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Introduction

"In the Nineteenth Century, There Was No International Law"

This book seeks to clarify the process by which international law ideas became objects of both reception and contention by officials, diplomats, jurists, and intellectuals in Chinese society. It also explores how this reception history intertwined, often in ways now obscure or forgotten, with changes to the international law profession at the global level. An additional aim will be to challenge certain prevalent notions about the history of international law in general.

Such notions include: 1) that the late nineteenth- to mid twentieth-century turn to increasingly formal international legal organization, legislation, and institution-building was a kind of natural, path-dependent evolution of the European law of nations as it existed at the beginning of that period; (2) that "peripheral" states were only indirectly connected to the development of legal norms during this era of transformations; and (3) that China and other non-Western states' emphasis upon articulating their own "sovereign" rights during and after decolonization has represented a rejection of international law as such, rather than a reappropriation.[1] In reality, as Georges Abi-Saab wrote of the latter process, it was precisely bound up with the "transformation of very large parts of the globe, mostly in Africa and Asia, from *objects* to *subjects* of international law."[2]

A conceptual history of international legal order as conceived in and in relation to China, like the one undertaken in this book, must place the family of concepts and arguments it comprises into their own discursive, social, and also material contexts.[3] From the beginning, the story of China's reception of international law was also the story of the Chinese state's and society's own incorporation into new, rapidly transforming global power structures. China was very much still at the heart of its own conceptual world order when, in 1776, the Qianlong emperor ordered officials to ensure that merchants pay back delinquent debts to the Western foreigners at Canton because "as these *yi* traders ventured over so many seas to get here in search of profit, we must treat them fairly and send their ships back laden with goods: only thus would we comport with China's great stately propriety" (*fang de zhonghua da ti* 方得中華大體).[4]

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At just the same time in Britain, the first readers of Adam Smith's *The Wealth of Nations* were encountering his view that China had, "even long before [Marco Polo's] time, acquired that full complement of riches which the nature of its laws and institutions permits it to acquire." For Smith, despite the wealth, population, and order so long admired by European intellectuals, China's failure to realize the benefit of liberal foreign trade had long left it "stationary"; with the result that "the greater part of Europe being in an improving state... China seems to be standing still."[5] This premise, with its close linkage between civilizational progress and the continuous outward expansion of economic relations, would in coming decades grow ever more influential. By the mid nineteenth century, as Qianlong's successors sought to stem mounting foreign encroachments with continued offers of magnanimity from the imperial center, the notion had fully coalesced among British and other foreign merchants that China needed to be "opened" and its economy more fully integrated into the global network of European-centered trade.

From the First Opium War of 1839–1842, that project of opening was well entrenched. As the preamble to the 1982 Constitution of the People's Republic of China would later put it, "After 1840, feudal China was gradually turned into a semi-colonial and semi-feudal country."[6] Much of China's subsequent law and politics has been premised on this notion that the country's "modern" history began at this point, and in direct response to Western economic imperialism. Certainly, at this point, China was indeed gradually incorporated as a "periphery" into systemically unequal economic relations, backed by direct and indirect forms of coercion that reinforced foreign capitals' dominance in productivity, trading agency, and financial capacity.[7]

At the same time, modern Chinese legal and political thought emerged in a polity whose market was, in many ways, at the very forefront rather than the periphery of global capitalist expansion. While constructed as the quintessential "backward" state actor, it was also treated as a workshop for the latest projects of avant-garde governance, from cooperative institution-building to (imposed) multilateral projects of free trade promotion and the "opening" of local markets. Both frontier and experimental laboratory, there are few subject/objects of international law that could better exemplify a "simultaneity of the non-simultaneous" (*Gleichzeitigkeit der Ungleichzeitigen*) in legal history than did China from the mid nineteenth to mid twentieth centuries.[8]

This book builds upon growing scholarly attention to both the histor(ies) of international law[9] and China's specific legal interactions and experiences.[10] As noted, international law did not come to China as some kind of ready-made universal rulebook – despite the occasional pretensions to this effect by Western officials and, on occasion, even their Chinese interlocutors. Instead, the global professional community that would elucidate and seek to codify this "gentle civilizer of nations" in its modern form was itself first taking shape precisely during the mid to late nineteenth-century period when Western global capitalist expansion finally penetrated China's theretofore largely

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"closed" political and economic space. The rapid imposition of regulatory structures in areas ranging from war to navigation to diplomacy is best understood against this context. Rather than unbidden flashes of moral genius in the minds of men who happened to be elite jurists of expanding commercial empires, the new ideas of global order were very much "the scholarly manifestation of a partisan political project, the civilizing mission."[11]

That notion, of international legal order as a "civilizing" project, was applied to China just as much as to more notionally "savage" zones; indeed, in some respects, China's supposed "half-civilized" status made it a more important target for "civilizing" legal innovations. Its vast existing and even vaster potential market, as noted previously, also served as a continuous draw for new international agreements and legal regimes of varying degrees of formality intended to ensure that civilization, trade, and Christianity could flourish in tandem on soil once secluded by isolationist policies. It is seldom appreciated the degree to which many of the most dominant and influential voices in Western international law during the period under consideration, including nineteenth-century figures such as Johann Caspar Bluntschli and Fyodor Fyodorovich Martens but also more recent heroes of the "invisible college," constructed ideas as to international law's content and potential in part via an Orientalizing gaze for which China – as the most significant state to be "almost" fit for membership in the club of the civilized – had a special status, giving rise to elaborate new justifications for domination. As we will see, from their very earliest encounters with such notions and their advocates, many Chinese interlocutors were well aware of the role of international legal argument in the procurement of Western geopolitical/commercial interests.

A special concern for international legal history in general is the question of "how to write the history of international law in a way that does not simply subsume the non-European periphery into an essentially European narrative of progress."[12] This book seeks to make the voices of Chinese interlocutors with international legal order in the period under consideration more fully available to today's readers, in part to underscore the profound contingency of international legal order as it has subsequently developed.[13] It is indeed the case that "the limits of our imagination are [the] product of a history that may have gone another way."[14] The failed or stymied projects of reform examined in this book, as much as those that succeeded, may illuminate aspects of international law that remain relevant to its current function and structure. This is the case even if, as we will see to be the case, China today more often stands for the status quo of international rules and institutions than for any effort toward their radical revision.

Synopsis

One aspect of general international legal history that this book helps explore is the function of *spatial appropriation* as a driving force in international law's

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development over time.[15] Not only cynical agents of expanding empires, but also many "progressive" international jurists in the West, and even avowed pacifists, saw the extension of this legal order to ever more new spaces, including China, other Asian states, and the vast African interior, as something akin to a manifest destiny for their field. The quintessential experience of international law as an "object," to employ Abi-Saab's dichotomy, was for a state to be rendered an "empty" space available for the application of imposed regulatory regimes. This was precisely China's experience after the coerced opening of its ports to foreign traders by the Treaty of Nanjing and in other bilateral "unequal treaties," but much more so in the aftermath of the multilateral 1860 Convention of Beijing. From then on, many new ideas concerning the rights and personality of states, freedom of trade, global governance, the use of force, and territorial integrity, among others, were tested in a region where outright conquest was usually less profitable than indirect domination.[16]

Finally, a key narrative presented throughout the book will be how Western-derived international legal structures and ideas came to operate as a new politico-legal grammar for public discourse across, and among, East Asian states and peoples. Although local and foreign intellectuals at times found (and, some argued, exaggerated) intriguing parallels between features of the ancient Chinese state system prior to unification and the international law of the West, few seriously denied that the latter was in most respects experienced as an imposed, unfamiliar order. That nonfamiliarity was generative of new ways of describing not only interstate relations, but also the internal character of states. Most fatefully of all, by the turn of the twentieth century, the concept of "sovereignty," newly associated with the ancient two-character phrase *zhuquan* 主權, had already become something like the foundational norm of public law, domestic and international, throughout East Asia. This notion's modern content was in large part transmitted as part of a larger lexicon of public law notions, and shaped by diplomatic and commercial interactions, especially through the medium of a Meiji Japan aspiring to regional hegemony.

Reflecting this inextricable connection between modern China's international legal history and the notion of sovereignty, this book also builds on, and in some cases challenges, recent studies of the "genealogy of sovereignty in China,"[17] illustrating that modern sovereignty discourse has always been very closely tied to notions about an underlying world order, and often initiatives to reform that order. The role of these diverse origins in the early development of modern Chinese notions of sovereignty and world order will be a particular focus of the early part of this book's narrative. Importantly, throughout the period covered by the first of this book's first three chapters, it was not "sovereignty," but rather the Chinese concept of *guoti* 國體 – loosely translatable depending on context as "state form" or "stateliness" – that served as the dominant metric for evaluating legal interactions. Only gradually did *guojia*

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zhuquan/state sovereignty come to serve as a "basic concept"/*Grundbegriff* of legal and political discourse.

Meanwhile, as we will also see, *guoti* itself was interpeted in different ways by different actors, and as early as the 1850s was invoked by some officials in the name of territorial control or autonomy over economic policy, rather than solely by reference to imperial *auctoritas*. While even much modern scholarship in East Asia tends to remember the Chinese side of early encounters with the West as stubbornly insistent upon "an egocentric and universalistic world image with a strong sense of superiority [i.e.,] Sinocentrism,"[18] close attention to the discourse of "stateliness" reveals a far more dynamic and self-aware praxis of engagement. Relatedly, Chinese international lawyers have often seen in this modern field family resemblances to various ancient ideas and practices among the warring states of China's preunification era. As one of the profession's most important twentieth-century figures, Wang Tieya, suggested in his 1990 course at the Hague Academy of International Law, there was in that formative period of China's culture already something like a "quasi-international law," or at least perhaps a "rudimentary international law . . . analogu[ous] to that of the Greek cities" of the ancient Mediterranean.[19]

China's nineteenth-century Manchu rulers, too, brought to bear in their relations with the West a different set of conceptual categories that, at times, facilitated a pursuit of "equal" relations – perhaps in a more genuine sense than did Western treaty practices using formal equality to mask informal control. For later generations of officials, diplomats, and eventually lawyers, as well, it was to be the inherent *equality* of sovereign states that was often treated as sovereignty's essential feature, though this notional equality was also closely linked with territorial control. For a state already embedded in a dense fabric of legal relations, "reclaiming sovereignty" most often meant learning to put law to use, not rejecting it. Already by the 1850s, erstwhile Qing efforts to "unilaterally apply . . . norms based on its own world image"[20] to the encroaching West were giving way to far more nuanced strategies mixing compromise, self-assertion, and emulation. Western legal regulation, however, took on ever more universalist aspirations as it changed from a framework of more or less coercive bilateral dealings to a truly world-spanning imperial code.

A body of law that China first encountered as a system of imposed norms and alien "projects" gradually, over roughly a century, became space for the projects of its own people.[21] Some young intellectuals of the Qing Dynasty's last years, for example, already argued that "in the 19th century, there was only power, no public [international] law" (*zhi you qiang er wu gongfa* 祇有強而無公法).[22] Given that Western states "preserve[d our] territorial integrity only in name, while in reality laying claim to their own interests," such observers suggested that, from their standpoint, the real history of international law – a discourse "that only exists among equals" – had yet to begin.[23]

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Being primarily a work of conceptual history, this book does not purport to provide a comprehensive overview of the many elements of international law doctrine that it discusses. Nor is this mainly a study of diplomatic history, international relations, or political economy, a sociological study of China's international law profession, or a biographical study of individual figures in the field, although it necessarily includes discussions related to all of these subjects. Its topic is, more modestly, an account of certain historically situated ways of thinking about the world, the state, and law. The ensuing analysis of international law's conceptual history in, and in relation to, China will proceed via engagement with both primary and secondary sources. Naturally, the many existing excellent studies of China's social and diplomatic as well as legal history from the Late Qing through modern eras have greatly contributed to the analysis herein.[24]

Meanwhile, combining these sources with the close reading of archival documents that have never previously been translated and, in some cases, not yet utilized in any Chinese or foreign historical study, has helped to illuminate previously underemphasized aspects of Chinese encounters with international law and its ideas. In some cases, these consulted sources comprise records that have only been made available in recent years. Foreign ministry archives from the mid nineteenth century through the mid twentieth century, private correspondence and memoirs of diplomats and other officials, and databases of scholarly and popular publications have proved invaluable sources for evaluating changing ideas about international law. So too, of course, are doctrinal international law writings, both those articulated from the Western "center" and those from writers in its vast "periphery." At no point during the period under examination, or since, has "international law" been a monolithic discourse lacking for alternative voices and vocabularies.

The nine chapters of this book focus on Chinese engagements with international law in the period between 1850 and China's World Trade Organization (WTO) accession in 2001. Already by roughly the midpoint of that long span, amid the fateful experiences of the Paris Peace Conference and "May Fourth Movement" of 1919, both Western international law and ideas of sovereignty as the constitutive legal status of statehood had been thoroughly internalized in China. As of the first decades of the twentieth century, global legal ordering had become a field in which Chinese jurists, diplomats, and politicians, as well as those of many other once "peripheral" states and peoples, could articulate and pursue their own projects, rather than only being the objects of those initiated in the West. China's own domestic polity, meanwhile, had itself long since been inextricably embedded in a web of transnational relationships and structures, views about which and the possibilities for their revision would shift across a number of regimes, and a radically changing world situation.

The nineteenth-century "family of nations" as well as the post-1919, post-1945, and post-1989 frameworks of international law have been ways of

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mentally ordering the world as well as authority structures based on shifting centers of wealth and power. The Great Qing *gurun*, which was coercively incorporated into the law of nations as a key object of administration, eventually turned into the Chinese republic that cofounded the modern international legal order in 1945, and whose state socialist successor is ever more deeply intertwined – or even synonymous – with it today, sharing a place at the summit of institutions such as the United Nations Security Council and at the core of regulatory systems like the WTO. Across that span of time, generations of publicly engaged individuals sought out ways to reform the vast array of rules and power networks in which they found themselves and their polity thoroughly imbricated, though they also often endorsed many of its essential features and, ultimately, contributed in many ways to entrenching its current status quo. In all of these senses, for readers anywhere in the world today, the history of ideas regarding China and international law is a matter of "self-knowledge."[25]

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Part I
Preserving Stateliness, 1850–1894

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Universal Prosperity

In early January 1850, a boat carrying the renowned but officially disgraced 66-year-old official Lin Zexu moored on the Xiang River by the city of Changsha, as Lin made his way home to Fujian accompanied by his three sons, his late wife's coffin, and a large quantity of books. While passing through Hunan, Lin sought out a local scholar in his late thirties named Zuo Zongtang, who had been recommended to him as a serious thinker on policy matters. On board the vessel, Lin and Zuo talked long into the evening about the problems afflicting the Qing Empire, of which the most important involved "bureaucracy, finance, and maritime defense." As Zuo would later recount, they went over "countless" documents together, discussing in particular affairs related to Xinjiang, where Lin had formerly been exiled. One day, he thought, that far-off region could be made as politically secure and economically productive as the Yangzi River Delta.[1]

After being dismissed in 1840 from his high-level position as the viceroy of Liangguang for his role in helping to "provoke" the First Opium War, Lin had spent several years working in exile in the region of Ili, near what is now China's border with Kazakhstan. There followed several years of service in Ili and elsewhere, most recently Yunnan, where his wife passed away in 1847. Lin was now returning to his native Fuzhou to retire. Once home, however, he hardly had time to settle before learning of the death of Emperor Daoguang, who had raised Lin to his former esteemed rank and then laid the blame on him after full-scale war broke out with Britain. Following Daoguang's death, his nineteen-year-old son and successor, the Manchu prince Iju, ordered Lin Zexu out of retirement to help face a new crisis – the growing, religiously tinged uprising against Qing rule centered in Guangxi that would soon transform into the Taiping Rebellion.[2]

Several officials remonstrated to the new emperor that Lin's health was weak and that he likely could not bear the strains of returning to active service, but Iju angrily rejected these views, especially because they came from officials who had, after Lin's removal, reversed course to sign the conciliatory 1842 Treaty of Nanjing that opened new ports for British trade, provided reparations for the opium that Lin had destroyed, and handed over Hong Kong as a "supply depot." In a scathing imperial order issued soon after taking

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the throne, Iju demoted the Manchu high officials Mujangga and Kiyeng, who had both influenced his late father's appeasement policies. The Lin affair provided some useful ammunition: Mujangga had "sought to prevent the use of talent" out of jealousy for his own influence, and "tried to confuse Me with false reports." Kiyeng, meanwhile, was to be punished most of all for his decade-long course of conciliation, in particular, during his tenure as viceroy at Guangzhou, where he had gone on to sign treaties with France and the United States on terms similar to those of the Treaty of Nanjing. Both officials, Iju charged, had abused his father's favor and "usurped imperial authority" (*qie quan* 竊權).[3] Such behavior would now be banned, Iju declared. In reality, however, his decade-long rule was to be marked by even worse defeats and, eventually, a near-total submission to Western commercial and legal structures. By then, Iju's official reign name, in Chinese *Xianfeng* and in Manchu *Gubci Elgiyengge* – both meaning "Universal Prosperity" – would seem deeply ironic.

As it turned out, the reports of Lin's frail health were apparently accurate after all, as he died en route to his new post, never to take up the task of suppressing the new rebel movement. British colonial officials in Hong Kong expressed some regret at the death of their erstwhile opponent, whose tough approach might now have been helpful in suppressing the "banditti" and "desperadoes" who threatened local trade as well as state authority.[4] They were displeased, as well, with the demotion of Kiyeng: Future concessions might have been more easily procured had he stayed in office in Canton.[5] Also of concern was competition from foreign rivals including France and (particularly) Russia, who were already seeking to emulate British success in China. And, perhaps most importantly, the British mercantile community both locally and back home was vocal that the status quo remained insufficient. Full access to China's vast interior market would have to come sooner or later. Perhaps, many British merchants and politicians came to feel, the key to commercial progress was to establish direct, European-style diplomatic and legal relations with the Throne, preferably but not necessarily by noncoercive means.[6]

Law among States?

When Kiyeng was brought to task by his new emperor over concessions like paying reparations for the opium destroyed by his predecessor at Guangzhou, opening up ports, approval of extraterritorial jurisdiction, or de facto legalization of missionary activities, he could draw upon the words of the late Emperor Daoguang for his defense. These moves, he said, had all been but ways to "set aside minor details and focus on grand policy matters" – for example, allowing consular jurisdiction would help Qing officials avoid adjudicating "foreign nuisances."[7] Kiyeng maintained that he had faithfully followed the orders he (like Lin before him) had received from Iju's father:

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