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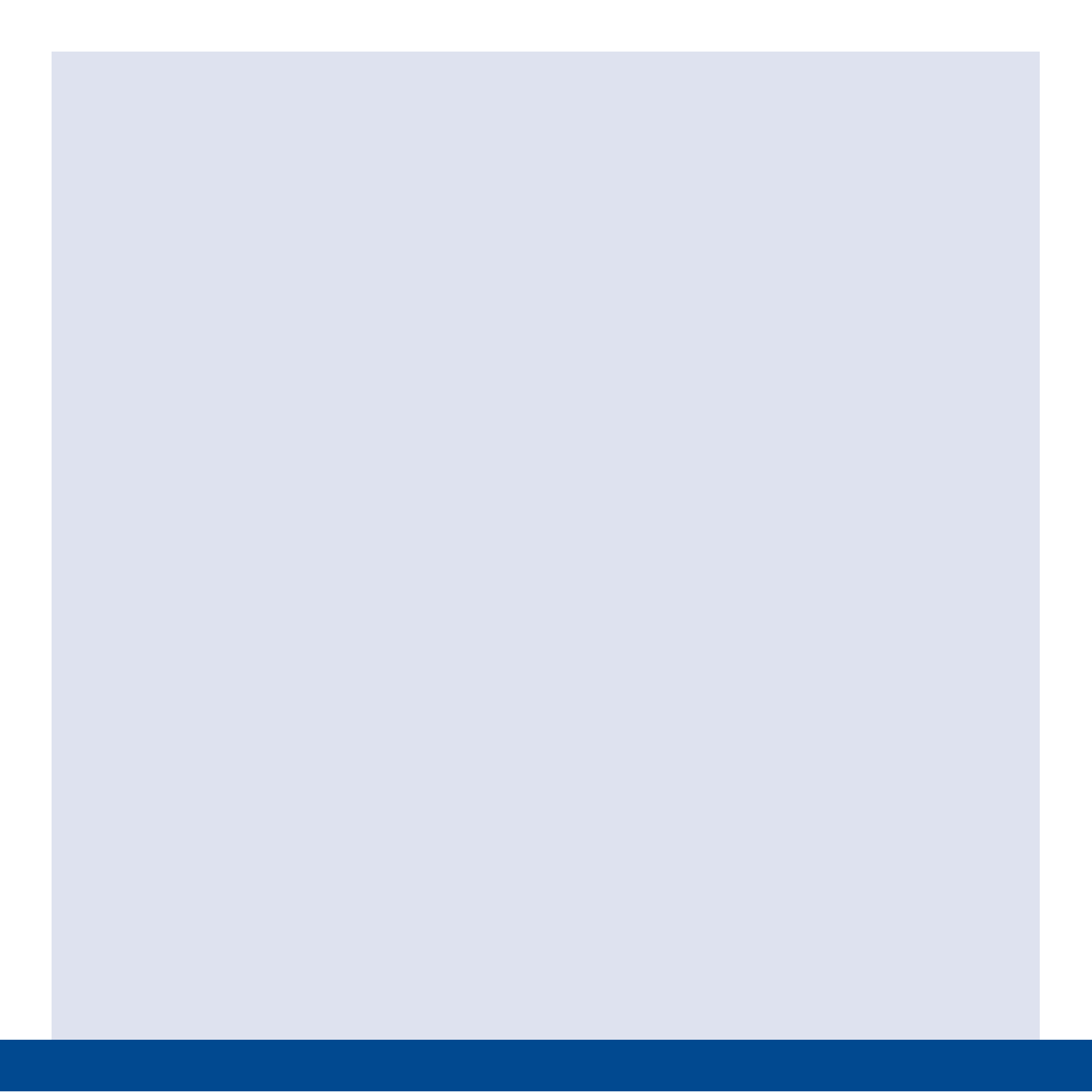
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Prof.dr. H. Owada

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Universiteit Leiden



The encounter of Japan with the community of civilized nations

Oratie uitgesproken door

Prof.dr. H. Owada

bij de aanvaarding van het ambt van hoogleraar op het gebied van
de Betrekkingen tussen Europa en Japan
aan de Universiteit Leiden
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Universiteit Leiden

Introduction

It is a great honour for me to be given an opportunity of addressing such distinguished audience on the solemn occasion of the inauguration of my honorary professorship at this prestigious University of Leiden. I wish to express my deep gratitude to the Rector Magnificus, Dr. Breimer; to the Dean of the Faculty of Arts, Dr. Booij; and to all the others who have contributed so much for my appointment to this honourable position.

Just over a year ago, I had the privilege of addressing on the commemoration of the 150th anniversary of the creation of the University Chair for Japanese Studies at Leiden University. As I said in my commemorative speech on that occasion, the University chair for Japanese Studies was created at this University in 1855 as the first such chair for the academic pursuit of Japanese studies in Europe and in the world. And this fact is no coincidence. After all, it was the Dutch who succeeded in cultivating serious interest in the relations between East Asia and Western Europe through their wide-ranging activities in East Asia, especially the activities of the Dutch East India Company in the 17th and 18th centuries. Thanks to this development the Dutch studies (*rangaku*) in the Tokugawa Japan became an important subject of intellectual pursuit.

It seems fitting to this occasion of my appointment as honorary professor to recall this fact. It was the Dutch ship, *De Liefde* (Charity), which reached the shores of Japan on 19 April 1600, that marked the initiation of official contacts between Japan and Holland. Jan Joosten Lodensteijn, a member of the crew and scion of a prominent Delft family, later served the Shogun as his adviser on foreign affairs. This effectively opened the way for the subsequent development of special relations that the Dutch came to enjoy for the next 250 years with Japan. *Rangaku* started

to flourish in spite of the official policy of the Shogunate since 1639 to close the country to the outside world (*sakoku*). Scholars such as Aoki Konyo (1698-1769), Maeno Ryotaku (1723-1803), Sugita Genpaku (1733-1817) and Otsuki Gentaku (1757-1827) were the pioneers of the Dutch studies in this new development on the Japanese side.

Today, however, I do not propose to trace the history of this remarkable development in the “Dutch studies” in Japan during the Tokugawa period. My intention in this inaugural lecture is to build upon the theme I tried to present in my speech last year, and further to develop my reflection on the civilizational significance of Japan’s encounter with the international community, which in those days was called “the Community of Civilized Nations”, in the context of historical evolution of international law in Europe. I have chosen this subject, first of all because I believe that the history of the encounter of Japan with this “Community of Civilized Nations”, and her reception of the concept of the “Law of Nations” as the code of her conduct in this community, forms a fascinating intellectual history. Its significance to my mind goes further, however. Not only does it offer an interesting sidelight to the history of Japan of the period for those who are engaged in Japanese studies; it also provides a rich material for reflection for those who are engaged in the study of the fundamental character of international law.

Japan was brought into the community of nations as its new member just over one hundred and odd years ago, in very much the same way as the newly born States of today have been in recent years. She, however, in contrast to her brethren in more recent years, appears to have followed a course widely different from the one that the new members of today would appear to have been pursuing. Japan’s performance is seen, by

and large, to be what might have been expected of a good pupil eager to follow, without questioning, the teaching of his mentor. This picture seems to make a marked contrast with what has taken place in the post World War II era, where many newly independent States of Asia and Africa very often questioned the applicability, or even the validity, of what they perceived as the “Western international law”. Is this picture of Japan accurate? If it is accurate, why has it been so with Japan? Or is this picture of Japan more apparent than real? If that is the case, what is the real picture? An attempt to answer these questions requires an insight into the ramifications of history surrounding Japan at the time of her admission into the international community in the second half of the 19th century, as well as an analysis of the perception of Europe in those days about the “Community of Civilized Nations”, a concept which provided the theoretical basis for the applicability of the “law of nations” to states lying outside the geographical/cultural scope of Europe.

I do not claim to be able to give a complete answer to these questions in this short presentation. What I modestly hope to attempt here is to share with you some aspects of this experience of Japan and to reflect upon their possible relevance to one of the fundamental issues of contemporary international law - the issue of “universal applicability” of international law as the law of the international community.

The Concept of the “Community of Nations” in the 19th Century

In the modern history of Europe, it used to be customary for many years to perceive international law as the “law of European nations”.

It may not be possible to trace with accuracy the precise genesis of this perception back to its original source, but it

would seem less difficult to identify some elements in the evolution of the concept that led scholars to this perception of the law of nations. It essentially emanates from the idea that the “law of nations is a product of the cultural life and the legal conscience of the nations of European civilization”.¹

In my view, there seem to lie behind this assertion two intertwined elements that fostered such perception. One is the conception of the law, developed theoretically as a doctrine born in the tradition of Christian theology, represented by such names as Francisco de Vitoria, Suarez and especially Hugo Grotius, which was rooted in the concept of the *jus naturale* of Christian origin. The other is the concept of the law, developed historically as a doctrine nurtured in the expansionist milieu of the 19th century Europe, which was founded on the notion of the “community of European nations sharing a common civilization” of Judo-Christian faith.

An illustration of the first element can be found already in the doctrine developed by Francisco Vitoria (1480-1546). Earlier, Pope Innocent IV (1243-1254), who is described as “the greatest lawyer that ever sat upon the chair of St. Peter”² because of the influence he had on his jurisprudential successors like Francisco de Vitoria and Hugo Grotius,³ claimed that the Pope, as the vicar of Jesus Christ, “can grant indulgences to those who invade the Holy Land for the purpose of recapturing it although the Saracens possess it . . . [for] they possess it illegally”.⁴ While inheriting this legacy of Christian theology, the Spanish theologian, Francisco de Vitoria, tried to theorize the Spanish conquest of the Americas against the alleged rights of the inhabitants of the New World on a broader basis of natural law.⁵ He tried to justify the Spanish action by taking the position that “the issue was less one of faith and more one of protecting certain natural rights [of the Spaniards]”.⁶ However, Vitoria’s acceptance of the “natural rights” of the Amerindians

is to be regarded as being based not only on “Europe’s concern to define the rights of all with whom it came into contact in legal terms” but also on “its unchanging demand that the basic elements of what later became known as a standard of ‘civilization’ be enforced”.⁷ In this sense, I submit that Vitoria is to be regarded as a forerunner of the protagonist for natural rights within the legacy of Christian Europe.

Hugo Grotius, who is universally regarded as the “Father of the Law of Nations” for his contribution to the construction of the modern law of nations, based on the law of nature through his systematic treatment of the law of war, also observes the following in his chef d’oeuvre, *De Jure Belli ac Pacis*:

*“In two ways men are wont to prove that something is according to the law of nature . . . Proof a priori consists in demonstrating the necessary agreement or disagreement, of anything with a rational and social nature . . . Proof a posteriori, in concluding, if not with absolute assurance, at least with every probability, that that is according to the law of nature which is believed to be such among all nations, or among all those that are more advanced in civilization . . .”*⁸

Then he continues:

*“Not without reason did I of speak of the nations ‘more advanced in civilization’; for as Porphyry rightly observes, ‘some nations have become savage and inhuman and from them it is by no means necessary that a fair judges draw a conclusion unfavourable to human nature’”*⁹

It is my submission that in these teachings of the classical school of international law one can discern a seed of the process in which the first element of the doctrine of *jus naturale* in the context of Christian theology would develop into a theorization of a doctrine which led to the second element of the Eurocentric view of the international

community at the time of an expansionist Europe. I suggest that a link between the two in this context is already visible in Montesquieu, the philosopher of the Enlightenment, when he wrote in his “*De l’Esprit des Lois*” (1748) the following on the law of nations:

*“All nations have the law of nations; and even the Iroquois, who eat their prisoners, have one. They send and receive embassies; they know the laws of war and peace: the trouble is that their law of nations is not founded on true principles.”*¹⁰

Interestingly, it is he also who found a distinction between the “savage” and the “barbarian”, as the following passage demonstrates:

*“One difference between savage peoples and barbarian peoples is that the former are small scattered nations, which, for certain particular reasons, cannot unite, whereas barbarians are ordinarily small nations that can unite together . . . Many things govern men: climate, religion, laws, the maxims of the government, examples of past things, mores, and manners; a general spirit is formed as a result. To the extent that, in each nation, one of these causes acts more forcefully, the others yield to it. Nature and climate almost alone dominate savages; manners govern the Chinese; laws tyrannize Japan . . .”*¹¹

It would be permissible to suggest that from this position of Montesquieu on the distinction between the savage and the barbarian as distinguished from the civilized, it was only one small step to reach the thesis advanced by James Lorimer, a well-known authority of international law of the 19th century. He made the famous distinction between “civilized humanity”, “barbarous humanity” and “savage humanity” and questioned the applicability of the “law of nations” to the different groups according to this distinction.

He opined as follows:

“As a political phenomenon, humanity, in its present condition, divides itself into three concentric zones or spheres - that of civilized humanity, that of barbarous humanity and that of savage humanity. To these . . . belong, of right, at the hands of civilized nations, three stages of recognition - plenary political recognition, partial political recognition, and natural or mere human recognition . . . The sphere of plenary political recognition extends to all the existing States of Europe, with their colonial dependencies, in so far as these are peopled by persons of European birth or descent; and to the States of North and South America which have vindicated their independence of the European States of which they were colonies.

The sphere of partial recognition extends to Turkey in Europe and in Asia, and to the old historical States of Asia which have not become European dependencies - viz. to Persia and the other separate States of Central Asia, to China, Siam, and Japan. The sphere of natural, or mere human recognition, extends to the residue of mankind; though here we ought, perhaps, to distinguish between the progressive and non-progressive races. It is with the first of these spheres alone that the international jurist has directly to deal . . . He is not bound to apply the positive laws of nations to savages, or even to barbarians, as such; but he is bound to ascertain the points at which, and the direction in which, barbarians or savages come within the scope of partial recognition.”¹²

When examined in this way, it becomes clear that the history of the European perception on the law of nations contains a continuum in thinking from the concept of the law of nations based on the law of nature as theorized by Vitoria and Grotius to the ideology of the law of nations as “the law of European civilized nations” as advanced by Lorimer. This ideology served

the purpose of providing a theoretical basis for the call of the “civilizing mission” of Europe (e.g. “la mission civilisatrice” advocated by Victor Hugo for France) as a justification for the expansion of Europe to Asia and Africa especially of the 19th century, and became particularly conspicuous in the writings of theorists of international law of the period.

In the same vein, Henry Wheaton, well-known publicist of international law of the period, based his theory of international law on the idea that international law was founded on the principles of Christian morality, as reciprocally practised between the Christian States of Europe. He put forward this perception in the following thesis:

“progress of civilization, founded on Christianity, has gradually conducted us to observe a law analogous to this in our intercourse with all the nations of the globe, whatever may be their religious faith, and without reciprocity on their part”.¹³ In Wheaton’s view, in other words, “public [international] law, with slight exceptions, has always been, and still is, limited to the civilized and Christian people of Europe or to those of European origin”.¹⁴

It is important to note, however, that this perception of “common European civilization” at the basis of the law of nations contained an element of practical implication for the future application of the system to a broader world. While the law of nations was limited to the “civilized Christian people of Europe”, it was recognized that there could be a necessity to regulate the intercourse between the Europeans and the people outside European civilization, as they came in contact with each other. This indeed was the theoretical basis for the “system of extraterritoriality” that came to be practiced by European nations in their dealing with nations outside the orbit of European civilization.

By comparison, John Westlake, Whewell Professor of International Law at Cambridge in the second half of the 19th century, while sharing this predominant view of the period that full recognition before international law and membership in civilized international society had to be limited to the society of states having European civilization, made the following point: “Throughout Europe and America, if we except Turkey, habits, occupations and ideas are very similar . . . The same arts and sciences are taught and pursued, the same avocations and interests are protected by similar laws, civil and criminal, the administration of which is directed by a similar sense of justice . . .

[In contrast] Turkey, Persia, China and Japan, Siam and some other countries have civilizations differing from the European . . . The Europeans or Americans in them form class apart, and would not feel safe under the local administration of justice, which, even when they assured of its integrity, could not have the machinery necessary for giving adequate protection to the unfamiliar interests arising out of a foreign civilization.”¹⁵ In saying this, Westlake makes it clear that “we have nothing here to do with the mental or moral characters which distinguish the civilized from the uncivilized individual, nor even with the domestic or social habits”.¹⁶ For him, what was at stake in this context was the question of “the prime necessity [of] a government under the protection of which [Europeans] [might] carry on the complex life to which they [had] been accustomed in their homes”.¹⁷ And it was this test that Japan would come to face in the crucial years of the second half of the 19th century, when the fateful encounter with this “Community of Civilized Nations” fell upon Japan.

The Encounter of Japan with the “Community of Civilized Nations”

It should not be assumed that Tokugawa Japan during the period of sakoku was completely cut off from the movements of the outside world. Through the restricted contacts with the Dutch at Nagasaki, the advanced knowledge of the West did flow into Japan. Nevertheless, these contacts were almost exclusively limited to the fields of science and technology, such as medicine, natural science and weaponry, and did not extend to the fields relating to social and cultural life of the people, such as humanities or law. Also, contacts were restricted to purely commercial trade, and therefore did not develop into any official relationship between the Japanese authorities and the Dutch authorities. Dutch traders in Japan, confined to the tiny island of Deshima in the port of Nagasaki, were subjected to strict regulations of conduct imposed upon them by the Japanese authorities, and no question was raised about their treatment as aliens in the light of the standard of treatment commonly practised by the European nations in their mutual intercourse. By contrast, after some futile attempts by various maritime powers to open Japan to the intercourse with nations of the world¹⁸, when Commodore Matthew Perry of the United States arrived in Japan in 1853 with four “Black Ships” to present President Fillmore’s letter to the Japanese “Emperor”, his interest, in spite of what was stated in the President’s letter, was as much political as economic.¹⁹

Perry’s basic position in carrying out his instructions was “to demand as a right, and not solicit as a favour, those acts of courtesy which are due from one civilized nation to another”, “to be received in a manner honourable to [his] Government”, and “to be treated on a footing of equality, thus destroying the presumed claim hitherto held forth by China and Japan, that all presents to the respective emperors have been tendered as

tribute to superior powers”. Thus, the first exposure of Japan to the “Community of Civilized Nations”, and together with it to the totally alien concept of “law of nations” came into being. When Commodore Perry anchored off the shores of Uraga, only a few miles away from Edo, the capital of the Shogunate, his demarche triggered a heated reaction in Tokugawa Japan, dividing the camps of daimyo (feudal lords) between those who advocated for the policy of *j i* (expelling the barbarians) and those in favour of *kaikoku* (opening the country). Paradoxically, however, this configuration of alliances was in reality as much based on political manoeuvres as on ideological differences, against the background of the declining power of the Shogunate and the strategic consideration of gaining support among the daimyo in the ensuing battle for the succession of power. To prove this point, what started as a movement for *sonno-j i* (revering the Emperor cum expelling barbarians) against *sabaku-kaikoku* (supporting the Shogunate cum opening the country) ended up by turning into a movement for bringing down the Shogunate under the banner of *sonno-kaikoku* (revering the Emperor cum opening the country). In fact, apart from a series of xenophobic incidents provoked by nationalistic extremists, the whole country came to be eventually consolidated in support of the policy for opening the country, while rejecting the century-old ancestral precept of the Tokugawa Shogunate to keep the country immune from the evil influences of the outside world - a policy which originated in 1639.

It was in fact the defeat of China in the Opium War (1840-1842) which forced China to open five ports, including Shanghai, to Western powers that alarmed the people in Japan. Nevertheless, when the news of this defeat was brought to the officials of the Shogunate by the Dutch, the reaction of the Shogunate was one of indecision. King Willem II delivered a State Note to the

Shogun on 15 February 1844, in which the King advised that “if your happy land is to be spared of devastation of the war, laws strictly forbidding foreigners [to enter into intercourse] should be relaxed”, but the reply of the Shogunate was that they did not intend to change their “ancient law handed down over the generations”.

Small wonder, therefore, that the arrival of Commodore Perry at Uraga created a big commotion not only within the Government but throughout the country.

Tokugawa Nariaki (1800-1860), former Lord of Mito (one of the three families closest in blood to the Shogun) and a fervent advocate of the *j i* faction, sent a letter of urgent warning to Bakufu (14 August 1853), arguing that “the final and most urgent of our tasks is for the Bakufu to make its choice between peace and war, and having determined its policy, to pursue it unwaveringly thereafter” and he urged that the Shogun choose the latter course of action - war to expel the Western barbarians.

He advised in effect as follows:

“[If] we put our trust in peace, even though things may seem tranquil for a time, the morale of the country will be greatly lowered and we will come in the end to complete collapse. This has been amply demonstrated in the history of China . . . Though Rangaku-sha (scholars of Dutch studies in Japan) may argue secretly that world conditions are much changed from what they were . . . [and that] our best course would be to communicate with foreign countries and open an extensive trade, yet to my mind if the people of Japan stand firmly united, if we complete our military preparations and return to the state of society that existed before the middle ages, then we will even be able to go out against foreign countries and spread abroad our fame and prestige . . .”.

Against this emotional outburst of nationalistic sentiments on the part of the sonno-jōi faction, some leaders within the Shogunate, including the Tairō (Prime Minister) of the Shogunate Government, Ii Naosuke, were much more sober in their assessment of the international situation surrounding Japan, as described in the State Note of King Willem II. Thus Ii Naosuke stated to the Shogun (1 October 1853) as follows: “Careful consideration of conditions [of the outside world] as they are today leads me to believe that despite the constant differences and debates into which men of patriotism and foresight have been led in recent years by their perception of the danger of foreign aggression, it is impossible in the crisis we now face to ensure the safety and tranquillity of our country merely by an insistence on the seclusion laws as we did in former times . . . There is a saying that when one is besieged in a castle, to raise the drawbridge is to imprison oneself and make it impossible to hold out indefinitely; and again that when opposing forces face each other across a river, victory is obtained by those who cross the river and attack . . . Even though the Shogun’s ancestors set up seclusion laws, they left the Dutch and the Chinese to act as a bridge [to the outside world]. Might not this bridge now be of advantage to us in handling foreign affairs, providing us with the means whereby we may for a time avert the outbreak of hostilities and then, after some time has elapsed, gain a complete victory?”

Eventually this view prevailed, though at the cost of the life of Ii Naosuke, who was assassinated. In 1854, the Treaty of Peace and Amity with the United States was concluded by the Shogunate Government, thus putting an end to the 250 year history of self-imposed seclusion of Japan from the outside world.

While Perry, a soldier, forced Japan to open its door to the

outside world with a show of arms, it was Harris, the first Consul-General in Japan, who gave “in-field instructions” to the Japanese authorities on the “law of nations” in the course of the ensuing negotiations for the conclusion of a more full-fledged treaty - the Treaty of Amity and Commerce of 1858 with the Commissioners of the Shogunate.

Again and again Harris invoked the “law of nations” in his dealings with Japanese officials. In his own diary, he records the following:

*“I [added] that the proposition to shut out the Minister [i.e., the head of the diplomatic mission] from residing at Edo [i.e., the site of the Shogunate], or wherever he pleased, was highly offensive . . . and that the Minister and the Consuls must have all the rights enjoyed by such person under the laws of nations; that I asked nothing more for them than those rights, and that I could not take any less.”*²⁰ (Italics supplied.)

According to his diary, he pursued this point further as follows: *“I told [the Commissioners] that it was useless to proceed with the further consideration of the Treaty until they would consent to grant the Minister the rights he enjoyed under the laws of nations.”*²¹ (Italics supplied.)

This first encounter with the new concept of the law of nations was a great surprise to the Bakufu authorities. The concept was totally alien and novel to them. They were told that the whole concept of the law of nations was the essential prerequisite for a satisfactory conduct of intercourse with these barbarian Westerners. The outside world consisted of a number of nations like Japan, so it was said, but they were organized to form a “community of civilized nations” where certain basic rules of conduct would apply. The community of nations could accept only those nations which were civilized enough and prepared to practice this code of conduct in their mutual

intercourse. Thus told, they decided that the study and understanding of this “law of nations” was a matter of immediate urgency for Japan.

As the Japanese looked for a clue to their understanding of this alien concept of the law of nations, they found a Chinese translation of Wheaton’s book, *Elements of International Law*, which had just been published in China in 1864. The translation was made by the Reverend W.A.P. Martin, an American missionary, assisted by a commission of Chinese scholars appointed by Prince Kung, Minister of Foreign Affairs.²² Intellectual élites of the day, eager to gain access to this new concept of the law of nations, thus devoured the book in its Chinese translation.²³

This attitude of the Japanese authorities would appear to make a remarkable contrast with the attitude of the Chinese authorities during the same period. China first became aware of international law already during the early years of the Ch’ing dynasty (1644-1912). Representatives of the Dutch East India Company had met with the Chinese officials between 1662 and 1690 and frequently referred to the “law of all nations” and “the custom of all princes” in the context of their discussion on such principles as the immunity of envoys from detention or arrest.²⁴ It is also a historical fact that the Ch’ing dynasty China negotiated with the Czarist Russia to conclude China’s first treaty with a Western power - the Treaty of Nerchinsk - in 1689 to settle the border issue between the two States.²⁵

Nevertheless, in spite of the pressure exerted by some Western powers on China to abandon her isolation and to establish political and commercial intercourse on the basis of sovereign equality, China continued to insist on her position that Western emissaries conform to the Chinese protocol based on the tributary system. As one scholar put it, “it was difficult for the conservative Chinese élite to understand and accept ideas

completely alien to the traditional East Asian system of conducting foreign relations”.²⁶

What I wish to emphasize with this process is that these Japanese officials paid particular attention to the problem of the nature and sources of international law. In their desperate struggle to grasp this novel concept of the law of nations, these officials tried to understand the whole concept within the context of their Confucian culture. Upon the strength of their familiarity with the philosophy of neo-classical Zhu Zi school of Confucianism, they eventually came up with the idea that the concept of the law of nations, defined as a canon of rules governing the relations between States, must be somewhat analogous to their own Confucian metaphysical concept of the “principles of the universe” (*tendo*), which were the basic principles governing the human relations in society. Thus, these Japanese officials came to the conclusion that the Western concept of the law of nations must consist of some high moral precepts of universal justice applicable to the intercourse among States in very much the same way as the high moral principles of Confucian *tendo* were applicable to the human relations between individuals in society. Thus they came to refer to this concept of the law of nations as “*kodo*” (public principles), which was reminiscent of the Confucian principles of “*tendo*”, i.e., principles of the universe.²⁷ It is my submission that what is important with this development for our purposes today is not so much the point that Harris insisted on invoking the “law of nations” in his negotiations, as the point that it marked the beginning of the process in which the Japanese authorities came to absorb the precepts of this law of nations as the universal principle of justice applicable to the East as well as to the West, which would make it possible for Japan to accept the precepts of this

“community of civilized nations”. It is also to be noted that it marked the beginning of the process in which the West, as represented initially by the United States but followed immediately by major European powers such as Great Britain, France, Russia, and the Netherlands, came to accept Japan as a member of this essentially European régime of the “Community of Civilized Nations”. Treaties similar to the Harris Treaty of 1858 were concluded with these powers in the same year.

As soon as the Imperial Government of the Emperor was established following the return of political power by the Shogunate to the Emperor in Kyoto at the beginning of 1868, the new Imperial Government immediately issued various proclamations and decrees, in which the Government made its firm commitment to the “law of nations”. Already on 8 February of the same year, the Imperial Proclamation on Foreign Policy was issued, in which we find the following declaration: “Our foreign intercourse shall be conducted henceforth in conformity with the public law of the universe (udai no koho)”. Only two months later, on 6 April 1868, Emperor Meiji issued the “Five Articles of Oath” (the “Charter Oath”) as the basic policy pledge of the new Government to the nation. Its fourth article declared the following:

“The evil customs of the past shall be broken off and everything henceforth shall be based upon the ‘public principles of the universe’ (tenchi no kodo)”.

Thus the new Meiji Government, which took over the power from the Shogunate and set on the course of modernization, thought it appropriate to invoke the “public law of nations” or the “principles of the universe” as the guiding principle of the Government and appealed to the Japanese public at large to abide by this precept.

It was only natural under these circumstances that a vast majority of intellectuals of the day viewed the “law of nations”

as being synonymous with the European civilization operating on the principles that governed the “Community of Civilized Nations”. What is most significant in this respect is that they based their understanding of this concept on the premise that it related to some universal principles of justice which ran in common through both the Occidental system and the Oriental system. The law of nations was accepted by them on this metaphysical level, with its natural law aspect as its predominant feature and with their understanding that it was synonymous with the neo-classical Confucian concept of the principle of heaven.²⁸

In fact, some of these intellectuals even took the more utopian view of this concept and regarded the law of nations as nothing else than an embodiment of natural justice and reason. For them, therefore the law of nations should be the instrument to serve as the shield of the weak and the sword for equality; it would protect a nascent, weak Japan from the hands of strong Western nations. Thus, there was a virtual consensus among the leading élites of the country that the law of nations was the essential ticket for the admission of Japan into the “Community of Civilized Nations” consisting of the European Powers.

On a superficial level, what came to be known as the “Rekumeikan period” was a manifestation of this trend of the time. Rekumeikan is the name of a social club created by the Meiji Government for leading élites of society as a place for emulating everything European, including western clothing, western culture, and western life-style such as social dancing. However, much more difficult was the creation of social and juridical institutions.

As Westlake incisively suggested, however, the opening of the country to foreign nations did not make Japan automatically acceptable as an equal member of this community. Indeed,

precisely for this reason a series of treaties, concluded in the early stage of the opening of the country starting in the Ansei period (1854-1859) by the Shogunate with a number of Western Powers (the Ansei Treaties), contained stipulations for the régime of extraterritoriality which reserved the treatment of foreign residents in Japan to the consular jurisdiction of the Treaty Powers. In their eyes, Japan at that time still belonged to the group of nations where “the Europeans [did] not feel safe under the local administration of Justice”.

Against this background, the most urgent policy objective of the Meiji Government was to get rid of the inequalities contained in these “Ansei Treaties”, in particular the régime of extraterritoriality. The Treaty Powers on their part, however, demanded as the prerequisite for such revision of these treaties the modernization of the legal system of Japan in line with those of the European countries. In this situation, the new Government had to grapple with the problem of transforming social and political organization of the country on the basis of principles of the modern state system of the European nations which constituted the “Community of Civilized Nations”. This called for the restructuring of the legal system. The urgency required did not allow Japan to wait for the law to grow spontaneously in response to the needs as they would arise through the transformation of old Japan into a modern society. Under these circumstances the Government resorted to an extreme step of introducing the legislation of France based on the Napoleonic codes, regarded as the most modern in Europe at that time, as the model for the Japanese legal system. At the centre of this exercise for drafting the civil code were such people as Mitsukuri Rinsho (1846-1897), who had pursued the Dutch studies, which in those days were considered to be most important for the study of European culture. The draft civil code consisting of 1,820 articles was completed in 1878.

While it was not adopted in the form it was originally proposed as it was thought to be too much a reproduction of the French Civil Code, it came to constitute the essential framework for the new legal system of Japan.

The Experience in the Revision of Unequal Treaties and Its Aftermath

At the same time as the new Imperial Government proclaimed its commitment to the continued obligations under those treaties upon its assumption of power in 1868, it also took steps immediately to notify the representatives of the Treaty Powers as early as the beginning of 1869 of its desire to revise certain treaty provisions.

In fact, when the Meiji Government initiated a preparatory study of the problem, the Government came to realize the essentially “unequal” character of the treaties, in particular, in relation to three major issues - (a) the régime of extraterritoriality of jurisdiction (b) the unilateral nature of the conventional tariffs and (c) the unilateral unconditional character of the most-favoured-nation clause. All of these were perceived to place Japan on an unequal footing with the Western contracting parties to the treaties concerned and to constitute an infringement of the sovereignty of Japan. However, the Meiji leaders soon had to realize that the road was by no means an easy one. For this purpose, an official mission of the Japanese Government led by Iwakura Tomomi was sent to the Treaty Powers in 1871 to put forward the views and demands of the Government with respect to the proposed revision of the treaties. Nonetheless, the attitude of the Treaty Powers to the Iwakura Embassy turned out to be a disappointing one. And it was the disheartening experience of this mission that dealt a hard blow to the confidence the Japanese side had in the justice of the “law of nations.”

By far the most shattering experience of this mission came when the Iwakura Embassy visited Prussia and met Chancellor Otto von Bismarck. He had this to say to the mission:

“In today’s world, it is said that every country interacts with other States on the basis of friendship, harmony, and courtesy (reigi). However, this is merely a superficial lip service, behind which lies actual practice, that is, insults to which the strong subject the weak, and scorn in which the big hold the small. When I was a child, my Prussia was poor and weak...

[I perceived that] the so-called law of all nations argued for the profit of great powers. If the law of nations contained in it an advantage for them, the powerful would apply the law of nations to the letter, but when it lacked attraction, the law of nations was jettisoned, and a military might employed, regardless of the tactics.”

By the time Iwakura Tomomi returned from his mission to the West in September 1879, he himself was a different person from the one who, as a senior member of the new Imperial Cabinet of Emperor Meiji, had made the recommendation in 1869 to the Cabinet that “Japan should base her intercourse with Western countries on reason and justice and good faith”. What had been the minority view on the law of nations as being the tool of the strong was to become the majority opinion within the members of the mission.

The most debilitating experience that would have a long lasting effect, however, came with the Japanese House Tax case - an arbitration case which Japan herself brought before the Permanent Court of Arbitration in 1903.

The positive stance of Meiji Japan towards embracing the law of nations had been manifested in her forthcoming positive attitude towards international arbitration. Starting with the Maria Luz case of 1873, in which the Meiji Government had for the first time brought an international dispute before an

international arbitration after only five years of its existence, Japan had been a party to as many as four arbitration cases in the short span of twenty-five years between 1877 and 1902. It is believed that this is a record which no other country of the period could equal. While each of these cases had a different background arising under different circumstances, it can safely be said that this is an evidence that shows the degree of positive attitude of esteem in which Japan held international law in those days.

The dispute in the Japanese House Tax case involved the interpretation and application of some provisions which came to be incorporated in the revised treaties of commerce and navigation that the Meiji Government had just succeeded in concluding with the former Treaty Powers after arduous protracted negotiations extending over 20 years (with Great Britain in 1894, and with France and Germany in 1896). The purpose of the revision had been to eliminate the elements of inequality contained in the old “unequal treaties” that had been imposed upon the Shogunate Government in the 1850s. The provisions in issue in the new revised treaties concerned the problem of abolition of the régime of extraterritoriality that had been granted under the old treaties to the resident nationals of the Treaty Powers with respect to taxation. The provisions in question, acknowledging the existing status quo in relation to the real property that had been leased in perpetuity to the foreigners under the old régime, stipulated that “existing leases in perpetuity under which real property is now held in the Settlements shall be confirmed, and no conditions of any kind other than those contained in the existing leases shall be imposed in respect of such property”.²⁹ The dispute arose when the Government of Japan claimed that under the new régime of the revised treaty the land only was exempt from the payment of imposts and other charges, and

sought to levy tax on the houses built on the land leased in perpetuity to these foreigners in the Settlements. Against this, the three Powers argued that by virtue of the provisions in the article in question, not only the land leased in perpetuity was exempt from the tax, but buildings constructed on such land, continued to enjoy the same exemption.

The Permanent Court of Arbitration, composed of three arbitrators from France, Japan and Norway, came out with an award in favour of the three European Powers. The decision was based primarily on a technical ground of law involving the interpretation of the provisions in question.

While this is not the proper place to engage in the detailed analysis of the arguments of both parties on the merits, the central issue in dispute would boil down to the following: Should the special régime of tax exemption for real property under the new revised treaties, recognized by the Meiji Government as *lex specialis* to the *lex generalis* under which the régime of extraterritoriality was abolished, apply only to the land in the foreign Settlements or also to the houses erected upon it? Thus formulated, the answer should be found through ascertaining the object and purpose of the new revised treaties, and the intention of the parties as seen from the natural and ordinary meaning of the provisions at issue. The Court took an approach to look for the answer to the question put to it through in particular two elements: i.e., first, the intention of the parties in creating this exemption at the time of the old treaties, and second, the subsequent practice of the parties during the period of the old treaties. The Court in its relevant parts of the award stated as follows: “[I]n order to estimate the nature and extent of the engagements entered into on both sides by the lease in perpetuity, it is necessary to refer to various arrangements and Conventions arrived at between the Japanese authorities and

the Representatives of various Powers, when the old Treaties were in force: From these instruments and from the stipulations inserted in the leases, it appears:

That foreigners not being permitted, according to the principles of Japanese law, to acquire ownership of land situated in that country, the Government have leased land to them in perpetuity;

That it was agreed in principle the foreign settlements should remain outside the municipal system of Japan . . .;

It would be easy to account for the care taken in drawing up the said instruments with a view of defining the obligations of every kind incumbent upon foreigners towards the Japanese Government, if it was understood that . . . they would, as lessees, only have to pay the imports and charges expressly mentioned in the said leases;

The land was leased for building purposes, which is indicated both by the situation of the ground and by the nature of the measures taken for its management by the Japanese Government;

It must be admitted that the circumstances thus recorded constitute arguments against the plea that this ground and buildings form entirely separate objects in the relations between the parties and from the fiscal point of view;

It is unquestionable that, in accordance with a practice which has not varied and which has existed for a long series of years, not only the land in question, but also the buildings erected on the land, have been exempt from all imports, taxes, charges, contributions or conditions whatsoever, other than those expressly stipulated in the leases in perpetuity;

The Government of Japan maintains . . . that this state of things, as well as the fiscal immunity enjoyed in general by foreigners in the country, was only due to the circumstances that the Consular Tribunals refused to give the necessary

sanction to the fiscal laws of the country; However, this claim is devoid of proof, and it is not even alleged that the Japanese Government ever made reservations [on this point].”

In a nutshell, the Court held that the “unequal” favoured treatment of foreigners under the old Ansei Treaties continued to exist in relation both to the house tax and the land tax, on the ground inter alia, that the institution of tax exemption in the foreign Settlements under the old treaties was created with the intention of treating the Settlements separate from the municipal system of Japan and that it was not proven by the subsequent practices with regard to the régime of extraterritoriality that this arrangement under the old treaties was intended to apply only to the land but not to the buildings erected on it.

Whatever the cogency of the reasoning of the Court may be on legal grounds, it is easy to see how upset and disillusioned people in Japan were at this negative outcome of the award. This was so in particular because the nature of the dispute was directly related to the most emotional issue of the extraterritoriality régime contained in the “unequal treaties”. Their disappointment was all the greater because of their earlier conviction that the justice of the case was on their side. Indeed, they had not even dreamed of the possibility that their case could have been somehow flawed from a purely legal point of view. Under such circumstances, the loss of that case by Japan had two major repercussions, both of which were going to exert an immeasurable impact on the subsequent course of Japan.

The first is that the award kindled the suspicion that the West after all might not really be interested in treating Japan on a fair and equal footing basis as a member of the “community

of civilized nations”. A further suspicion grew that the West might well bear some racial prejudice against Japan and might be working against the just interests of Japan.

The second significant repercussion of this case, which to my mind is no less important, is that this experience taught a lesson to the Japanese - at least to those Japanese who were in a position to apply international law. The lesson they learnt was that international law was not so much a body of principles based on natural justice which the East could share in common with the West, as a bunch of technical rules to be manipulated. They might work to your advantage if you were sufficiently skilful, or they might work to your disadvantage if you were not skilful. The disappointment and the disillusionment on the part of many at the loss of the case was proportionately the stronger because of their initial conviction in the justice of their case. There appeared a gradual but discernible trend towards an erosion in their faith in international law, which subsequently came to lead Japan into her tragic destiny.

The Encounter of Civilizations and Their Interaction

In the context of the history of contacts expanding over centuries, Europe and East Asia have shared a tumultuous past. However, the greatest historical evolution that changed the fate of a large part of East Asia, which has had until today a lasting imprint upon the relationship between Europe and East Asia came about in the form of colonial domination, to which many of the East Asian nations fell victim. Thus the Philippines became a colony of the Spaniards, Indonesia was also colonized by the Dutch, Malaya and Burma came under the British rule and Indochina fell under the French domination. China also became a target of colonial appetite. In this situation Japan also was exposed to the impact of this aggressive advance of European powers.

The experience of Japan, nonetheless, was very different from those of many fellow East Asian nations. When in the latter half of the 19th century the real impact fell upon Japan with the demand for the opening of Japan to the world, Japan decided to engage in systematic efforts to turn this challenge into an opportunity, through her assiduous learning and digestion of things European, in order to assert her place within this “Community of Civilized Nations”. It is no doubt true that at a time when Japan was practically the only country outside Europe³⁰ to have been exposed to this process of admission into this community, it was unthinkable to those Japanese who handled this process to question and challenge the validity of the proposition that Japan could be part of the “Community of Civilized Nations” only through the process of assimilation to European civilization. In such an environment, it became imperative for Japan to pursue studies of European civilization and introduce it into her traditional social milieu. This conscious effort was carried out on a truly amazing scale in such wide-ranging fields as the system of government, economy, law, military affairs, and science and technology, and further extending to arts, literature, food, clothing and housing. In those days in Japan, the term “modernization” thus became synonymous with “Europeanization”. The footprints left by Europe in Japan during this period have indeed been indelible. Nevertheless, I do not believe it is accurate to say that this “modern” Japan has been built entirely on the model of “Europeanization” in the sense of her total assimilation and integration into the orbit of European civilization. In fact, the process of “modernization” of Japan, at any rate in its civilizational sense, has been an unfinished history of the intellectual struggle to reconcile and amalgamate the two seemingly different civilizations of the West and the East. Japan, instead of engaging in the “clash of civilizations”, has

tried hard to assert her identity and her proper place within this “Community of Civilized Nations” through identifying something common and universal that she could accept as the basis of “modernization” of Japan in continuum with her past.

The process has not at all been easy; in fact, I do not claim that it has been a total success. As a famous professor of law at the Tokyo Imperial University of the Meiji period lamented, a serious concern was expressed that “with the coming into existence of the new Civil Code, the traditional virtues of loyalty to the sovereign (ch) and piety to the parents (k) would perish”. This spiritual agony of the intellectuals of Japan has been even more dramatically articulated in the field of literature - a domain of intellectual expression for the “Zeitgeist” of society. A number of the most representative novelists of modern Japan have focussed their attention to the dilemma of “living with two civilizations” in the existential sense, as exemplified by the works of Natsume Soseki, Tanizaki Junichiro, and Yokomitsu Riichi, to name only a few.

This intellectual struggle continues to this day in my view. In fact, I believe that one of the basic reasons why the process of globalization of today, as distinct from that of internationalization in the Meiji period of Japan, is so difficult lies precisely on this point. Globalization for Japan would involve not a quantitative change in society but a qualitative transformation of society.

Through the period of encounter of Japan with the West, when the Japanese intellectuals were confronted with a totally novel concept of “the law of nations” of the West, they tried hard to understand and grasp the concept by looking for a comparable frame of reference in their own cultural heritage and to identify this concept as one which should have its rational meaning in this context and should therefore

represent something common both to the East and the West. While it may be true that this attempt on their part led them later into disillusionment and eventually into a blind alley which contributed to the subsequent course of history of Japan with tragic results, these Japanese élites who were engaged in the “modernization” of Japan proved to be highly intellectual and scientific in their approach. They tried to comprehend the meaning of what was “specific” by identifying what was “universal” in that specificity. To borrow the words of Lévi-Strauss, a well-known social anthropologist of constructionist school, the scientific approach of structuralism in anthropology should consist in the “quest for the invariant, or for the invariant elements among the superficial differences”. What I am trying to say is that this approach of “the quest for the invariant elements among the superficial differences” represented the essence of the process of Japan’s encounter with the “Community of Civilized Nations”.

It is my submission that a true understanding of contemporary Japan, whether it is in its political, economic or social aspects, can only be complete and truthful on the basis of a comprehensive grasp of Japan in the context of such continuum in her history, her cultural heritage and her societal interaction expanding over centuries. To talk about the “enigma” of Japan as if there were something “enigmatic” or “intractable” about the contemporary Japan, applying the yardstick of one’s own cultural heritage, would be a superficial approach that could cloud one’s intellectual quest for “the invariant among the superficial differences”. In this brief presentation of mine today, I have tried to depict some of the essential points that I believe we have to bear in mind in our efforts to advance the cause of promoting Japanese studies at Leiden University, by using the historic episode of the reception of the “law of nations” into Japan as their illustration.

Leiden University has been for the last few centuries the renowned centre of excellence for Japanese studies in Europe based on its holistic approach, solidly founded on its rich heritage of classical study of Japan. While specialized studies of contemporary Japan in her different facets are rapidly developing in this country and throughout Europe as the interaction between Japan and Europe is fast growing, I believe that it is this holistic approach to Japan as an organic whole as she exists in her historical and cultural contexts which constitutes the key to the success of this task.

I wish to close my remarks by quoting the classical wisdom of Confucius who said that “one can truly understand the new by going back to the basics of the old”. I believe that this should be the basis for genuine comprehension of various diverse facets of contemporary Japan with her diverse and often confusing manifestations.

Ik heb gezegd.

Notes

- 1 Friedrich von Martens, *Völkerrecht. Das Internationale Recht der Civilisirten Nationen* (1909), §41 at p.181 (translation by this writer).
- 2 F.W. Maitland, "Moral Personality and Legal Personality" in *The Collected Papers of F.W. Maitland* (1911), Vol. III, p.310.
- 3 Brett Bowden, "The Colonial Origins of International Law, European Expansion and the Classical Standard of Civilization" in *Journal of the History of International Law*, p.4.
- 4 Pope Innocent IV, Documents 40: "Commentaria Doctissima in Quinque Libros Decretarium", quoted in Brett Bowden, "The Colonial Origins of International Law", 7 *Journal of the History of International Law*, p.4.
- 5 Brett Bowden, *ibid.*, p.10.
- 6 Gerrit W. Gong, *The Standard of "Civilization" is International Society* (1984), p.36. (Cf. for a more benevolent view of Vitoria as universalist, see James Brown Scott, *The Spanish Origin of International Law: Francisco Vitoria and his Law of Nations* (1932), at p. ix.)
- 7 *Ibid.*, p.37.
- 8 Oppenheim's *International Law*, 8th ed. (1955), p.85.
- 9 Hugo Grotius, *De Jure Belli ac Pacis*, translated by F.W. Kelsey (1925), Book 1, Chapter 1, XII, p.42.
- 10 Montesquieu, *The Spirit of the Laws*, Book 1, Chapter 3.
- 11 *Ibid.*, Book 14, Chapter 4.
- 12 James Lorimer, *The Institutes of the Law of Nations*, Vol. 1 (1883), pp.101-102.
- 13 Henry Wheaton, *Wheaton's Elements of International Law*, 3rd ed. (1863), p.21.
- 14 *Ibid.*, p.16-17.
- 15 John Westlake, *The Collected Papers*, (1913), pp.101-102.
- 16 *Ibid.*, p.103.
- 17 *Ibid.*
- 18 For example, Russia had tried to establish relations with Japan through the visits of A. Laxman to Nemuro in 1792 and of Rezanov to Nagasaki in 1804; Great Britain through the visit of S.S. "Phaeton" to Nagasaki in 1804; Holland through sending a State note of King Willem II to the Bakufu in 1844; but they all had failed in their respective attempts.
- 19 The instruction Commodore Perry had from the Acting Secretary of State, Charles M. Conrad, contained the following points to be addressed to the Japanese authorities: (a) the protection of shipwrecked sailors; (b) the opening of Japanese ports for provisions and repair of vessels; and (c) the opening of Japanese ports for commerce.
- 20 *The Complete Journal of Townsend Harris*, ed. by M.E. Cosenza (1930), p.567.
- 21 *Ibid.*, p.513.
- 22 See footnote 8 given by Richard Henry Dana to Wheaton's "Elements of International Law" in the *Carnegie Classics of International Law* at p.19.
- 23 The book was so popular that it was later translated into Japanese from the Chinese edition.
- 24 *Ibid.*, p.143.
- 25 Thomas Pereira, a Portuguese Jesuit missionary is said to have participated in these negotiations on the Chinese side and reportedly stated in his diary that his role at Nerchinsk was to make sure that everything was done in accord with the principles of the law of nations.
- 26 J.A. Cohen and H. Chiu, *People's China and International Law*, Vol. 1 (1974), p.8.
- 27 Count Soyeshima Taneomi, one of the senior statesmen of the Meiji era, stated in the recollections of his life that, "the Japanese intellectuals of the late Tokugawa period had interpreted Martin's Chinese translation of international law as being in consonance with their own Asian way of thought." Thus, the law of nations was popularly referred to through such expressions as bankoku koho (public law of the world,) or tenchi no kodo (just way of the Universe), which actually meant the metaphysical rules of justice in human relations applied to the conduct of inter-State relations.
- 28 In April 1869, Iwakura Tomomi, then a senior member of the new Imperial Cabinet, presented for the deliberation of the Cabinet a memorial in which he recommended that the following announcement be made to the public: "All peoples in the world, whatever the difference in their physical features may be, are equal as human beings, and it is against justice

to regard [the Westerners] as animals or to look down on them as barbarians. We should receive them with honour like our brothers and friends . . . The reason that we should treat them with due respect is that the [European nations] hold their foreign intercourse with each other in accordance with reason and justice and good faith. In Europe the small States like Holland can maintain independence and associate with strong powers on an equal footing and without fear, because their conduct in foreign intercourse is based on reason and justice and on keeping faith. Today, all nations in the world honour their international agreements and fill each other's needs through the exchange of culture and goods. Why should our country alone preserve the traditional policy of seclusion? If we desire our country to be strong and prosperous, then we should have relations with foreign countries...These are the main reasons why our Imperial Court [has decided] to have foreign intercourse.”

It seems appropriate to notice here that Iwakura Tomomi uses the term “reason and justice and good faith” to describe what should be the basis of intercourse among Western countries as equivalent to the law of nations.

29 Treaty with Great Britain, Article XVIII, para. 4.

30 This statement should be qualified by one exception, i.e., Turkey. Turkey's case was *sui generis* to the extent that she had been a non-Christian but quasi-European power, having been constantly involved in the struggle for power on the soil of Europe, culminating in the conclusion of the Treaty of Paris of 1856. Thus it is difficult to argue that Turkey was outside the orbit of the “European law of nations”.

In deze reeks verschijnen teksten van oraties en afscheidscolleges.

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???? Tekst???

- 1972-1975 specialisatie kindergeneeskunde in het Sophia Kinderziekenhuis
- 1976-1978 specialisatie pediatrische endocrinologie
- 1978-1981 werkzaam als kinderarts in Dominica
- 1981-1993 werkzaam als pediatrisch endocrinoloog en hoofd afdeling kinderendocrinologie aan het Wilhelmina Kinderziekenhuis Utrecht
- 1986 promotie op het proefschrift *Responses to growth hormone therapy*
- 1994- hoogleraar kindergeneeskunde in Leiden

