have already referred to this earlier in this paper. Consequently, I cite only the important part for our subject. In his theory, as far as the qualifications for the family of nations were concerned, any states outside the orbit of

[18] Takahashi Sakuyé, Cases on International Law during he Chino-Japanese War, Cambridge, 1989, p.165.
[19] T. E. Holland, Studies in International Law, Oxford, 1898. p.113.

European civilization had to show them. Whether they possessed them or not was not to be presumed, but needed to be established from the special circumstances of each case. Because of the recent diplomatic intercourse between European states and the Eastern powers with their treaties, Europe was accustomed to regarding "these new-comers as belonging to the charmed circle, though, perhaps, as admitted to it only on probation". He said :"Such might seem to be the position of Japan; but such could hardly be said to be the position of China; for China is far behind Japan in readiness to assimilate the ethical ideas of the West, or to enter into the network of treaties.... Antecedently to the war, therefore, we should have said that Japan was admitted on probation, while China was only a candidate for admission, to the 'Family of Nations'[20]". Also, with the reference to the conduct of warfare, Holland estimated Japan loyal to international law and China indifferent. He affirmed that "China has not accepted the customs, nor has she bound herself by the express conventions, which prevail among civilized nations.... (On the contrary)... the conduct of the operation of war by the Japanese seems to have been in accordance with the best European practice...."

Holland further analysed the respective qualifications of the two Empires regarding the law affecting belligerent and neutral states in detail. Following this analysis of individual events, he concluded as follows: "Japan, apart from the lamentable outburst of savagery at Port Arthur, has conformed to the laws of war, both in her treatment of the enemy and in her relations to neutrals, in a manner worthy of the most civilized nations of Western Europe. China, on the other hand, has given no indication of her acceptance of the usages of civilized warfare". This attitude of China was regrettable even for him, because more than thirty years the Chinese had been studying international law at Peking. There had been Chinese translations of the works of Wheaton, G. F. de Martens, Woolsey, Bluntshli and the Manuel des Lois de la Guerre of the "Institute de Droit International". The translator, Dr. Martin was a Professor of international law at the Imperial College of Tung-wen. Admittedly, China had become well-versed in the ceremony of embassy and conduct of diplomacy. However, according to Holland "to a respect for the laws of war they have not yet attained[21]".

The difference between Japan and China seems to have come from the different system of government and common sense in both countries. China was still under despotism. She was too proud of herself to introduce Western civilization on a large scale. Japan was a state of constitutional monarchy under which the prime minister was, in reality, responsible for every political issue. Japan had decided to accept "Civilization and Enlightenment" as her basic policy. "Civilization" meant the Western civilization including international law. This contrast was clearly realized by Japanese political leaders. The foreign minister at that time wrote in his famous memoirs: "Although the short distance of the Japan Sea separates Japan and China, Japan represents Western civilization and China keeps Asian traditionalism.... We despise China as an extremely conservative state, obstinate and ignorant. China looked down on Japan as a small island of fickle and frivolous nature imitating superficially European civilization... Therefore, it was obvious that one day a conflict would appear and its cause would be the collision between the new Western civilization and the old Asian civilization[22]".

Japan apparently tried 'entering into Europe, escaping from Asia' (Fukuzawa Yukiti) as

[20] Ibid., pp.114–5.
[21] Ibid., pp. 128–9.
[22] Mutsu Munemitu, Kenkenroku (first edition, Iwanami Bunko, 1983, p.59.

a whole. The die had been cast. Consequently, the Japanese government was very pleased with Holland's logic and judgement, because his realization was consistent with the stratagem planned by the government before the war. This lecture was translated into Japanese by the order of the Japanese government and distributed among its officers[23].

2. An Academic Work of Propaganda by Takahashi Sakuyé

Japan undertook to show her determination to observe international law as a civilized nation at the outbreak of the war. The Japanese army and navy were accompanied by distinguished international lawyers as legal advisers, who legally dealt with many cases during the conduct of war. Ariga Nagao, Professor of the Imperial Military Staff College, went to battle fields with Governor-General Ohyama. The Imperial Navy appointed Takahashi Sakuyé, Professor of the Imperial Naval Staff College, its legal adviser. He joined the Matsusima, the flag ship, and advised Admiral Ito commanding the Japanese fleet. Each professor described the process and cases during the war in his book in English and French later. Ariga published "La Guerre Sino-Japonaise au point de vue du Droit International, Paris, 1896". Takahashi produced "Cases on International Law during Chino-Japanese War, Cambridge, 1899". They were to publish books concerning the Russo-Japanese War from the viewpoint of international law around ten years later[24].

In particular Takahashi's "Cases" considerably interests us. This book included a preface by T. E. Holland and an introduction by John Westlake (1828–1913). Reading this book, we can easily understand the Japanese eagerness to enter the family of nations and the British distinguished scholars were acquainted with it. Holland admitted the Japanese had anxiously wanted to fight against China conforming to "the highest standards of loyalty and humanity". He even admired that under Takahashi's guidance the Japanese navy had taken great pains to observe in all questions of naval capture "the best traditions of European Prize Courts"[25]. His goodwill to Japan's attitude to international law was obvious.

J. Westlake, who looked after Takahashi when the latter was in Cambridge, perused the first draft of his "Cases" and gave him "the most and valuable advice", wrote the introduction to Takahasi's work. This introduction also deserves a mention. Westlake began his introduction with a question: Whether and how far was international law, which was recognized between the states of Christendom, applicable between them and Mahometan or other oriental states? He distinguished "two departments of international law" to answer this question. First there were the rules for the conduct of states before treaties, such as those of good faith and diplomatic intercourse and so on. These rules were based on the ideas of justice or natural law, or habitual conduct as useful and agreeable to nature. European states had to observe in their dealings with oriental states, "without regard to reciprocity", all these rules. On the other hand the second department comprised institutions dependent on treaties, such as extradition and consular jurisdiction. These institutions were related to the social condition of particular

[23] This copy of translation is now reserved in the Mutsu Munemitsu Kankei Bunsho 78–I–9 (Documents concerning Mutsu Munemitsu) at the Constitutional Record Room in the National Diet Library.

[24] Ariga Nagao, La Guerre Russo-Japonaise au point de vue Continental et le Droit International d'apres les Documents Officiels du Grand Etat-major Japonais, Paris, 1908. Takahashi Sakuyé, International Law Applied to the Russo- Japanese War, London, 1908.

[25] Takahasi Sakuyé, Cases on International Law during the Chino-Japanese War, Cambridge,1899, p.vi.

states. European nations had no faith in the social condition of the countries of different civilizations. "Consequently the international law which prevails between European and oriental states is very different, with respect to the presence or absence of such institutions, from that which prevails between European states". In this point Japan is being exceptional. As a result of treaties already concluded with the leading Christian states of Europe and America, Japan would "shortly be freed from the institution of consular jurisdiction". Besides she displayed in her recent war with China "both the disposition and in the main the ability to observe western rules concerning war and neutrality". Thus, Westlake expressed his understanding and symbolically showed the categories of states in the 19th century.

"Japan presents a rare and interesting example of the passage of a state from the oriental to the European class[26]".

Coincidentally Takahashi prudently tried to describe how the Japanese were keen on observing international law during the war. First he pointed out Japan had introduced "European civilization" "with eagerness" thirty years before. Japan became one of the signatories of the Geneva Convention (1864) in 1886 and signed the Declaration of Paris (1856) in 1887. In reality Japan displayed her law-abiding spirit in waging war against China. "It was the earnest intention of the Japanese Emperor to do nothing inconsistent with International Law". Accordingly in the declaration of war the Emperor ordered the Japanese army and navy to carry on hostilities with all the means at their disposal, "consistently with the law of nations". This Rescript became "a foundation-stone for the whole elaborate system on which Japan carried on hostilities[27]". The Emperor issued an ordinance for protecting the Chinese people in Japan immediately after this declaration. Now we can easily show the ordinance was in accordance with the belief of Fukuzawa Yukiti.

Following this general explanation, he went into the details of individual legal aspects of war. He attempted to contrast civilized Japan with barbarous China. "China is a signatory neither of the Geneva Convention nor of the Declaration of Paris. She was very barbarous in her methods of carrying on hostilities. She declared that Japanese vessels should be broken up, and even offered a large reward for the head of a Japanese general. China also detained neutral merchant vessels by means of privateers, killed prisoners, and sometimes hacked them to pieces. More than this, she killed not only combatants, but also non-combatants who remained in China after the outbreak of war". Japan had the right of reprisal against such barbarous conduct by the Chinese.

However, Japan refrained from exacting revenge, for she intended to set "an example of generosity by carrying on hostilities in an enlightened fashion". Besides the ordinance protecting the Chinese living in Japan, she abstained from employing volunteers. The use of privateers and plundering were forbidden absolutely. Japan nursed the wounded prisoners as well as her own men. She treated all prisoners most generously and freed those who surrendered at Wei-hai-wei. She governed the people of the occupied districts adequately. Takahasi continued: "It must be confessed that this generosity is chiefly owed to European civilization, which was introduced thirty years ago, but in general it may be said that if the graft was from Europe, the stock was an ancient one, deep rooted in Japan from the earliest

[26] John Westlake, Introduction, in: Takahashi Sakuyé, op. cit., p. xvi.
[27] Ibid., p.2.

times[28]".

Apart from the matter of the stock deep rooted in Japan, the things pointed out by Takahasi were right on the whole. After the Kow-Shing affair[29] at the beginning of the war, the Japanese government quite properly dealt with legal problems occurring during the war. It promulgated the Prize Court Law on 20th August. The Prize Court was established at Sasebo and the Higher Court in Tokyo. The German Prize Act (1864) and English Naval Prize Act (1864) were the models for this law. It came into force from the date of proclamation. On 7 th September 1894 the Prize Law of Japan was also issued. This was drafted based on the work of Professor Holland, the decisions of the Institute of international law (1882) and the Instructions for the French Navy (1870).

Takahasi recognized that the Japanese prize laws imitated the European models. However, he indicated "the difference between the copy and the original". "In western countries, it was and has been the usual custom that the whole or a portion of the captured movables should be given to the captors, according to some scales of reward fixed by public authority". For example the said Naval Prize Act of Great Britain declared that the captors should "continue to take only such interest (if any) in the proceeds of prizes as may be from time to time granted to them by the crown". As in this act, it had been "the invariable rule of England, in modern times, to surrender the entire proceeds to the officers and men engaged in the capture". "The general practice of prize courts" was "to order a sale of the vessel or goods on condemnation". The sum thus accomplished was "divided among the captors". Takahasi pointed out Japan had not accepted this general practice. "But in Japan no prize was to be given to the captors, who are deemed to seize property at sea on the ground of some breach of law connected with it, for the sake of their country and not for their own sake[30]".

In theory the Japanese system of prize was distinctly more modern, progressive and civilized. The prize law of Europe still had some remains of medieval times, for the law of prize and its application had a private element of gains of war in medieval Europe[31]. Yet in this meaning the prize laws of Western states were historical products like other modern laws in 19-th century Europe. They were shot through with their custom and mentality, particularly individualism, because in medieval Europe individual knights and soldiers fought for their own profit as well as their war lords[32]. However, Japan wanted to introduce the system of prize law as an evidence of Japanese civilization. The war in a modern sense is a conflict between

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[28] Ibid., p.4.

[29] The Kow-shing was a steamship whose nationality was British. The captain and officers were British, too. Yet it was hired by Chinese government to transport Chinese soldiers to Korea to fight against Japan and sunk by a Japanese cruiser ,whose captain was Togo Heihachiro, who was to be a commander-in-chief of the Japanese Navy in the Russo-Japanese War. He gave order to fire with consideration to the lawfulness. As this affair happened before the declaration of war, British opinion reproached Japan. However, Professor Holland and Westlake recognized "the right of the Japanese to destroy her" according to the law of nations and wrote letters of such opinions to the editor of the Times. For example Westlake wrote: "I have said nothing about the violation by the Japanese of the usages of civilized warfare...". Thanks to them the excitement of British people was calmed. No compensation was claimed against Japan.

This affair was also explained as "a remarkable case" of enemy character acquired by subjects of neutral state by Oppenheim later. Cf. L. Oppenheim, International Law, Vol. II, London, 1905, p.99.

[30] Ibid., p.12.

[31] Cf., Maurice H Keen, The Laws of War in the Late Middle Ages (Reprint of 1965 dition), Aldershot, 1993. Theodor Meron, Henry's Wars and Shakespeare's Laws, Oxford, 1993.

[32] Yamauchi Susumu, Looting of Men and Legal Theories in Medieval and Early Modern Europe, Hitotsubashi Journal of Law and Politics, Vol.23, 1995, pp.31-2.

nations, and a battle between armies of warring nations. The State supplies soldiers with everything to fight with for its own sake. Accordingly all the prizes should belong to the state of the captors theoretically. Japan made such a modern and civilized law of prize.

Therefore, the difference was shown as a proof of Japanese progressive civilization. In reality it also conformed to Japanese tradition and one policy of modern Japan, namely authoritarianism. It was contrary to liberalism and individualism, which were important elements of civilization.

Yet Takahashi neglected this aspect. He only insisted on the advancing feature to show the capability of being a member of the family of nations.

On this point Fukuzawa and Uchimura should be distinguished from Takahashi and the authorities of Meiji Japan. Fukuzawa and Uchimura aimed at the establishment of individualism and anti-authoritarianism in Japan. Particularly to Fukuzawa the independence of Japan had to be based on the independence of individuals. However, his theory on civilization was on the surface similar to the perception of Takahashi. They realized the progressiveness of European civilization and the necessity of its adoption.

They believed this could be the only way for Japan to participate in the progressive world and survive in the age of imperialism. This seems to have been the common recognition of not only intellectuals and the authorities of government but also the people of the Meiji era[33]. It was hardly surprising that this recognition was like the other side of the judgement by Holland and even Lorimer, who stressed the European nature of international law. Nevertheless, we must realize that it was possible even for the people in the Meiji era to oppose these theories and perceptions concerning the purely Western characteristics of modern international law and the criteria of civilization.

IV. *"Universality of International Law" in Alexandrowicz and Grewe*

According to the theory of C. H. Alexandrowicz it is doubtful that international law was the product of European civilization and purely European. Such perception was only a reflection of the feeling of European superiority in the 19th century. It was simply a shadow of history. Europe was not so great and strong in the world before the 18th century. The relationship between Europe and Asian countries was equal. It was in the 19th century that Western people began to maintain the backwardness of Asia.

The great thinkers of natural law between the 16th and 18th centuries attempted to expand the law of nations to the non-European world based on the law of nature. None of them concerned recognition. If there existed a state with a government, it was a subject of international law. It was not supposed that only the European family of nations decided the admittance of other states. There were many international lawyers of such opinions even at the end of the 18th century. Alexandrowicz particularly referred to D. H. L. von Ompteda and pointed out the importance of his work in 1785, "Literatur des gesamten sowohl natürlichen als positiven Völkerrechts, Regensburg". He classified "jus gentium" into two kinds: jus

[33] Iguchi Kazuki, Nihonnjin no Kokusaiseijikan (The View of International Politics for the Japanese), in: idem., "Chino-Japanese War and Russo-Japanese War", Tokyo, 1995, p.231.

gentium naturale and jus gentium voluntarium. On the one hand "the bare natural law of nations (jus gentium naturale)" covered "all nations, civilized or not". The principal elements of this kind of law of nations were "the natural freedom, independence and equality of nations". On the other hand "a modified natural law of nations (jus gentium voluntarium)" was born from "the requirements of intercourse between civilized nations". They appeared based on their presumed agreement (consensus praesumptus). The jus gentium voluntarium included customary law (jus consuetudinarium) and treaties (jus gentium pactitium). The contemporary positivists of international law began to keep the scope of this "jus gentium voluntarium" within Europe. Still Ompteda tried to reconcile "jus gentium naturale" and "jus gentium voluntarium". Ompteda wrote as follows :"In view of the fact that the civilized nations are mainly to be found in Europe, at least until now, the teachers of the law of nations called the last two categories of the law of nations (i.e. the modified and customary law of nations) the European law of nations. However, as there exists outside Europe since a long time, civilized nations...to which the law of nations of these two categories applies...the term European law of nations is much too limited.[34]"

Furthermore as maintained by Alexandrovicz, Ompteda criticized the new trend of positivism recognizing only the European law of nations as international law, which was applicable only between Western nations. They ignored the universality of the law of nations neglecting the bare natural law of nations. Therefore Ompteda's reasoning implied "the fear that many civilized nations outside Europe would, according to positivist views, find themselves in a legal vacuum being neither in the orbit of European positive law (Particularrecht) nor even covered by the rules of the declining universal natural law..."

He further mentioned Moser, Martens, Justi and so on. Still more he added, as far as theory was concerned, a constitutive theory of recognition was created by the influence of Hegel. "The Hegelian school combined positivism with constitutivism and abandoned the pure defactist basis of sovereignty and recognition"[35]. Yet until the 18th century, European and Asian states had been trading and kept an international legal relationship. He stressed the importance of this fact of interaction between Europe and Asia. In his opinion the concept of the universality of the law of nations based on the natural law idea was rather dominant in Europe before the 19th century. This was in a sense a reflection of the historical fact of the economical and legal relationship between civilizations. Accordingly he concluded that in both theory and practice prior to the 19th century there was universal international law and it was applicable between different civilizations. He denied the classical theory that only Europe contributed to produce international law and its nature was exclusively European[36].

The proposition of Alexandrowicz attracted the attention of international lawyers. Yet it was not necessarily accepted. For instance Professor Grewe valued Alexandrowich's theory highly, but simultaneously criticized it quite severely. It was untrue for Grewe that universal international law was dominant prior to the 19th century. The notion that in the 19th century only European international law remained and became dominant was also erroneous to him. Apart from theory, in practice the contemporary governments and rulers recognized the law

[34] C. H. Alexandrowicz, Doctrinal Aspects of the Universality of the Law of Nations, BYIL37, 1961, p.507.

[35] Idem., The Theory of Recognition in Fieri, BYIL34, 1958, p.195.

[36] C. H. Alexandrowicz, Treaty and Diplomatic Relations between European and South Asian Powers in the 17-th and 18th Centuries., Recueil des Cours, Vol.100 (1961). Idem., An Introduction to the History of the Law of Nations in the East Indies (16th, 17th and 18th Centuries), Oxford, 1967.

of nations as the legal order of the Christian and European family of nations. Grewe thinks that before the 19th century there was no universal international law and European international law became universal first in this century, because of the idea of civilization. Civilization was in nature completely different from other criteria like religion and race, for civilization was accessible in a technical meaning. Admittedly the idea of international law in the 19th century classified the peoples into civilized, barbarous and savage, but the reasoning was different from that of medieval times. The reason that the international community refused to admit them is that they had not reached the minimum standard of civilization required by international law. Grewe says:

> "International community was perceived as fundamentally universal at that time. It was always open to every country not recognized as a full member on the ground of the legal technique[37]".

To Grewe civilization was a tool for "the comprehensive and total trend of the universalisation of international law" since the 19th century. The concept of "the barbarous" or "the uncivilized" was only an incompetent ideology compared with this historical decisive trend. Yet apparently this ideology was never incompetent as we have seen. Grewe did not explain the relation between civilization as a useful tool of the universalization of international law and civilization as an exclusive tool for the uncivilized nations. The key to this contradiction is the idea of "the minimum standard of civilization", which Grewe used only once without any definition.

V. *The Standard of Civilization in International Law*

Alexandrowicz showed us a different paradigm from the orthodox theory of the history of international law. Although his doctrine has not become dominant, at least he was successful in indicating the importance of non-European elements in the development of international law. Thus, S. Verosta illustrated the universal history of international law[38]. W.Preiser also stressed the importance of the history of international law outside Europe[39]. The section of "History of the Law of Nations" of the Encyclopedia of Public International Law covers its development in various areas[40]. C. S. Rhyne suggested the influence of Islamic Law on the European laws of nations. He stated. :"Almost unrecognizedly, through its contacts with the Western world, Islamic law has presented Graeco-Roman legal concepts, and has made substantial contribution to international law and theory.[41]" Besides, according to R. Ago, in medieval and early modern times there existed a "Euro-Mediterranean international community", which embrace all the countries in the Euro-Mediterranean world. There was an international legal relationship between Europe and non-European countries based on legal

[37] W. G. Grewe, Vom europäischen zum universellen Völkerrecht, ZaoRV 42–3, 1982, S.471.
[38] A. Verdross (mitarbeit. von Dr. Stephan Verosta, Völkerrecht, 5Aufl., Wien, 1964, SS.31–94.
[39] W. Preiser, Die Völkerrechtsgeschichte, ihre Aufgabe und ihre Methode, Wiesbaden, 1964.
[40] Encyclopedia of Public International Law. Published under the Auspiecies of the Max Planck Institute for Comparative Public Law and International Law under the Direction of Rudolf Bernhardt, Vol II, Amsterdam, 1995, p.716ff.
[41] Charles S. Rhyne, International Law, Washington, D. C., 1971, p.23.

customs like the redemption of prisoners of war, treaties of peace and war, respect for the immunity of envoys and treaties for peaceful commercial transactions[42].

If such elements contributed to the formation of international law and Europe developed it in the political and commercial transactions with Afro-Asian countries in early modern times, the European supremacy and exclusiveness in international law could be an ideology of 19th-century Europe. In reality even in the middle of the 19th-century international law was not limited to Western states. As for the case of Japan, Western Powers forced Japan to open herself to foreign intercourse, showing the law of nations. This was obviously a threat. However, it was the law of nations that they showed first in persuading the authorities of the Tokugawa government. What did this mean? Is it not possible to judge that European Powers recognized Japan as a member of the international legal community?

As stated by H. A. Smith in 1932, Great Britain did not think that China and Turkey were the subjects of the law of nations because of their uncivilized status. Smith clearly denied the understanding that international law had "been hitherto recognized, and now substituted by the common consent of Christian nations". In the 19th century no record could "be found of any definite and authoritative action based on the principle that non-Christian states as such lie outside the range of international law". He says :"There are various *obiter dicta*, both diplomatic and judicial, to the effect that rules cannot be applied with the same rigidity in the case of non-Christian and uncivilized states, but the general application of the rules is not denied[43]".

Smith pointed out the same thing also about the case of Turkey. The leading textbooks authorized their accepted theory on the ground of the effect of Article 7 of the Treaty of Paris (1856). They maintained that by this article Turkey became a member of the family of nations. Oppenheim clearly affirmed from this moment "International Law ceased to be a law between Christian States solely". In the opinion of many writers represented by Oppenheim, "Turkey was not bound by the general body of international law before 1856". But "the opinion is not supported by the practice of our own and other governments". As the fact of diplomatic intercourse, treaties concluded between Turkey and Great Britain, and the official documents makes clear, "the general body of international law was considered to apply". Article 7 meant only the admission to "the specifically European group of nations which was deemed to have been established by the Vienna settlement of 1815"[44]. He reached the following conclusion concerning the scope of international law.

> "Broadly speaking, the general conclusion which we may draw from the practice is that Great Britain has always regarded international law as the necessary consequence of orderly international intercourse. That is to say, if a state possesses a degree of civilization and stability sufficient to enable it to maintain normal relations with other states, then those relations will be regarded by the general body of international law. Whether the

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[42] R. Ago, Die pluralistischen Anfänge der internationalen Gemeinshaft, in: Alfred Verdross (Hrsg.), Völkerrecht und Rechtsphilosophie, Berlin, 1980, SS.37ff.

[43] Herbert Arther Smith, Great Britain and the Law of Nations, London, 1932, p.14.

[44] Ibid., p.17. Hugh McKinnon Wood (The Treaty of Paris and Turkey's Status in International Law, AJIL37, 1943, p.274.) says :"Article 7 of the Treaty of Paris does not deal with Turkey's status in international law. It is not an instance of recognition of Oriental State as a subject of that law. Its purpose was not even, in a strict sense, a legal but rather a political purpose...The article was an act of admission to what today might be called a regional understanding..."

culture of such countries be Christian or non-Christian, European or Oriental, would appear to be irrelevant[45]".

The question is of course "a degree of civilization". What kind of "degree of civilization" was required? This question is closely related to the concept of "the minimum standard of civilization". First of all what was the standard of civilization maintained by eminent international lawyers? This is well explained by G. W. Gong. He thinks the standard of civilization was extremely high and consisted of five requirements:

1. the protection of the basic rights, i.e. life, dignity and property, especially of foreign nationals.
2. the organization of bureaucracy with some efficiency in running the state machine.
3. the adherence to generally accepted international law and maintenance of domestic system of courts, codes and published laws.
4. the fulfilment of the obligations of the international system by diplomatic interchange and communication.
5. the conformation to the accepted norms and practice of the "civilized international society", e.g. suttee, polygamy and slavery.

In brief, these requirements were so European in the 19th century that "drawing the fine lines between a universal standard of 'civilization', and a standard of European civilization was one of the problems of defining and applying the standard of 'civilization'[46]".

However, the standard of civilization mentioned by H. A. Smith was different from that showed by Gong. To Smith the truth of the matter was that "international law presupposes, not any common faith or culture, but a certain minimum of order and stability". The most important element was "a certain minimum of order and stability". This was not concerned with faith or culture. It did not require any more than a minimum order, stable and functional as a state.

As far as the scope or orbit of international law is concerned, Smith could be correct. According to H. M. Wood before 1856 Britain had already recognized Turkey as a subject of international law. This was obvious from the action of the British government. It did not only draw theoretical conclusions from their acts[47]. As for theory, Wheaton pointed out in the first edition of his masterpiece that there was no universal law of nations but different kinds of jus gentium. The international law of the civilized Christian nations of Europe and America was one thing. That which governs the intercourse of the Mohammedan nations of the East with each other, and with Christians, was another and a very different thing. Yet there was international law between Christian and Muhammadan nations. Naturally in this intercourse the Christian nations of Europe and America had been "sometimes content to take the law from the Muhammadans, and in others to modify the christian code in its application to them[48]". Here whether Turkey was the subject of international law or not was beyond question. Even when he mentioned the consular jurisdictions in Turkey and the Barbary states, he only wrote their nature depended on "the stipulations of the treaties between the two

[45] H.A. Smith, op.cit., p.18.
[46] Gerrit W. Gong, The Standard of 'Civilization' in International Society, Oxford, 1984, pp.14–15 and p.21.
[47] H. K. Wood, op.cit., p.272.
[48] Henry Wheaton, Elements of International Law with a Sketch of the History of the Science, Vol 1, London, 1836, p.52.

states[49]". This was not thought of as a crucial problem in the 1830s. Wheaton recognized the fact even after the third edition tending to stress the extension of the international law of Christendom that the independence and integrity of the Ottoman Empire had long been regarded as forming essential elements in the European balance of power[50].

"A certain minimum of order and stability" meant "the minimum standard of civilization". But Gong thought that the more European requirements were added to this minimum standard in the second half of the 19th century. As a result there appeared the high standard of civilization which included the five requirements. His theory is correct to a degree. As I have discussed already, many writers of international law then began to require the non-European countries to possess the so-called European requirements which were considered necessary for civilized nations. It was at this time, when most theory and practice seemed to require the high standard of civilization, that Japan confronted Western Powers and European civilization.

However, with this high standard of civilization, even in the latter half of the 19th century, the idea of the minimum standard of civilization continued to be influential. It ultimately exceeded the complete set of five requirements especially after the First World War. H. A. Smith revealed it in the sphere of practice. Regarding theory I will refer to Westlake here.

Admittedly Westlake believed in the excellency and supremacy of the European law of nations, but to him international law was different from European international law. Simultaneously international law was not restricted only to Western or Christian nations. He recognized the existence of "the rules for the conduct of states which are prior to treaties". European states observed them in their dealings with oriental states, although "without regard to reciprocity" and "often inflicting severe punishment for any failure in that regard." Therefore, he defined international law as "the body of rules prevailing between states[51]" or "the law of the society of states or nations[52]". He excluded the concept of civilization from this definition. Apparently he did not try to stress the importance of civilization in the meaning of Europe. This is undeniable, comparing his definition with those of other international lawyers. This is particularly impressive considering his successor, Oppenheim's definition. He explained that "Law of Nations or International Law (*Droit de gens, Völkerrecht*) is the name for the body of customary and conventional rules which are considerd legally binding by civilized States in their intercourse with each other. Such part of these rules as is binding upon all the civilized States without exception is called universal International Law...[53]".

Of course Westlake mentioned civilization. However, to him civilization has "nothing to do with the mental or moral characters which distinguish the civilized from the uncivilized individual, nor even with the domestic or social habits". He says, for Western people who came into contact with non-Western people, "the primary necessity is a government under the protection of which the former may carry on the complex life to which they have been accustomed in their homes...and which may protect the natives in the enjoyment of a security and well-being at least not less than they enjoyed before the arrival of the strangers". Does this kind of government exist or not? "In this answer to that question lies, for international law, the

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[49] Ibid., p.156.
[50] Idem., Elemets of International Law, Oxford, 1936, p.19.
[51] John Westlake, Chapters of the Principles of International Law, Cambridge, 1894, Cambridge, p.1.
[52] Idem., International Law, Part I, Cambridge, 1904, p.3.
[53] Lassa Oppenheim, International Law A Treatise, Vol.I. Peace, London, 1905, p.3.

difference between civilization and the want of it. If even the natives could furnish such a government after the manner of the Asiatic empires, that would be sufficient[54]".

The most important test of civilization was to Westlake only the protection of life, liberty and property of foreigners. This was "the minimum standard of civilization". Therefore, if a state had such a government, this state could be regarded as a civilized nation. Accordingly international law could be applied to this state as well as Western countries. Yet we can ask: How could the unequal treaties, from which Japan and other Asian countries suffered, be interpreted by Westlake? He explained his opinion concerning this question in the title of "the Equality of States in Civilization, and the Protection of Subjects abroad".

Westlake thought that the basic rights of subjects abroad had to be valued and the differences between civilizations needed the consular jurisdictions in Turkey, Persia, China, Japan, Siam and other countries "for giving adequate protection to the unfamiliar interests arising out of a foreign civilization". But the consuls had to depend in the end on the support of the local governments. The local governments followed their central governments, namely properly ordered states. Consequently, the jurisdictions of the consuls relied on the old and stable order of the related countries with organized force behind them. "Such countries therefore must be recognized as being civilized, though with other civilizations than ours[55]".

Accordingly, to Westlake the consular jurisdiction came from the difference of civilizations and did not show the lack of civilization in international law. Because of the differences in the family relations, the criminal law and its administration, Europeans and Americans deemed that it was necessary to be protected by the consular jurisdictions. Those consular systems were "established by treaties concluded with the territorial powers, which possesses civilizations of their own sufficiently complex to enable them to appreciate the necessity, and their maintenance as well as their establishment must depend to a considerable extent on the concurrence of those powers". Even so, and even for Westlake, such countries could not enjoy the whole of international law, but only parts of it. In the Westlake's work of 1904 they were Morocco, Turkey, Muscat, Persia, Siam and China. However, they were in essence the subjects of international law as civilized nations. Westlake made it clear as follows:

> "The European and American states maintain diplomatic intercourse and conclude treaties with them, they regard their territories as being held by titles of the same kind as those by which they hold their own, and when at war with them they regard the laws of war as being reciprocally binding just as between themselves[56]".

The foreign policy of Great Britain and the theory of Westlake showed the status of the subjects of Asian countries in international law. Naturally their rights as sovereign states had some limitations as a result of the consular jurisdictions. Yet this limitation did not mean the negation of their rights. They were civilized nations. The most important part of international law could be applied to them. They had to be recognized not as barbarous or savage peoples, but as civilized nations in international law.

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[54] J. Westlake, Chapters., p.141.
[55] Ibid., p.103.
[56] J. Westlake, International Law: Part 1 Peace, Cambridge, 1904, p.40.

7. The Standard of Civilization and Modern Japan

According to G. Schwarzenberger since the 19th century the European law of nations became universal and was simultaneously increasing separation from its Christian and ethical foundation. It processed its formalization and became "a law congenial to the needs of the industrial pioneer and capitalist investor". He says:

> "The test whether a State was civilized and, thus, entitled to full recognition as an international personality was, as a rule, merely whether its government was sufficiently stable to undertake binding commitments under international law and whether it was able and willing to protect adequately the life, liberty and property of foreigners. In a multitude of treaties these minimum standards were codified in meticulous detail and gradually developed into rules of international customary law[57]".

Although the distinction between civilized and uncivilized peoples was available to imperialism and colonialism, it is important "the minimum standards of civilization" became the rules of international law. "The primary interest of the western Powers consisted in the protection of their own nationals, and they willingly granted the complementary implication that the nationals of non-European States were the exclusive concern of these States[58]". Further, as stated by Schwarzenberger, there existed sufficient evidence that these minimum standards had become rules of international customary law.

In 1937 H. Lauterpacht clearly criticized the classification of Lorimer. The means Lorimer suggested of distinguishing the conditions for recognition were "so arbitrary, vast, and impracticable, as to be ridiculous[59]". In the same year in the fifth edition of Oppenheim's International Law he added the next paragraph :"After the World War the Capitulations and some other restrictions upon the territorial sovereignty of most of these States were abolished. These and other non-Christian States have been admitted to membership of the League of Nations and it is impossible to deny that they are full members of the Family of Nations. Religion or the controversial test of degree of civilisation have ceased to be, as such, a condition of recognition of Statehood[60]". Furthermore, mentioning 'the general principles of law recognized by civilized nations' of article 38(I)(c), he stressed the universal character of general principles. "The reference to 'civilized nations' does not, in this connection, imply any general or specific test of degree of culture or civilization—though probably it implies a minimum of it. Neither is it connected with the frequent emphasis upon Christian civilization and religion as constituting the basis and origin of modern international law[61]".

R. Y. Jennings, reflecting on the progress of international law , insisted on the significance of the appearance of the United Nations. It embraced nearly all the states of the world. The position was very different in the mid-19th century. Yet in his interpretation the 19th century

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[57] Georg Schwarzenberger, The Standard of Civilization in International Law, Current Legal Problems, Vol.8, 1955, p.220.

[58] Idem., The Frontiers of International Law, London, 1962, p.57.

[59] Hersh Lauterpacht, Regles Generales du Droit de la Paix, Recueil des Cours de l'Academie de Droit International, Vol.62(VI), Paris, 1937, p.256.

[60] L. Oppenheim, International Law, Fifth Edition edied by H.Lauterpacht, London, 1937, p.46.

[61] H. Lanterpacht., Collected Papers of International Law of Hersch Lauterpacht, Vol.I, 1970, pp.114–5.

was the time when the family of nations was significantly enlarged. Admittedly the concept of civilization was crucial and some writers may have considered it as Western or Christian in error, "but this was certainly not its proper meaning". As Westlake explained, the "civilized" was "a term of art". "The international test of civilization was simply government". Turkey, China and Japan "were regarded by writers as members of the family of civilized states[62]".

J. Crawford clearly affirmed that "although some writers required a certain degree of civilization as a prequisite for statehood, it had long been established that the only necessary pre-condition was a degree of governmental authority sufficient for the general maintenance of order, and subsequent practice was not sufficiently consistent or coherent to change that position". Even though there was "a extensive system of capitulations and concessions" in many circumstances, "Asian States such as (for example) China, the Ottoman Empire, Afghanistan, Japan, Korea, Thailand (Siam), and the Maratha Empire in India were early recognized as sovereign States subject to international law[63]".

This is the most progessive opinion concerning this theme. As far as the membership of international law in general is concerned, it can be agreed. However, it could not have been so certain whether such Asian countries had been undoubtedly recognized as the members of the family of civilized nations and subject to international law before the the First World War. If the recognition had been so clear even during the second half of the 19th century, Japan and other Asian countries would not have worried about their disadvantaged status so much. Even if Western Powers admitted tacitly "the minimum standard of civilization", it could be used for their imperialistic interventions[64]. The situation was, in a sense, ambiguous. Both ideas of the minimum standard and high standard were in theory and practice competing with each other, and at the same time supporting one another. Oppenhem properly stated the circumstances in 1904 and 1912 as follows:

> "Some publicists maintain that the dominion of the Law of Nations extends as far as humanity itself, that every state, whether Christian or non-Christian, civilized or uncivilized, is a subject of International Law. On the other hand, several jurists teach that the dominion of the Law of Nations extends only as far as Christian civilisation, and that Christian States only are subjects of International Law. Neither of these opinions would seem to be in conformity with the facts of the present international life and the basis of the Law of Nations...The fact is that the Christian States have been of late obliged (compelled—2nd ed.) by pressing circumstances to receive several non-Christian States into the community of States which are subjects of International Law[65]".

In brief such Asian countries were members of the family of nations, but not full

[62] R. Y. Jennings, The Progress of International Law, BYIL34, 1958, p. 353.

[63] James Crawford, The Creation of States in International Law, Oxford, 1979, p.176.

[64] Yamamuro Sinichi, a historian of the Meiji State, pointed out that at the beginning of the Meiji era Western Powers made the standard of civilization the minimum standard to become a subject of international law. The standard of civilization was the ability for the protection of the life, property, and liberty of foreigners. He says: "This principle of the minimum standard of civilization was without doubt a product of Euro-centrism. Unless an ordered society accepted this standard and was recognized as a civilized state, even though it had its own population, and organized its own state and society, it was regarded as a "terra nullius". Thus on the grounds of occupation originated in Roman law, vast Asian and African areas were in reality colonized". Yamamuro Sinichi, The System and Idea of the Meiji State, Iwanami Kouza Nihon Tsuushi (Iwanami The History of Japan) 17, 1994, pp.115ff.

[65] L. Oppenheim, International Law A Treatise, Vol. I, London, 1905, p.30.

members. Oppenheim's International Law (1904, 1912) stated this as follows: "China, Persia, and Siam have even taken part in the Hague Peace Conference. All of them make efforts to educate their populations, to introduce modern institutions, and thereby to raise their civilisation to the level of that of the Western. They will certainly succeed in this respect in the near future. But as yet they have not accomplished this task, and consequently they are not yet able to be received into the Family of Nations as full members". Also in the third edition (1920) this paragraph remained. Yet its tense changed from the present to the past like the following :"All of them were making efforts to educate their populations, ...But as yet they *had not* accomplished this task, and consequently they *were not* yet able to be received into the Family of Nations as full members".

Japan was already recognized as a full member at this time. But also the old Asian contries were recognized as civilized nations and the members of the family of nations, for they were well-ordered societies and had the sufficient governments to reach the minimum standard of civilization. At least they had the rights to require its status because of their stability and order.

Nevertheless, Japan during the Meiji era believed it necessary to become a subject of international law to be a civilized Westernized nation. Yet to reach the highest civilized standard was no more than one option, though valuable. To misunderstand this the sole option, was a reflection of the nature of the Meiji State and its thinking pattern which could be called mass-hypnotized. The Japanese in the Meiji era failed to think of the qualifications to enter international society as being artistic, minimal, and irrelevant to the full requirements of European civilization. Japan did not imagine participating in the formation and reform of international law, reaching only the minimum standard and keeping her cultural and institutional independence. She never dreamt that semi-civilized countries could maintain such an opinion.

The Meiji State was in a sense naive enough to believe the theory of civilization maintained by some European intellectuals. This naivete could not be underestimated, for Japan managed to succeed in the modernization partly thanks to it. However, she was stuck in the perception first feared by herself. Japan began to discriminate against other Asian countries. If in the Meiji State a reasonable and pluralistic idea formalizing and reducing the standard of civilized states had been influential, modern Japan could have proceeded in a different way from the actual one. Japan may have been able to recognize the other Asian countries as civilized nations in international law and cooperate with them, promoting modernization and escaping from the discrimination against Asian nations.

However, what modern Japan selected was to conform with European civilization, and as a result to discriminate against and invade Asian "uncivilized" states based on the vertical concept of civilization. In 1937, the same year H. Lauterpacht decisively criticized the theory of Lorimer, the Japanese government set up a committee attached to the Cabinet, which would do research into the necessity of the declaration of war against China. The committee did not recognize its necessity. One reason was that China was not equal to Japan. The prime minister, Tojou Hideki, announced that the objects of diplomacy were opposing equal states, but there were no states equal to Japan in the Asian area (Daitoua Chiiki)". He established the Asian Office (Daitouashou) as the organization handling the relations with Asian countries besides the Foreign Office. According to Professor Fujimura, "this showed Japan did not realize Asian states as well as China as equal states". There were some important questions at this moment;

whether negotiations with China could be the objects of the Foreign Office or not? whether the other parties were for Japan to be entities in international law or not? Accordingly the Japanese authorities asked whether the conflicts between Japan and China or other Asian countries had to be treated as wars in international law. The answers to these questions did not depend on "the reality of actions but the recognition of the equal status of the other parties[66]".

This could partly be related to the fact that the Japanese army committed many war crimes in Asia between presumably 1937 and 1945. Japan did not recognize many military conflicts as wars. If they had not been wars, logically all the actions could not have been illegal, for the laws of war had not been applied. The Japanese military continued to fight against Asian peoples at least without the definitive will of obeying the laws of war. This was the reverse side of the law-abiding spirit of the Meiji State which sought the status of belonging to the family of civilized nations. Japan very seriously wanted to reach the highest standard of civilization. She did not doubt the framework itself of the orbit of international law stated by Holland etc. Furthermore Japan had kept this discriminatory framework and used it, even if vaguely, until the end of the Second World War. This vertical scheme of international society was behind the times in particular in liberal-democratic Europe after the First World War. Japan failed to latch onto this new trend of horizontal solidarity of humankind. Japanese leaders did not realize the increasing importance of human rights in international law. On the contrary, Japan strove for the militaristic, authoritarian way, keeping the transfigured framework of civilized and uncivilized nations. It was an unexpected and disastrous result of the struggle for existence of the Meiji State[67].

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[66] Fujimura Mitio, Nissin Sensou (Chino-Japanese War), in. Iwanami Kouza Nihon Rekisi 16, Tokyo, 1976, p.4.

[67] Of course, there were many causes of the notorious actions of Japan before and during the Second World War. I do not think the idea of civilization adopted by the Japanese was their main cause. It contributed to create the liberal-democratic elements of modern Japan without doubt. However, simultaneously it also brought some discriminatory feeling and actions against Asian nations. They were connected with jingoism and some fatal elements in Japan before the Second World War. Mutsu Munemitsu already cautioned in his memoirs that the jingoism of the Japanese might bring danger to Japan (op. cit. pp.178–80).