

When was the Law of International Society Born? – An Inquiry of the History of International Law from an Intercivilizational Perspective*

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* This is a preliminary paper giving the basic scheme of a book intended to reconstrue (and reconstruct) the history of international law from an intercivilizational perspective. Due to this preliminary nature, references will generally be given not in a specific way, but rather in a summarized way. I am grateful to many people who kindly read earlier versions of my manuscript including the Japanese version: Professor Nicholas Onuf, Professor Jörg Fisch, Professor Benedict Kingsbury, Professor Yogesh Tyagi, Professor Watanabe Hiroshi, Professor Magami Toshiki, Professor Moteki Toshio, Professor Suzuki Tadasu, Professor Nitta Ichiro, Professor Morozumi Yoshiaki, Professor Matsubara Kentaro, Ms Besty Roeben, Mr Gregory Ellis, Mr Saito Tamitomo, Ms Huh Sookyeon and Mr Richard Small. Given the enormity of the task, I am fully aware of the limits of my knowledge and ability to theorize. I will welcome comments from the reader and take them into account for my future book.

In this article, I seek to express the order of the name given according to the proper way respective of culture. For example, Chinese, Japanese, Korean and Vietnamese names generally appear with family name preceding given name.

I. The History of International Law and the Notion of International Law

1. The Link between the History and Notion of International Law

Questioning the history of international law constitutes a crucial perspective for asking and responding to the question: What is international law? The question “When was international law born and how has it developed?” cannot be dissociated from the very notion of international law. In fact, the historiography of international law shows a recurrent preoccupation with the definition and the concept of international law.

Let us consider the relevance of the history of international law to a basic question: Should we say that international law exists if there is a treaty between states? When we refer to *states* in this question, what kind of personal and territorial entity with a certain power and authority do we assume? Ancient and medieval states or bodies politic (or political entities) ranged from empires¹ such as Rome, the Abbassid dynasty and the Tang dynasty to feudalistic states to city states in ancient Greece or medieval Italy. Nomads in Central Asia sometimes became extremely powerful groups threatening even the vast Chinese empire. They concluded with the Chinese emperor and other leaders in their neighborhood various kinds of agreements for the purpose of commercial dealings and peace settlements. Should we characterize these agreements as treaties between states? Moreover, when we say treaties between states, what kind of written or oral agreements, concluded by what kind of subjects or entities, do we understand as treaties? What kind of sanction is needed for an agreement to be called a treaty?

Or, is it insufficient for the existence of international law that we witness sporadic presence of treaties? In order to be called international law, it may be necessary for treaties and/or customs to constitute a legal system or legal order.² If so, what constitutes the requirements for such a system or order?³ Is it necessary for the totality of those living in a particular period of time in the region to recognize such a system or order?

¹ The term “empire” is an equivocal notion. In this article, it basically means a body politic which rules more than two human societies, with one society superior to other society or societies. It should be noted, however, that “we should not give the definition of empire *a priori* and conclude that ancient Rome, Ch’in and Han dynasties, and the Ottomans were empires *because they fall within this definition*. Rather, ancient Rome was the empire (*imperium*), and the Ch’in or Han dynasty, and the Ottomans were called as empires because they looked similar to the Roman Empire in the eyes of Europeans (original emphasis)” (Yoshimura Tadasuke, “Teikoku to iu gainen ni tsuite,” 108-3 *Shigaku Zasshi* (1999), p. 60). For a more detailed analysis, see Nakamura Ken-ichi, “Teikoku to minshu shugi,” Sakamoto Yoshikazu, ed., *Sekai seiji no kozo hendo*, I, *Sekai chitsujo* (Iwanami shoten, Tokyo, 1994), pp. 183-243.

² Tabata Shigejiro, *Kokusaiho* (2nd ed., Iwanami shoten, Tokyo, 1966), pp. 7-9.

³ Hedley Bull distinguishes the notion of international order, international system, and society of states (Bull equates this with international society) in a sophisticated manner (Hedley Bull, *The Anarchical Society* (Columbia University Press, New York, 1977), pp. 8-10). Although I have high regard for his sophisticated definitions, I doubt whether even his definitions can be applicable in various regions and time which we have to deal with. I will discuss this issue later in detail.

Since the notion of the totality involves a fiction, is it sufficient for the majority of eminent academics and/or practitioners to recognize such a system or order? Or, is it permissible to apply today's predominant notion of international legal order to the past, disregarding the normative consciousness then prevailing?

Moreover, if international law is a kind of normative system, what criteria should we adopt to distinguish it from other normative systems? Should we say that a treaty between the king or emperor of Egypt and the Hittites did not constitute an international legal norm but a religious norm because the major guarantor of their promises was their gods? Also, what kind of criteria should we adopt to distinguish *domestic* legal measures from *international* law? When powerful empires such as the Roman Empire and the Chinese dynasties engaged in making arrangements with *de facto* foreign political entities, they tended not to recognize the very notion of treaties concluded between independent states on an equal footing. Rather, they regarded the arrangement with foreign entities as the emperor's order, charter, concession or other kind of unilateral measures, which should be imposed on or granted to other parties regardless of their will. Should we assume that such an arrangement constitutes a treaty, although at least one party does not so recognize it?

Furthermore, when the European states colonized Asia and Africa in the nineteenth century, many of them or their chartered companies concluded "treaties" with various types of rulers in Asia and Africa. These "treaties" transferred the latter's territory or the power and authority to rule the people in the territory (sometimes called "sovereignty"), or created a protectorate. The European powers argued that they acquired the territory or sovereignty, or assumed the protectorate lawfully, because it was ceded or assumed by treaties based on the agreement of the parties. However, European international lawyers at the time defined international law as the law of/among civilized nations, and did not recognize most Asian and African political entities as subjects of international law. How could they reconcile this view with the argument that the European states lawfully acquired the *territory* or *sovereignty* from the Asian and African *nations* by means of *treaties*?

The question does not end here. How was this process perceived and characterized by *Asians and Africans* occupying the majority of the world population at that time, according to *their* notion of normative system regulating relations among independent human groups? Did they share with the Europeans a normative consciousness which was expected to legitimize the binding force of the treaty? If they did not, how could one argue for the legal nature of such a *treaty* without shared normative consciousness?

All these questions are closely related with the question: What is international law? International lawyers dealing with the history of international law inevitably faced this critical question of the definition or the concept of international law. However, they differ in responding to this question, according to their methods, approaches to international law, sense for "others", and other factors. Some confronted the question squarely. Others evaded it. Still others simply could not be aware of the question itself.

2. The Notion of International Law Held by Major Publicists

Let us examine Oppenheim's *International Law*, the leading international law treatise in the twentieth century.⁴ According to Oppenheim:

“International Law as a law between Sovereign and equal states based on the common consent of these States is a product of modern Christian civilisation.”⁵

“The necessity of a Law of Nations did not arise until a multitude of States independent of one another had successfully established themselves.”⁶

“The seventeenth century found a multitude of independent States established and crowded on the comparatively small continent of Europe. Many interests and aims knitted these States together into a community of States. International lawlessness was henceforth an impossibility. . . . Since a Law of Nations was now a necessity, since many principles of such a law were already more or less recognised and appeared again among the doctrines of Grotius, since the system of Grotius supplied a legal basis to most of those international relations which were at the time considered as wanting such basis, the book of Grotius obtained such a world-wide influence that he is correctly styled the ‘Father of Law of Nations’.”⁷

To define international law as “a law between sovereign and equal states based on the common consent of these states” and to refer to its birth is not limited to Oppenheim. It is common to major international lawyers. Arthur Nussbaum, one of the leading historians of international law most sensitive to problems of terminology, wrote that:

“A distinct concept of the law of nations as a law prevailing among independent states has emerged from earlier vague notions only during the last few centuries. Besides, conditions of antiquity and of the Middle Ages and even of the sixteenth century make it difficult or impossible to apply to them such tests as ‘independent states’ or ‘law’ if the latter term is understood, as it may be today, in a juristic sense. Interrelations of the most diverse human groups bearing some resemblance to states and, on the other hand, norms of a purely religious character will have to be considered in any extensive inquiry. The term ‘law of nations,’ translated from the ancient

⁴ To use the term *century* itself assumes a certain way of observation and understanding of the world, because it is based on the Christian calendar. However, this problem involves every aspect of human undertaking, including my writing this article in English, the name of various nations and human groups, and the like. I therefore only invite readers’ attention to this crucial problem, and basically follow the prevalent terminology, sometimes with qualifications and explanatory notes.

⁵ Lassa Oppenheim, *International Law* (Longmans, Green, and Co., London etc., 1905), p. 44.

⁶ *Ibid.*, p. 54.

⁷ *Ibid.*, p. 58.

⁸ Arthur Nussbaum, *A Concise History of Law of Nations* (rev. ed., Macmillan, New York, 1954), p. ix.

Latin *jus gentium*, is broad enough to cover the various historic patterns. It is therefore employed in the title of the present volume, though the phrase ‘international law,’ which is now synonymous with ‘law of nations,’ has become more current.”⁸

One could also find a parallel structure of argument among major scholars dealing with the history of international law. After the end of the nineteenth century some influential publicists, such as James Brown Scott, criticized the predominant view which regards Grotius as the father of international law.⁹ They argued that those of the late Spanish school such as Francisco de Vitoria were the true founders of international law. Although they are right in demonstrating the premodern aspects of the theory of Grotius, they have tended to over-evaluate the significance of the late Spanish school, and have rightly been criticized by such prominent scholars as Nussbaum and Haggemacher.¹⁰ There are still others who emphasize the importance of Vattel, pointing out modern, liberal features in his theory.¹¹ In any event, the very question whether Grotius, Vitoria or Vattel should be regarded as the father of international law assumes that international law was born in modern Europe, and is confined within the perspective of Eurocentric modernity.¹²

3. *The Problem of Eurocentrism: Perspective vs. Historical Record, or Both?*

In a book dealing with the history of international law, Hedley Bull and Adam Watson claimed that “[b]ecause it was in fact Europe and not America, Asia, or Africa that first dominated and, in so doing, unified the world, it is not our perspective but the historical record itself that can be called Eurocentric.”¹³ What concerns me here is a rather easy use of the terms *our perspective* and *the historical record*. When Bull and Watson say *our perspective*, whose perspective do they specifically assume? Human beings as a

⁹ James B. Scott, *The Spanish Origin of International Law, I, Francisco de Vitoria and His Law of Nations* (Clarendon Press, Oxford, 1934). The best critical description of the efforts to elevate Vitoria in place of Grotius is given by Peter Haggemacher, “La place de Francisco de Vitoria parmi les fondateurs du droit international,” A. Truyol y Serra *et al.*, eds., *Actualité de la pensée juridique de Francisco de Vitoria* (Emile Bryulant, Brussels, 1988), pp. 33-35.

¹⁰ Nussbaum, *supra* n. 8, pp. 296-306; Haggemacher, *supra* n. 9, pp. 27-80.

¹¹ See A. de Lapradelle, “Introduction” to Emerich de Vattel, *Le droit de gens, ou principes de la loi naturelle, appliqués à la conduite et aux affaires des nations et des souverains*, I (reproduction of Books I and II of Edition of 1758, The Classics of International Law, Carnegie Institution of Washington, Washington, 1916), pp. iii-iv; Tabata, *supra* n. 2, pp. 30-65. See also David Kennedy, “Primitive Legal Scholarship,” 26 *Harvard International Law Journal* (1986), pp. 1-98; Martti Koskenniemi, *From Apology to Utopia* (Finnish Lawyers’ Publishing Company, Helsinki, 1989), pp. 52-100.

¹² I myself have been confined by this perspective in my earlier works. Although I sought to overcome Eurocentrism in ONUMA Yasuaki, ed., *A Normative Approach to War* (Clarendon Press, Oxford, 1993), pp. 371-86, the analyses there often reveals this restricted perspective.

¹³ Hedley Bull and Adam Watson, eds., *The Expansion of International Society* (Clarendon Press, Oxford, 1984), p. 2.

transhistorical entity? Or human beings as a whole in today's world? European and American publicists who have been engaged in the historical study of international law? Contributors to their book? Or Bull and Watson? In short, who represents *our* perspective?

Also problematic is their dissociation of *the historical record* from *our perspective*. History is composed of countless facts. The very act of selecting historical facts – e.g., collecting some facts and ignoring others – and describing a history based on these *selected* facts already assume a certain perspective. A claim that since Europe unified the world, we should construct or construe the history of international law based on the historical record centering on the historical facts that Europeans have regarded as important or meaningful, already assumes a certain – Eurocentric – perspective.

It is true that those living in the present world could see the history of human species only from the perspective of today's world, which is certainly of Europeans' making. In this sense what Europeans have regarded as important or meaningful – Eurocentric perspective – is already shared by people all over the world. However, today's world cannot be characterized solely as the one of Europeans' making. It is also a world of various civilizations' making which date back much further than modern European civilization. It is a world of thousands cultures' making, ranging from today's nations, ethnic minorities, aboriginal peoples to the past ones.

Even if modern European ideas of world ordering predicated on territorial sovereign states, diplomacy and international law based on the notion of equality of states were imposed on, and accepted by, non-Europeans, these ideas have not eradicated all other ideas of world ordering based on other civilizations and cultures. In fact, today's world is composed of more than one billion of Muslims, some 1.5 billion people whose way of thinking is more or less influenced by Confucianism, almost 800 million Hindus and many other people whose world-image is characterized not only by Eurocentric perspectives but also some other perspectives.¹⁴ It is one thing to recognize the fact that Europeans dominated and unified the world. It is quite another to see the process of this European domination and unification solely from the perspective which Europeans have taken for granted. Such an attitude may well impoverish the academic undertakings which should take diverse perspectives into account.

Take, for example, the leading figures of international law who preached natural law doctrine in the sixteenth to the eighteenth century Europe. They generally assumed that their natural law was valid for all human beings. However, the same sort of egocentric universalism was common to the doctrine of the *siyar* in the Muslim world from the seventh century to the eighteenth century or the Sinocentric notion of the world in East Asia from the era of the Han dynasty (third century B.C.) to the nineteenth

¹⁴ It is difficult to fix the number of people who believe in certain religion or share some social ethics. The figure in the text is based on Philip Parker, *Religious Cultures of the World: A Statistical Reference* (Greenwood Press, Westport, 1977), p. 4 and Ito Abito *et al.*, eds., *Gendai no shakai jinrui gaku*, III (Tokyo University Press, Tokyo, 1987), pp. 116-17 as far as the Muslim and Hindu populations are concerned. The number of people whose way of thinking is influenced by Confucianism is an estimation based on the population of China, Japan, North and South Korea, Taiwan and Vietnam.

century. Of course, none of them was actually valid all over the world. If this is the case, one may reasonably be tempted to ask what were the *relations* between the coexisting norms based on the different, but similarly universalistic, world-images of such coexisting civilizations? How did diverse peoples with universalistic norms *understand* others who held other universalistic norms? When they conflicted with each other, how could they solve the conflicts without abandoning their fundamental premise, i.e., the universal validity and applicability of their norms?

When one poses these questions, one thing becomes clear: What is critical is the question of the scope of a society in which a certain normative system is valid and applied. Whether “ancient international law,” the Islamocentric *siyar*, the Sinocentric tribute system or Eurocentric law of nations, they were nothing other than regional normative systems which were applied in only a limited area of the earth and lasted for a limited period of time. Although international law doctrines of the sixteenth century to the eighteenth century have generally been characterized as universal, their *universality* has serious limitations even as to substance.¹⁵ Needless to say, their actual application was limited to Europe and a part of America at that time. The overwhelming majority of the human species lived in the areas where “*universal*” natural law had no impact at all. It was only around the end of the nineteenth century that the European international law actually became valid as universal law of the world in the geographical sense.

As the foregoing remarks suggest, peoples of the world today regard international law as the law which is valid in international society covering the entire globe. What differentiates international law from domestic laws, which are valid in domestic societies, is this global validity and applicability. If so, when did such an international society come to exist? One can study, analyze, and answer the problem of the birth and development of international law by posing and answering this question. The following is an attempt to address this problem through reappraisal of the history of international law from an intercivilizational perspective. This perspective assumes the coexistence of plural civilizations, each of which had a normative system regulating the relations between nations, bodies politic, and mutually independent religious groups. It thus seeks to explore a variety of relationship and logic of legitimation when these civilizations have intercourse and dealings, whether peaceful or violent, with each other¹⁶.

¹⁵ I have already demonstrated these limitations in the “*universal*” theory of Grotius. See ONUMA Yasuaki, “Hugo Grotius ni okeru ‘ippan kokusaiho’ no kannen (The notion of “general international law” in Hugo Grotius),” *Kokka to shimin* (Yuhikaku, Tokyo, 1987), pp. 438-43.

¹⁶ For more on the intercivilizational perspective, see ONUMA Yasuaki, *Jinken, kokka, bunmei* (Chikuma shobo, Tokyo, 1998), pp. 26-33. For a summary of this book, see ONUMA Yasuaki, “A Quest for Intercivilizational Approach to Human Rights,” *7 Asian Yearbook of International Law* (forthcoming). The English translation of the book will be published by Columbia University Press.

II. The Coexistence of Regional Civilizations in the Pre-Twentieth Century World

1. *The Peculiarity of Today's World*

The world where we live today is, historically speaking, a very peculiar and exceptional one. When today's people refer to their world, they assume the world which covers the entire globe. This globe is divided by the meridian with Greenwich at zero degrees, and is composed of independent sovereign states. Human species are basically divided into members of such sovereign states. People spend their lives, whether economic, political, informational, social and cultural, in accordance with international law which covers the entire globe. It is true that they carry out these activities in accordance with their own national laws. However, these activities cannot regularly and smoothly be conducted unless there exists international law which all nations recognize as valid to them and accept as a common body of globally valid norms regulating their relations.

For most of the time since the human species appeared in history, the human sphere of activities did not cover the entire globe. People lived as a member of various societies, communities, or *worlds*, ranging from families, to clans, villages, cities, states, empires and civilizations. Members in these societies shared a world image with those in other societies of the world. Many of these world images were egocentric and sometimes universalistic, and were accompanied by a superiority complex towards other peoples who did not share their world image. The largest world image of this sort was the one shared by the members of civilizations, which existed in various regions in various periods. Sinocentrism, which was to a certain extent shared by the people in East Asia until the nineteenth century, is an example. The sense of Christian or Islamic community shared by Christians or Muslims respectively during the pre-modern period, with the sense of supremacy over the others, is another example.

The intercourse between peoples without such common world image was limited. However, when people were engaged in trade or in war with those who did not share the common world image, they still needed to regulate these relations by some communicative and normative framework. Without such a framework they could not even engage in a war, because the war involves a certain exchange of intention for surrender, a truce, treatment of hostages and other related matters, which could be done only through this framework. In such cases, they sought to regulate the relations by applying rules, norms and rituals based on their own world image. When one party was powerful and authoritative enough to impose their own norms and rituals on the other party, the norms and rituals based on the world image of the former prevailed. When, however, the party was not so powerful, it had to take one of the following measures or a combination thereof: (1) cut off the relations with the other party, and ignore the other party completely, (2) lower the level of the relations to a minimum one so that they could substantially ignore the other party, (3) reach an agreement with the other party by compromise, but explain domestically that they maintain their superior position, or, (4) give in and accept the norms and rituals based on the world image of the other party.

For most of human history, i.e., until the nineteenth century, many independent human groups or bodies politic whose members shared the egocentric world image

coexisted in various regions of the globe. We may call these groups: (1) regional international systems, societies or orders, in the sense that a number of political entities coexist with, at least an awareness of other parties whose behavior has sufficient impact on one party, or shared interests and values as well as an awareness of common rules of conduct and evaluation, (2) spheres of civilizations, in the sense that they share certain types of agricultural systems, religions, languages, belief systems, mores, rituals, as well as legal and political ideas and institutions, (3) groups with a common world image, in the sense that they share a world image through which they understand the basic features of the cosmos or the world, or (4) *worlds* simply and vaguely meaning parts of the globe comprising plural independent human groups or bodies politic, such as the Sinocentric world and the European world. What specific notion should one adopt to express and explain such various regional human units in human history?

This is basically a question of definition, and what definition one should adopt depends on each researcher's objective. However, there exist substantial problems as well. Terms adopted to express these regional units are related to the prevalent notions through which people – especially those in a dominant power or powers – in a certain region at a particular time see and understand the world or the cosmos, and to the criteria through which they distinguish the self-group from the other-group. For example, the term “international” used in such analytical notions as “international orders,” “international systems” or “international societies” is typically valid to the coexistence of sovereign nation states in modern Europe. As such, it proves not necessarily adequate if applied to other regional civilizations whose prevalent notions on cosmology and for distinguishing the self and the other are different from those in modern Europe.

It is true that if one defines a state as a group of humans inhabiting a certain territory, with a rule-subordination relationship within the group and a capability to hold its own with other such groups, then one can observe *interstate* relations between such states in antiquity, in the medieval Muslim region, in premodern East Asia, and so on. However, these states were not necessarily nation states, which are basically modern construct. The contemporaries living in diverse regions and times did not necessarily understand as *interstate* or *international* what today's people usually understand as international. For example, in the Muslim world from the seventh to the eighteenth century, the crucial criterion to distinguish existing human groups which they dealt with was *not* whether one belongs to some state in the sense of a territorial body with a certain population under a certain form of government. The most important criterion was a religious one: Whether one was a Muslim or not.¹⁷

From the tenth century onwards it became apparent that the Muslim world was divided by diverse dynasties. However, people in those dynasties did not adopt the cognitive framework which would have caused them to describe such a situation as the coexistence of states or nations. The cognitive framework which remained the most important was based on the difference of religion: Whether a human group was Muslims or not, and, if not, whether they were a people of the Book (basically Christians and Jews) or idolaters, remained a crucial problem to them. Although the unity of Muslims

¹⁷ This has been demonstrated by a number of experts. See, e.g., Suzuki Tadasu, *Isurammu no ie kara baberu no to e* (Libro Port, Tokyo, 1993), pp. 19-21, 25-28, 47-49, 51-52.

proved to be a fiction, still the fundamental framework of distinguishing the self and the other was not one's belonging to a political or national community, but one's belonging to a religious community.¹⁸ Thus, the notion of *international* is not appropriate either as a notion to express the relations between the Muslim dynasties or as a notion to express the relations between the Muslim dynasties or groups and non-Muslim dynasties or groups.

Likewise, according to the Sinocentric notion of the world, which was prevalent in East Asia until the nineteenth century, the notion of a state as a body of people within a territorial unit was not so important as it is today. Rather, the question whether one was a civilized member of the Sinocentric world according to the Sinocentric cosmology was regarded as crucial. This Sinocentrism was accepted by other independent human groups or bodies politic in East Asia, especially those in Korea, Japan, Vietnam, and other independent human groups located in the "southeast crescent" region,¹⁹ although the degree of such acceptance differed according to particular groups and particular times. In general they did not necessarily understand the relations between independent human groups within the framework of *nations*.²⁰ In this way, the very notion of criterion is itself not free from cultural, religious and cosmological preconceptions and conditions.

It is thus clear that if one applies the notion of *international* to some regions in the premodern period, it is difficult to understand the relationship between various independent human groups as their contemporaries did.²¹ On the other hand, the notion of civilization in a possible explanatory concept of "spheres of civilization", as described earlier, is notoriously equivocal.²² Whatever definition of civilization one may adopt, one cannot distinguish peoples and regions at a particular time in an unequivocal manner. There always exists a certain degree of overlapping in a particular human's belonging

¹⁸ *Ibid.*, pp. 47-49, 51-52.

¹⁹ As to the notion of "southeast crescent" (opposite of "northwest crescent"), see Mark Mancall, "The Ch'ing Tribute System," John Fairbank, ed., *The Chinese World Order* (Harvard University Press, Cambridge, Mass., 1968), p. 74.

²⁰ Hamashita Takeshi, *Kindai chugoku no kokusaiteki keiki* (Tokyo University Press, Tokyo, 1990), pp. 25-47. See also references in *infra* n. 24.

²¹ Even in Europe, the notion of *international* has limited use. For Europeans living in the medieval period, when Christian churches took care of the registration of birth, education, marriage, discipline of daily life and funeral, what was critical for them was the fact that they were Christians. Also important was the fact that they were members of a village, guild and fief. Whether one was a member of some nation or not was not so crucial as it is today. Under such circumstances, the notion of *international* could not have such an important meaning as it has in the modern period.

²² As to the classical studies of the notion of civilization, see L. Febre *et al.*, *Civilisation: Le mot et l'idée* (La Renaissance du Livre, Paris, 1930). See also A. Kroeber and C. Kluckhorn, *Culture: A Critical Review of Concepts and Definitions* (Harvard University, Cambridge, Mass., 1952). A recent example which has been criticized is Samuel Huntington, "Clash of Civilizations?" *Foreign Affairs* (Aug 1993), pp. 22-49 and his book, *Clash of Civilizations and the Remaking of World Order* (Simon and Schuster, New York, 1996).

to a certain civilization. However, if one allows a certain degree of proximity as inevitable in a transhistorical and transregional concept, and agrees to the idea that one can be a member of plural civilizations at a particular time, then the notion of civilization can be of some use for transhistorical and transregional analyses.

Another possible explanatory concept is “groups with a common world image.” It focuses on the critical fact that human groups which are independent from each other and differ in specific cultures may nevertheless share a common image of the world in terms of religion and/or cosmology. Sinocentrism in East Asia, shared to a certain extent by peoples in the regions of today’s China, Korea, Japan, Taiwan, and Vietnam, is an example of such a common image of the world. Christianity and Islam for Europeans and Muslims respectively, provide other examples. This notion shares with that of the spheres of civilization the flaw of being equivocal. However, so long as one is aware of this flaw and uses the concept with qualifications, it may be a useful tool for examining the common ideas, notions, assumptions, views, preoccupation and images shared by those in certain spheres of civilization.

Another possible explanatory notion – that of *world* – is so vague and general that it carries no definite meaning. Moreover, it may not be appropriate to designate a regional unit which does not cover the entire globe by the term *world* whose connotation does have a global coverage. However, if one is aware of these problems, it may be safer than other three possible explanatory concepts – regional international systems or orders, spheres of civilizations, and groups with a common world image – precisely because it carries no definite meaning, and therefore less likely to mislead. In a sense, the notion of world, designating a predominant but regional unit, has already been popularized by Immanuel Wallerstein and his school.

In any case, no notion is immune from flaws in analyzing transregional and transhistorical phenomena. Therefore, it is not unreasonable to use all these notions according to context, and with qualifications, if necessary. Relations among independent human groups within a regional world were generally regulated by agreements between the independent human groups sharing a common world image, and by unilateral rules of a central state or empire, if there was such a central state. However, there scarcely existed a common norm (the equivalent with today’s international law) among such regional worlds or civilizations. I will explore this state of affairs by elaborating on the coexistence of three major worlds, which barely lasted until the nineteenth century, on the Eurasian continent.²³

2. *The Sinocentric Tribute System in East Asia*

In East Asia – which today covers approximately China, the Korean peninsula, Japan, Taiwan and Vietnam – there existed a sphere of civilization with China at its center. Bodies politic in the region differed greatly from each other in size, culture and structure, ranging from the Ch’ing Dynasty from the seventeenth to the nineteenth century, whose territory equates with the whole Europe, to the Ryukyu Kingdom, which ruled a territory merely the size of a prefecture in today’s Japan. However, these bodies politic shared

²³ Because of the limit of the space and insufficiency of my knowledge, I limit my research in this article to the spheres of civilization in East Asia, the Muslim world and Europe.

common characteristic features such as Chinese characters and sentences, Confucianism, Buddhism and legal rules and institutions originating in China, although the degree and specific form of these features differed from country (or group) to country and from one era to another. They also shared normative frameworks to a certain extent. The relationship between these bodies politic which developed within this normative framework can be summarized as follows.²⁴

First, China was in a far superior position to others because of its vast territory, massive population, huge production, sophisticated culture, and highly developed legal rules and institutions. It thus maintained an egocentric and universalistic world image with a strong sense of superiority: Sinocentrism. According to this world image, all the world under Heaven is the realm of the emperor. Not only domestic local rulers in China but also rulers beyond the immediate pale (not necessarily the territory in the modern sense) of China must obey the emperor, who is the only supreme authority under Heaven. Since there should be only one emperor and it was taken for granted that the emperor should be the one of the Middle Kingdom, there was no such word as the “Chinese emperor” or “Han emperor.” Thus, there should be no relationship based on the equality between the emperor and other rulers, even if the latter was not actually subordinate to the former.

All relations in the region had to be regulated basically by Chinese rules, customs and rituals, not by “treaties” between the parties. Foreign rulers were expected to send a mission to the emperor and to pay a tribute to him in accordance with the well-established rules and rituals including the kowtow to the emperor.²⁵ The emperor, in

²⁴ The following view in the text is based on the writings by the experts on East Asian, Chinese, Japanese and Vietnamese history, history of ideas and legal history. They include Nishijima Sadao, *Chugoku kodai teikoku no keisei to kozo* (Tokyo University Press, Tokyo, 1961); Banno Masataka, *China and the West* (Harvard University Press, Cambridge, Mass., 1964); id., *Kindai Chugoku seiji gaiko shi* (Tokyo University Press, Tokyo, 1973); Tanaka Takeo, *Chusei taigai kankei shi* (Tokyo University Press, Tokyo, 1975); Fairbank, *supra* n. 19; Denis Twitchett and John Fairbank, eds., *The Cambridge History of China*, X (Cambridge University Press, Cambridge etc., 1978); John Fairbank and Kwang-Ching Liu, eds., *The Cambridge History of China*, XI (Cambridge University Press, Cambridge etc., 1980); Tanaka Takeo, *Taigai kankei to bunka koryu* (Shibunkaku shuppan, Tokyo, 1982); Morris Rossabi, ed., *China Among Equals* (University of California Press, Berkeley etc., 1983); Shiga Shuzo, *Shindai Chugoku no ho to saiban* (Sobun sha, Tokyo, 1984); Tanaka Takeo, ed., *Nihon zenkindai no kokka to taigai kankei* (Yoshikawa kobunkan, Tokyo, 1987); Tsuboi Yoshiharu, *L'Empire vietnamien face à la France et à la Chine* (L'Harmattan, Paris, 1987); Arano Yasunori, *Kinsei nihon to higashi Asia* (Tokyo University Press, Tokyo, 1988); Hamashita, *supra* n. 20; Tsuboi Yoshiharu, *Kindai Vietnam seiji shakai shi* (Tokyo University Press, Tokyo, 1991); Arano Yasunori et al., eds., *Asia no naka no nihon shi*, II,IV,V (Tokyo University Press, Tokyo, 1993); Nishijima Sadao, *Shin Kan teikoku* (Kodansha, Tokyo, 1996); Watanabe Hiroshi, *Higashi Asia no oken to shiso* (Tokyo University Press, Tokyo, 1997); Nishijima Sadao, *Wakoku no shutsugen* (Tokyo University Press, Tokyo, 1999).

²⁵ The kowtow was a ritual required to be performed when one was received in audience of the Chinese emperor. It consisted of three genuflections, each accompanied by three acts of prostration, the forehead touching the ground nine times in all.

return, conferred official ranks and titles on the local rulers according to the established rules and customs of official ranks and titles which were basically the same as those applied to domestic local rulers. He also gave them certain gifts and a permission to engage in trade activities during their stay in China. All these procedures were carried out on the basis of the highly sophisticated culture of the literati officials embodying elegant Chinese poetic sentences and Chinese classical knowledge.²⁶

Various bodies politic or independent human groups in the neighborhood did not always share the norms based on such Sinocentrism. Especially for nomads in Central Asia, who were regarded by China as northern or western barbarians, China was just one of many foreign powers which they would obey when it was powerful, and exploit it when it was weak. When the Nomads were exceptionally strong, they succeeded in concluding a treaty with China on the basis of equality, or even characterizing their leader as superior to the Chinese emperor. An egocentric world image with a sense of superiority was not limited to the Hans, the majority group of the Chinese. Such an image was common to many human groups, including the nomads in Central Asia, the Japanese and the Vietnamese. They sought to have relations with China based on equality, and to develop their relations with non-Chinese neighbors on the premise of their superiority.²⁷

When Japan dispatched its mission to the Chinese Emperor Yang-ti of the Sui dynasty in the seventh century, the official letter of the Japanese government began with the following sentence: "The Son of Heaven of the country where the sun rises hereby conveys a letter to the Son of Heaven of the country where the sun sets." Although the intent and the meaning of the letter have been debated seriously, it cannot be denied that it connotes a sense of equality, however ridiculously it sounded, given the enormous gap between Japan and China at this period. Since then, Japan sought to maintain such a posture, although its leaders most likely knew that it was actually impossible to do so. Likewise, although the Vietnamese king of the Nguyen dynasty in the nineteenth century reluctantly complied with the order of the Chinese emperor not to use the title of emperor, he continued to use the title of emperor in relation to his domestic subordinates and to his less powerful neighbors.²⁸

On the other hand, the tribute to China was actually a form of trade, and generally produced great profits for various human groups in the region.²⁹ China was also the most important center of knowledge, information, religion, education and other forms of culture. Especially for rulers in the region where people accepted Chinese characters,

²⁶ Tanaka Takeo, "Kanji bunka ken no naka no buke seiken," 796 *Shiso* (1990), pp. 5-30, especially 6, 9-12; Murai Shosuke, *Higashi ajia okan* (Asahi shinbun sha, Tokyo, 1995).

²⁷ Sakayori Masashi, "Kai shiso no shoso," Arano *et al.*, *supra* n. 24, pp. 27-58, and writings of Nishijima and Tanaka, *supra* n. 24.

²⁸ See Tanaka, *supra* n. 24 [Chusei], pp. 14-15 *et passim*, Nishijima, *supra* n. 24 [Higashi Asia] and [Wakoku], *passim* and Tsuboi, *supra* n. 24 [L'Empire], pp. 96-103.

²⁹ It has been widely accepted that the tribute was in one respect a form of trade which brought great advantages to those who participated in the tributary system. See writings in Fairbank, *supra* n. 19, Banno, *supra* n. 24 [Kindai] and especially Hamashita, *supra* n. 20.

Confucianism, literature, arts, as well as political and legal ideas and institutions, official ranks and titles conferred by the Chinese emperor were important means to legitimize their rule or suzerainty over competing rivals. In practice, peoples in the region, especially those in the southeast crescent, including those in today's Korea, Japan, Taiwan and Vietnam, generally accepted Chinese ideas and institutions, as well as the basic world image of Sinocentrism. Moreover, Korean and Vietnamese rulers, whose domain was adjacent to the Chinese domain, had to consider that they might be a target of military sanctions if they openly offended or refused to obey the authority of the Chinese emperor. For these reasons, rulers in the neighborhood of China, especially those in the southeast crescent, generally complied with the Sinocentric rules and procedures when they dealt with the Chinese authorities. They were inclined to regulate their relations based on this framework not only vis-a-vis China, but also among themselves.³⁰

Second, the Sinocentric normative framework of these regional relations was generally characterized as an extension of the domestic framework of the central power, i.e., China. Seen from the Chinese perspective, the emperor was supposed to reign over the entire world or even the cosmos. In regions where his rule did not actually reach, the emperor recognized the legitimacy of the rule of a foreign ruler by conferring on him an official title and ranking. The strict distinction between the "international" and the "domestic" seen in modern international law did not exist. Seen from a non-Chinese ruler's perspective, whether his neighbor was an equal independent power, a weaker and/or less civilized one who ought to be subordinate to him, or a stronger and/or more civilized one to whom he ought to be subject, was not necessarily clear. There existed a complex network of suzerainty and tributary relations among these independent powers. However, it was apparent to all in the region that China was paramount. So long as a ruler of a certain independent human group recognized the authority of the Chinese emperor, he could make use of this Sinocentric system and generally enjoy economic, political, cultural, communicative and military advantages.

The mechanism of formal relations between the bodies politic was one of these advantageous mechanisms available to the members of the tribute system. The formal relations were carried out through a series of complex procedures: dispatch of an envoy carrying a formal letter of a dispatching ruler addressed to a recipient ruler; reception by the recipient ruler of the envoy after a series of complex rituals and ceremonies according to the ranking of the dispatching ruler and the envoy; submission of the formal letter from the envoy to the recipient ruler together with a list of tributes; reciprocation by the recipient ruler addressed to the dispatching ruler. Envoys were in principle to be sent on a regular basis according to established standards based on the physical and psychological distance between the bodies politic, but actually were sometimes sent on an *ad hoc* basis.

Frequency of the dispatch to and reception of missions in China as well as the procedures of the tribute system were not provided by "treaties" between the parties, but were stipulated in the Chinese statute. It naturally differed according to the relationship between the Chinese dynasty and its neighbors. However, Korea (or Korean

³⁰ Tanaka, *supra* n. 24 [Kanji], pp. 13-14 *et passim*. Tanaka, *supra* n. 24 [Chusei], p. 18.

ruler)³¹ was always regarded as the most intimate tributary, and was required to send the tributary mission most frequently of all neighbors of China. Whether these “tributaries” actually sent missions according to the Chinese rules naturally depended on various factors, as described earlier.

Chinese was the “*lingua franca*” of the region.³² Not only letters sent by the Chinese emperor, but also those by other rulers were written in Chinese. They had to satisfy an elaborate and sophisticated style based on the culture shared by the Chinese literati officials, who were in charge of Chinese diplomatic relations. Their counterparts in the non-Chinese bodies politic were often priests who studied in China, or those who mastered such elaborate culture by learning from these priests. Chinese characters and sentences of such an elaborate and sophisticated style were used as a means of diplomatic and cultural communication not only involving China, but also between non-Chinese bodies politic or independent groups.³³ This fact reflected the general adoption by East Asian peoples of Chinese character as an official and cultural language in their domestic settings.

How and to what extent they accepted the Chinese characters varied according to regions, periods, the nature and type of regimes and other factors. Therefore, whether they used the Chinese characters or their own characters or letters in their correspondence with non-Chinese rulers depended upon these factors. For example, Japanese rulers during the Muromachi period (1392-1573) used Japanese letters in their correspondence with the Ryukyu ruler, but adopted Chinese characters during the Momoyama period (1568-1600), and again used the Japanese during the Tokugawa period (1600-1867).³⁴

Third, whether a certain ruler (typically the Chinese emperor) could coerce or urge other foreign rulers to pay tribute to him depended on various factors: (1) relative military strength; (2) economic advantage, i.e., whether he could offer such an abundant profit and advantage to the other that the latter thought that it would be worthwhile for him to place himself formally in an inferior position to the former; (3) cultural and religious attraction as well as informational advantage, i.e., whether his country could offer attractive religious teachings, highly developed culture and education, and strategically and economically useful information; (4) legitimacy attraction, i.e., whether he could confer titles and rankings which were highly regarded as legitimate for political rule among neighbors, and, (5) the distance between the parties in question.

In some cases, although the Chinese emperor thought that a certain ruler should pay tribute to him, the ruler failed to do so. Such failures could range from a manifest

³¹ It was basically a foreign ruler, not a foreign nation or state, that was expected to pay a tribute to the emperor. However, since there was not a clear sense of differentiation between the state or nation as an abstract entity and the ruler, the list of tributaries in the Chinese statute generally referred to them in terms of the name of countries.

³² It should be noted that the term “Chinese” at this point of history did not necessarily hold the same meaning as it does today. Rather, it was a group of signs embodied in Chinese characters and sentences.

³³ Tanaka, *supra* n. 24 [Kanji], pp. 13-14 *et passim*.

³⁴ *Ibid.*, pp. 17, 26.

rejection with the expression of, at least in the Chinese perception, contempt towards or rebellion against the emperor, to a minor error of delayed or other irregular tribute. The response to such failures could differ according to various factors, especially (1) the gravity, manner and (construed) intent of the failure; (2) the comparison in terms of military strength between China and the party in question; (3) the distance between China and the party (whether the party is so distant that the failure does not seriously matter in Chinese domestic politics, or the party is so close and well-known to China that the knowledge of the failure might hurt the authority or prestige of the emperor); (4) the domestic situation (whether it is financially and/or militarily possible for the Chinese dynasty to dispatch military forces to sanction the “disobedient” party). A comparison with precedents was another important factor.

China had basically three options: (1) to ignore the failure by characterizing the objecting party as an ignorant savage whom the civilized people such as the Chinese would find it a waste of time to bother with; (2) to content itself with making a compromise agreement with the party that the latter would bring a gift to the emperor which could be explained as a tribute; and, (3) to send a punitive expedition, regarding the failure as a challenge to the authority of the emperor. This “punitive action” was in fact a war between China and the “disobedient” party, but was regarded by the Chinese not as a war between equals but as a sanction. Although the rules and principles regulating the relationship among the members of the East Asian system were social and cultural norms mainly based on Confucian cosmology, they were also coercive as norms which could be enforced by military power.

Whether one could, and should, consider these norms as law depends, at least to a certain extent, on the definition of law. As the foregoing analyses make it clear, “treaties” between independent human groups did not play an important role either in the formation or in the maintenance of normative order in East Asia. It was the extension of Chinese norms that functioned as a basic regulatory framework. If one defines law as a norm which is regarded as legitimate by the members of a community and can be enforced by force, and emphasizes the possibility of “punitive action” by a more authoritative and powerful bearer of the norm (especially China) as described above, then one might say that a normative element of the tribute system which entailed the possibility of military enforcement was of a legal nature. On the other hand, until the Ch’ing dynasty, people in East Asia understood law with enforcement mechanisms as basically domestic. The very notion of applying the law as an enforceable norm outside the territory or between independent bodies politic was foreign to them.

The fundamental philosophy underlying the tribute system was the rule by virtue. The emperor should embody the virtue and spread it throughout under Heaven. Generally, even those uncivilized people were expected to understand the virtue of the emperor, and send a tributary mission to him in order to share in his virtuous rule. However, if someone did not understand the high virtue of the emperor and failed to send a mission to him, such an ignorant savage could be left alone. The natural sanction should be that he would remain uncivilized. It would be against the philosophy of virtue to compel him to send a mission. This lack of proselytizing zeal is a characteristic feature which distinguishes Sinocentrism from other similar egocentric and universalistic belief systems such as Christianity and Islam. Because the very notion of imposition of

the Sinocentric ideals was lacking, it was natural for the agent of Sinocentrism not to resort to the idea of legal enforcement as a means of disseminating the virtue outside the domain of China.

Independent human groups in the region coexisted by qualifying their own egocentric world image with those factors described above. According to Sinocentrism, because the emperor was the only one to reign under Heaven, no non-Chinese ruler was allowed to call himself the emperor. However, some local rulers sought to place themselves in a superior position in relation to others and to use the title of the emperor.³⁵ Therefore, disputes as to the name and title of oneself and the other, as well as the characterization of the third party who pays a tribute to both, occurred frequently. In order to mask such disputes, they often adopted different expressions in their diplomatic and domestic instruments. In some cases this involved the falsification of diplomatic letters and the dispatch of false ambassadors.³⁶

These deviations were an inevitable consequence of the Sinocentric relations among independent bodies politic. Even if China was a superpower for much of human history, it was impossible for China to impose its will on all the peoples in the world with its limited military and economic power, and its cultural influence. Thus, it was from the very beginning impossible to maintain the fundamental notion of Sinocentrism: to accept tributes from those who live under Heaven and pay a visit to the emperor, and to confer upon them official titles and rankings according to the Chinese rules and customs. In this sense, the tribute system inherently comprised an estrangement from reality, and could function only when the parties in the system acquiesced in this estrangement. On the other hand, it had a number of merits and worked well, so long as the players did not stick to the principle in a rigid manner. It also shared many common features with other systems which existed in other spheres of civilization.

For example, it was not only in East Asia that coexisting states or political entities claimed superiority over each other. Again, it was quite common that in such cases both parties compromised with each other, acquiescing in, at least *de facto* equality on an international plane, but each explaining superiority over the other on a domestic plane. In human history, it was quite usual that egocentric bodies politic with a sense of superiority to others coexisted for a long time and maintained peaceful relations, by resorting to techniques similar to those employed in the Sinocentric tribute system. The falsification of the state letter to conceal the perception gap with a foreign party was not limited to East Asians, but was common to Europeans.³⁷

³⁵ See references in *supra* n. 28.

³⁶ See, e.g., Tashiro Kazui, *Kakikaerareta kokusho* (Chuo koron sha, Tokyo, 1983).

³⁷ This was clearly exemplified in the case of the Macartney mission to China in 1793. Emperor Ch'ien-lung's letter of 1793 addressed to George III, which was written on the premise of traditional Sinocentrism, was so indignant to the British that the translators of the mission carefully altered the most insolent formulations. However, Macartney and his aides regarded that even this altered letter was too indignant to the British pride. They drafted an English summary which was effectively a forgery, and this summary subsequently came to be regarded as the official text in Britain (Alain Peyrefitte, *L'empire immobile ou le choc des mondes* (Librairie Arthème Fayard, Paris, 1989), pp. 288-89).

Moreover, East Asia was not the only region where a central power used its domestic rules for regulating foreign relations, and neighboring bodies politic accepted such rules and even used them for regulating relations which did not involve the central power. In the case of ancient Rome, it concluded agreements with other bodies politic on an equal footing when it was not powerful enough, but imposed unilaterally its domestic rules on the neighbors when it became a powerful empire. Similar examples can be seen in the case of the Ottoman Empire, the Byzantine Empire and other powerful empires.³⁸ There were many cases in which “agreements” concluded by those empires and foreign bodies politic were characterized by the empires as an application of their domestic laws or as concessions granted by the emperor, but by the other party as a treaty based on an equal footing.

3. *The Muslim World and the Siyar*³⁹

Islam, like many other great religions of the world, was born as a universal belief system. Although it was a minor Arab religion in the era of the founder and his immediate successors, it rapidly expanded its sphere of believers under the Abbasid dynasty (750-1258). The Abbasid dynasty was an Islamic empire which included not only Arabs but also many non-Arabs, as well as various kinds of converts, Jews and Christians. The Abbasid rule was legitimized by the *ulama*, a group of religious leaders, on the basis of Islam.

The Islamic world image was expressed in the theory of *sharia*. The *sharia* is composed of norms which are based on the Qur'an and are addressed to Muslims. The

³⁸ Thus, one could understand, although one may not endorse, why the US tends to apply unilaterally its domestic laws even outside its territory. Since the US is today's version of the central power or empire, it is in a sense natural for it to behave unilaterally, disregarding rules of international law which are based on the principle of equality. The serious problem for the US is that, unlike historical norms surrounding the former empires behaving unilaterally, today's international law is based, not on hierarchical notions, but on the notion of equality of states. Moreover, the US itself values highly the notion of equality in domestic settings. Thus, the hypocritical character of the US behavior often becomes evident, thereby inviting much criticism that hurts its legitimacy and authority.

³⁹ The following view in the text is based on the earlier studies, including Joseph Schacht, *An Introduction to Islamic Law* (Clarendon Press, Oxford, 1964); Majid Khadduri, *The Islamic Law of Nations* (John Hopkins Press, Baltimore, 1966); Charles-Emmanuel Dufourcq, *La vie quotidienne dans L'Europe médiévale sous domination Arabe* (Hachette, Paris, 1978, Japanese trans. by Shiba Osami and Shiba Hiroko, Fujiwara shoten, Tokyo, 1997); Majid Khadduri, *War and Peace in the Law of Islam* (John Hopkins Press, Baltimore, 1979), *L'Islam dans les relations internationales, Actes du colloque franco-pakistanaï, Paris, 14-15 mai 1984* (EDISUD, Aix en Provence, 1986); C. G. Weeramentory, *Islamic Jurisprudence* (St. Martin Press, New York, 1988); James Johnson and John Kelsay, eds., *Cross, Crescent, and Sword* (Greenwood Press, New York etc., 1990); John Kelsay and James Johnson, eds., *Just War and Jihad* (Greenwood Press, New York etc., 1991); Yajima Hikoichi, *Islam sekai no seiritsu to kokusai shogyo* (Iwanami shoten, Tokyo, 1991); Bernard Lewis, *Islam and the West* (Clarendon Press, Oxford, 1993); Suzuki, *supra* n. 17; Haim Gerber, *State, Society, and Law in Islam* (State University of New York, 1994; Japanese trans. by Kuroda Toshio, Fujiwara shoten, Tokyo, 1996).

sharia regulates the behavior of Muslims in their domestic and foreign affairs. Thus, it regulates not only relations among Muslims themselves but also their behaviors in relation with non-Muslims. The norms which regulate external aspects of Muslims are called *siyar*. The basic theory of the *siyar* was established by al-Shaybani, a disciple of Abu Hanifa, who was the founder or eponym of the Hanafi school, one of the four major Sunnite schools of sharia.

Islam is inherently a religion addressed to individuals. Therefore, its basic category distinguishing the self and the other is “believer vs. unbeliever.” However, in the process in which the Abbasid dynasty expanded its territory in the eighth century, al-Shaybani and other jurists came to divide the world into the *dar al-Islam* (abode of Islam), the territory under the Muslim rule, and the *dar al-harb* (abode of war), the territory under the rule of unbelievers. This dichotomy was basically maintained during subsequent periods.

Muslims must constantly make efforts to convert the *dar al-harb* to Islam. These constant efforts are called the *jihad*.⁴⁰ Although the *jihad* includes peaceful as well as military efforts, the *jihad* by military means occupied a central place in the rules and practice of sharia during the early period of Islamic expansion. The relationship between the *dar al-harb* and the *dar al-Islam* was juridically characterized as a state of war, even though there might not be actual hostilities between them. The terms *dar-al-Islam* and *dar-al-harb* were not found in the Qur’an, and became general only after the theory of Abu Yusuf of the Hanafi school exerted its influence. However, the very fact that these terms became predominant to express the fundamental relations between the self and the other demonstrates the supremacy of militaristic thinking among Muslims in this period.⁴¹

In this way, the teaching of sharia, as established during the expanding Abbasid dynasty, had two faces. On one hand, it was based on a universal religion seeking to overcome ethnocentrism, which was common to most religions in those days. On the other, it tended to regard Islam as the absolute doctrine and to proselytize others even by forceful means. In its earlier period of expansion and prosperity, Muslims, especially those in the rising Abbasid dynasty, confronted other groups which did not share their world image, with a high profile based on the egocentric sense of superiority. Interpretation of Islam to divide the world into the *dar-al-Islam* and the *dar-al-harb* was an ideology reflecting this self-righteous and aggressive element of the early Abbasid dynasty.⁴²

However, the Muslims gradually had to modify such a resolute dogmatic stance. Muslims, favored by their geographical dominance of the center of the Eurasian continent, were actively engaged in commercial activities which connected Asia and Europe. These commercial activities naturally demanded lasting peaceful relations with

⁴⁰ As to the *jihad*, see Khadduri, *supra* n. 39 [War and Peace], pp. 50-82. See also Fred Donner, “The Sources of Islamic Conceptions of War,” Kelsay and Johnson, *supra* n. 39 [Just War]; Abdulaziz Sachedina, “The Development of Jihad in Islamic Revelation and History,” Johnson and Kelsay, *supra* n. 39 [Cross].

⁴¹ See Donner, *supra* n. 40, pp. 34-50.

⁴² See Sachedina, *supra* n. 40, pp. 40-44.

other religious groups or political entities. These peaceful relations were explained by the later jurists as the *sulh*, a suspension of the jihad.⁴³ Various kinds of agreements were made even with “non-believers.” The binding force of the agreements with the “non-believers” was generally recognized, although there were some loopholes for the advantage of the Muslims.

According to the prevalent interpretation, Muslims were allowed to engage in economic and cultural activities in the dar al-harb. The “people of the Book,” such as Christians and Jewish people, were allowed to do the same in the dar al-Islam. They were called the *musta'min*, whose life, security and property were protected, and other privileges guaranteed by the Muslim ruler.⁴⁴ Although the life, freedom and property of the *musta'min* were protected, they were naturally placed under various restrictions. Especially, when they stayed long in the abode of Islam, they were to be treated according to the rules governing the *dhimmis* or the “people of the Book” who from the beginning lived in the abode of Islam.⁴⁵ However, because many Muslim dynasties thought that the commercial activities of those *musta'min* contributed to their economy, they often treated the *musta'min* favorably and granted them certain privileges. Although these arrangements included an element of agreement between the parties, the privileges of the arrangements were generally characterized as the unilateral *ahdname* conferred *ex gratia* by the Muslim ruler and could be unilaterally revoked whenever the pledge of friendship was construed to be violated.⁴⁶

A fundamental contradiction was involved, however, in explaining the enduring peaceful relations between Muslims and non-Muslims as the suspension of the jihad. Had it been a suspension, it should have been regarded as limited to a relatively short period of time. However, once the rapid expansion ended, the peace became a normal state of affairs. Many scholars sought to establish a persuasive theory to bridge the gap between the principle of constant war and the reality of peaceful relations. In practice, various periods of *sulh*, such as that of ten years, were adopted according to various political, economic and military considerations. Many agreements were concluded between Muslim powers and non-Muslim powers under the name of the suspension of the jihad. The discrepancy was sometimes masked by a theory of a renewal of the limited peace period.⁴⁷ Moreover, because of the normalcy of the peaceful relations with non-Muslims, it was almost inevitable that rules concerning peaceful relations increased in the *siyar*, which originally was mainly composed of rules concerning hostilities. Although the *siyar* was originally a unilateral system of norms addressed to Muslims, it came to be more agreement-oriented and less unilateral in character.⁴⁸

⁴³ Suzuki, *supra* n. 17, p. 22.

⁴⁴ As to the status of the *musta'min*, see Khadduri, *supra* n. 39 [War and Peace], pp. 166-68.

⁴⁵ As to the status of the *dhimmis*, see *ibid.*, pp. 175-201.

⁴⁶ Suzuki, *supra* n. 17, p. 33.

⁴⁷ Khadduri, *supra* n. 39 [War and Peace], pp. 218-22, 271-73.

⁴⁸ H. Inalcuk, “Imtiyazat ii in the Ottoman Empire,” C. E. Bosworth *et al.*, eds., *Encyclopedia of Islam*, III (new ed., E. J. Brill, Leiden, 1960), pp. 1179-89. See also Suzuki, *supra* n. 17, pp. 35-37.

Revisions in the doctrine of the sharia were also unavoidable with regard to the relations among Muslims themselves. In the eighth century, the Umayyads, who were expelled by the Abbasids from Central Asia, reestablished a dynasty in Spain. In the tenth century, the Fatimids established its dynasty in north Africa. With three dynasties coexisting, the original theory of the unity of the Muslim community revealed its fictitious nature. In the thirteenth century, with the collapse of the Abbasid dynasty, the Muslim world became even more pluralistic in its political structure. Some scholars called these dynasties *dawla* and tried to explain their coexistence in that they would realize the universal sharia in their own territory. However, the discrepancy between the theory and reality was too evident.⁴⁹

During the period when the Muslim dynasties, especially the Ottoman Empire, were powerful and prosperous, they could basically impose their rules of world ordering on the non-Muslim neighbors including the European nations. The Ottoman Empire generally maintained its principle of unilateral diplomacy towards Europeans by applying the rules of *siyar* which were based on the egocentric and universalistic Islamic image of the world. During this period, although a few Muslim merchants received similar treatment in some European states, the Ottoman Empire and other Muslim powers regarded more profitable to allow Christian and Jewish merchants (*musta'min*) to be engaged in commercial activities in their own territories. Even if the Muslim powers granted a certain autonomy to the non-Muslim merchants, they could control the relationship with these merchants and their governments by the discretionary power reserved to them.

However, from the seventeenth to the eighteenth centuries, while European nations increased their economic and military power, the Ottoman Empire and other Muslim powers gradually declined. With the overall decline of the Muslim powers, they could no longer control the relationship with the non-Muslim merchants and their governments. The protection of European merchants and the recognition of their consular jurisdiction, which had been regarded as a generous grant by the emperor based on the notion of the superiority of the Ottoman Empire, came to be interpreted as a bilateral agreement that could not be unilaterally revoked by the emperor. It thus came to imply a restriction of the territorial jurisdiction of the Ottoman Empire. It became not only difficult for the Ottoman Empire to regulate relations with European nations by unilateral norms of the *siyar*, but also disadvantageous to do so. Thus, the Ottoman Empire gradually sought to regulate relations with the Europeans on a reciprocal basis which was grounded in the principle of sovereign equality under European international law.⁵⁰

It was basically advantageous for the European nations to expand their system of world ordering to the Muslim world. However, with a growing sense of self-confidence in their power and a long established sense of superiority in Christianity, they were not willing to give an equal status to the declining Ottoman empire or any other Muslim powers. Being in an inferior position in terms of military and economic power, the

⁴⁹ Khadduri, *supra* n. 39 [War and Peace], pp. 268-70; Suzuki, *supra* n. 17, pp. 25-27, 154-64.

⁵⁰ J. C. Huerwitz, "Ottoman Diplomacy and the European State System," *Middle East Journal* (Spring 1961), pp. 141-52. See also Suzuki, *supra* n. 17, pp. 32-35.

Ottoman Empire and other Muslim powers had no other choice but to enter the Eurocentric system of world ordering either as an inferior partner who was forced to accept unequal treaties, or as a colony of some European power. In this way, with the steady decline of the Ottoman Empire from the seventeenth century, the Eurocentric system of world ordering came to cover the vast areas of the Eurasian continent, where the Islamocentric way of world ordering had once been prevalent. This did not mean that the European powers accepted Muslims as legitimate, inner members of their system of world ordering, “the family of nations.” This complex and discriminatory process will be discussed later in III.

4. *The Decentralized Structures and Christianity in the European World*⁵¹

After the collapse of the Western Roman Empire, decentralized and feudalistic structures were long maintained in Europe. Those who held power and authority to rule others at

⁵¹ The following view in the text is based on the earlier studies, including Carl von Kaltenborn, *Die Vorläufer des Hugo Grotius* (Verlag von Gustav Mayer, Leipzig, 1849, Nachdruck, Antiquariat Sauer & Auvermann, Frankfurt am Main, 1965); Ernest Nys, *Les origines du droit international* (Alfred Castaigne, Bruxelles, 1894); Alfred Vanderpol, *La doctrine scolastique du droit de guerre* (A. Pedone, Paris, 1919); Ernst Cassirer, *Die Philosophie der Aufklärung* (J.C.B.Mohr, Tübingen, 1932, Japanese trans. by Nakano Yoshiyuki, Kinokuniya shoten, 1962); John Epstein, *The Catholic Tradition of the Law of Nations* (Burns Oates & Washbourne, London, 1935); Paul Hazard, *La crise de la conscience européenne* (Boivin, Paris, 1935, Japanese trans. by Nozawa Kyo, Hosei University Press, Tokyo, 1973); Marc Bloch, *La société féodale*, I,II (Paris, 1939, Japanese trans. by Shimmura Takeshi *et al.*, Misuzu shobo, Tokyo, 1973); Lewis Hanke, *Spanish Struggle for Justice in the Conquest of America* (University of Pennsylvania Press, Philadelphia, 1949); Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Dunker & Humblot, Berlin, 1950, Nachdruck, 1974); A. P. D’Entrève, *Natural Law* (Hutchinson House, 1950, Japanese trans. by Kubo Masahata, Iwanami shoten, Tokyo, 1952); Fritz Kern, *Recht und Verfassung im Mittelalter* (Basel, 1952, Japanese trans. by Sera Koshiro, Sobun sha, 1968); Silvio Zavala, *The Political Philosophy of the Conquest of America* (Editorial Cultura, T.G., S.A., 1953); Otto von Girke, *Die deutsche Genossenschaftsrecht*, III (Akademische Druck- und Verlagsanstalt, Graz, 1954; partial Japanese trans. by Sakamoto Jinsaku, Minerva shobo, Kyoto, 1985); Arthur Nussbaum, *A Concise History of the Law of Nations* (revised ed., Macmillan, New York, 1954); Otto Brunner, *Neue Wege der Verfassungs- und Sozialgeschichte* (Vandenhoeck & Ruprecht, Göttingen, 1968; Japanese trans. by Ishii Shiro *et al.*, Iwanami shoten, 1974); J.H.Elliot, *The Old World and the New* (Cambridge University Press, Cambridge, 1970); James Johnson, *Ideology, Reason, and the Limitation of War* (Princeton University Press, Princeton, 1975); Michael Howard, *War in European History* (Oxford University Press, New York etc., 1976); J.A.Fernandez-Santamaria, *The State, War and Peace* (Cambridge University Press, Cambridge etc., 1977); Richard Tuck, *Natural Rights Theories* (Cambridge University Press, Cambridge etc., 1979); John Finnis, *Natural Law and Natural Rights* (Clarendon Press, Oxford, 1980); Peter Haggenmacher, *Grotius et la doctrine de la guerre juste* (PUF, Paris, 1983); Jörg Fisch, *Die Europäische Expansion und das Völkerrecht* (Steiner, Stuttgart, 1984); Wilhelm Grewe, *Epochen der Völkerrechtsgeschichte* (Nomos Verlagsgesellschaft, Baden-Baden, 1984); Hedley Bull *et al.*, eds., *Grotius and International Relations* (Clarendon Press, Oxford, 1990); Aron Gurevich, *Kategorii sredvekovoi kul'tury* (2nd ed., 1984, Japanese translation by Kawabata Kaori

various levels swore loyalty to the more powerful and authoritative and secured protection from them. These relations of rule-subordination extended beyond the borders of various kingdoms and the Holy Roman Empire as multi-layered networks in Europe. The decentralized structures were favorable to various arrangements by means of agreements between independent human groups. Unlike Sinocentric or Islamocentric world, there was no combination of egocentric universalism and the single central power which could impose unilateral norms in an authoritative manner, although the pope and the emperor of the Holy Roman Empire played a similar role to a certain extent. Although domestic laws, decisions of the domestic courts and domestic jurisprudence of major powers such as Britain exerted a substantial influence in treaty making and state practice, still the role of agreements between independent powers based on an equal footing was more conspicuous in Europe than in Sinocentric or Islamocentric world. On the other hand, in these decentralized structures, law was to be realized by self-help undertaken by various bearers of rights including the head of the household. It was thus natural that medieval Europe witnessed thousands of private wars and blood revenges.⁵²

To be accepted in such a society, Christianity had to abandon the absolute pacifism of the early church and to approve of certain types of war or violence. St. Augustine, who formulated the basic relationship between the Christian doctrine and the secular power in medieval Europe, adopted a just war doctrine. Thomas Aquinas, who brought about a radical change and rejuvenated the Christian doctrine in late medieval Europe, also adopted a just war doctrine. According to him, wars conducted under the authority of a prince, with a just cause such as self-defense and reparation of injuries, and accompanied by a just intention such as to promote good or to avoid evils, should be regarded as just wars.

By compromising with the actual power structure of the society, Christianity infiltrated deep in the Europeans' mind. Churches took care of Europeans from birth to death. Many tasks which national and local governments carry out today, such as the registration of birth, marriage, funerals, providing for education and hospitals, and settlements of disputes were carried out by churches. Bishops, cardinals and the pope had some authority over feudal lords or monarchs, and exerted influences on relations between European powers, and those between European and non-European powers. They played an important role in the arbitration, restriction of wars by declaring the Peace of God and Truce of God, providing for refugee in time of war, and various other matters.⁵³

and Shigehara Shigeo, Iwanami shoten, Tokyo, 1992); ONUMA, *supra* n. 12; Yamauchi Susumu, *Ryakudatsu no ho kannen shi* (Tokyo University Press, Tokyo, 1993); *id.*, *Kita no jujigun* (Kodansha, Tokyo, 1997). For further studies, see references cited in ONUMA, *supra* n. 12.

⁵² Yamauchi, *supra* n. 51 [Ryakudatsu], citing Bloch and other authorities, emphasizes this aspect of medieval Europe.

⁵³ During medieval Europe, one can see the development of the just war doctrine, a series of attempts for the Peace of God and the Truce of God, and repeated attempts to restrict cruel behavior, looting and other inhuman acts by resorting to the spirit of chivalry and/or Christian ethics. These facts reveal how prevalent private wars, blood revenges and reprisals were among Europeans at the time. The *repeated* attempts also demonstrate how desperately needed and yet difficult it was to restrict the violent behavior.

On the other hand, the just war doctrine, which was elaborated by Christian theology and Roman law during the medieval period, served as an ideology to justify certain kinds of war, rather than as a rule to prohibit or restrict wars. Moreover, the restrictive function of the just war doctrine was further limited: Only wars among the Christians were restricted. "Pagans," who were regarded to be, or were sometimes actually, hostile to the Christians were viewed as an agent of the devil. To convert them to Christianity even by force was believed by many Europeans to be a sacred mission of Christians.⁵⁴

Thus, the pope often justified the Christian monarch's rule and its expansion under the banners of spreading the Gospel and rule by a good Christian ruler. In many cases, he tried to prohibit the Christian monarchs from allying or trading with Muslims. When these monarchs did not abide by these prohibitions, he often imposed severe sanctions on them such as excommunication, deprivation of public offices and expropriation of their properties. The primary self image of Europeans during this period was that of Christianity. This self image was consolidated by the image of confrontation with Muslims, and provided a psychological basis for the Crusades, the Northern Crusades, Portuguese expansion to North West Africa and the *Reconquista* movement in the Iberian Peninsula. The famous bull of Alexander VI of 1493, which endorsed the domination of American continent by Isabella of Castilla and Fernando of Aragon after the "discovery" of America by Columbus, was based on this long established notion of universal propagation of Christianity.⁵⁵

The European powers colonized the world from the sixteenth to the early twentieth century simultaneously with the establishment of the sovereign states system and its accompanying system of modern international law and diplomacy in Europe. The mainstream of the study on the "history of international law" has generally concentrated on the latter aspect, ignoring the meaning of colonization in relation to international law. Moreover, it understood the emergence of the European sovereign states system as an event of worldwide significance from the very beginning. Lying behind such an understanding is Eurocentrism, which holds what is important for Europe should be important for the world.

Seen from a contemporary perspective, the establishment of the sovereign states system was, however important for Europe, just a minor event, because Europe in those days was just an underdeveloped, remote country area of the world. According to Bairoch, an economic historian, Europe as a whole produced only 23% of the world's manufacturing goods in 1750, a century after the Peace of Westphalia. China, on the other hand, produced 33% just as one country, and the Indian subcontinent produced 25%. Even in 1800, when the industrial revolution had already begun in England, the whole of Europe produced only 28% of the world's manufacturing goods, whereas China still produced 33%.⁵⁶ These figures vividly demonstrate how the prevalent image

⁵⁴ Yamauchi, *supra* n. 51 [Kita], pp. 15-21 *et passim*. See Gurevich, *supra* n. 51, pp. 105-06.

⁵⁵ Nussbaum, *supra* n. 51, pp. 19-21; ONUA, *supra* n. 12, pp. 372-75, 382-86; Yamauchi, *supra* n. 51 [Kita], pp. 273-92. Alfred Rubin, "International Law in the Age of Columbus," 39 *Netherlands International Law Review* (1992), pp. 5-35.

⁵⁶ Paul Bairoch, "International Industrialization Levels from 1750 to 1980," 11 *Journal of European Economic History* (1982), p. 296.

of *developed Europe* in the modern period is strongly influenced by the projection of today's image onto the past.⁵⁷

The European colonization of the world and the development of the sovereign states system went hand in hand. But this does not mean that Europeans deliberately carried out some conspiracy of world dominance by the sovereign states system. Nor did the European powers expand in order to propagate Christianity or justify their expansion always by Christianity, although proselytizing psychology did exist among many Europeans. Rather, the European expansion on a global scale and development of the sovereign states system occurred in the process of the secularization of the European mind from the sixteenth to the nineteenth century. One can see a prototype of this paradox in the theory of Francisco de Vitoria and Hugo Grotius. Vitoria's *De indis*, the famous lecture on the Amerindians, exemplified a prototype of the legitimation of the modern European colonization, and Grotius's *De jure belli ac pacis* exemplified a prototype of modern European international law as a normative system among nations,⁵⁸ which played an important role in colonization of the world as a silent companion.

According to Vitoria, even the *barbari* ("barbarians," i.e., Amerindians) were entitled to their own property and ruler. Titles based on universal imperial jurisdiction, papal grant, discovery, sin on the part of the Indians, and other titles claimed by many in those days could not justify colonization. In this sense, one could see a humanitarian aspect or even a tendency towards egalitarianism in Vitoria's theory. However, his argument did not end here. He argued that human beings were sociable in nature, and were entitled to have social intercourse with others. Therefore, the Spaniards were entitled to travel in America, to have intercourse and dealings with the inhabitants and to engage in commercial activities there. If the *barbari* hindered these activities, the Spaniards could resort to war and realize their rights. Furthermore, it was the right and the duty of Christians to propagate Christianity. If the *barbari* hindered this mission, they could resort to war, depose the Indian ruler and establish a new ruler.⁵⁹

It should be noted that Vitoria made these arguments when the Spaniards were already in America but no Amerindians were in Europe, and when the Spaniards were in the process of conquering the Amerindians. In such an asymmetrical context, Vitoria's seemingly egalitarian theory could not but function as an ideology to justify the actual colonization of America by the Spaniards. The combination of Vitoria's egalitarian theory and the Spanish military supremacy and ruthlessness, i.e., the critical elements of modern European civilization, realized and legitimized European domination over the non-Europeans. This pattern shows a prototype of the combination of modern European international law, which is based on the egalitarian principle among nations,

⁵⁷ One should bear in mind that these figures are speculative. Also, in terms of per capita production, major European countries were already superior to China. Still, the figures in the text are telling.

⁵⁸ As to the significance of Vitoria and Grotius in the history of international law, a large number of works have been produced. For a detailed study, see ONUMA, *supra* n. 12 and references cited therein.

⁵⁹ Francisco de Vitoria., *De indis relectio prior* (Latin Texts & Translation by J. P. Bate, Classics of International Law, Carnegie Institution of Washington, Washington, D.C., 1917), A, sec. II.

and the supremacy of the military power on the part of the Europeans, a result of which was worldwide colonization by the European powers.⁶⁰

Furthermore, Vitoria's egalitarian theory was decisively qualified by the discriminatory axiom that Christianity was the only true religion which could save human beings. In order to be absolved from sin and to find salvation after death, human beings must accept Christianity. It was because of this absolute superiority of Christianity over any other value system that the Spaniards could resort to just war in case the Amerindians hindered the propagation of Christianity. Although this notion was not subsequently followed because of the secularization of European society, the view which regarded international law as the law among Christian nations remained until the nineteenth century. Since the nineteenth century, the discriminatory view of European supremacy changed its substance from Christianity to Civilization, and was maintained until the middle of the twentieth century. The definition of international law as the law of/among civilized nations, which was advocated by major European and American publicists from the late nineteenth century to the early twentieth century, exemplifies the deeply rooted sense of supremacy held by them. This definition was adhered to even by the non-Europeans through the mechanisms of Western intellectual influence all over the world.⁶¹

Grotius, like Vitoria, had a complex approach to the relationship between Christianity and secularization, as well as to the emergence of the European states system and the establishment of worldwide colonial rule by Europeans. Grotius has generally been associated with the "secularization of natural law." Grotius pursued the minimization of bloodshed in seventeenth century Europe, where religion was both an actual cause of bloody wars and an excuse for resorting to violence. In order to realize his primary object of minimizing bloodshed, Grotius had to oecumenize the law which he expected to restrain and regulate wars between various sorts of independent powers.⁶² Yet, Europeans in the seventeenth century were deeply committed to Christian social ethics. Had legal norms been dechristianized, they would not have been able to restrain or regulate the behavior of monarchs or feudal lords. Therefore, while Grotius dissociated natural law from God in principle, yet he introduced Christian norms into his legal "system" in a multi-layered manner. In this way, he sought to maximize the actual regulatory power of his multi-layered normative structure.⁶³

Unlike Vitoria, Grotius did not directly deal with the problem of the relationship between Europeans and non-Europeans in his master piece, *De jure belli ac pacis*. However, by *not* taking up the problem of the colonization of America or the establishment of the commercial hegemony of the Europeans in South and Southeast Asia as a question of natural law or the law of nations, which were supposed to be universal, Grotius's theory tacitly accepted the status quo – the European powers were colonizing most of the American continent and establishing the commercial hegemony in Asia

⁶⁰ ONUMA, *supra* n. 12, p. 384.

⁶¹ *Ibid.*, p. 385.

⁶² *Ibid.*, pp. 7-9, 333-57.

⁶³ *Ibid.*, pp. 83-84, 375-80.

and Africa – and acquiesced in these states of affairs. The actual function of Grotius’s theory with regard to European colonization was thus similar to that of Vitoria. The combination of theory and military supremacy on the part of Europeans, i.e., the integrated elements of European civilization as a whole, brought about the actual colonization and its legitimation.

However, the actual effect of the combination of theory and military strength was not limited to modern European civilization. The combination of Islamocentric theory and military strength of the Muslim empires such as the Abbasid and the Ottoman empires, and the combination of Sinocentrism and the economic-military power of the Chinese dynasties such as the Tang and Ch’ing dynasties, had basically the same meaning and function. In fact, European powers in the age of Vitoria and Grotius, although vigorously expanding to other regions of the world, were far inferior to the Ming dynasty and the Ottoman empire. The “division of the world” by the bull of Alexander VI and by the Treaty of Tordesillas sounded for the contemporary Chinese nothing other than a joke by the barbarians. It took some three centuries for the combination of the theories of Vitoria and Grotius, and the military strength of Europeans, to show its aggressive nature fully and for the Eurocentric image of the world, with “international law” as its constituent, to be actually valid all over the world.

III. The Globalization of Eurocentric Ordering of the World in the nineteenth Century

1. *The “Collision of Two Civilizations”*⁶⁴

In 1793, Emperor Ch’ien-lung of the Ch’ing dynasty received in audience Lord Macartney, who led a British mission sent by George III. Although Britain had a trade relationship with China, trade was carried out within the framework of the Chinese tribute system. Britain imported large quantities of tea and other articles, but China imported almost nothing except opium, a shameful export from British India beginning in the eighteenth century. Britain wanted an expanded and more stable trade relationship which could not be jeopardized by unilateral claims of China, and sent Macartney for this purpose.

According to the official instruction given to Macartney by the British government, his mission was to: (1) open new ports for British trade in China, (2) obtain the cession of a piece of territory where British merchants could reside year round and in which British jurisdiction would be exercised, (3) request the establishment of a permanent mission in Peking, and (4) promote any other initiatives that would lead to expanded and more stable British trade in East Asia.⁶⁵ However, Britain sent its mission under the pretext of establishing a firm and lasting friendship, and did not explicitly request a trade relationship on the basis of equality.⁶⁶ The Chinese authorities, regarding Britain

⁶⁴ This expression is borrowed from the English translation title of Alain Peyrefitte’s marvelous work on Macartney’s mission to China, *supra* n. 37.

⁶⁵ *Ibid.*, pp. 9-10.

⁶⁶ *Ibid.*, pp. 194-97.

as one of many remote tributaries wishing to partake in Civilization, which, according to the Chinese view, should be Chinese civilization, demanded him to abide by the ritual of kowtow, which they regarded as a universally valid rule.

However, Macartney considered it humiliating for his country to follow this ritual, and refused to follow it. He negotiated patiently with the Chinese authorities, and succeeded in meeting the Emperor basically according to the Chinese style, but without the nine prostration.⁶⁷ Despite his substantial victory in the battle of rituals and form, Macartney could not achieve his objectives. The British requests to have a more stable and expanded commercial relationship on the basis of equality were flatly rejected by China. Ch'ien-lung's letter of 3 October 1793 addressed to George III stated that:

“We, by the Great Heaven, Emperor, instruct the King of England to take our charge.

Although your country lies in the far oceans, yet inclining your heart to towards civilization, you have sent an envoy respectfully to present a state message, and sailing the seas, he has come to our Court to kowtow and to present congratulations for the imperial birthday, and also to present local products, thereby showing your sincerity.

We have perused the text of your state message and the wording expresses your earnestness. From it your sincere humility and obedience can clearly be seen. It is admirable and we fully approve . . .

As to what you have requested in your message, O King, namely to be allowed to send one of your subjects to reside in the Celestial Empire to look after your country's trade, this does not conform to the Celestial Empire's ceremonial system, and definitely cannot be done . . .

In fact, the virtue and power of the Celestial dynasty has penetrated afar to the myriad kingdoms, which have come to render homage, and so all kinds of precious things from over mountain and sea have been collected here, things from chief envoy and others have seen for themselves. Nevertheless we have never valued ingenious articles, nor do we have the slightest need of your country's manufacturers. Therefore, O King, as regards your request to send someone to remain at the capital, while it is not harmony with the regulations of the Celestial Empire, we also feel very much that it is of no advantage to your country. . . . You, O King, should simply act in perpetual obedience so as to ensure that your country may share the blessings of peace.⁶⁸

⁶⁷ Peyrefitte, who scrutinized contemporary documents including the reports and diaries of the members of the Macartney mission, archives of the Ch'ing authorities and other relevant materials, concluded that the prevalent image of Macartney's rejection of kowtow was exaggerated. According to Peyrefitte, although Macartney succeeded in rejecting nine prostration, and instead, genuflected one knee according to the European way of expressing respect to the sovereign, he and his mission most likely followed the threefold repetition of bowing, which was also an essential part of the kowtow. Macartney also likely followed the Chinese style of ceremony in other matters such as handing a letter of accreditation to the Emperor through a mandarin (*ibid.*, pp. 88-89, 102-6, 168-70, 203, 193-99, 205-8, 212-14, 224-27).

⁶⁸ *Ibid.*, pp. 289-91.

By the time of Macartney mission, one and a half centuries had already passed since the publication of *De jure belli ac pacis* by Hugo Grotius (1625) and the conclusion of the Peace of Westphalia (1648). Among European nations treaty practice and other diplomatic intercourse based on the principles of reciprocity and equality of nations had generally been established. Britain, at an earlier stage of the Industrial Revolution, had gained a decisive victory in the Seven Year War of 1756-63, and had established its hegemony in the Indian subcontinent through the East India Company. Other European powers were also expanding their territorial and commercial control over the Asian and African continents. The Americas were ruled either by European powers or the descendants of European colonists who had basically expelled or subjugated the original inhabitants. The Ottoman Empire and the Mogul Empire, which once dealt with Europeans on a high profile, had already lost their superior positions. Furthermore, the conflict of universalistic assertions made by the Ch'ing dynasty and the Macartney mission took place four years after the French Revolution, which exemplified West-centric modernity through its proclamation of universal human rights and secularism.

Despite all these facts, "international law" at this moment was *not* the law of international society as one takes for granted today. Macartney argued that China should respect the rules of "international law" and diplomacy based on the common practice of European nations. However, from the Chinese perspective, it was nothing more than a joke of the "barbarians" who were ignorant of the long established "universal" rules and rituals through which all nations must behave themselves. According to the Chinese view, since the Celestial Empire produces abundant goods and products, it is not necessary for it to engage in trade with others. It is the barbarians that are in need of trade with China. This being so, then it is the barbarians who ought to abide by the rules which China regarded as applicable between China and other countries. This was a perfectly logical argument on the part of China, with substantial facts to back it up. China under the Emperor Ch'ien-lung was prosperous and powerful, producing approximately ten times as many manufactured goods as Britain did.⁶⁹

It is true that this formal logic was beginning to contradict certain realities. In science and technology China was definitely inferior to Britain. The squadrons accompanying the Macartney mission were far superior to their Chinese counterparts. In the later period of the Emperor Ch'ien-lung's reign, the Ch'ing dynasty began to suffer its decline. Yet, it was absolutely impossible for Britain to impose rules of "international law" on China in 1793. On the contrary, eager to maintain trade relations with China, Britain was compelled to carry out trade with China within the framework of the tribute system, which China and other East Asian nations regarded as universal, until the middle of the nineteenth century.⁷⁰

⁶⁹ According to Bairoch, while China produced 32.8% and 33.3% of the world manufactured goods in 1750 and 1800, respectively, Britain produced 1.9% and 4.3% in each year (Bairoch, *supra* n. 56, p. 296).

⁷⁰ In 1816, Britain sent another mission to China: the Amherst mission. However, the Chinese authorities under the Emperor Chiach'ing, unlike those in 1793, demanded Amherst to abide by the rules of kowtow in a strict manner. Amherst, rejecting this demand, could not but return home in vain without even having an audience of the Emperor.

Some half a century after the failed mission of Macartney, however, China had to accept the mode of regulation between states by European international law as far as its relations with the Western nations were concerned. And a century after the Macartney mission, China accepted the regulation of interstate relations by European international law not only with regard to Western nations, but with regard to Asian nations. Also by the end of the nineteenth century, most of the African continent was partitioned by the European powers. Other continents such as America and Oceania had already been under the domination or hegemony by European powers. Thus, international law, which the European powers regarded to regulate international relationships among themselves, became the law of international society as we see today.

Major factors which brought about this change were the military and economic power of European states, based on the Industrial Revolution. Non-European peoples were forced to abandon their own world image, and with it their norms of world ordering, and to accept the European world image and their norms regulating interstate relations. However, it was not merely a victory of the naked military and economic power on the part of Europeans. A significant number of non-Europeans, reluctantly at the beginning but more positively in the later stage, accepted essential components of modern European civilization such as the ideas of equality of humans and nations, human rights, capitalist economy and democracy. They even utilized these ideas for liberating themselves from the European dominance in the form of colonial system and unequal treaties. However, this process took a long time – from the middle of the nineteenth century to the present, and will likely continue in the twenty-first century.

2. Conflicts of Two Universalistic Systems in East Asia

As long as European powers profited from trade with China, their frustration with being treated as tributaries did not explode. However, when China sought to abolish the opium trade, Britain determined to end the relationship based on the tribute system and to impose on China a relationship regulated by European international law, which could well serve its commercial interests, including the opium trade.⁷¹ In 1839, Britain dispatched expedition forces, beat the Chinese army and navy, and imposed on China the Treaty of Nanching.

By the Treaty of Nanching and the subsequent treaties, the Ch'ing dynasty came to be incorporated into the Eurocentric system of international law as far as its relations with the Western powers were concerned.⁷² However, the Ch'ing dynasty maintained

⁷¹ In the nineteenth century, opium smoking was fairly common not only in China, but also in Britain. Also a significant number of Chinese, especially those in the Canton region gained profit from the opium trade. Thus, it may not be fair to criticize the British attitude alone from today's ethical viewpoint. However, there was strong criticism even in Britain of its resorting to war against China for securing the interest of the opium trade. Yet, Britain finally resorted to war, and imposed on China the continuation of the opium trade against its will. Imposition of European international law in the form of treaties was basically a means to realize the objective of gaining material profits including this infamous commercial activity. Here one could see almost a caricature of the definition of international law as the law of "civilized" nations, which was prevalent at the time.

⁷² As will be discussed later, this did not mean that China was "admitted" to the "Family of

its traditional relationship with its neighbors such as Korea, Vietnam, and Central Asian nations. China, which had ruled a vast domain for thousands of years, had often experienced such phenomena as local disputes, temporary defeat of the central government, and the appeasement of powerful “barbarians.” Consequently, the Ch’ing dynasty could not understand that their defeat in the Opium War was fundamentally different from those historical experiences.

Thus, the Ch’ing dynasty “understood” the Treaty of Nanching and other similar treaties with European states within the traditional Sinocentric framework. It characterized the consular jurisdiction as a case in which it allowed “barbarians” to settle their own disputes by themselves, and the most favored nation treatment as a benevolent policy of the emperor to treat all subjects under Heaven as equal.⁷³ The European states, for their part, expected China to implement the provisions of the treaties strictly in accordance with the general rules and principles of European international law. The European states expected that China abide not only by specific provisions of the treaties, but also by customary rules and principles of European international law when they dealt with matters relating to the treaties. For China, to abide by the treaties meant to abide by their explicit provisions. Rules and principles not explicitly stipulated in the treaties had nothing to do with them, even if these rules and principles were assumptions or inevitable consequences of the explicit provisions in the eyes of the Europeans.⁷⁴ It was thus inevitable that both parties clashed with each other. In 1856, they rushed into the Second Opium War. The result was a miserable defeat on the part of the Ch’ing dynasty.

The Ch’ing dynasty was forced to change considerably the practice of traditional Sinocentrism at least in part as a consequence of their defeat in the Second Opium War. Part of the Chinese leadership began to share a sense of crisis that China could not match the Western powers unless it reformed itself by adopting to a certain extent a policy of Westernization. The Western powers took an even tougher stance in urging China to implement faithfully the rules and principles of European international law. They made the Ch’ing dynasty allow permanent missions in Peking and grant the right of propagating Christianity in the interior of China. They also urged the Ch’ing dynasty

Nations.” Rather, it means that both European states and the Ch’ing dynasty sought to manipulate European international law in favor of their own interests and that the former was far more successful than the latter.

⁷³ Banno Masataka, *Kindai chugoku gaikoshi kenkyu* (Iwanami shoten, Tokyo, 1970), pp. 6-29; Sato Sin-ichi, *Kindai Chugoku no chishikijin to bunmei* (Tokyo University Press, 1996), pp. 54-60. See also Motegi Toshio, “Chuka teikoku no ‘kindai’ teki saihei to nihon,” Oe Shinobu, ed., *Iwanami koza kindai nihon to shokuminchi*, I (Iwanami shoten, Tokyo, 1992), pp. 59-84; *id.*, “Chuka sekai no ‘kindai’ teki henyo,” Mizoguchi Yuzo *et al.*, eds., *Asia kara kangaeru*, II (Tokyo University Press, Tokyo, 1993), pp. 269-99.

⁷⁴ Sato, *supra* n. 73, p. 56. For more details including the background of this attitude, see Banno, *supra* n. 24[Kindai]; *id.*, *supra* n. 73; Immanuel Hsü, *China’s Entry into the Family of Nations* (Harvard University Press, Cambridge, Mass., 1960); Mary Wright, *The Last Stand of Chinese Conservatism* (Stanford University Press, Stanford, 1981).

to abandon using the term “barbarians” in diplomatic instruments and to recognize the opium trade under the name of “Western medicines.”⁷⁵

In this way, with the defeat in two Opium Wars, the Ch’ing dynasty began to follow the rules and principles of European diplomacy and international law as far as its relations with Western powers were concerned. Consequently, it established the Tsungli Yamen⁷⁶ to deal with external affairs with the Western states. The dynasty also had William Martin, a missionary residing in Peking, translate Wheaton’s *Elements of International Law*, publishing the Chinese version in 1865.⁷⁷ In the 1870s it started to establish permanent missions in Western nations and Japan, which they had never previously envisaged.

With regard to the way the Chinese emperor received foreign missions, the Ch’ing dynasty was obligated to follow the European practice under article 3 of the Tien-tsin Treaty of 1858, but was reluctant to comply with this provision. In 1873, the Chinese emperor began to receive heads of permanent missions, but only in accordance with the tributary practice including the kowtow. Emperor T’ung-chih received them in audience at the Tzu-kuang-ko, a pavilion which was located outside the Forbidden City and was used as the reception place for tributary missions. It was as late as in 1894 that the emperor began to receive foreign envoys within the Forbidden City in accordance with the European way of reception.⁷⁸

As noted earlier, successive dynasties in China held the Sinocentric view of the world for a long period of time. When they were powerful enough to enforce this view, they actually did so. Even when they were not powerful enough, they did not change the fundamental cosmology of Sinocentrism. They appeased various kinds of independent groups or political entities whom they regarded as “barbarians,” and papered over the difficulties within the framework of Sinocentrism. Since such experiences were not uncommon in their long history, they did not feel it necessary to change the Sinocentric view even when they lost the Opium Wars. Such defeats were nothing new to them. All they had to do was to appease and manipulate the “Southern barbarians,” i.e., Europeans and Americans, who should become more “civilized” over the course of time. These were the images and ideas shared by the leadership of the Ch’ing dynasty.⁷⁹ Although the Chinese and the Europeans regarded that the treaties between them were binding, the assumptions, images and backgrounds were still extremely different from each other.

⁷⁵ Kato Yuzo, *Igirisu to Asia* (Iwanami shoten, Tokyo, 1980), p. 148.

⁷⁶ For a classical study of the institution of the Tsungli Yamen, see Banno Masataka, *China and the West* (Harvard University Press, Cambridge, Mass., 1964).

⁷⁷ A concise, yet very useful article on this problem is Chia-ning Chang, “‘Bankoku koho’ seiritsu jijo to honyaku mondai,” Kato Shuichi and Maruyama Masao, eds., *Honyaku no shiso* (Iwanami shoten, 1991), pp. 381-400. See also Sato, *supra* n. 73, pp. 60-77.

⁷⁸ John Fairbank, “The Early Treaty System in the Chinese World Order,” *id.*, *supra* n. 19, pp. 261-62.

⁷⁹ *Ibid.*, pp. 257-73; Sato, *supra* n. 73, pp. 13-16, 54-60.

3. *The Collapse of the Islamocentric System of World Ordering*

The Ottoman Empire and the European nations were engaged extensively in concluding treaties, exchanging diplomatic missions and conducting various kinds of trade and commercial activities. When the Ottoman Empire was powerful and prosperous, these relations were basically dealt with on the terms of the Ottomans. The European powers were not powerful enough to impose their own international rules on the Ottoman Empire.⁸⁰ However, from the late seventeenth to the early eighteenth century, their power relationship was reversed, and the norms which regulated their relations were gradually changed in accordance with this reversal. When they had diplomatic negotiations and conclusion of treaties, the Ottoman Empire could no longer impose Islamocentric rules and customs of the *siyar*, but had to accept rules and principles of European international law and European way of diplomacy. Furthermore, the rules and principles of European international law were not applied on an equal footing, but were applied by the European powers in a selective and unequal manner.

For the Ottoman Empire, this change of applicable norms meant primarily an imposition by European powers against the will of the Empire. At the same time, the leaders of the Ottoman Empire gradually realized that Ottoman's power was weakening, and sought to adopt Western ideas and institutions to revitalize it. They also were aware of the fictitious nature of their own world image in which they assumed the supremacy of the Islamic community over other communities, divided the world into the abode of Islam and the abode of war, and would regulate the relationship between the two worlds by unilaterally applying the rules and principles of the *siyar*. Although they did not openly deny this world image, many of them knew that these ideas had long revealed their unrealistic nature not only with regard to the relations between Muslims and Europeans, but also with regard to relations between Muslims themselves.

However, the Ottoman Empire had long enjoyed a status as the most powerful single state vis-a-vis any of the European states. From the Islamocentric perspective, European Christian states had been merely peripheral non-believers. The Ottoman Empire was accustomed to deal with Christians basically on its own – Islamocentric – terms. For such an empire, it was extremely difficult to acknowledge its inferior position and redefine itself as a member, even an inferior member, of the Eurocentric international system. Within the Ottoman court, there were harsh debates as to whether the Ottoman Empire ought to maintain, or even reinforce, its traditional Islamocentric diplomacy, or to claim that it was entitled to equal treatment within the framework of Eurocentric international law.⁸¹ For example, Selim III, while maintaining some features of the traditional Islamocentric world image, sought to participate in European diplomacy from the late eighteenth to the early nineteenth century. But his attempt failed, partly because there remained strong resistance within the Empire, and partly because the

⁸⁰ Naff wrote that “[t]he Sultans, supported by an invincible army, customarily regulated the Empire’s foreign relations by the simple technique of issuing a pronouncement of their will” (Thomas Naff, “Reform and the Conduct of Ottoman Diplomacy in the Reign of Sulim III, 1789-1807,” *Journal of the American Oriental Society* (1963), p. 295. See also Hurewitz, *supra* n. 50, pp. 145-47; Suzuki, *supra* n. 17, pp. 33-34, 95-98.

⁸¹ *Ibid.*, pp. 54-65.

European diplomatic world was not favorable to this move.⁸²

For the European nations, which conducted their external affairs in accordance with the rules and principles of European international law based on the nation states system, it was basically desirable to reject the Islamocentric external behavioral pattern of the Ottoman Empire and to incorporate it into their own – Eurocentric – international system. However, this did not mean that they were willing to treat the declining Empire as an equal member of their system. The principle of equality among nations was not always respected even among European nations. Under the leading principle of balance of power, particularly the one advocated during the era of European Concert, the rights of smaller nations were often restricted by the Great Powers. Some international lawyers in the nineteenth century endorsed this restriction as a matter of law.⁸³

The European powers were all the more unwilling to treat the weakening, non-Christian Ottoman Empire as an equal partner. For example, during the nineteenth century the Ottoman Empire repeatedly requested European nations to abolish consular jurisdiction, because the Empire now recognized it as an infringement of its territorial sovereignty. It no longer regarded it as an *ex gratia* concession granted by the emperor in order to have foreign merchants settle their own disputes without being bothered of its own law and order. But the European powers rejected this request until the early twentieth century.⁸⁴

In 1834, the Ottoman Empire under the reign of Mahmud II and European states established diplomatic relations involving permanent missions in the European style.

⁸² Hurewitz, *supra* n. 50, pp. 147-48. See also Suzuki, *supra* n. 17, p. 36; Suzuki Tadasu, *Osuman teikoku to Islam sekai* (Tokyo University Press, Tokyo, 1997), p. 58. It should be noted, however, that, if compared with the Chinese leaders in the nineteenth century, the Ottoman leaders were far less reluctant to introduce Western ideas and institutions in order to rescue their declining Empire. For example, as early as in the beginning of the eighteenth century, when the Ottoman Empire sent its ambassador to France, one of his missions given by the Ottoman government was to investigate the bases of the prosperity and civilization of France and to inform what could be applied in the Ottoman Empire. It should also be noted that although the Ottoman Empire fought with European states for centuries, their relations were not merely antagonistic, or simply characterized as a clash of civilizations. As is well known, France was eager to ally with the Ottoman Empire in order to check the power of the Habsburgs. Some sultans of the Ottoman Empire, on their part, were eager to introduce European culture and academics, based on their pride and belief in the universal empire which should include the European world.

⁸³ See, e.g., Alphonse Rivier, *Principes du droits des gens*, I (Librairie nouvelle de droit et de jurisprudence, Paris, 1896), pp. 63-68, 75, 79-93, 123-131.

⁸⁴ Suzuki, *supra* n. 82, pp. 58-60. Twiss, writing in 1861, stated: The Consuetudinary Law of Christendom has accordingly not invoked as the governing rule of intercourse between Christian and Mahomedan Powers with the same absoluteness as between Christian Powers. In matters however . . . where a primary question of International Right is involved, the European Powers have enforced against the Ottoman Porte and her dependencies on the Barbary Coast, the same rule of conduct which has been accepted amongst Christian Nations (Travers Twiss, *The Law of Nations Considered as Independent Political Communities* (Oxford at the University Press, 1861), pp. 126-27).

When Selim III set up permanent missions in European countries in 1792, the Ottoman court thought that they merely did the same thing as the Europeans had long done without changing the traditional framework of Islamocentric world image. However, the Ottoman court under Mahmud II characterized the establishment of permanent missions as being based on the rules of modern European international system. From 1838 to 1840, the Ottoman Empire concluded a series of treaties with Britain and other European nations. Egypt and Iran followed suit. These events constituted a final phase under which Muslim powers abandoned the traditional system of world ordering based on the *siyar*, accepted the Eurocentric international law, and dealt with relations with foreign nations within the Eurocentric framework of world ordering.⁸⁵

In 1853, Russia fought with the Ottoman Empire over the issue of the privileges granted to Russian orthodox Christians in the Ottoman Empire. When the Russian army overwhelmed the Ottoman army, Britain and France were afraid that Russia would gain a decisive victory and jeopardize the balance of power in the region. Thus, both powers joined the Ottoman side and won the Crimean War. In 1856, the powers concluded the Peace Treaty of Paris. Although it was basically a peace treaty which settled the Crimean War, it contained an interesting article from the viewpoint of the globalization of European international law. This was article 7, which reads as follows:

“Sa Majesté la Reine du Royaume Uni de la Grande Bretagne et d’Irlande, . . . [names of the signatories] . . . déclarent la Sublime Porte admise à participer aux avantages du droit public et du concert Européens. Leurs Majestés s’engagent, . . . à respecter l’indépendance et l’intégrité territoriale de l’Empire Ottoman: garantissent en commun la stricte observation de cet engagement: et considéreront, . . . toute acte de nature à y porter atteinte comme une question d’intérêt général.”⁸⁶

This article has generally been construed as the “reception (or admission) of the Turkish Empire (or Ottoman Turks)⁸⁷ into the Family of Nations.”⁸⁸ According to this

Judging from the context, where Twiss quoted Lord Stowell’s reference to the obligation of a blockade (*Ibid.*, pp. 127-28), Twiss’ “primary question of International Right” meant a primary question of rights *on the part of Europeans, not on the part of the Ottomans*.

⁸⁵ See Suzuki, *supra* n. 82, pp. 58-59.

⁸⁶ Clive Parry, ed., *114 Consolidated Treaty Series (1855-1856)* (Oceana Publications, New York, 1969), p. 414.

⁸⁷ Although article 7 uses the term “Sublime Porte,” the term “Ottoman Turks” became prevalent in later writings. This fact reflects the reality that the European view regarding the Ottoman Empire as a “Turkish” state became prevalent with the globalization of Eurocentric view of the world.

⁸⁸ See, e.g., Oppenheim, *supra* n. 7, pp. 32-33. It should be noted that not all Western publicists drew this conclusion merely on the basis of the intention and behavior of the Western nations. A few tried to justify this conclusion on the basis of the consent on the part of the Ottoman Empire. Twiss, e.g., wrote that “it [the Ottoman Porte] may be considered to have substantially pledged itself to the acceptance of the International Law of Europe by subscribing, as one of the Parties to the General Treaty of Paris, . . . the clause of the Seventh Article, whereby the Sublime Porte

interpretation, the Ottoman Turks had neither been a member of the Family of Nations, nor a subject of international law. By this treaty the Ottoman Empire was admitted as a member of the Family of Nations and became a subject of international law.

An opposite view, however, has been advanced. According to this view, Turkey had maintained diplomatic intercourse and concluded treaties with European Powers, and the general body of international law was considered to apply for many centuries.⁸⁹ This minority view claims that to interpret article 7 as granting a new membership in the international legal community to the Ottoman Turks ignores this long established legal reality.

It is certainly true that the European nations and the Ottoman Empire had been engaged in various types of trade and commercial activities as well as diplomatic and treaty relations. However, for most of this period, each side construed these relations according to its own notions of world ordering based on its own world image. According to the universalistic notion of international law prevailing in Europe from the sixteenth to the eighteenth century, not only European but also non-European rulers and peoples were subjects of the *jus natrae* and the *jus gentium*. According to the predominant view of the Ottoman Empire, many of the “treaties” between the Ottoman Emperor and the European rulers or peoples were basically unilateral acts of the emperor, or a temporary truce unilaterally regulated by the rules of the *siyar*.⁹⁰ They had nothing to do with the *jus natrae* or the *jus gentium*. In this way, although the relations between the Ottoman Empire and the European nations were regulated by the universalistic “international law” of respective parties, the fundamental notion of universality and the basis of the rules were radically different from each other.

As far as the legislative process of the Treaty of Paris was concerned, the intent of the drafters of article 7 did not seem to bring about a radical change in the international legal status of the Ottoman Empire by admitting it to the “Family of Nations” and to recognize it as a subject of European international law, which they had previously denied. According to Matsui,⁹¹ who recently made a detailed survey of the Paris Conference, what the participants of the Conference regarded as important were articles 8 and 9 rather than article 7.

Article 8 reads:

“S’il survenait, entre la Sublime Porte et l’une ou plusieurs des autres Puissances

is declared “to be admitted to a participation in the advantages of the Public Law of Europe” (Twiss, *supra* n. 84, p. 84. Twiss further took up a number of Ottoman’s conducts as evidences of its acquiescence in, or adoption of, European international law in the middle of the nineteenth century (*Ibid.*, pp. 84-85).

⁸⁹ A. J. Smith, *Great Britain and the Law of Nations*, I (1932), p. 16. See also Hugh Wood, “The Treaty of Paris and the Turkey’s Status in International Law,” *37 American Journal of International Law* (1943).

⁹⁰ Khadduri, *supra* n. 39 [War and Peace], pp. 202-22; Suzuki, *supra* n. 17, pp. 32-33.

⁹¹ Matsui Yoshiro, “Huhenteki kokusai chitsujo no seiritsu to kokka shonin seido no yakuwari,” (unpublished article on the role of recognition of states in the globalization of European international law), p. 34. See also Wood, *supra* n. 89, pp. 265-69.

signataires, un dissentiment qui menaçât le maintien de leurs relations, la Sublime Porte et chacune de ces Puissances, avant de recourir à l'emploi de la force, mettront les autres Parties Contractantes en mesure de prévenir cette extrémité par leur action médiatrice."⁹²

Article 9, on the other hand, provided that:

“Sa Majesté Impériale le Sultan, . . . ayant octroyé un firman qui, . . . consacre ses généreuses intentions envers les populations Chrétiens de son Empire, et voulant donner un nouveau témoignage de ses sentiments à cet égard, a résolu de communiquer aux Puissances Contractantes le dit firman spontanément émané de sa volonté souveraine.

Les Puissances Contractantes constatent la haute valeur de cette communication. Il est bien entendu qu'elle ne saurait, en aucun cas, donner le droit aux dites Puissances de s'immiscer, . . . dans les rapports de Sa Majesté le Sultan avec ses sujets, ni dans l'administration intérieure de son e[E]mpire.”⁹³

As noted earlier, around the time of the Conference the Ottoman Empire wanted to abolish the institution of “capitulation” in the near future. In order to secure this critical objective, the representative of the Ottoman Empire stated at the Paris Conference that they would pursue a series of reforms by means of a recently issued imperial ordinance. The Ottoman Empire expected that such reforms would satisfy the European powers and that they could thereby persuade the European powers to relinquish the privileges provided by the treaties of capitulation. The European states welcomed this statement, and wanted to incorporate it in the Treaty or the General Act. After some negotiation, article 9, which referred to the imperial ordinance improving the status of Christians in the Ottoman Empire and the notification of the ordinance, was adopted.⁹⁴

On the other hand, the participants were concerned that Russia or any other power would intervene in the domestic affairs of the Ottoman Empire, and would jeopardize the balance of power in the region. In particular, they did not want the notification of the domestic measure by the Ottoman Empire to be abused by an interested power, particularly Russia, to intervene in the domestic affairs of the Ottoman Empire. Therefore, they wanted to establish a framework through which European powers could secure the territorial integrity of the Ottoman Empire from an external (i.e., Russian) threat. Thus article 8 and the latter part of article 9 were adopted. Article 7 was not important *per se*, but was stipulated as a precondition to articles 8 and 9, which served the common interests of the major European powers. It was not intended to deal with such a critical problem as the international legal status of the Ottoman Empire.⁹⁵

However, European psychological surroundings gradually changed through the nineteenth century. European studies on international law became more positivistic,

⁹² Parry, *supra* n. 86 p. 414.

⁹³ *Ibid.*

⁹⁴ Matsui, *supra* n. 91, pp. 34-36.

⁹⁵ *Ibid.*, pp. 37-38. See also Wood, *supra* n. 89, pp. 269-73.

and treatises on international law tended to use the phrase “European international law” in their titles.⁹⁶ While the advocates of natural law from the sixteenth to the eighteenth century rather naïvely assumed the universality of the *jus natrae*, international lawyers in the latter half of the nineteenth century no longer held such an unrestricted notion of universality. Both Klüber and Heffter, leading international lawyers in the nineteenth century, published treatises with the expression of *European* international law (*Droit des gens moderne de l’Europe* (1819) and *Das europäische Völkerrecht der Gegenwart auf den bisherigen Grundlagen* (1844), respectively). Although other leading treatises did not necessarily carry the word “European” in their titles, the basic characteristic centering on the “positive” international law of Europe (or European or Christian civilization) was common to them.

This sense of locality was more or less associated with the sense of superiority on the part of Europeans. It is basically due to the superiority of the European civilization over other civilizations that Europeans have international law—this sense of exclusiveness based on the sense of superiority constituted an assumption of the restricted notion of international law. With a rapid progress in European economic and military power in the nineteenth century, the sense of superiority became more and more deeply rooted in Europeans’ mind. To further consolidate their sense of superiority, the Ottoman Empire, the Ch’ing dynasty, the Mogal Empire and other competing powers in the non-European world declined successively during the nineteenth century, and ceased to be their rivals. Progress in European medical science, together with economic and military power, made it possible for Europeans to penetrate deep into Africa, the last continent “to be civilized.”

Until the early nineteenth century, some Europeans regarded highly at least some aspects of the Chinese civilization, e.g., the egalitarian and fair recruitment system of bureaucracy in China. Through a series of military victories over China in the middle of the nineteenth century, even this minimum respect for China was gone. Thus, Europeans in the late nineteenth century held a strong sense of self-confidence and superiority, which their ancestors in the earlier centuries boasted and yet could not fully enjoy. With the establishment of European hegemony all over the world and the acceptance of the Eurocentric world image even by their most persistent competitor, China, the awareness of the local character of international law and the European sense of superiority now took the form of the potentially universal international law on one hand and the hierarchy of nations on the other.

International law, which was once characterized as the law of Christian nations, European nations, or European and American (Christian) nations, now came to be defined as the law of civilized nations. Although this criterion of civilization still retained earlier features of Christianity and other European characteristics, it gradually became more neutral in terms of religion and culture. Instead of Christianity or European culture,

⁹⁶ Already in the late eighteenth century, a few authors such as Moser and Martens published treatises whose title carried the expression of “European International Law” (e.g., Johan J. Moser, *Grundsätze des jetzt üblichen europäischen Völkerrechts in Friedenzeiten* (Hanau, 1750) and George Friedrich von Martens, *Précis du droit des gens moderne de l’Europe fondé sur les traités et l’usage* (Paris, 1789)).

the capacity of a state to protect life, freedom and the property of aliens was regarded as critical.

This shift went hand in hand with the recognition by European nations of non-Christian or non-European nations such as Japan as a subject of international law. The shift also responded to the common interests of the European powers and the US to protect their citizens abroad in the period of active international trade and investment in the late nineteenth century. In this psychological climate, European international lawyers came to define international law as the “law of (or among) civilized nations,” on the assumption that European civilization was the only civilization in the world.⁹⁷

Under this non-universalistic, and yet arrogant view of international law, a different interpretation of article 7 came to prevail. This interpretation goes as follows: The Ottoman Turks had not been allowed to be a member of the international legal community because of its inferior capacity as a state, based on its different (=inferior!) religion and uncivilized condition. However, with efforts of the Ottoman Turks to “civilize” their society, the European nations admitted it to participate in the international legal community when they concluded the Treaty of Paris and provided for article 7 in the Treaty. This retrospective interpretation sounded so natural during the subsequent period of the Treaty, i.e., the late nineteenth and early twentieth century, when the definition of international law as the law of civilized nations was widely shared, that it came to be followed later by the majority of publicists. Even today this interpretation still prevails.

4. *The Partition of Africa and the “Law of Civilized Nations”*

Since the fifteenth century Europeans had secured several strongholds on the northwest coast of Africa. Until the late nineteenth century, however, their power and influence in Africa were rather limited.⁹⁸ It was from the 1870s that European states aggressively

⁹⁷ See Josef Kunz, “Zum Begriff der ‘nation civilisée’ im modernen Völkerrecht,” 7 *Zeitschrift für Öffentliches Recht* (1928), pp. 86-99; Schmitt, *supra* n. 51, pp. 190,199,201; Georg Schwarzenberger, “The Standard of Civilisation in International Law,” 8 *Current Legal Problems* (1955); Onuma, *supra* n. 12, pp. 375-81; Geritt Gong, *The Standard of Civilization in International Society* (Clarendon Press, Oxford, 1984); Antony Anghie, “Finding the Peripheries,” 40 *Harvard International Law Journal* (1999), pp. 22-66.

⁹⁸ Some writers claim that there existed African customary law between African states at least in West Africa (See, e.g., Robert Smith, “Peace and Palaver,” 14 *Journal of African History* (1973), pp. 599-621). One might be able to demonstrate that there were certain normative relations between independent groups in certain regions of Africa at certain periods. However, when European merchants and African rulers or merchants were engaged in slave trade and other activities, their arrangements seemed to be made rather on an *ad hoc* basis, depending on various factors including types of dealings, power relations, threats and frauds by either or both parties. This was in a sense inevitable because each party had different images and notions of the dealing and agreement, and the existence and nature of norms, which were based on different images of the world. In other words, there was no common “international law” in today’s sense of the term through which Europeans and Africans could make arrangements *in a stable and reliable manner*. One might be tempted to assert, however, that the universal rule of *pacta sunt servanda* should have been valid both to Europeans and Africans. Alexandrowicz seems to take this view for

sought to expand their spheres of influence and territorial possessions in Africa. In the 1880s, the tension between the European Great Powers increased with regard to the fate of the Congo Basin and the future of the African continent at large. In terms of European international law, the European states seeking the acquisition of territories or the establishment of spheres of influence could, and did, resort to various claims: cession of territory (or property, or the right and/or authority to rule the inhabitants in a region) from African local rulers; cession of these titles from a sultan or a similar ruler holding a higher authority in the region; cession of a part of external (and internal) “sovereignty” from these rulers by means of “treaties” of protectorate with them; hoisting a national flag in a territory where an agent of a chartered company or an adventurer arrives; conquest of African nations by force; combination of these titles, and so on.⁹⁹

By the 1880s it was thus necessary for the European powers to settle on what mode of territorial acquisition they should employ to establish legitimate title to territory in Africa.¹⁰⁰ In order to coordinate the complex interests and resolve conflicting problems,

granted (see, e.g., Charles Alexandrowicz, *The European-African Confrontation* (Sijthoff, Leiden, 1973)). It is true that the rule of *pacta sunt servanda* in the naïve and general sense is valid regardless of the time and region. However, the substance of such a suprahistorical and universal rule would be so vague and equivocal, lacking the strictly binding character of law, that specific legal consequences could hardly be deduced from it. Therefore the validity or existence of the “common” rule of *pacta sunt servanda* in the naïve and general sense of the term does not necessarily secure that normative expectations of each party would be realized through this rule in a stable and reliable manner. If one party believes that the *pacta sunt servanda* means a that a simple promise or a *nudum pactum* has a binding force, and the other party believes that the existence of some particular form, rituals or consideration constitutes an essential requirement for a binding agreement, then the mere acceptance of the *pacta sunt servanda* rule by both parties can hardly satisfy their normative expectations. Thus, even if both parties concluded an agreement, the actual implementation of such an agreement would depend on various contingent factors. As to the different normative levels of the rule of *pacta sunt servanda*, see Onuma, *supra* n. 12, pp. 176-220.

⁹⁹ As to the treaties involving various kinds of European “titles” to African territories which were concluded between Europeans and Africans as well as those between Europeans, justifying the acquisition of African territories by European powers, see Sir E. Hertslet, *Map of Africa by Treaty*, I-III (3rd ed., Her Majesty’s Office, London, 1909). See also M. F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (Longmans, Green and Co., London, 1926), pp. 139-77, 181-246; Sadiya Touval, “Treaties, Borders, and the Partition of Africa,” 7 *Journal of African History* (1966), pp. 279-92; Alexandrowicz, *supra* n. 98; Mumbanza Mwa Bawele, “Afro-European Relations in the Western Congo Basin c. 1884-1885,” Stig Förster *et al.*, eds., *Bismarck, Europe, and Africa* (Oxford University Press, New York, 1988), pp. 471-87.

¹⁰⁰ France and Germany were concerned with the British expansion of its territories and spheres of influence in Africa, and criticized the logic of British justification of its expansion. Also the modes of trading and control over non-European territory were easily open to abuse. For example, Henry Stanley, a famous adventurer, made some 300 “treaties” with native “sovereigns.” More directly, the British move to conclude a treaty with Portugal purporting to establish their spheres of influence invited harsh criticism among major European powers. These factors lead to the

they convened the Berlin Conference from 1884 to 1885. Although this conference had a critical impact on the future of Africa, no African representative was invited by Germany, which hosted the Conference. It was a typical imperialistic conference where the European Great Powers determined the fate of Africans without their representation.¹⁰¹

The Europeans were at the height of their self-confidence when they met at the Berlin Conference.¹⁰² Britain had destroyed the once powerful and prosperous Mogul Empire in India. The European powers had substantially weakened the Ottoman Empire, once an unbeatable foe. In the 1840s and 1850s, they beat down the Ch'ing dynasty, an empire whose rules of world ordering they had had to obey in order to maintain trade relations which they had desperately needed. All these powers were no longer European rivals, let alone superiors. Based on this self-confidence, the Berlin Conference and its General Act exemplified a formulation of the assumptions, logic and ideas which were shared and utilized by Europeans for justifying their domination and hegemony not only in Africa but in other regions as well.

In his opening speech at the Conference, Prince Bismarck stated that "le Gouvernement Impérial a été guidé par la conviction que tous les Gouvernements invités partagent le désir d'associer les indigènes d'Afrique à la civilisation en ouvrant l'intérieur de ce

European powers gathering in Berlin. As to the historical background of the Berlin Conference, see Ronald Robinson and John Gallagher, *Africa and Victorians* (Anchor Books ed., Doubleday & Co., Garden City, N. Y., 1968), pp. 163-76; Itagaki Yuzo, "Sekai bunkatsu to shokuminchi shihai," *Iwanami koza sekai rekishi*, XXII (Iwanami shoten, Tokyo, 1969), pp. 135-52; articles by Ronald Robinson and other contributors in parts A and B of Förster *et al.*, *supra* n. 99, pp. 1-246.

¹⁰¹ Major powers in Europe such as Great Britain, France, Germany, Russia, Austria, and other minor European nations such as Portugal, Spain and Belgium, as well as the United States were present in the Conference. Fisch wrote that "Africa was not the subject but the object of the Conference," pointing out that while even European states which had no significant interests in Africa such as Austria-Hungary, Denmark and Sweden were invited, no consideration appears to have been given to the possibility of inviting African states even though Zanzibar's full sovereignty was acknowledged by all the important European states (Jörg Fisch, "Africa as *terra nullius*," Förster *et al.*, *supra* n. 99, p. 347).

¹⁰² Major players of the imperialist policies including the partition of Africa were Europeans. Furthermore, leading figures influencing public opinion and international lawyers were also Europeans. However, around the end of the nineteenth century, Americans in the sense of those in the US were already regarded as occupying the similar status of the Europeans. Various common factors including "race(white)", religion (Christianity), language (English), scientific and economic development, and many cultural tenets supported the treatment of the U.S. in the exclusive club membership that were proud of their civilization. Thus reference to Europe or Europeans here often includes the people in the US. Many popular expressions such as the "white man's burden," "manifest destiny," and "la mission civilisatrice" exemplified this self-confidence and arrogance of the Europeans and people in the US at this period. It should also be noted that this was the period when racism in the West was at its height.

continent au commerce.”¹⁰³ Other leaders made similar statements.¹⁰⁴ In these speeches as well as in the General Act of the Conference, “civilization” basically meant the European civilization. Non-Europeans were regarded as either barbarians or savages, outside the pale of civilization. Since international law was the law of/among such civilized nations, non-European nations, especially African tribes or natives, could not be a subject of international law.¹⁰⁵ The Europeans had a sacred mission to educate, cultivate, lead and rule non-Europeans so that the latter could enjoy the fruits and advantages of this glorious civilization. Such were the assumptions, ideas and images commonly held by the European leaders at this period. Major international lawyers at this time also held this view, although they differed slightly from each other in their logic and classification of non-Western societies.¹⁰⁶

Article 6 of the General Act of the Berlin Conference provided for the protection of indigenous peoples, missionaries and navigators as well as for the freedom of religion. It reads:

“Toutes les Puissances exerçant des droits de souveraineté, ou une influence dans lesdits territoires s’engagent à veiller à la conservation des populations indigènes et à l’amélioration de leurs conditions morales et matérielles d’existence et à concourir à la suppression de l’esclavage et surtout de la traite des noirs; elles protégeront et favoriseront, . . . , toutes les institutions et entreprises religieuses, scientifiques ou charitables créées et organisées à ces fins ou tendant à instruire les indigènes et à leur faire comprendre et apprécier les avantages de la civilisation.”¹⁰⁷

How hypocritical these words appear from today’s perspective! One should however be careful not to regard these words as merely an expression of hypocrisy or ideology

¹⁰³ Jules Hopf, éd., *Nouveau Recueil Général de Traités*, deuxième série, X, 2ème livraison (Librairie de Dieterich, Gottingue, 1885), p. 201.

¹⁰⁴ See, e.g., the remarks by the British representative (*Ibid.*, p. 204) and the US representative (*Ibid.*, p. 213). See also Schmitt, *supra* n. 51, p. 190; Gong, *supra* n. 97, pp. 76-77.

¹⁰⁵ See views of the leading international lawyers of the time such as Henry Wheaton (*Elements of International Law* (Little, Brown & Co., Boston, 1836), p. 18 as well as subsequent editions); J. C. Bluntschili (*Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt* (3 Auf., Verlag der C. H. Beck’schen Buchhandlung, Nördlingen, 1878), S. 61); James Lorimer (*The Institute of the Law of Nations*, I (Edinburgh, 1883, reprint, Scientia Verlag Aalen, 1980), pp. 93-103); John Westlake (*Chapters on the Principles of International Law* (Cambridge at the University Press, 1894), pp. 1-7, 129-89). It should be noted, however, that some of them acknowledged that some Asian nations had governments which could secure law and order in their own ways and therefore could be regarded as civilized (See, e.g., *ibid.*, pp. 141-42).

¹⁰⁶ For analyses of the assumptions and ideologies at the time of the Berlin Conference, see Schmitt, *supra* n. 51, pp. 190, 199; Fisch, *supra* n. 101, pp. 347-76; Anghie, *supra* n. 97, pp. 22-66.

¹⁰⁷ Hopf, *supra* n. 103, p. 418.

to camouflage economic and strategic interests of the European powers. In the Western world, especially in Britain, a significant number of people were seriously engaged in the movement to abolish slave trade in the nineteenth century. By the time of the Berlin Conference they had succeeded in having their governments to enact domestic laws and international treaties prohibiting the slave trade. Also many missionaries went to Africa, and were actively engaged in medical and educational activities in addition to the propagation of Christianity.¹⁰⁸

Although the abolition of the slave trade and the pursuit of other humanitarian activities coincided with the economic and strategic interests of the colonizing powers, they were more than a mere ideological tool of the egoistic pursuit of these interests. Yet, it is because these words were not merely an intentional tool of the interests pursued by the Europeans of the time, but to a certain extent a sincere expression of their beliefs, that they were in a sense more problematic: Even humanitarian and idealistic considerations were based on the discriminatory assumptions of civilized Europe (or West or “white”) vs. uncivilized (or savage, barbarian, barbarous, backward or stagnant) Africa (or Orient or East).

In retrospect, the critical issue in the Berlin Conference was the future acquisition of African territory and the establishment of protectorates by European powers. However, for those actually participating in the Conference, the perspective of the future status of the African continent was too abstract a matter to produce specific and unequivocal rules.¹⁰⁹ What they were actually concerned with was the protection of commercial activities in the Congo Basin, not the acquisition of territories in the African continent at large. The acquisition of territories or the establishment of protectorates was important so long as it was useful for safe and stable commercial activities. As far as the psychology of the participants of the Conference was concerned, they still viewed the world in terms of informal empires, not formal empires.¹¹⁰

Nor did the participants want to establish rigid rules, for the future development might call for somewhat different arrangements from those they had in mind at the time of the Conference. Therefore, articles 34 and 35, provisions relating to the acquisition of territories and the establishment of protectorates, only provided abstract procedures and vague conditions for the new occupation of territories and the assumption of protectorates on the coasts of the African Continent. Article 34 reads:

¹⁰⁸ As to humanitarianism as an ideology and reality, see L. H. Gann, “The Berlin Conference and the Humanitarian Conscience,” Förster *et al.*, *supra* n. 99, pp. 321-32; Suzane Miers, “Humanitarianism at Berlin,” *Ibid.*, pp. 333-46. See also H. Gruender, “Christian Missionary Activities in Africa in the Age of Imperialism and the Berlin Conference of 1884-1885,” *Ibid.*, pp. 85-104.

¹⁰⁹ For more details, see Robinson and Gallagher, *supra* n. 100, pp. 174, 177-80; H. L. Wesseling, “The Berlin Conference and the Expansion of Europe: A Conclusion,” Förster *et al.*, *supra* n. 99, pp. 527-40; Anghie, *supra* n. 97, pp. 60-61.

¹¹⁰ Wesseling, *supra* n. 109, pp. 527-30, 537-39. See also Takeuchi Yukio, *Igirisu jiyu boeki teikoku shugi* (Shinhyoron, Tokyo, 1990), pp. 13-72.

“La Puissance qui dorénavant prendra possession d’un territoire sur les côtes du Continent Africain situé en dehors de ses possessions actuelles, ou qui, n’en ayant pas eu jusque-là, viendrait à en acquérir, et de même, la Puissance qui y assumera un protectorat, accompagnera l’acte respectif d’une notification adressée aux autres Puissances signataires du présent Acte, afin de les mettre à même de faire valoir, s’il y a lieu, leurs réclamations.”¹¹¹

Article 35 reads:

“Les Puissances signataires du présent Acte reconnaissent l’obligation d’assurer, dans les territoires occupés par elles, sur les côtes du Continent Africain, l’existence d’une autorité suffisante pour faire respecter les droits acquis et, le cas échéant, la liberté du commerce et du transit dans les conditions ou elle serait stipulée.”¹¹²

These provisions sought to guarantee the freedom of commercial activities including trade and transit of any European nationals on one hand, and to secure the vested rights of Europeans on the other. The participants of the Conference worked hard to reconcile the conflicting claims by achieving a balance among the conflicting interests of the European powers. With other compromises such as limiting the application of the provisions to the coast of Africa and omitting any references to protectorates from article 35, the participants formulated a very vague criterion: Whether a colonizing nation could maintain an effective authority capable of protecting existing rights, and the freedom of trade and transit in the regions subject to colonial rule.

Protection of the freedom of commerce and transit was a common interest which all European powers shared in the pursuit of their interests in Africa. As long as a colonizing power’s authority could secure this common interest, it must be respected by other powers. If not, such an ineffective authority must be replaced by a more effective authority. Furthermore, commercial activities were characterized not only as a common interest for Europeans, but as a tool to bring the blessing of civilization to the “dark continent of Africa.” Article 10 provides:

“Afin de donner une garantie nouvelle de sécurité au commerce et à l’industrie et de favoriser . . . le développement de la civilisation dans les contrées mentionnées à l’article 1 et placées sous le régime de la liberté commerciale, les Hautes Parties signataires du présent Acte . . . s’engagent à respecter la neutralité des territoires . . . , aussi longtemps que les Puissances qui exercent ou qui exerceront des droits de souveraineté ou de protectorat sur ces territoires, . . . rempliront les devoirs que la neutralité comporte.”¹¹³

It was thus evident that in the General Act the concept of civilization and its formulation in terms of international law played a critical role in justifying European colonization

¹¹¹ Hopf, *supra* n. 103, p. 426.

¹¹² *Ibid.*

¹¹³ *Ibid.*, p. 419.

of Africa in two ways: by balancing conflicting interests among the European powers, and by legitimating their “effective authority,” i.e., European colonial rule in Africa.

However, the significance of the Berlin Conference and its General Act, especially that of the principle of effective occupation provided in article 35 of the Act, has not unanimously been acknowledged. Two major views, diametrically opposed to each other, have been advanced. The first view, adhered to by many Africans, regards the Conference as having a decisive importance for the subsequent partition of Africa.¹¹⁴ The second view criticizes this as a mystification of the Conference and emphasizes that most of the rules and principles adopted in the Conference were not strictly followed in subsequent practice.¹¹⁵

It is true that the Berlin Conference did not decide the partition of Africa *per se*. As for the substantive rules of colonization, the Conference established only vague and general rules and principles. Although the important procedural rule, expressing the obligation to notify signatory powers of the acquisition of a territory, was provided in the General Act (article 34), subsequent state practice did not seem to regard the notification as obligatory.¹¹⁶ Application of the substantive rules and principles on territorial occupation was restricted to newly occupied areas on the coasts of Africa. This restriction was repeatedly emphasized during the Conference, and was expressed both in the preamble and the title of chapter 6 (composed of articles 34 and 35) of the General Act.¹¹⁷ Even in relatively limited areas where the provisions of the General Act were to be applied, they were not strictly abided by the signatories. In all, Africa

¹¹⁴ Most African contributors to Förster *et al*, *supra* n. 99 hold this view. As a leading example, see G. N. Uzoigwe, “The Results of the Berlin West Africa Conference,” *ibid.*, pp. 541-52. For many of them, the Berlin Conference was a symbol for the tragic partition of Africa by avaricious European imperialist powers. As to the importance of the Berlin Conference from somewhat different perspectives, see Schmitt, *supra* n. 51, pp. 190-200; Itagaki, *supra* n. 100, pp. 139-42. Taijudo claims that while the provisions of the General Act had many qualifications in their application, they came to be accepted as customary rules of international law (Taijudo Kanae, *Ryodo kizoku no kokusaiho* (Toshindo, Tokyo, 1998), pp. 62-64). However, Taijudo’s study overlooks the fact that an enormous number of treaties were concluded between Africans and Europeans at the time, and tends to overemphasize the significance of the principle of effective occupation. This problem will later be discussed more in detail.

¹¹⁵ The first major study of the Berlin Conference by S. E. Crowe, *The Berlin West Conference, 1884-1885* (London, 1942) took this view. Since then, many European historians have sought to destroy the “myth” of the Conference. Many European contributors to Förster *et al.*, *supra* n. 99 share this view. The article by Wesseling (*supra* n. 109, pp. 527-40) exemplifies a concise, yet full-fledged summary of this view.

¹¹⁶ The Convention of St. Germain-en-Laye of 1919 did not provide for the obligation of notification. In the arbitral award on the Palmas case, which is famous for its reference to the principle of the effective occupation, Max Huber, the sole arbitrator, did not regard the notification as obligatory (2 *Reports of International Arbitral Awards* (United Nations, 1974), p. 868). See further, Lindley, *supra* n. 99, pp. 292-95, 302, and Taijudo, *supra* n. 114, pp. 61-76.

¹¹⁷ Hopf, *supra* n. 103, pp. 414, 426. See also Lindley, *supra* n. 99, pp. 144-46, 148-49.

was not necessarily partitioned according to the rules of the General Act.¹¹⁸

Furthermore, the General Act did not resolve the fundamental problem of the status of African political entities in European international law. Many European states more or less justified the acquisition of territories or the establishment of protectorates by means of “treaties” with local rulers in Africa.¹¹⁹ However, this practice was in fundamental conflict with the predominant ideas held by the Europeans at the time: International law is a law of or among civilized nations. The Europeans did not regard the African political entities (“tribes,” to borrow their expressions) as civilized nations.¹²⁰ Therefore, it should have been difficult for them to legitimate the transfer of African territories or the sovereignty – either external as in the case of protectorates or full in the case of annexation or cession – of African “tribes” or their “chieftains” to the European nations by means of treaties concluded with those rulers. If those “tribes” were not subjects of international law, and lacked the independent sovereign status in European international law, how could they “lawfully” “cede” or “transfer” their “territories” or “sovereignty” to the European states by means of “treaties”?¹²¹

At first glance, the Berlin Conference seems to have resolved this issue by establishing the principle of effective occupation in the General Act. If the effective occupation were the essential requirement for the acquisition of territory in Africa, this should imply that territories governed by African rulers were *res nullius* in terms of European international law.¹²² There should have been no need for the treaty of cession or protection with African rulers.¹²³ However, this was not the case at all insofar as European state practice was concerned.

¹¹⁸ Since the first major study of the Conference, Crowe, *supra* n. 115, this point has been fully demonstrated. Fisch even went as far as to write: The amazingly peaceful implementation of the partitioning of Africa, . . . was due not to the application of chapter 6 of the Berlin Act but to the large extent to which it was ignored in practice (Fisch, *supra* n. 101, p. 353).

¹¹⁹ See the list of numerous treaties between Europeans and African rulers in Hertslet, I, *supra* n. 99, pp. ix-xii. See also Alexandrowicz, *supra* n. 98, pp. 30-141, esp. the list and diagram of treaties at pp. 129-41. It should be noted, however, that many of the arrangements listed in these list of “treaties” were not really treaties in the sense of European international law. Alexandrowicz himself acknowledge this fact (*Ibid.*, p. 97).

¹²⁰ See major treatises of European or Euro-American international law cited in n. 105. For a detailed study, see Gong, *supra* n. 97, pp. 26-35.

¹²¹ Among many scholars dealing with this problem, Fisch is most keen on this critical issue. See Fisch, *supra* n. 101, pp. 355-69.

¹²² *Ibid.*, pp. 356, 358.

¹²³ In the concluding discussion of the chapter 6 (articles 34 and 35), the US delegate, Kasson, stated that the US Government “se rallierait volontiers a une règle plus étendue et basée sur un principe qui viserait le consentement volontaire des indigènes dont le pays est pris en possession” (Hopf, *supra* n. 103, p. 335). However, the president of the Conference stated that Kasson’s statement “touche à des questions délicates sur lesquelles la Conférence ne saurait guère exprimer d’opinion,” and just referred Kasson’s proposal to the minute of the Conference (*Ibid.*, pp. 335-36 (emphasis added)). This fact seems to reveal the “delicate” nature of a double standard in the

First, it should be noted that the application of article 35 establishing the rule of effective occupation was, as mentioned earlier, limited to the taking of possession of territories on the coast of Africa. It did not apply either to inland territories or to the establishment of protectorates.¹²⁴ Second, there was a more serious and fundamental problem: Even after the Berlin Conference, which established the principle of effective occupation, the European powers as actively as before resorted to “treaties” with African rulers to secure their claims to the newly acquired territories and protectorates. This fact is fully demonstrated by a huge number of treaties concluded between the Europeans and African local rulers after the Berlin Conference. In fact, treaty making between Europeans and Africans witnessed its peak between 1880-90 and its second highest period between 1890-1900.¹²⁵ In this sense, the Berlin Act did not substitute the European powers’ practice of concluding the “treaties” of cession or protection with the principle of effective occupation at all.

In this way, although African political entities were not regarded as subjects of international law according to the prevalent definition of international law at the time, European states continued to conclude “treaties” with African rulers to acquire the “sovereignty” or bring these rulers under “protection.” Does this mean that the Berlin Act, which established the famous principle of effective occupation, was not important for the European powers? In essence, did not European policy makers bother themselves with the Berlin Act and the theoretical definition of international law as the law among civilized nations?¹²⁶

However, the problem was not so simple. The European states and their chartered companies often referred to the Berlin Conference and the Berlin Act when they negotiated agreements transferring territory from African local rulers to themselves or coordinating spheres of influence among themselves. They sought to *legitimate* their claims by invoking provisions of the Berlin Act, whose vague and general nature contributed to this arbitrary and illogical justification.¹²⁷ In fact, the Berlin Act played a critical role in providing the most important framework for the subsequent negotiation and arrangement on the colonization of Africa and the justification of claims made by colonial powers.¹²⁸

logic of acquiring territories in Africa, which the participants were vaguely aware of, but did not want to discuss openly. Kasson’s position was tacitly adhered to, though not explicitly endorsed, by most European states, so far as the actual practice of treaty making *for the purpose of transferring African territories to European nations was concerned*. For a detailed study, see Westlake, *supra* n. 105, pp. 137-39; Lindley, *supra* n. 99, pp. 169-77, 182-206; Alexandrowicz, *supra* n. 98, pp. 30-128; James Crawford, *Creation of States in International Law* (Clarendon Press, Oxford, 1979), pp. 178-80; Fisch, *supra* n. 101, pp. 358-60.

¹²⁴ Lindley, *supra* n. 99, pp. 63-64.

¹²⁵ See Hertslet, *supra* n. 99, pp. 633 *et passim* and Alexandrowicz, *supra* n. 98, p. 141.

¹²⁶ Fisch seems to suggest that a gap between theory and practice was a key to explain the apparent contradiction (Fisch, *supra* n. 101, p. 358), although he gives a more complicated explanation later (*Ibid.*, pp. 360-69).

¹²⁷ *Ibid.*, pp. 358-63; Anghie, *supra* n. 97, pp. 63-64.

¹²⁸ For example, in 1873 Britain concluded a treaty of protection with a ruler of southeast

After the Berlin Conference, the colonization of Africa proceeded rapidly. Most of the treaties justifying the cession of African territories to European nations or establishment of European protectorate were negotiated and concluded in accordance with the rules and principles of European international law, both in substance and procedure. Even when African rulers insisted on their own rules and principles in the negotiation and conclusion of treaties, they could hardly realize their claims. The political entities in sub-Saharan Africa were too small in size, and too often in conflicts with each other, to impose their own rules on the Europeans.

In 1876, territories under European colonial rule occupied 11% of the African continent. In 1890, they increased to 90%. A few international lawyers such as Westlake raised a doubt whether the cession by “treaties” with the “tribes” in Africa could be a legitimate title under international law.¹²⁹ A similar doubt was raised not only by academic lawyers but policy makers in the Western states as well.¹³⁰ However, this concern was not fully discussed by leading international lawyers. Although the question was raised from time to time, both international legal theory and state practice in those days generally ignored this important issue.¹³¹

In the “scramble for Africa,” European powers did question the validity of the agreements concluded by their rivals and African rulers. Issues which a third (European) party raised in attacking the validity of the agreements between a rival European power and an African ruler ranged widely: (1) whether an African agent held the authority to

Nigeria (Obobo), Jaja, and recognized his right to monopolize the trade in this region. However, Britain gradually changed its policy, taking into consideration the Berlin Act, which provided for the free trade and transit in the region of the Niger. Finally, Britain expelled Jaja, and sought to comply with the principle of free trade and transit. It is likely that the strategic considerations and expectations for material profits were major reasons for the change in British policy. However, it cannot be denied that Britain also wished to avoid criticism from its rivals for failing to comply with the provisions of the Berlin Act. Finally, it is evident that the Berlin Act also provided a critical justification for Britain to expel the local ruler from his territory (Takeuchi, *supra* n. 110, pp. 73-98). There were many other cases in which the European powers sought to use the Berlin Act to support their own arguments and to rebut the argument by the rival powers. Fisch also stresses the significance of the ideological function of the Berlin Act (Fisch, *supra* n. 101, pp. 360-63).

¹²⁹ Westlake, *supra* n. 105, p. 145.

¹³⁰ For example, in 1884, an Assistant Under Secretary at the British Foreign Office asked to Sir Edward Hertslet, the authority on African colonial affairs and the author of *Map of Africa by Treaty* (*supra* n. 99), whether the consent of the natives was necessary to the validity of the annexation of their territory. The reply of Hertslet was ambiguous and somewhat evasive: “Such consent would not appear to be necessary on all occasions” (Gifford and Louis, *France and Britain in Africa*, p. 209, quoted by J. A. Andrews, “The Concept of Statehood and the Acquisition of Territory in the Nineteenth Century,” 94 *Law Quarterly Review* (1978), p. 419).

¹³¹ Although the Institut de Droit International dealt with the theory of the Berlin Conference on the occupation of territories in 1888, it could not provide a theoretically coherent explanation. See Anghie, *supra* n. 97, pp. .

dispose the territory or the authority to rule, (2) whether a European agent held the authority to represent his country, (3) whether the agreement was concluded according to the appropriate rules of the African political entity, (4) whether the “genuine” will of the African ruler was expressed, especially whether there was not an element of coercion or fraud, and so on.¹³² However, hardly any European state seemed to attack other European states for concluding an agreement with an African ruler on the ground that African tribes were uncivilized and therefore not entitled to conclude a treaty with an European state.¹³³ This fact suggests that despite the notion of international law as the law of/among civilized nations, which prevailed among European states during this period, the European states implicitly recognized with each other the capacity of African rulers under international law *as long as they appeared as a party of a treaty purporting the cession of their territory and the establishment of protectorates.*

Seen from today’s perspective, it is difficult to explain why such an apparent contradiction was overlooked. Fisch argues that a major reason why European states resorted to treaty making with African rulers rather than regarding African territories as *terra nullius* was to minimize the cost of colonization: Had they regarded the African territories as *terra nullius* and sought to occupy them by force, they would have encountered a stronger resistance of the Africans sometimes involving force. If, on the other hand, Europeans first succeeded in concluding a treaty of protection with African rulers and gradually weaken their power, they could obtain the same fruit with much less resistance.¹³⁴ This argument is convincing and can explain the advantage of treaties in achieving Europeans’ political and economic goals.

Still, a critical problem remains why most European intellectuals, whether they were international lawyers or decision makers in the government, were not bothered by such an apparent contradiction between the denial of subjecthood of African entities in international law on one hand, and the ongoing treaty making with them on the other. Although Alexandrowicz, Fisch and others who have argued that “treaties,” not the principle of effective occupation, played a critical role in the colonization of Africa are right in explaining the situation at the time, they have not given satisfactory answers *why* the contradiction described above went unnoticed at the time.¹³⁵ One could only assume that the *spirit of the time* characterizing most Europeans and Americans during

¹³² Alexandrowicz, *supra* n. 98, pp. 36-41 *et passim*; Touval, *supra* n. 99, pp. 280-92.

¹³³ I have not scrutinized the bases of various arguments utilized by European powers for attacking the validity of treaties concluded by rival European powers in their favor. I may have to change this judgment if contrary evidence is provided. The judgment in the text is a tentative one, based on earlier studies cited above.

¹³⁴ Fisch, *supra* n. 101, p. 359.

¹³⁵ It should be noted that Alexandrowicz tried to explain this contradiction by pointing out that the 19th century international lawyers fell into doctrinal positivism rather than empirical positivism (Alexandrowicz, *infra* n. 166). Anghie is also critical of the 19th century positivist international lawyers (Anghie, *supra* n. 97, *passim*). However, I doubt whether this was merely a problem of (doctrinal) positivism in international law at the time. For example, Lorrimer, a representative international lawyer discriminating against Afro-Asians in international law, was not a positivist.

this period of imperialism prohibited Western intellectuals from questioning such a contradiction.¹³⁶ Or, one might be able to say that, as in the case with the application of international law to Muslim powers,¹³⁷ *so long as an issue did not involve the imposition of obligations on, or loss of some profit of, European powers*, even an apparent contradiction in terms of international law did not attract much concern. Because Europeans were gaining, not losing, a great profit from colonization by treaty making with Africans, it might be only natural that the contradiction went unnoticed.

Once territories in Africa became colonies of the European powers, the very issue of the relationship between the colonial power and the African states or bodies politic came to be a matter of domestic jurisdiction of the former.¹³⁸ It now ceased to be a question of international law. In this way, European international law came to *cover*, though not *apply to*, the African continent as a quiet companion of imperialistic diplomacy and colonialism. It justified colonization by “treaties” and the principle of effective occupation on one hand, and evaded the problematization of the essential meaning of colonization under international law on the other.¹³⁹

¹³⁶ One might be able to say that a certain kind of the doctrine of recognition might have served to settle this issue: Although African political communities were outside the pale of the Family of Nations, to recognize the limited capacity of treaty making of such entities was possible (see in this respect, Crawford, *supra* n. 123, p. 179-81). Or, a kind of a theory of inchoate title or “indirect effect of contracts between a state and native princes or chiefs of peoples,” as suggested by the arbitral award in the Palmas case of 1928 (*supra* n. 116), might have provided a theoretical basis to settle the problem. According to the arbitral award in the Palmas case, although these contracts “are not . . . treaties or conventions capable of creating rights and obligations such as may, in international law, arise out of treaties,” they are not “wholly void of indirect effects on situations governed by international law. . . . The form of the legal relations created by such contracts . . . is a form of internal organisation, on the basis of autonomy for the natives . . . to be completed by the establishment of powers to ensure the fulfilment of the obligations imposed by international law on every State in regard to its own territory. . . . And thus suzerainty over the native State becomes the basis of territorial sovereignty as towards other members of the community of nations. It is the sum-total of functions thus allotted either to the native authorities or to those of the colonial Power which decides the question whether . . . the conditions required for the existence of sovereignty are fulfilled.” (*Ibid.*, pp. 858-59). According to this reasoning, transfer of “territory” or “sovereignty” stipulated in the agreements would *become the basis* of territorial sovereignty, if followed by the establishment of the effective occupation, although no logical reason was provided.

These are only a few examples of possible explanations. Whether the European powers actually invoked such an argument remains a subject of future investigation (see in this respect, Alexandrowicz, *supra* n. 98, pp. 96-105).

¹³⁷ See n. 84 and the accompanying text.

¹³⁸ Crawford, *supra* n. 123, p. 182.

¹³⁹ One had to wait nearly a century for this problem to be discussed openly as an issue of international law. The Western Sahara Case of 1975 (*ICJ Rep.* 1975) provided such an opportunity, albeit in an insufficient and rather dogmatic manner. See also Crawford, *supra* n. 123, p. 181; Fisch, *supra* n. 101, pp. 370-71.

5. *The Collapse of the Sinocentric System of World Ordering*

Even after China lost the Second Opium War and subsequently established the Tsungli Yamen in 1861, they conducted diplomacy in accordance with European international law only with the Western nations. With regard to Asian neighbors, they still maintained relations with them in accordance with the rules and principles of Sinocentric tribute system. In their understanding, it was merely an exceptional case due to the accidental weakness of the present dynasty that relations with Europeans and Americans had to be conducted in accordance with European international law. When the present dynasty recovered its inherent power, things would become “normal,” and the relations with the Western powers would be regulated by the rules and principles of the Sinocentric tribute system.¹⁴⁰ This view was not limited to the Chinese. It was common to political and military leaders and intellectuals in Vietnam, Korea and other neighbors who shared the Sinocentric view of the world for a long period of time.¹⁴¹

The Western powers, on their part, sought to have Asian nations break away from the Sinocentric tribute system, and to put them in their spheres of influence within the framework of Eurocentric international society. Consequently, the Ch’ing dynasty and the Western powers fought a series of war over China’s neighbors in the latter half of the nineteenth century. The Ch’ing dynasty fell into constant conflict with Western powers over a variety of issues: with Russia over relations with Turkish “tributary” peoples; with Britain and France over relations with “tributary” Burma and Vietnam; over the issue of the implementation of the peace treaties concluding the Second Opium War, and the like.¹⁴²

Britain, which had already colonized India, gradually extended its power and influence to Burma during the nineteenth century. Through a series of wars, Britain overcame Burmese resistance and the Chinese claim to suzerainty, and finally annexed Burma in 1886. The annexation was formally carried out by means of a treaty with Burma, which was not regarded a “civilized nation” in European international law.¹⁴³ In the 1870s France advanced into Indochina, and through a series of treaties with the declining dynasty in Vietnam, made first Cambodia, and then Vietnam itself, its

¹⁴⁰ Sato, *supra* n. 73, pp. 13-16,66-95.

¹⁴¹ Perhaps Japan was the only exception in the region. Although many conservative leaders shared the view described in the text, some enlightened leaders and intellectuals were determined to change the fundamental world image of Sinocentrism traditionally shared by the Japanese. They thus carried out a kind of “cultural revolution” in Japan and succeeded in having the Japanese adhere to the new world image of Westcentrism. This was the beginning of the glory and guilt of modern Japan in the last one and a half centuries, characterized by rapid economic development, imperialistic policies during the pre-1945 period, and the wholesale Westernization of the society.

¹⁴² Banno, *supra* n. 24, pp. 311-69.

¹⁴³ *Ibid.*, pp. 332-37. As with the cases in Africa, European decision makers and international lawyers did not seem to be bothered by the apparent contradiction between their definition of international law as the law of/among civilized nations and treaty making with a “barbarian” or “savage” nation.

protectorate. Again, Vietnam, which concluded “treaties” with France was not regarded as a “civilized nation” under European international law of the time. The Ch’ing dynasty claimed its suzerainty over Vietnam and sought to block the expansion of France. However, it lost the Sino-French War of 1884-85, and had to recognize that Vietnam, its traditional tributary, had become a French protectorate.¹⁴⁴

The final blow to the Sinocentric East Asian system, however, was not given by a Western power. It was given by Japan, which had been a *quasi* member of the Sinocentric system,¹⁴⁵ but speedily changed itself to a member of Eurocentric international system. From the 1860s Japan began to Westernize itself, and sought to reorganize its relations with neighbors in accordance with the European way of world ordering. In this process, it had a series of friction and conflicts with China, which sought to maintain the Sinocentric way of world ordering among East Asian nations. In 1894, Japan and China entered a war over the hegemony over Korea. Japan won the war, and imposed a Peace Treaty on China in 1895.

The Treaty of Peace between China and Japan of 17 April 1895 (Treaty of Shimonoseki) provided for the cession of Taiwan and the Liantao Peninsula, the payment of reparations, the grant of unilateral most-favored nation status from China to Japan, and other arrangements favorable to Japan. Most important of all provisions of the Treaty, however, was article 1, which provided for the international status of Korea. It reads:

“China recognizes definitely the full and complete independence and autonomy of Korea, and, in consequence, the payment of tribute and the performance of ceremonies and formalities by Korea to China in derogation of such independence and autonomy shall wholly cease for the future.”¹⁴⁶

This provision had a tremendous significance in world history surpassing that of peace settlement between two individual countries, Japan and China. China not only lost the war with Japan, which had been a *quasi* member of the Sinocentric tribute system, yet now clearly defined itself as a member of the Westcentric international system. Most importantly, China had to recognize that Korea would definitely secede from the Sinocentric tribute system, a system of long established Sinocentric world ordering. This fact had a critical importance in the establishment of international society as a global society and the birth of international law as the law of such international society.

Korea had been China’s most faithful tributary. While other rulers had been expected to send tributary missions every one, two or four year, or on an irregular basis, Korean rulers had been expected to do so four times a year during the Ch’ing dynasty period.¹⁴⁷

¹⁴⁴ Banno, *supra* n. 24 [Kindai], pp. 341-67. See also Tsuboi, *supra* n. 24 [Kindai Vitonamu] [*L’Empire vietnamien*], pp. 233-41.

¹⁴⁵ Onuma Yasuaki, “Japanese International Law in the Prewar Period”, 29 *Japanese Annual of International Law* (1986), pp. 23-24.

¹⁴⁶ Clive Parry, ed., 181 *Consolidated Treaty Series (1895)* (Oceana Publications, New York, 1979), p. 217 [Kindai].

¹⁴⁷ Banno, *supra* n. 24, p. 87. In practice, Korea sent a tributary missions once a year.

Korea was willing to maintain suzerain-vassal relations with China even after other Asian nations successively seceded from the Sinocentric tribute system during the late nineteenth century. Despite this long established rule and practice, China now had to recognize that Korea was an independent and autonomous nation. China had to abandon the long established custom of receiving a tribute from Korea in accordance with Sinocentric ceremonies and formalities. To China, Korea was now merely one of many nations whose status was to be characterized in accordance with European international law. The Sinocentric tribute system, which had suffered from a series of blows but had nonetheless at least partially been maintained, finally proved to be defunct. It ceased to be a system of world ordering competing with the Eurocentric one.

In China, during the latter half of the nineteenth century, there gradually emerged a view suggesting that the Western “barbarians” were superior not only in military power, science and technology, whose value had been underestimated in terms of the traditional Confucian value system, but also in spiritual civilization, which had been regarded as the core of the traditional value system.¹⁴⁸ Although this view gradually spread among Chinese intellectual leaders, the Sinocentric way of thinking was still deeply rooted in, and taken for granted by, them. Furthermore, to make matters worse, they had the theoretical frameworks and historical experiences which could explain the deviation from Sinocentric assumptions. Thus, it was extremely difficult for them, especially before the defeat in the Sino-Japanese War, to fully accept the view that the Western powers were not only superior in their military, scientific and technological power but also civilized in their spiritual or literal achievements.¹⁴⁹

However, now it became evident for them that Sinocentrism had completely lost its relevance to reality and could no longer be maintained. During the period from the Sino-Japanese War to the Nationalist Revolution of 1911, many political leaders, intellectuals and activists were engaged in the heated debate whether they should maintain the Ch’ing dynasty, reform it, or carry out a revolution. However, most of these claims acknowledged that China was not an empire with the sole emperor on earth, but one of many nations in the world. China should abide by the treaties it concluded with foreign nations in accordance with the rules and principles of European international law; and China should conduct its diplomacy within the framework of European international law.¹⁵⁰ Few dared to claim that China should maintain the Sinocentric system of world ordering.

The Sinocentric view of the world had long been the predominant principle of world ordering in East Asia because it had been supported by economic and military power as well as the cultural influence of China, and by its acceptance by East Asian leaders and peoples, especially those in the southeast crescent. Even after the Islamocentric view of the world declined in the eighteenth century, the Sinocentric view remained as the competing universalistic view of world ordering against the Eurocentric one. Certain substantive realities remained to support this view. For example, the world share of the

¹⁴⁸ Sato, *supra* n. 73, pp. 13-14, 62-66.

¹⁴⁹ *Ibid.*, pp. 57-60. See also Fairbank, *supra* n. 19, pp. 257-75.

¹⁵⁰ Sato, *supra* n. 73, pp. 95-164.

manufactured products of China was approximately ten times as large as that of Britain in 1840, when it lost the Opium War against the latter. The Chinese share was on a par with that of Britain as late as in 1860, when the latter enjoyed its peak of free trade capitalism.¹⁵¹

However, by the end of the nineteenth century, such substantive bases were completely lost. In 1900, while the Chinese share of manufactured products in the world was only 6.2 %, Britain's share was 18.5 %, and the share of Europe as a whole was ten times as much as that of China.¹⁵² Just as the "division of the world" by the Bull of Alexander VI of 1493 was, in the eyes of the contemporaries of non-European societies, an universalistic illusion of the expanding yet still less developed Europe, the universalistic view of world ordering based on the Sinocentrism held by the Ch'ing dynasty in the late the nineteenth century was nothing more than an illusion of a powerless, underdeveloped China. In contrast, the once universalistic illusion of the Europeans in the late fifteenth century now became a reality. It was not only supported by the superiority of economic and military power of the Western states, but also accepted by such powers as the Ottoman Empire and the Ch'ing dynasty, which had once held the competing universalistic views of world ordering and material realities to support them.

What appeared in the following period was a *projection* of the predominant view *onto the past* by *assuming* that such a reality had already been existing during the period of the Pope Alexander VI, or even much earlier during the period of ancient Greece and Rome. In this *projective interpretation of the history*, what Europeans believed to be universal in those days, such as *jus natrae* and *jus gentium*, were assumed to be actually universal. Also appearing was the historical treatment of international law based on the projection of today's predominant, i.e., Westcentric, notions onto the past. This is the picture that we have seen in the twentieth century, and is likely to persist in the twenty-first century, if we cannot liberate ourselves from this premise. For this is the predominant way of discourse that we have accepted as "the history of international law."

IV. In Search of Overcoming Westcentrism in International Law

1. Earlier Criticism of Modern Eurocentrism

As noted in I, the study of international law focused its attention primarily on Europe, and secondarily on North America until the middle of the twentieth century. It regarded the history of modern European international law as the history of international law *per se*. Even when it took up antiquity or the medieval period, it basically dealt with Greece and Rome as the birthplace of European civilization, and referred to the just

¹⁵¹ Bairoch, *supra* n. 56, p. 296. As noted in n. 57, these figures must be accepted cautiously because they are speculative and could show only limited aspects of economy in China and in Europe. However, they at least give us living in the late 20th century world *a warning* that we have to liberate ourselves from our "common sense" of "developed Europe vs underdeveloped China" when we think of the global situation in the 19th century.

¹⁵² *Ibid.*

war doctrine, natural law doctrine and legal practice of medieval Europe. Thus it was inevitable that criticism was raised against such Eurocentrism, especially modern-Eurocentrism, when Asian and African nations attained independence and came to be visible in international society.

Some writers, while basically maintaining a Eurocentric view of history, sought to trace back the history of international law to antiquity. For example, Ago, while criticizing “the wholly unwarranted belief that international law is of exclusively Christian, European descent and that, . . . it was made up of rules deduced from dogmas and ethical principles common only to the countries of western Europe,” claimed that “in Antiquity, the Mediterranean basin and the neighbouring regions witnessed the successive emergence and disappearance of international communities of varying size, formed by distinct political entities between which legal relationships of an international kind arose.”¹⁵³

However, if one is willing to trace back the history, it is hardly convincing to put a geographical limitation, whether that were European, Mediterranean or anywhere else. Most of the premodern societies lacked the characteristic features of the modern European states system: (1) lack of the sole empire which could project economic, political and military power and exert cultural influence on the neighbors; (2) coexistence of territorially integrated and mutually independent nations on one hand, and the existence of common cultural and religious bonds such as Christianity and Roman law shared by such independent nations on the other; (3) smooth functioning of diplomacy among the independent nations through the institution of permanent missions; and, (4) prevalence of the notion of equality among the members of the political entities (European nation states) which constitute the European states system. This is only natural, given the fact that modern Europe is just one of numerous historical types of regional units, which existed in a diversely structured form all over the world. Given the prevalence of hierarchical ordering of the members of premodern regional systems all over the world, the modern European states system was rather an *exception* than a rule.

Thus, it would make little sense to limit the area to the Mediterranean when one discusses the history of international law dating back to the premodern period. In fact, Preiser, whom Ago cited to support his argument on the existence of international law of the antiquity,¹⁵⁴ himself criticizes the Eurocentric nature of the past study of the history of international law, by showing the existence of international law in the civilizations in Asia and Africa.¹⁵⁵ A similar view was expressed by Alexandrowicz, who had a great influence on the study of the history of international law in the 1960s and 1970s.

Alexandrowicz claimed that relations between European nations, and Asian and

¹⁵³ Roberto Ago, “The First International Communities in the Mediterranean World,” 53 *British Year Book of International Law* (1982), pp. 214-215. See also *id.*, “Pluralism and the Origins of the International Community,” 3 *Italian Yearbook of International Law* (1977), pp. 3-30.

¹⁵⁴ Ago, *supra* n. 153 [International Communities], pp. 215 n. 4, 217 n. 10.

¹⁵⁵ See Wolfgang Preiser, *Die Völkerrechtsgeschichte ihrer Aufgabe und ihrer Methode* (Wiesbaden, 1964).

African nations in the nineteenth century were very different from those in the pre-nineteenth century period. According to him, the classical writers such as Grotius and Gentilis recognized that European nations could conclude treaties with non-Christian nations under the universal law of nations. International law was created and developed under the influence of long established relations between European nations and Asian nations, as well as the treaty practice which regulated these relations.¹⁵⁶

In this process, Alexandrowicz argues, the European nations entered into the networks which had existed for a long period of time in Asia, and followed the practice which had been established among the Asian nations. The European nations and their chartered companies were engaged in trade with the Asian nations in many cases as an equal partners, but in some cases such as the relations with the Mogul Empire, as inferiors. It was only after the period when many Asian nations lost their independence or were reduced to dubious legal status that the publicists began to see the Asian states system as outside the pale of international law.¹⁵⁷ Although over the course of the nineteenth century the study of international law espoused positivism, it nonetheless ignored the fact that the European nations had concluded a number of treaties with the Afro-Asian nations, and fell into doctrinal positivism.¹⁵⁸

In this way, Alexandrowicz demonstrated that from the sixteenth to the eighteenth century there existed a wide range of treaty relations between European and Asian nations, and stressed the universal nature of international law – in fact, European international law – at that period. Some international lawyers such as Grewe criticized his ideas, pointing out that although European academics might claim the universality of naturalistic international law during this period, European governments held the view that international law was a legal order of the Christian and European Family of Nations.¹⁵⁹ Even among the academics who claimed the universal nature of international law, there was a sense of Christian supremacy, and their idea provided a convenient ideology for the European empire-builders from the sixteenth century on.¹⁶⁰

¹⁵⁶ Charles Alexandrowicz, “Treaty and Diplomatic Relations between European and South Asian Powers in the Seventeenth and Eighteenth Centuries,” *Recueil des Cours* (1960-II), pp. 231-35; *id.*, *An Introduction to the History of the Law of Nations in the East Indies (16th, 17th and 18th Centuries)* (Clarendon Press, Oxford, 1967), pp. 85-86; *id.*, “The Afro-Asian World and the Law of Nations (Historical Aspects),” *Recueil des Cours* (1968-I), pp. 145-48.

¹⁵⁷ Alexandrowicz, *supra* n. 156 [Treaty and Diplomatic Relations], pp. 207-208, 213-17; Alexandrowicz, *supra* n. 156 [The Afro-Asian World], pp. 134-44.

¹⁵⁸ Charles Alexandrowicz, “Doctrinal Aspects of the Universality of the Law of Nations,” 37 *British Year Book of International Law* (1962), pp. 506-15; *id.*, “Empirical and Doctrinal Positivism in International Law,” 47 *British Year Book of International Law* (1977), p. 289.

¹⁵⁹ Wilhelm Grewe, “Vom europäischen zum universellen Völkerrecht,” 42 *Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht* (1982), pp. 449-79. According to Grewe, Alexandrowicz’s claim contains “only a half of the truth” (*Ibid.*, p. 452. English translations are by Onuma).

¹⁶⁰ Schwarzenberger explicitly pointed out this ideological function of the universalistic natural law doctrine of the sixteenth century: “However idealistic the intentions of the Spanish naturalists

However, basic claims advocated by Alexandrowicz were on the whole well accepted by contemporary and subsequent writers. Grewe, who criticized Alexandrowicz for his idealization of the natural law doctrinaires, himself emphasized the need to overcome Eurocentrism and to expand the area of study of international legal history.¹⁶¹ Certain non-European international lawyers such as Anand, Ellias and Singh also stressed the need to reappraise the history of international law and claimed that Asian or African nations had played an important role in the development of international law.¹⁶²

Thus, Preiser, writing for the *Encyclopedia of Public International Law* in 1984, claimed that the basic principles of international law, i.e., the response of collective condemnation by the great majority of the society of nations against a state disregarding the guiding principles and the restraint of those nations desiring to break out of the legal order, had existed not only in modern Europe but always and everywhere.¹⁶³ According to Preiser, although one cannot find the values and rules of conduct for inter-state relations in textbooks, one can find them in non-legal materials such as the record of the actions of the persons who played leading roles in shaping politics.¹⁶⁴

Such expansion of the study of the history of international law signifies a considerable degree of liberation from Eurocentrism which dominated the earlier studies. I share many of the criticisms put forward by such writers as Alexandrowicz, Anand, Grewe and Preiser directed against traditional mainstream international lawyers. Also significant are the studies of certain international relations scholars such as Wight, Bull, Gong and Watson, who exemplified various aspects in the process of the globalization of European international society and international law.¹⁶⁵ These studies since the 1960s have shown many important aspects which were ignored by traditional studies.

were, in fact, their doctrines provided highly convenient ideologies for the empire-builders of the sixteenth century" (Georg Schwarzenberger, *The Frontiers of International Law* (Stevens & Sons, London, 1962), p. 53).

¹⁶¹ Grewe, *supra* n. 159, *passim*. However, Grewe's own major work on the history of international law, *Epochen der Völkerrechtsgeschichte* (Nomos, Baden-Baden, 1984), retains a rather strong Eurocentric tendency.

¹⁶² R. P. Anand, ed., *Asian States and the Development of Universal International Law* (Vikas Publication, Dehli etc. 1972); Nagendra Singh, "India and International Law," *ibid.*, pp. 25-43; A. P. Anand, *Origin and Development of the Law of the Sea* (Nijhoff, The Hague etc., 1983); Ellias, *Africa and the Development of International Law* (Nijhoff, The Hague, 1972); Irie Keishiro, "The Principles of International Law in the Light of Confucian Doctrine," *Receuil des Cours* (1967-I), pp. 1-59.

¹⁶³ Wolfgang Preiser, "Basic Questions and Principles," *Encyclopedia of Public International Law*, VII (Elsevier, Amsterdam, 1984), p. 130.

¹⁶⁴ *Ibid.*

¹⁶⁵ Martin Wight, *Systems of States* (Leicester University Press, 1977); Bull, *supra* n. 3; Gong, *supra* n. 97; Bull and Watson, *supra* n. 13. I regret that I could not refer to Barry Buzan and Richard Little, *International Systems in World History* (Oxford University Press, 2000) when I wrote my manuscript. I received it in the process of correcting proofs.

2. Problems of Prevailing Concepts and Terminology

However, there still remain a number of problems to overcome. First, there remains a persistent problem of the predominant concepts and terminology. The studies since the 1960s led by Alexandrowicz, Anand, Bull, Grewe, Preiser, Wight and others have made it clear that European international law from the sixteenth century to the middle of the nineteenth century was just one of many regional normative systems. Yet, the term “international law” or “law of nations” without the qualification of “European” is still generally used to designate this regional, not global, system.

As is well known, “international law” is a neologism invented by Bentham in the late eighteenth century. Since then, it has been used, together with such terms as the “law of nations,” “droit des gens” and “Völkerrecht,” to designate the law valid in international society, and has become the predominant term to express the law of international society. However, despite the subjective intent of those who use this term, its local, i.e., European, or “European and American” nature cannot be denied until the late nineteenth century, because the actual applicability of “international law” was limited to Europe or Europe and America at most. If this is the case, at least those who use this term as an analytical or descriptive notion should make it clear that it was *European* international law, not *global* international law during this period. However, this has not been done. Even the studies demonstrating the regional nature of European international law have often referred to “international law” and “international society” in the pre-late-nineteenth century Europe without the critical term “European.”

Moreover, earlier studies by Preiser and others critical of the traditional studies of international law have expanded the sphere of their study to premodern societies, often discussing whether these societies or relations between certain nations, states or political entities had “international law” or not. This is basically a desirable undertaking, but from a methodological perspective, it has its own problems.

It is true that whenever human beings organize groups or societies such as clans, tribes, ethnic groups, religious groups, nations and the like, and are engaged in commercial or cultural intercourse, or armed conflicts among such groups, it is always necessary to make agreements among such groups, or more specifically, among their leaders. When these groups are engaged in economic dealings, it is necessary to have at least an agreement on the exchange rate, even if the dealing is conducted as a primitive barter. Even when they are engaged in a war, they cannot continue to fight a war with each other indefinitely. Thus, they need to reach a peace agreement or at least a truce, unless one party can overwhelm the other and make the latter surrender unconditionally. Even in this last case, there must be a common understanding between the parties which action or sign should be interpreted as the surrender.

The need for these arrangements, agreements and understandings is common to any time or place, whether it be Mesopotamian antiquity, the East Asian medieval period, or European modernity. Therefore it is certainly necessary to study such universal and supra-historical phenomena from a perspective of agreements among various independent human societies. This may be called a study of intercommunity law or intersocietal law.¹⁶⁶ It is

¹⁶⁶ See Georges Abi-Saab, “International Law and the International Community,” Ronald Macdonald, ed., *Essays in Honour of Wang Tieya* (Nijhoff, Dordrecht etc., 1994), p. 31.

also desirable to encourage such a study, for there have been few attempts to explore these questions because of the excessive interest in modern European history and lack of interest in other regions and periods.

However, in order that such an expanded study of international law can be truly fruitful, one has to scrutinize the very concept of international law. Assumptions, frameworks, ideas, notions, ways of thinking, as well as substantive structures and conditions in various regions in the past were in many ways very different from those that one assumes in the twentieth century. If one believes that one can research these premodern arrangements and agreements in various regions in the same way as one researches the present international law, then one would seriously misunderstand these arrangements or agreements by projecting the prevalent notion of international law onto the past.

Today's international law is perceived as a secular comprehensive legal order existing among nation states which are sovereign, independent and equal, irrespective of their size, power and influence. It is a law valid in global international society which covers all these states. It is different from domestic laws which are valid in respective states. Treaties exist as explicit agreements among states and do not cease to exist even if the governments or leaders that have actually concluded them cease to exist. Gods are not expected to be the guarantors of these agreements. The *pact sunt servanda* is a legal rule in the strict sense, whose breach entails an obligation of reparations and other countermeasures or sanctions.

By contrast, as has been demonstrated in II and III of this article, agreements between political or religious entities in various regions during the premodern period more or less lacked these characteristic features. For example, as far as the form of the "agreement" is concerned, many of them were agreements between kings, emperors or politico-religious leaders rather than those between states.¹⁶⁷ If they wished that the agreement should be kept after their death, they had to stipulate specific provisions to that effect.

In the case of agreements between a powerful and authoritative empire or central state and its neighbors, the agreements did not necessarily take the form of treaties between independent states. They often took the form of concessions, charters or privileges granted by the emperor, or the form of domestic orders, regulations or laws of the empire or central state. Although they might be *de facto* agreements between the independent parties, they often took such forms as to express the superiority of the head of the more powerful and prestigious party, because both parties shared the perception of the superiority of the more powerful and authoritative party.

The relationship among the parties to normative systems in the premodern period was also very different from the one we have today. It was not necessarily a uniform relationship among "states" as abstract entities. It was quite common for the head of entity A to be superior to the head of entity B, equal to the head of entity C, and inferior

¹⁶⁷ For example, in the treaty between Rameses II of Egypt and Hatsilsil III of the Hittites in the 13th century B. C., the subjects making promises were Rameses and Hatsilsil, not the state or empire of Egypt and the Hittites. This practice of "treaty" making between politico-military or politico-religious leaders under their names, not under the names of "states," could also be found in Africa, America, Asia and Europe, and lasted well into the modern period, i.e., until the 19th century.

to the head of entity D, not only in physical or military terms but also in spiritual or psychological terms. As is fundamentally different from today's situation, there did not necessarily exist a common standard by which one could assess the relationship between them in terms of power and authority between A, B, C and D. When they had a common religion, culture or normative standard, as well as sufficient information on the military strength of the parties, one might be able to assess the relationship by these common value systems and military information. However, even in such a case, it was difficult to assess it unequivocally if religious and/or cultural authority and economic and/or military power did not reside in the same party.

If the parties did not share a religion, culture or a normative standard, it was almost impossible to assess their relations in terms of authority. In such cases, factors defining the relations were economic interests, military power, the strength of egocentric pride or sense of superiority over the others, and other similarly unstable features. Even if each party held a universalistic notion of world ordering (such as Christianity, natural law doctrine, Islam and Sinocentrism) and located the other party within this universalistic framework, such a location could easily conflict with each other, because in most cases such a universalistic notion was accompanied by an egocentric sense of superiority over the other, which the other party would not accept. These have been fully demonstrated in II and III.

Thus, for example, merely demonstrating that European international law based on natural law doctrine from the sixteenth to the eighteenth century was more universalistic than that in the nineteenth century does not make much sense to clarify the normative situation *on a global scale*. First, such a universalistic law might well rationalize the expansion of European powers on a global scale.¹⁶⁸ More importantly, one needs to know how the *other side*, i.e., subjects of non-European regional normative systems, perceived and characterized the relations between such a universalistic European international law and themselves.¹⁶⁹ This study of diverse civilizational perceptions and characterization is of critical importance, because during the whole period of human history, Europeans represented only a very small portion of the human species. Unless one scrutinizes how people in the non-European world perceived and understood the

¹⁶⁸ See the analyses of the function of the universalistic theories of Vitoria and Grotius in Onuma, *supra*, n. 12, pp. 366-70, 382-86, as well as criticism of Alexandrowicz made by Grewe and Schwarzenberger at *supra* ns. 159 and 160.

¹⁶⁹ One cannot solve these problems by resorting to today's notions of treaties and international law: Whereas the agreements between states are treaties and therefore constitute international law, those between nonstate entities or between states and nonstate entities are not treaties, and do not constitute international law. For example, could one say that whereas the agreement between Ramesses II of Egypt and Hattusili III of the Hittites was a treaty because both Egypt and the Kingdom of the Hittites were states, but the agreements between Muhammad and the chiefs of the tribes in Arabia were not because the groups they lead were nonstate entities? Or, conversely, the agreement between Ramesses II and Hattusili III was not a treaty because its major guarantors were their Gods? Such simplistic characterizations without further contextual analysis does not contribute to the solid understanding of these agreements. It is just misleading.

world including European natural law or international law, one cannot understand *the normative conditions of the world on a global scale*. However Europeans asserted the universal validity of their natural law or international law, its actual validity, even less its efficacy, was restricted only to Europe during the time of Grotius.

3. A View from an Intercivilizational Perspective

The Trap of Universalism

These problems make us aware of the significance of the perspective through which we see the world. It is certainly true that Alexandrowicz made a great contribution by uncovering a wide-range of “treaty” practice between Europeans and political entities in Asia and Africa from the sixteenth to the eighteenth century. However, he was less successful in demonstrating how such treaty practice had contributed to the elaboration of European international law which later became global.¹⁷⁰ More serious is his failure to see how the treaty practice was *perceived, understood and explained by Asians or Africans* during those periods. Although Alexandrowicz claimed to overcome Eurocentrism and sought to clarify Afro-Asian perspectives, he was fundamentally concerned with how *Europeans* perceived and understood the world, and not otherwise. Basically the same is true with Bull, Grewe, Preiser and others.

In the case of Anand and other Afro-Asian international lawyers who engaged in the historical studies of international law in the 1960s and 70s, a major concern was on the Asian or African side. They argued that their regions or civilizations had, or contributed to the development of, international law. However, most of them tended to take the concept of international law as granted, and were interested in demonstrating how earlier studies had ignored the existence of this particular notion of international law in Asia or in Africa. Their claim was basically that “We too had international law.”

Underlying this claim was a tacit assumption that international law was something good and desirable that should not be a monopoly of European civilization. Thus they claimed that their own civilization had “international law” without scrutinizing the basic world image of these civilizations and the form, substance and nature of their norms regulating relations among independent groups in their regions. Despite their critical posture of international law in general, they basically projected the notion of international law prevalent in the twentieth century onto their own past. They also failed to see egocentric universalistic aspects of Asian and African world images which grounded Asian and African normative systems, although they were highly critical of such aspects of European international law. In short, a strong psychological inclination

¹⁷⁰ Alexandrowicz did enumerate a number of matters such as the principle of *pacta sunt servanda*, the treatment of foreigners, the freedom of the sea, some rules of the maritime law and the secularization of international law as examples where the impact of state practice in the East Indies could be demonstrated (Alexandrowicz, *supra* n. 156 [The Afro-Asian World], pp. 162-63; *id.*, *supra* n. 156 [Treaty and Diplomatic Relations], pp. 33, 36, 40, 45-48). However, what he did in these references was to show that these practices existed in Asia and that they *coincided with* the rules of European international law. He failed to *demonstrate* how these Asian practices *brought about* or *influenced* the formation and development of these rules in European international law.

to believe that Asians and Africans were from the very beginning the authentic subjects of international law seems to have dominated their concern.

Today, we certainly know that European international law was just one of many regional and historical normative systems. We also know that various peoples in the non-European world had their own world images and normative systems based on these world images. Yet, we hardly know how the leaders, or indeed the people, in these systems regarded *each other*. We are ignorant of how *either side* sought to regulate the relationship between their systems, and how these leaders explained the relationship to their followers as well as to the third parties. What we have been told by the earlier studies is basically limited to *how the members of the European international law regarded the subjects of the non-European regional systems*. Very few studies have given the other side of the story, or the *inter-perception* of the both sides.

As was suggested by the criticism of Alexandrowicz's understanding of the "universality" of international law based on the natural law doctrine of the sixteenth to the eighteenth century, the notion of universal international (or natural) law was a European construct of the time.¹⁷¹ Such Eurocentric notions of universality were not accepted by the overwhelming majority of the world population in those days. For contemporary Muslims, who dominated the central area of Eurasia, the universality of Islam was much more relevant and realistic. For the people in the Ming Dynasty and the Ch'ing dynasty, which were economically far more powerful than Europeans, European natural law was nothing other than an illusion of "barbarians."

A number of universalistic thinkers in Europe, or even certain political leaders in some European nations, might interpret the conclusion of treaties or the maintenance of diplomatic relations with certain Asian rulers as evidence of the inclusion of the Asian nations of these rulers within the "Family of Nations." Some of the Asian rulers, especially minor ones, might have said that they were pleased to be treated as a member of such "Family of Nations" in order to secure various interests such as trade and military security. However, even if these facts were demonstrated, one has to scrutinize which basic image of world ordering was held by these Asian rulers, how they actually dealt with their relations with European nations or their agents, and their Asian neighbors, and on what assumptions they behaved. Without such scrutiny, a mere fact that some European thinkers construed these practices as evidence of the universality of *European* international law tells us hardly anything.

In the imperial court of successive Chinese dynasties, various kinds of local princes, diplomats, high ranking priests, merchants, agents of chartered companies and other important persons were treated as tributary missions wishing to partake in Chinese civilization. Many of them acknowledged the universal authority of the Chinese emperor. Yet, we hardly think of treating such acknowledgment as evidence of the universality of Sinocentrism. However, comparatively speaking, for the most of pre-nineteenth century human history, the *universalistic* – not universal – claim of Sinocentrism had far more solid material basis than the *universalistic* claim of European natural law or international law. It is only through the magic of projecting today's Eurocentric notion onto the past that one is tempted to search for *universality* in premodern European ideas or institutions.

¹⁷¹ See ns. 159 and 160, and accompanying text.

Globalization of International Law in the Civilizational Sense

What I have sought in this article is to demonstrate that what most international lawyers have called *international law* during the sixteenth to the eighteenth century was just one of many normative systems which existed in various regions of the globe. It was as late as the end of the nineteenth century that international law as the law of global international society came into existence. I am fully aware that this is just a truism. Earlier studies since the 1960s have established this fact beyond any doubt. Even the European international lawyers in the nineteenth century were already aware that *their* international law was a local product, criticizing the universalistic natural law doctrine of their predecessors as unrealistic and unscientific.¹⁷² Yet, even today the local character of pre-twentieth century European international society (“Family of Nations”) and European international law is not fully appreciated. Let us take an example.

International lawyers from the nineteenth century to the twentieth century have repeatedly referred to the “admission” of a certain nation to the “Family of Nations” or “international society.” The subjects of the “admission” to this “family” or “society” were Turkey, Japan, China and other Asian and African nations. Even today, a significant number of writers who should be fully aware of the local character of European international society follow this line of argument.¹⁷³ This argument, however, unconsciously assumes the universalistic position of the Europeans and the Americans since the nineteenth century, and distorts the realities at the time.

Today, international society is composed of nations which cover the entire globe. If one talks about the “admission” of some nation into international society, one is inclined to assume that such a (global) international society has already existed when the “admission” of some nation is in question. Thus one is inclined to think that only a limited number of nations were *exceptionally* outside such international society and that they came to participate in it at a certain time.

However, if seen from a perspective of those living in the nineteenth century, the case was totally different. International society covering the entire globe with international law valid in such a global society did *not* exist until the late nineteenth century.

¹⁷² See n. 96 and accompanying text.

¹⁷³ For example, Sharon Korman dealt with the issue of colonization of the non-European nations in comparison with the issue of conquest between European nations in her recent work, *The Right of Conquest* (Clarendon Press, Oxford, 1996), which was dedicated to the memory of Hedley Bull. As has been repeatedly referred to in this article, Bull was a great British scholar seeking to clarify the process in which European international society became global international society. However, when she discusses the right of conquest in relations between European states and non-European states in Chapter 2, she adopts the title “The Right of Conquest in Relations between European States and ‘Barbarian’ Political Communities”, whereas when she discusses the same right in relations between European states (and the U.S.), she adopts the title “The Right of Conquest in Relations between States *Comprising International Society* (my italics).” It is both symbolic and ironical that a book which was published as late as in 1996 and was dedicated to the memory of Bull still equates European international society with international society *per se*, and fails to add the adjective “European” or “Western” which was needed for precision and from a global perspective.

It came to exist only when the Ottoman Empire, China, Japan and other nations or political entities in other regional orders participated or were coerced to participate in the *European-centered regional international society*, and when the European powers forcefully characterized African political entities in their own terms of international law. These critical events occurred during the nineteenth century and became complete around the end of the nineteenth century, when Africa, the last continent where European powers had been unable to penetrate, was effectively divided by the Europeans, and China, the most persistent agent of the competing universalistic system of Eurocentric ordering of the world, finally acknowledged that European international law and diplomacy, not the Sinocentric tribute system, should be the norms of world ordering covering the entire globe.

Before this period, there was no international society such as is taken for granted today. What most international lawyers have called “international society” or the “Family of Nations” was just a small group of nations composed of European, and at most, European and American nations, whose population constituted less than a quarter of the human species. Before the end of the nineteenth century, there was no international law characterized as the law of international society that the human species have today. What existed during most of modern history was the *coexistence* of European international law, the S’ar, the Sinocentric tributary system and other regional normative systems, all of which had only a limited local validity despite their universalistic claims.

Global international society came to exist as a result of the triumph of the imperial and colonial policies of the Western powers and the submission of non-Western peoples to them. It was a society where the overwhelming majority of human beings were under the system of colonies, protectorates, protected nations, or were formally independent nations but substantially suffering from the consequences of unequal treaties with the imperial powers. European international law played a critical role for creating this unequal international society: In the form of treaties ceding territories or sovereignty to colonizing powers; in the form of treaties of protectorates; or in the form of unequal commercial treaties providing for the consular jurisdiction, unilateral tariff arrangement; as well as in the form of international legal theories providing logic and bases of justification. Together with the globalization of the European international society, European international law became global international law.

In the nineteenth century many Asian and African nations suffered from their own problems. China was at the end of the Ch’ing dynasty, which lasted more than two centuries, and where the practice of bribes, local resistance and uprisings and other social diseases were rampant. Japan was at the end of the Tokugawa shogunate, which lasted more than two and a half centuries. Although reluctantly at first, many Asian intellectuals began to accept a number of ideas and institutions of European origin. International law was one of these things which many Asian leaders and intellectuals accepted rather positively.¹⁷⁴

¹⁷⁴ For example, major founders and leaders of the Meiji government of Japan in the 19th century such as Iwakura Tomomi understood international law as embodying the equality among nations, and sought to make use of it for maintaining the independence of the nation against the imperialistic policy of Western powers. Fukuzawa Yukichi, a leading thinker and educationalist

However, these nations seriously suffered from the consequences of unequal treaties for many years to come, and many Asian and African intellectuals came to be disillusioned by international law. Fukuzawa Yukichi, who first regarded international law highly, later wrote cynically that “[a] hundred volumes of universal law of nations cannot beat several cannons.”¹⁷⁵ In Africa, the ideological function of international law as justification for European colonization was too evident. It can hardly be denied that European international law, like many other ideas and institutions of modern European origin, had not only the positive aspects as many international lawyers have tacitly assumed, but also negative aspects as a companion of the European imperialism and colonialism.¹⁷⁶

Globalization of international law has been, and is, proceeding in the twentieth century. It will certainly continue to proceed in the twenty-first century. Many Asian nations suffering long from the consequences of unequal treaties of commerce succeeded in revising them after long struggles and negotiations with Western nations in the twentieth century. A large number of Asian and African nations once under colonial rule gained independence after World War II, and became full subjects of international law. In this process, they not only criticized the existing international law, but made full use of it. International law was not just a tool of Western hegemony, but provided useful weapons for the liberation of non-Europeans.

For less powerful nations which occupy a majority in international society, European international law certainly provided a more attractive and useful tool to fight against more powerful nations than Sinocentrism or the *sy’ar*, which were more unilateralistically and hierarchically oriented than European international law. It must be emphasized that even after attaining independence, Afro-Asian nations did not seek to reestablish their own traditional regional systems, but accepted the basic structure of international society including international law, which Europeans had created.

Moreover, international law itself has greatly changed its substance during the twentieth century. Like Christianity, Buddhism, Islam, democracy, human rights and other universalizable ideas and value systems, international law has been globalized by changing itself and being gradually accepted by those who were not familiar with it.

Still today, however, there are a certain number of people around the world who do not feel comfortable with international law whose basic tenets are alien to their own cultural and religious traditions. Muslims are a leading example. Some of them still claim that the Islamic law of nations rather than international law of European origin should regulate relations among Muslim nations. Not only Muslims but almost all Asian and African nations, who occupy an overwhelming majority of the world population, have certain reservations to today’s international law partly because of its original tenets and partly because of its inevitable nature as an ideological tool of Western powers.

in Meiji Japan shared a similar understanding and expectation (Onuma, *supra* n. 145, pp. 28-29, 29 n. 18).

¹⁷⁵ Keio gijuku, ed., *4Fukuzawa Yukichi zenshu*, IV (Complete Works of Fukuzawa Yukichi, Iwanami shoten, Tokyo, 1959), p. 637. See also Onuma, *supra* n. 145, pp. 28-29, 29 ns. 17, 18.

¹⁷⁶ See Anghie, *supra* n. 97.

For international law to be truly global in the sense that its legitimacy is voluntarily accepted by peoples all over the world, it must be accepted not only by existing states, i.e., by existing governments, but also by peoples with diverse civilizational backgrounds. Even if a government accepts a certain rule or principles of international law for political reasons, ordinary citizens may still remain frustrated or dissatisfied, and feel victimized. In order to overcome such negative feelings, international law must constantly reorganize and reconceptualize 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.

One of the areas where such efforts are desperately needed is the domain of human rights. I have elsewhere advocated that we need an *intercivilizational* approach to human rights.¹⁷⁷ Some others have advocated for a cross-cultural perspective on human rights.¹⁷⁸ There may be still other conceptual frameworks useful to such efforts. Only when such efforts can achieve certain substantial success, will international law become truly international without the qualification of “Eurocentric” or “Westcentric.” Such will be the day when we, people of the entire globe, can talk of *our* international law not only in the geographical sense but also in the civilizational sense.

¹⁷⁷ Onuma, *supra* n. 16 [*Jinken*]. See also Onuma Yasuaki, “In Quest of Intercivilizational Human Rights,” Daniel Warner, ed., *Human Rights and Humanitarian Issues* (Nijhoff, Hague etc., 1997), pp. 43-78; *id.*, *supra* n. 16 [Toward an Intercivilizational Approach].

¹⁷⁸ Abdullahi An-Na’im, ed., *Human Rights in Cross-Cultural Perspectives* (University of Pennsylvania Press, Philadelphia, 1992).

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