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The Dissemination of International Law and the Study of the Unequal Treaties in China*

On June 29, 1929, at a time when the Guomindang Nationalist Government was making its most strenuous efforts to rescind foreign consular courts in China, *China Weekly Review* reported that the Municipal Council of the International Settlement had coincidentally launched a drive against gambling in the foreign quarters of Shanghai. Raids staged by the Shanghai foreign police on gambling dens popularly known as “wheels” resulted in the arrest of some three hundred people, both foreign and Chinese. *China Weekly Review* listed the greatly varying legal consequences of the very same crime for defendants of different nationalities:

“The Chinese, of course, got the worst of it, because this type of gambling is clearly illegal under Chinese law and the Chinese were immediately arraigned in their Provisional Court where some 160 defendants received sentences ranging from 50 days imprisonment to fines ranging from \$200 to \$450, the total amount of the fines collected approximating \$30,000. Of the foreigners who were caught as a consequence of the raids, mostly of British nationality, whose cases have been disposed of up to the present, were simply bound not to frequent such gambling institutions in the future. In order to convict them it was necessary for the local British Court to dig up an old law passed in the time Henry VIII. Those of Spanish nationality who were caught in the raids, were brought up in the local Spanish Consular Court and since this form of gambling apparently is not illegal under Spanish law, they were simply cautioned and released. One Portuguese who was arrested is said to have been fined \$50 and one Japanese has had his case remanded for future hearing in the Japanese Consular Court [...]. [T]wo unfortunate Russians, who have lost their extraterritorial rights [as a result of the 1924 treaty between China and the U.S.S.R.], were arraigned in the local Chinese Provisional Court and received sentences of 50 days in jail, plus a fine of \$200.” (Unknown 1929:186–188)

This incident illustrates well the conflicting jurisdictions and sovereignty and the concomitant inequalities and failures in the justice system suffered by all na-

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nationalities under extraterritoriality (extrality or consular jurisdiction) in China. The story also reveals the paradox of equality and inequality which has been an ongoing feature of China's multi-faceted encounter with the West since the mid-nineteenth century.

This article explores aspects of the paradox of equality and inequality from the perspective of the dissemination of international law in China. The paradox has three levels of meaning. Firstly, the principle of extraterritoriality (or the practice of capitulations) was inserted into the "Unequal Treaties" which foreign countries imposed on China in the name of "justice and equality" in the aftermath of the Opium Wars (1840–42, 1856–60). However, as the above story illustrates, the actual legal consequences for different nationalities under extrality were all too unequal. Secondly, although sovereign nations are equal in principle, in reality they are politically and economically unequal. Thirdly, from the mid-19th century through the 20th century, the Chinese made considerable efforts to conform to international law in the hope of achieving an equal status in the world of power politics.

As China's first experience of international law, the Unequal Treaties were long a source of antagonism, working as a reminder of the mistreatment which was suffered on a large scale over many decades and which made the Chinese particularly sensitive to issues of sovereignty. It was to take many decades before the Chinese experience of international law could be transformed into a positive one. The modern literature on the subject either emphasizes China's passivity in the face of the "universalization" of international law, or stresses the translingual promulgation of international legal theories in the late nineteenth century (Dudden 1999; Hsü 1960; Li Chao-chieh 1996; Liu Lydia 1995; 1999b, c; Zhang Yongjin 1991). In his carefully researched book, *China's Entrance into the Family of Nations: The Diplomatic Phase 1858–1880*, Immanuel Hsü raises a question about the "national humiliations" suffered by China (often equated with the Unequal Treaties) that has continued to loom large in the Chinese consciousness: "Why, after the introduction of international law into China, did she [China] fail to use it as an instrument to assert her sovereignty and recover her lost rights?" (Hsü 1960:121) Moving away from such questions, however, I focus instead on the positive role played by the Chinese in the spread and development of international law. I also aim to extend the study of international law in China to the twentieth century, an undeservedly neglected topic in the field. Finally, the emphasis on language and translation as a tool of cultural transmission – an approach so popular in literature and cultural studies – is expanded through an examination of a unique dual process, i.e., the Chinese study of the Unequal Treaties and the concomitant dissemination of international law from the nineteenth to the twentieth centuries.

Through an examination of the almost contemporary Chinese publications on imposed and unequal treaties, on the one hand, and public international law, on the other, I attempt to show that the interpretation of international law can take place only on the terms presented by a given nation's own culture and history. Interpreting the history of international law in China also involves the reinvention of China's political, diplomatic and cultural inheritance. China's strong interest in topics such as the Unequal Treaties, national humiliations and the indigenization of international law indicate that China today still believes it has a wrong to rectify, a bitter reminder of the nation's weakness and vulnerability to outside forces in the past. In the meantime, the numerous Chinese publications dealing with these topics and the evolution of international law itself point to both the challenges posed and the contributions made by Chinese to the theory and practice of international law.

To many Chinese, modern Chinese history has been naturally equated with the history of the Unequal Treaties. The realities of the Unequal Treaties have long framed the general reception and broader praxis of public international law in China. The transplantation of international law to Chinese soil can be divided into three phases. The first, which began in the nineteenth century and ended in 1912, marked the introduction of international law into China; the Chinese were forced to grapple with the paradox of the legal equality of sovereign nations guaranteed by international law and the inequality resulting from the Unequal Treaties. The second phase lasted from 1912 to 1949 when the Republic of China grafted international law onto the Chinese legal system as part of the search for solutions to the issue of inequality. During this period, international law was indigenized and struck firm roots in China. The final phase occurred in the latter half of the twentieth century, a period when China developed an original and innovative set of rhetorical formulas with which to interpret world events. The People's Republic of China made full polemical use of the concept of the Unequal Treaties, turning international law into an instrument of struggle against imperialism, colonialism and hegemony in the dynamics of international bargaining. In addition, to Chinese, the true "internationalization" of international law demanded that it transcend its Christian European origins and expand to accommodate the cultures of non-Western nations.

THE BEGINNINGS OF INTERNATIONAL LAW IN CHINA AND THE "UNEQUAL TREATIES"

In this section, I argue that of all the factors relevant to the origins and development of international law in China, the issue of the Unequal Treaties has had by far the strongest impact on its transmission, appropriation, and indigenization in modern China. When international law was first applied in China, the Chinese

were perplexed by the paradox of the principle of equality between sovereign states and the unequal nature of the treaties imposed on China by the West.

In 1840, Qing imperial Commissioner Lin Zexu visited Guangzhou to crack down on opium consumption and the opium trade. Through the efforts of his interpreter Yuan Dehui (袁德辉) and Peter Parker, an American medical missionary, Lin became acquainted with *Le droit des gens*, the seminal work of the Swiss jurist Emmerich de Vattel (1714–1767) (Vattel 1760; Tian Tao 1999). The Chinese translation made by Parker and Yuan, however, was heavily glossed and scarcely intelligible to Lin. There is evidence that Lin was influenced by Vattel’s work, translated as *Geguo lüli* (The laws and regulations of all nations, 各国律例), which was also excerpted in Wei Yuan’s *Haiguo tuzhi* (An illustrated gazetteer of maritime countries; 海国图志). For instance, in a letter to Queen Victoria in 1839, Lin protested: “To clearly summarize legal penalties as an aid to instruction has been a valid principle in all ages. Suppose a man of another country comes to England to trade, he still has to obey the English laws; how much more should he obey in China the laws of the Celestial Dynasty?” (Teng/Fairbank 1954:26–27)

In 1864, under the auspices of the Tsungli Yamen, three hundred copies of the Chinese translation of Henry Wheaton’s *Elements of International Law* (Wheaton 1855) by William A. P. Martin (丁韪良, an American missionary, Sinologist, and interpreter to William B. Reed, American Minister to China), were distributed to Chinese officials.¹ Martin’s work was well received among leading ministers of the Qing Tsungli Yamen, especially Wenxiang and Prince Gong. “International law,” now always translated as *guojifa*,² was rendered by Martin as *wanguo gongfa*.³

In 1877, Martin, with Wang Fengzao (汪凤藻), et al., co-translated T. D. Woolsey’s *Introduction to the Study of International Law* into Chinese, titled *Gongfa bianlan* (公法便览). Then, three years later, the Chinese version of the French translation of the German jurist’s, Johann Caspar Bluntschli’s *Le droit international codifié*, co-translated by Martin and Lian Fang, et al., was published under the title *Gongfa huitong* (公法会通). Obviously, great effort was made to translate international law into Chinese in the decade after its first introduction, from foreigners taking the lead in translation to Sino-foreign collaboration. Reversing their initial passive role, the Chinese increasingly got involved and eventually took over the process of transplanting international law in China.

¹ Chinese translation in Ding Weiling 1998. See further Chen Shicai 1932, 1954:5.

² *Guojifa* (国际法) is a term first adopted by Mitsukuri Rinsho in 1873, according to Immanuel Hsü.

³ “The Public Laws of the Ten Thousand Nations”, 万国公法. (Hsü 1960:129).

At the time of its introduction into China, a number of officials immediately recognized international law as an important mechanism of conflict resolution. The reformist official Xue Fucheng wrote with implicit trust: “Nations, whether large or small, strong or weak, are in every way dependent upon international law to balance their differences and to alleviate potential conflicts. As far as weak and small nations are concerned, they must rely on international law for their survival.” (Xue Fucheng 1994:156–157)⁴ However, in their encounter with the West in the late nineteenth century, the Chinese had to face up to the paradox that, while international law employed a formal concept of national sovereignty that made all nations equal, it could not guarantee that such equality would be respected or enforced in practice. Chinese were quick to learn that formal judicial equality between sovereign states was not to be confused with political equality. Thus while international law was universally regarded as reasonable and instrumental, it provided no remedy for political and economic inequality. This dilemma was only too well recognized by officials such as the reformist Zheng Guanying: “Although international law applies to all, it has not, by any means, always been observed. [My speculation is] that international law can govern the relationships between equally powerful states. However, if there is no equality of national power, then public international law will not necessarily work” (Zheng Guanying 1982).⁵ Or, in the words of a Qing diplomat, “International law is [...] reasonable but unreliable. If it is a case of right without might, then right will not prevail” (Cui Guoyin: Vol. 2, Journal entry for April 12, 1891).

Chinese officials also recognized that the *spirit* of international law was in conflict with the ways in which European powers – claiming the *name* of international law – had acted in their relations with China. In this connection, the “Unequal Treaties” are particularly important. On the issue of tariff rates, Guo Songtao, China’s first minister to Britain and France (1876–1878), commented on the inequalities created by the series of treaties concluded between the Qing and various foreign countries. Compared with the uniform 5% *ad valorem* tariff charged on all foreign merchandise imported into China, he noted that countries such as England, France, and the United States levied much higher taxes (set at differential rates) on imported commodities. On some items, the tariff rate was as high as 100% (Ibid:706–707). The Qing diplomat, Zeng Jize, minister to Britain, France, and Russia (1878–1885), was later to express the same concerns. Draw-

⁴ The Chinese original reads “各国之大小强弱，万有不齐，究赖此公法以齐之，则可以弭有形之衅。虽至弱小之国，亦得藉公法以自存。” Xue Fucheng was considered to favor the adoption of international law in China (Liu Baogang 1999).

⁵ The Chinese original is “虽然公法一书久共遵守，乃仍有不可尽守者。盖国之强弱相等，则籍公法相维持，若太强太弱，公法未必能行也。”

ing a clear line between diplomatic immunity and non-diplomatic privilege, Zeng wrote, “In Western practice, the residential office of a foreign minister is regarded as the sovereign territory of that foreign country, over which the host country has no jurisdiction whatsoever.” By the same token, all diplomatic personnel enjoyed special diplomatic immunity. However, “foreign citizens with no diplomatic status are not supposed to be exempted from the jurisdiction of local authorities and laws” (Yang Xianqun 1985:164–165). Hence, in Zeng’s opinion, international law consisted of “empty principles” (虚理, *xuli*):

“As far as public international law is concerned, weak nations make use of it for self-protection, while strong nations, nonetheless, often violate it [...] As to its workings among states, both far and near, they do not necessarily comply with international law. Today, Western nations tend to regulate others by means of public international law; tomorrow, whenever they see opportunities to exploit our China, they will explain away theories of public international law in order to make their case. Their arguments [for requests] will come like swarms of bees so that the situation [China’s dealings with foreigners] will resemble a flight of steps overgrown with brambles” (Zeng Jize 1983:181–182).⁶

There was another view of the nature of international law. As one author pointed out in *Waijiaobao* in 1901, international law was just an instrument that required good skills to make it work better:⁷

“Those compatriots who have commented on international law often hold international law accountable for its inefficacy in regulating encounters between strong and weak nations [... In my view,] [t]he function of international law is the same as that of warships and fortresses. If one is not adept at operating warships and defending fortresses and as a consequence suffers defeat at the hands of one’s enemies, how come is it the fault of warships and fortresses [i.e., Can one really blame the warships and fortresses]?”

Historically, the Unequal Treaties were China’s first exposure to international law, an experience which confounded the Chinese because of the very different implications it held for strong and weak nations. This was the difficult situation which confronted them in seeking to implement international law for themselves.

Studies of international law began to take shape at the turn of the 19th and 20th centuries, as an integral part of Chinese efforts to pursue wealth, strength and Western learning. In 1896, two translated works on international law were published – one was John Fryer’s and Wang Zhensheng’s (1896) translated work

⁶ The Chinese original reads: “公法者, 弱国以自保, 而强国时时犯焉 [...] 而睦邻绥远之道, 亦未必与公法处处符合. 今日据公法以责人, 则他日西洋各国凡有可以取利于吾华者, 皆以曲援公法之说以相渎扰, 势将辩难蜂起, 步步荆棘.”

⁷ The original text reads: “吾国论国际法者, 多以强弱相遇公法无效为公法之罪 [...] 公法之用与战舰炮台同, 不讲于驾舰守台之策, 而忽焉蹂躏于外敌, 岂台舰之罪吁.” (Waijiaobao 1901)

Gongfa zonglun, the other was the Chinese version of Sir Robert Phillimore's (1810–1885) *Commentaries upon International Law*, *Geguo jiaoshe gongfa lun*, translated by John Fryer and Yu Shijue (1896). What was interesting from the late 19th century onward was that the Chinese seemed independently to take more initiatives to translate or initiate research about international law. There was a loose study group, *Gongfa xuehui* (公法学会), in existence from April to September 1898 in Changsha of Hunan Province. The bylaws of this study group indicates that topics such as international law, the treaties between China and foreign countries in connection with their biggest problems, small blemishes, issues to be added to negotiations with foreigners and issues to be negotiated for changes were highlighted for study and discussion (Duan Muzheng 1998). Meanwhile, some young Chinese intellectuals compiled translated works in Chinese on international law, and some translated Japanese books on international law into Chinese. Such examples were Tang Caichang's (唐才常, 1867–1900) *Gongfa tongyi* (公法通义) in 1897 and Cai E's (蔡锷, 1882–1916) *Guoji gongfa zhi* (国际公法志) in 1902 (Ibid).

Besides wealth, strength and Western learning, studying international law also served other political purposes. For instance, Hu Hanmin (1879–1936), one of the Tongmenghui's⁸ leading polemicists, also disseminated knowledge of international law in order to arouse anti-Manchu sentiments among the Han Chinese. To justify the efforts made by the United League to topple the Manchu Qing government, Hu, in his treatise *Panwai yu guojifa* (Hu Hanmin 1957) published in *Minbao* from 1906 to 1907, singled out the treaties as well as the Qing government's legal mistakes as essential factors that gave rise to xenophobic feelings among the Chinese.

FINDING A BASIS FOR THE APPLICATION OF INTERNATIONAL LAW IN CHINA (1912–49)

In the Republic of China (1912–49), the study of international law went hand in hand with the search for legal grounds on which to revoke the Unequal Treaties. The tensions between formal sovereign equality and actual political and economic inequality, which had been given scant attention within the traditional framework of international law, were extensively discussed by a variety of political and social agents in China. Furthermore, the perceived inadequacies of international law inspired scholarly interest in the subject, stimulating a body of literature on the Unequal Treaties and imperialist aggression in China. Thirdly, Chinese research on international law corresponded with the flourishing printing business in the

⁸ Its English translation is the United League, the forerunner of the Guomindang founded in 1905 in Japan by Sun Yat-sen.

studies of international law as well as the unequal treaties. Finally, the indigenization of international law in China was characterized by the invocation of existing legal theories and practices in calling for changes to the status quo.

In the 1910s, Chinese knowledge of international law was rudimentary and one of the main channels of dissemination was through secondary works in Japanese, rather than through direct Chinese translations of original legal works. Translated publications of significance included an edited volume by Jin Baokang, *Pingshi guojifa* (1907) (Jin Baokang 1907), and a translation of the Japanese text *Pingshi guoji gongfa* (1911) by Chen Shixia (Chen Shixia 1911), as well as *Guojifa yaolun* by Shen Yushan (1914).⁹ Evidence also confirms that the *Beiyang Fazheng Zhuanmen Xuexiao* in Tianjin¹⁰ adopted works in Japanese as textbooks for students to study international law. One of the founders and early leaders of the Chinese Communist Party, Li Dazhao (1888–1927) studied law there.¹¹ In 1909–1910, as a third year student of the Preparatory School, Li spent considerable time studying his textbook in Japanese on the general theories of law, one chapter of which is about public and private international law (Li Dazhao 1999: Vol. 1, 1–161). A few years later while studying at Waseda University in Tokyo, Li, together with his classmate and friend Zhang Runzhi, translated Imai Yoshiyuki's *Zhongguo guojifa lun* with a focus on foreign extraterritoriality in China (Imai Yoshiyuki/Li Da-zhao/Zhang Runzhi 1915).¹²

The translated book of *Zhongguo guojifa lun* provides us with a window through which we can see five characteristics of the propagation of international law in China in the 1910s: Firstly, the Chinese should firmly believe in the authority of international law as the basis of international covenants. Secondly, the power of international law and national strength should be based upon the equality of international status. Thirdly, changes to or elimination of international compacts by invoking the power of law should be in the hands of the Chinese. Fourthly, Li Dazhao felt embarrassed with the fact that foreign legal scholars, such as Imai Yoshiyuki, took the lead in research about international law and international relations related to China, whereas the Chinese intellectuals, absorbed by the politics of saving China, had found little time to devote to academic research. Fifthly,

⁹ See Lawrence 1910; Chen Shixia 1911; Gonghe fazheng xuehui bianjibu 1913; Shen Yushan 1914

¹⁰ The Beiyang School of Law and Government, 北洋法政专门学堂.

¹¹ Li's pursuit of law has normally not been taken notice of by scholars because of his active part in leading the Communist movement in China (Boorman 1968: 329–333).

¹² Imai Yoshiyuki (1878–1951), a graduate in law from the Tokyo Imperial University, taught at the Beiyang University of Law and Politics in Tianjin from 1908 to 1913 (Li Dazhao 1999: Vol. 2, 1–296). Also see the translation Li Dazhao 1999: Vol. 2, 1–293; Han Depei/Luo Chuxing/Che Ying 1999.

obviously aware of the differences between the Chinese and Japanese translations of the English concept of foreign leased territory and possessions – 租界 in Chinese and 居留地 in Japanese – Li in his translation into Chinese of the Japanese translation preserved the Japanese use of the term.

The political instability of the 1920s did little to dampen Chinese enthusiasm for public international law, and the publication of both translations of original legal scholarship and Chinese indigenous writings flourished in this period. Observations which can be made about promotion of international law in the 1920s China are: Firstly, international law emerged as a mature field of study and as a formal academic discipline. Many of the Chinese publications on international law in this period were university textbooks, which was an obvious advance on the situation in the 1910s when Chinese textbooks were lacking (For example, Ning Xiewan 1919:808; Ning Xiewan 1923:1114). A greater number of translations appeared, including the translation of Lassa Oppenheim's (1858–1919) classic *The Future of International Law* by Chen Zongxi (Chen Zongxi 1928). Secondly, we see a group of European trained Chinese international lawyers devoting their entire life to the study and dissemination of international law in China. These people – Zhou Gengsheng, Zhou Wei, Wang Tieya, Chen Tiqiang, and Zhou Ziya, etc – were critical figures assuming the role of teachers of international law in 20th century China (Zhou Gengsheng 1923; Zhou Gengsheng 1929; Cen Dezhong 1931; Zhou Wei 1930). Thirdly, instead of simply reproducing what points made by Western jurists, the specialized monographs in Chinese on international law displayed a greater grip by the Chinese on the whole nature and development of the subject. For example, in lucid language, Zhou Gengsheng in *Guojifa dagang* stated with precision what contemporary international law courses should cover: the nature, subjects, sources, basic rights and jurisdictions of nation states, treaties, international negotiations, diplomatic representation, resolutions to international disputes and the nature of international organizations. With regard to equality and inequality between nation states, Zhou made it clear that national equality refers to legal equity in spite of the fact that the fact that nation states are politically unequal. Political inequality cannot eliminate legal equality. In his summary of the differences among naturalists, Grotians and positivists, Zhou apparently agreed that positivism was the main direction in which international law evolved (Zhou Gengsheng 1929:20–25).¹³ *Xin guoji gongfa* by Zhou Wei, in a different style from Zhou Gengsheng's *Guojifa dagang*, engages in the discussion about the rubrics of international law with more emotions by introducing examples specific to China throughout the two volumes.

¹³ For more on the different schools of international law, see next section of the Chapter.

Several other legal and historical works on international law and the Unequal Treaties also received attention. The nature of capitulations (extraterritorial rights) in connection with the Unequal Treaties, for example, was thoroughly discussed in Liu Shishun's (刘师舜, 1900-) *Extraterritoriality: Its Rise and Its Decline* (Liu Shishun 1925). In his comprehensive legal study of the Unequal Treaties (Tseng Yu-hao 1931), Zeng Youhao (曾友豪), then President of the High Court of Justice for Anhui Province, devoted the first chapter to the issue of capitulations and the Unequal Treaties.

In the history of international law, the terms extraterritoriality, extrality, and capitulations refer to the diplomatic immunities secured where one state permitted another to exercise the latter's jurisdiction over its own nationals within the former's boundaries. Today such a privilege is granted only to certain diplomatic agents exempt from both criminal and civil charges in the countries where they are accredited, as stipulated in the Convention on Diplomatic Relations signed in Vienna in 1961 (Encyclopedia Britannica 2003).¹⁴

Both Liu and Zeng argued that the historical practice of capitulations originated in the inadequacy of local laws reflecting ancient familial and agricultural practices to embrace the complex business activities undertaken by foreign merchants. Thus, in the 13th century BC, Memphis and other Egyptian cities allowed Phoenician and Greek merchants to be subject to their own laws. Similar treatment was given to Phoenicians in Greece, to non-Roman citizens in the Roman Empire in the third century BC, as well as to certain citizens of Italian city-states in Antioch and Jerusalem in 1098 and 1123. Both Byzantine emperors and the Ottoman sultans followed such practices to avoid administrative and legal burdens. In 1535, the Franco-Ottoman Treaty was signed between Francis I of France and Süleyman I of Turkey granting the French consuls jurisprudence over the criminal and civil affairs of French nationals in Turkey. Medieval Europe witnessed the establishment of permanent consulates by merchants of a particular city in other cities of the same country or in foreign countries; they settled business disputes and exercised jurisdiction over merchants sharing their nationality (Keeton 1928: Vol. 2, 155–163). Liu and Zeng argued that these examples were more a matter of convenience or the gratuitous granting of territorial powers than the surrender of sovereignty.

In the mid-seventeenth century, the modern conception of the sovereign nation state, one of the basic concepts of international law, took shape in Europe. This

¹⁴ The first legal expression of this doctrine was formulated by Pierre Ayraunt (1536–1601), and later adopted by Hugo Grotius (1583–1645) and Samuel von Puffendorf (1623–1694). “Extraterritoriality” was introduced as a legal term by Georg Friedrich von Martens (1756–1821) in 1788 (Encyclopedia Britannica 2003).

concept emphasized reciprocity and equality among independent nation states, as embodied in the Peace of Westphalia in 1648. Liu and Zeng pointed out that the modern notion of sovereign supremacy and exclusiveness inevitably came into conflict with the precedents for extraterritoriality reviewed above. In the 1606 treaty between England and France, the 1787 treaty between France and Russia, the 1788 treaty between France and the U.S., and a series of treaties concluded between Portugal (1696), France (1701), England (1713) and Spain, reciprocal extraterritoriality was accorded (Liu Shishun 1925:35–43). While Europeans and Americans attempted to discontinue the ancient and medieval practice of capitulations among themselves, they happily imposed extraterritoriality on Turkey, China, Japan, and Siam, but with no corresponding rights given to nationals of those countries residing in Europe and the U.S. Extraterritoriality was brought to an end in Japan in 1899, in Turkey in 1923 (by the Treaty of Lausanne) and in China in 1943.

The work of the American historian Eileen Scully has added nuances to the picture of extraterritoriality in China. She challenges the common assumption that Western governments, consulate personnel, and their colonial nationals, as a monolithic unit, worked together harmoniously under the protection of extraterritoriality. “Far from being a blunt instrument imposed on a passive, victimized indigenous society by singled-minded imperialists, extraterritoriality was more in fact a complex balancing act in which metropolitan governments, colonial sojourners, indigenous elites, and opportunists of all nationalities battled for advantage.” (Scully 2001:9) Nonetheless, for Liu and Zeng such subtleties were neither an historical nor a legal concern. On the contrary, what interested Chinese jurists the most was the legal validity of the Unequal Treaties.

In his work, Zeng recognized the conceptual vagueness of unilateral treaties and unequal treaties in international law and identified the Unequal Treaties with “those conventions and agreements concluded in the Orient with Christian powers when the idea of territorial sovereignty was not seriously defended.” (Tseng Yuhao 1931:12, 17) Referring to China’s Unequal Treaties as “decaying institutions,” Zeng noted that the growing attention given to the topic had broadened research in the field of international law in the 1920s. He quoted the comments made by Raymond L. Buell at the 1927 meeting of the American Society of International Law: “There is a group of treaties which I imagine may be called unequal. You have treaties granting extraterritorial rights, of which the Chinese treaties are an example.” (Ibid.:10) At the same time, Zeng drew attention to similar concerns about this contradiction in the world of politics, such as the Porter Resolution of January 1927 by the U.S. Sixty-first Congress.¹⁵

¹⁵ The exercise in China of American extraterritorial rights as well as the established regime of customs duties was found to be inequitable and nonreciprocal in character. The Porter Reso-

The subject of a change of conditions relative to the termination of a treaty was given detailed attention in Tseng's book, which contended that the doctrine of *rebus sic stantibus* (conditions which warrant that the conclusions of a contract no longer exists) must be applied in the case of China, and thus would provide the necessary legal grounds for China to nullify certain treaties and to relieve itself of certain treaty obligations, including the Twenty-One Demands of 1915 signed with Japan (Ibid.:105–114).¹⁶ Such examples illustrate the close connection of academic studies of the Unequal Treaties and international law in the Chinese context.

In the 1930s, the Chinese study of international law came to maturity and the transplantation of the theory of the subject was completed. This had involved a dual process – the translation of Western theory and original Chinese research into international law. In 1934, the first Chinese translation of Oppenheim's *International Law: A Treatise*, became available and has been the most popular and most frequently reprinted international law treatise in China (Cen Dezhang 1934). Influential indigenous Chinese writings included Zeng Youhao's compilation *Guoji gongfa li'an* (*Cases in Public International Law*), Zhou Gengsheng's *Xiandai guojifa wention* (*Questions of Modern International Law*) and Li Daren's and Yuan Guoqin's *Guojifa fada shi* (*The development of International Law*).¹⁷ Approaching international law from a historical perspective, Liu Daren and Yuan Guoqin undertook a thorough examination of its definition, structure, nature, historical evolution, objects and subjects, neutrality and regulations – as well as the international diplomatic organizations and procedures that have arisen from it, and the solutions it offers for international disputes.

The proliferation of Chinese literature on the Unequal Treaties is characteristic of the spread of international law in China; to a great extent it overlaps with publications on “national shame” (国耻文学, *guochi wenxue*) and the literature on imperialist aggression against China.¹⁸ In the words of Chen Tiquang, “[...t]he

lution concluded that “the treaty relations between the two countries [China and the U.S.] shall be upon an equitable and reciprocal basis and will be such as will in no way offend the sovereign dignity of either of the parties or place obstacles in the way of realization by either of them of their several national aspirations or the maintenance by them of their several legitimate domestic policies.” (Ibid.:13; Congressional Report 1927).

¹⁶ In international law, the doctrine of *rebus sic stantibus* is defined as “a name given to a tacit condition, said to attach to all treaties, that they shall cease to be obligatory so soon as the state of facts and conditions upon which they were founded has substantially changed.” (Oppenheim 1912: Vol. 1, Section 539).

¹⁷ Zeng Youhao 1934, a compilation of cases considered at the Hague Conference, League of Nations, and the International Court. Zhou Gengsheng 1931 is a collected volume of papers; Li Daren/Yuan Guoqin 1937.

¹⁸ Paul A. Cohen (2002) has called for attention to be paid to the rich *Guochi* literature in China.

only field in which Chinese international lawyers made intensive study was the question of unequal treaties and special rights of foreign powers in China.” (Chen Tiqiang 1984:8)

These two sub-disciplines of the history of modern China developed in the latter half of the 1920s, and became perennial topics of discussion for many different interest-groups in the 20th century. Nearly 100 entries can be found under the heading of *diguo zhuyi qinhuashi* in *Minguo shiqi zongshumu* (*A Comprehensive Bibliography of the Republican period*) (Beijing tushuguan 1985). From its first appearance in 1925 to 1930, Wang Jingwei’s *Diguo zhuyi qinlue Zhongguo de qushi he bianqian lun* (*Characteristics and Evolution of the Imperialist Penetration of China*) was reprinted eleven times (Wang Jingwei 1925). The publication of more than a dozen books whose titles contain the key word *bupingdeng tiaoyue* underlines the point that the literature of the Unequal Treaties was flourishing by the mid-1920s (Beijing tushuguan 1985 under *Zhengzhi* 政治). Jin Baokang (1925) divided the Unequal Treaties into three categories – those treaties that should be terminated without consent; those that should be abrogated with bilateral agreement; and those that should be terminated unilaterally. Qiu Zuming (1926) offered a solid study of the Unequal Treaty system examining its origins, earlier critiques, and strategies for revision. He singled out the Treaty of Nanjing, Tianjin, the Boxer Protocol, and the Twenty-One Demands as the most “damaging to the existence of the nation”.¹⁹ Drawing on international legal theory, Qiu itemized those national rights lost through the negotiation of foreign treaties. Qiu thus argued that China’s sovereignty and independence were contingent on the Unequal Treaties, and the chief task of China’s diplomacy was to fight for national rights. With respect to international law, Qiu held that “public law can be used for constructing arguments but cannot be relied upon (公理可谈而不可俟) [...] Since it has been the case, ever since antiquity, that diplomacy is backed up by military power.” (Ibid:51)

Zhang Tinghao’s *Bupingdeng tiaoyu de yanjiu* (*A Study of the Unequal Treaties*) drew on the Leninist notions of imperialism and colonialism to interpret the phenomenon of the Unequal Treaties as an extension of developments in domestic capitalism (Zhang Tinghao 1926). As a consequence, Zhang wrote, “like a hunk of fat meat in Asia, China naturally fell prey to European and American imperialism. For the imperialists, the Unequal Treaties entailed rights for them to enjoy, whereas for us they meant obligations to be fulfilled.” (Ibid:3) In this connection, Zhang characterized public international law as “an instrument for imperialists to deceive weak and small nations in protection of their illegal rights”. (Ibid:143) A sample of the Unequal Treaties literature of the later 1920s thus illustrates the in-

¹⁹ The Chinese text reads: “四约不改, 国无幸存.” (Ibid:3)

terest the subject evoked among scholars, jurists, government officials, and writers of all political inclinations (Waijiaobu tiaoyue weiyuanhui 1929; Zhou Gensheng 1929; Guomingdang Shanghai tebieshi dangwu zhidao weiyuanhui xuanchuanbu 1929; Wang Tieya 1943; CCP 1943).

The Chinese perception was that public international law primarily served the purposes of assisting Western expansionism. Their unease about the principle of sovereign equality and the extent to which it negated differences in power were evident in Chinese pronouncements on the function of international law in world politics. As we have seen, the principle of equality was not honored in most treaties signed between China and foreign countries. To what extent then, could sovereign equality be applied to China? Disparities in national power were a perennial issue in the dissemination of international law in China as well as in China's struggle with the Unequal Treaties.

As a result, the diffusion of international law cannot be simply understood as a matter of spreading the word of law in the sense of a mere transfer, but it also involves the assimilation of the appropriate legal framework and legal language into the indigenous culture of the host nation at a particular historical moment. One example can be given here. Historically, international law was composed of two parts, public and private.²⁰ Today, international law, also known as public international law or the Law of Nations, refers to standards of conduct and rules that apply between sovereign states. This is distinct from private international law, which deals with the conflict of laws, i.e. legal problems arising from the multiplicity of legal systems obtaining in different states.²¹ For Chinese in the first half of the 20th century, private international law was of little interest since it had no relevance to the questions thrown up by their immediate historical context.

INDIGENIZING (本土化, *BENTUHUA*) INTERNATIONAL LAW IN THE CHINESE CONTEXT:
THE SECOND HALF OF THE 20TH CENTURY

Over the last half century, the Peoples' Republic of China (PRC, 1949–) has developed set formulas and a systematic rhetorical vocabulary for interpreting world events. Here I argue that it uses this rhetoric to define its position on a variety of issues, to invoke public international law to serve its own purposes, and

²⁰ This view became standard after the term “private international law” was coined in 1841 by the German jurist Schaffner. “Conflict of Laws.” (Encyclopedia Britannica 2004a)

²¹ The study of the “conflict of laws” (private international law), an expression first used in 1653 by the Dutch jurist Christian Rodenburg (1618–1668), coincided with the beginnings of modern public international law. The doctrines of modern international law were first developed by the Anglo-Dutch School, especially Alberico Gentili (1552–1608) and Hugo Grotius (1583–1645) (Encyclopedia Britannica 2004b).

to modify internationally accepted interpretations of domestic and international events with which it does not agree.

In 1971, at the height of modern China's isolation from the outside world, Jerome Alan Cohen (1972) prophetically observed:

"It would be surprising if the PRC did not make some distinctive impact upon international law in view of its Marxist-Leninist-Maoist ideology of struggle against imperialism; the fierce nationalism that derives from China's bitter heritage of foreign exploitation; the totalitarian order, 'socialist transformation' of the economy, and Cultural Revolution that have been instituted internally; the continuing civil war with the Nationalist forces; and the PRC's long-standing exclusion from many international organizations and bilateral diplomatic relationships."

Though Cohen's remarks were hardly propitious under the particular circumstances of the Cold War, they challenged the conventional (and still prevailing) wisdom which emphasized the passivity of China in its entry into the family of nations, the collapse of its traditional tributary system and its forced compliance with international norms (Hsü 1960; Zhang Yongjin 1991).

The great encounter between China and Europe between 1500 and 1800 made a significant impact on both sides. Yet it was in the period after the 1840s, with the new external threat posed by the West from the sea and the ongoing contest for legitimacy between rival governments (most notably the first Republic's warlord government in Beijing vs. the Guomindang (GMD) government in Canton; the GMD's Nanjing government vs. the CCP; and the GMD government in Taiwan vs. the PRC), that China and the world were confronted with a multitude of fascinating and challenging legal problems.²²

We can distinguish five separate facets of the adaptation of international law to the Chinese context. First, China managed to resolve the paradox of sovereign equality and political and economic inequality that classical theories of international law had not been designed to deal with. Working in the positivist mode pioneered by Oppenheim, Chinese international lawyers treat major inequalities between powers as political rather than legal issues. They have staunchly defended the principles of sovereignty and legal equality as the basis for the regulation of state-to-state conduct, advocating enhanced opportunities for small or weak states to influence legal development and to "pursue agendas that are not simply those of the powerful." (Kingsbury 1999:621, see also Macdonald 1994) However, China's most prominent jurist, Wang Tieya, stresses that such arguments must not be equated with the doctrine of absolute or unrestricted sovereignty – under which

²² David Mungello (1999) characterizes the three centuries of encounter between China and the West as a reciprocal process of acceptance and rejection, at different times and in different ways.

nation states enjoy freedom to act at will, perhaps leading to the emergence of a single "superpower" or even "world government" (超世界政府) – which would only lead to anarchy. This is the kind of situation which the PRC has perceived as paving the way for past imperialist expansionism and aggression (Deng Zhenglai 1993:355–358; Zeng Lingliang 1994). The Chinese argument is that:

"The principle of equality does not mean that states are all equal in fact. The fact that states are different in size and population – large or small – and in terms of power – strong or weak – cannot be ignored. However, this actual inequality should not be a reason for the denial of the legal equality of states as the basis of interstate relations and a fundamental principle of international law." (Deng Zhenglai 1993:363)

Wang viewed this underpinning legal equality as "a safeguard" for the small and the weak "against encroachments on their rights by larger and stronger powers" (Deng Zhenglai 1993:363). Chinese international lawyers also argue that the limited enforceability of international law should be regarded as a potential strength rather than a deficiency (缺陷). The source of authority in international law lies in "equitable coordination" (平等协作) among sovereign states in the international legal order rather than in the ability of any one state or grouping of states to act as the world's policeman (Jiang Guoqing 2000).

The second way in which international law has been adapted to the Chinese context results from globalization and multi-nationalism. These ubiquitous features of the contemporary world have confirmed Chinese jurists in opposing the radical change in the modern conception of national sovereignty proposed in some recent work in international law. Their objection derives from China's "bitter experience" of the Unequal Treaties in the past, as well as from the conviction that the doctrine of sovereignty is "the only foundation upon which international relations and international law can be established and developed" (Leng Shaoquan 1965:260–261).

The history of international law demonstrates broad support for national sovereignty as "territorial supremacy" and for sovereign equality as a fundamental principle of an international legal system (Oppenheim 1905:171). Nonetheless, there was no consensus on its theoretical basis, and "unease about it persisted in practice" (Kingsbury 1999:603). Among international law theorists, three positions predominate with regard to the paradox of equality and inequality. Benedict Kingsbury (1999:603–604) summarizes them as follows:

"Vattel's naturalistic approach, with its remarkable analogy between equality of individuals and equality of states, has remained influential [...]. It persists in assertions that the exclusion of individuals from democratic participation in local and national government is the same injustice as exclusion of large third world states from permanent membership in the Security Council.[...] The positivist alternative, well represented by Oppenheim, sees equality as a logical corollary of sovereignty. A third explanation, reciprocity, is preferred by structural realists in international relations (for whom particular configurations of power

among states will largely determine the patterns of inter-states interactions), as reciprocity potentially accounts for the otherwise puzzling acceptance by states of formal equality despite disparities of power.”

Chinese international lawyers have been more at ease with positivists (Oppenheim) than naturalists (Grotius, Puffendorf, and Vattel), a stance clearly related to China’s experience with the Unequal Treaties.²³ Provoked by the discrepancy between the principles of international law which Western nations preached and what they actually practiced, Chinese viewed the transplantation of international law to their country as a bitter and humiliating experience involving the cynical separation of theory and practice (He Qinhu 2001). Nonetheless, despite the fact that international affairs were often not conducted in accordance with the principle of equality between sovereign states, Chinese international lawyers accepted the practical value of international law in providing the legal framework for a coherent world order.

As a third major point of distinction, Chinese discourse on international law displays a universalistic rhetoric that demands that the subject be sufficiently elastic to adapt itself to a constantly changing world environment. From time to time, this universalistic rhetoric appears self-contradictory. On the one hand, Chinese scholars stress that international law dealt initially with only a few European states. Developments since World War II, however, have created a legal system that applies to all nations universally. On the other hand, Chinese legal scholars argue that, given China’s size and importance, “the extent to which contemporary international law can really be said to be universal in character depends largely on China’s attitudes towards international law.” (Li Zhaojie 1993)

Fourthly, having accepted the efficacy of international law, China has exerted considerable pressure on traditional international legal doctrine. As a result of their violent history, the Chinese came to believe that public international law could be an effective instrument of struggle against imperialism, colonialism and hegemony.²⁴ In nearly all the textbooks on international law published in the PRC,

²³ Important naturalist writers agreed that the source of national and international laws were derived, “not from any deliberate human choice or decision, but from principles of justice which had a universal and eternal validity and which could be discovered by pure reason; law was to be found, not made.” (Malanczuk 1997:15–17) By the 18th century, the theory of the law of nature was challenged by positivism, which argued that law was largely positive and man-made. In other words, positivism held that law and justice were not the same thing, and international law was credited through states’ behavior and practice. Concerning treaties, positivists normally “assert legal rules can be found by consulting provisions of treaties that have entered into force. Among these scholars, there seems to be a great deal of sanctity accorded to the written text.” (Ku/Diehl 2003:25)

²⁴ A good example is Chen Tiquang 1985.

a prominent place is given to the Five Principles of Peaceful Co-existence as leading principles of international law (Liang Xi 1993; Wang Tieya 1998). The Five Principles were first formulated and proclaimed as the basis of international relations in a treaty known as the Agreement between the Republic of India and the People's Republic of China on the Trade and Intercourse between the Tibet Region of China and India signed on April 29, 1954. This agreement was later reconfirmed in several international documents, including the "Ten Principles" adopted at the Bandung Conference in 1955, and the Charter of Economic Rights and Duties of States approved by the UN General Assembly on December 12, 1974 (Chen Tiqiang 1984).²⁵ The five principles are: mutual respect for each other's territorial integrity and sovereignty; mutual non-aggression; mutual non-interference in each other's international affairs; equality and mutual benefit; and peaceful coexistence.

China's reading of international law and the Unequal Treaties has been seminal in shaping both academic perspectives on the subject and its stance on foreign relations, resulting in an emphasis on incorporating international law into research on modern China's foreign relations. An important example is Cheng Daode's *Jindai Zhongguo waijiao yu guojifa* (Modern Chinese foreign relations and international law), which examines such issues as foreign extrality in China, the concession system, tariffs, and the Treaty of Friendship and Alliance between China and the U.S.S.R. of 1945 (Cheng Daode 1993).

CONCLUSION

The issue of legal equality versus political and economic inequality engages with a broad range of debate in China on the meaning of modernity (expressed in the desire for international standards) and nationalism (molding and reconstructing national identity through the story of the Unequal Treaties and national humiliations), whether in the age of imperialism, the period of nationalist movements, or the post-imperialist period.

The conclusion that emerges from a study of the dissemination of international law in China and its links with the story of the Unequal Treaties is that the tangled web of connections between two significant collective impulses – the desire to conform with international standards and the concomitant molding and reconstructing of cultural, ethnic, and historical memories – should not be overlooked as a factor in the development of Chinese nationalism in the twentieth century. The issues of the Chinese development of international law and the Unequal Tre-

²⁵ In this article, Chen details the origins, development and significance of the Five Principles from the perspective of the PRC.

ties display a triple concern for internal unification, international status, and the reinforcement of Chinese identity. This supports my argument that the age of globalization, far from diminishing the influence of nation-states, has in reality made the role of sovereign nations more diverse and complex (Smith 2001:135–139; Duara 2002).²⁶

The paradox of equality and inequality enters into the discussion of Chinese nationalism on two levels. Firstly, there is the narrative of the past that constitutes cultural and historical memories. The working of memory in popular consciousness, as Paul A. Cohen (2001) remarks, is primarily about defining identity and “framing the past interpretively” in such a way that it ultimately makes the past square with a preferred present. In the case of China, memories of the Unequal Treaties and the one-sided application of international law reinforce a deep sense of injustice, or fear of injustice in a world of power politics, that is central to modern Chinese identity. This fear, bordering on paranoia, is well illustrated in the following two examples.

At the end of 8 months of negotiations over the 16-article Sino-MacKay Treaty of 1902, as detailed in Chapter 1, China’s chief negotiator Zhang Zhidong commented that, for fear of losing more *zhuquan* (主权 sovereignty), rights related to *zhiquan* (治权 extraterritoriality), *caiquan* (财权 rights related to finance), and *liquan* (利权 interests), the Chinese “had met [with the British] more than 60 times, and bargained over and over again about every single detail of each treaty clause till their tongues and lips were parched.”²⁷ My second example is taken from a series of seminars on international law run by the CCP Central Committee in 1996. On December 9, 1996, at the end of one of the seminars, the then Chinese President Jiang Zeming warned the participants that, owing to their lack of knowledge of international law, some local and departmental cadres were severely disadvantaged in their work. Therefore, Jiang urged, “our leaders and cadres, especially those of high rank, ought to take note of international law and enhance their skills in applying it [...] We must be adept at using international law as ‘a weapon’ to defend the interests of our state and maintain national pride.” (Renmin Ribao 12/10/1996) Jiang’s talk was later characterized by Wang Tiewa as a “second spring” in twenty years of international law in China (the “first spring” being the launching of reform in China in 1978, Wan Xia 1996; 1999). In addition to the element of anxiety, these examples also illustrate China’s search for a balance between the acceptance of international legal standards (by reasoning things

²⁶ For more about different aspects of Chinese nationalism and transnationalism, see <http://cio.ceu.hu/>.

²⁷ The Chinese text reads: “聚议六十余次之多, 舌敝唇焦。” (Wang Yanwei/Wang Liang 1987: vol. 162, 2602)

out, *shuoli* 说理) and vigilance over any verbal or actual provocation that might pose a threat to its sovereignty.

The second level at which the paradox works in the context of nationalism is seen in the formulation of a distinctive language of controversy and polemic used to communicate China's interpretation of current events to the wider world. On March 21, 2003, on the eve of the U.S. attack on Iraq, Chinese jurists met and agreed that the impending war had no legal basis and was in violation of both international law and the United Nations Charter. The President of the Chinese Association of International Law, Wang Hongli, commented: "The American war on Iraq is the result of the bad reasoning of 'Monopowerism' and unilateralism (一强独大和单边主义). Subjecting international law to 'the law of the fist' will surely bring about a catastrophe for humanity." (Renmin Ribao 03/22/2003)

This line of argument resonates with what China defines as the true "internationalization" of international law after WWII. For China, the fundamental changes in international relations that characterized the post-war period included the abandonment of the principles and rules that justified imperialism and colonialism and their replacement by the principles of self-determination and sovereign equality among all nations (Ibid.:195). Disputing the existence of what some commentators have called "a crisis" of international law as a result of the "disappearance" of "cultural unity," Wang Tiewa described the task of international lawyers as "taking account of [the] different histories and cultures of various countries" and seeking principles of law and justice which are common to all (Wang Tiewa 1990:356). What this means for China is that any application of international law in matters where China is concerned must take into consideration its historical situation as well as its national culture.

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