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## ESSAY

# The Impact of International Law on the Transformation of China's Perception of the World: A Lesson from History

LI ZHAOJIE (JAMES LI)<sup>†</sup>

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## INTRODUCTION

A nation's attitude toward international law stems from its world outlook. In this respect, China is no exception. But what makes China different from other nations is its unique historical experience. The legacy of history shapes the present. We make our own history not just as we please, but only "under circumstances directly encountered, given, and transmitted from the past."<sup>1</sup> History plays a particularly important role in China.<sup>2</sup>

Anyone taking a brief look at modern Chinese history will find a broad spectrum of earth-shaking and kaleidoscopic changes in the modern nation-building process. In the space of one and a half centuries, China was reduced by foreign imperialism from its own "Middle Kingdom" at the center of the universe to a semi-colonial society.<sup>3</sup> China then emerged as an independent republic and

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1. Karl Marx, *The 18th Brumaire of Louis Napoleon*, reprinted in KARL MARX & FRIEDRICH ENGELS, *BASIC WRITINGS ON POLITICS AND PHILOSOPHY* 320 (Lewis S. Feuer ed., 1959).

2. SAMUEL S. KIM, *China and the World in Theory and Practice*, in *CHINA AND THE WORLD: CHINESE FOREIGN RELATIONS IN THE POST-COLD WAR ERA* 12 (1994).

3. John K. Fairbank, *Introduction* to *THE CHINESE WORLD ORDER* 1, 2-5 (John K. Fairbank ed., 1970).

eventually became a major world power. Concomitant with such great changes was the radical and fundamental transformation of the Chinese global outlook from a Sino-centric one based on Confucianism to modern Chinese nationalism, which embraces the idea of sovereign equality and independence.<sup>4</sup>

What is the *leitmotif* that cuts broadly across the process of such transformation? Immanuel C. Y. Hsü, a distinguished historian, observed that this transformation is certainly not a passive response to the onslaught of the West, but an “active struggle of the Chinese to meet the foreign and domestic challenges in an effort to regenerate and transform their country from an outdated Confucian universal empire to a modern national state, with a rightful place in the family of nations.”<sup>5</sup> This author fully agrees with this observation. From a legal perspective, the formation and development of the Chinese attitude toward international law is, therefore, a reflection of this historical transformation.<sup>6</sup>

#### I. FORMAL INTRODUCTION OF MODERN INTERNATIONAL LAW INTO CHINA

Beginning with the Opium War, Western imperialistic invasions broke down China’s Sino-centric world view and replaced it with an

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4. *Id.* at 1–5. For a long time in history, geographical barriers kept the whole region of East Asia separate from the West. To Westerners, East Asia was a remote and seemingly inaccessible land at the end of the earth. Even today, in the European parlance, “the Far East” still remains in common use. However, the Chinese did not perceive their world the same way the Westerners did. The Far Eastern region in Chinese eyes became *Tianxia*, literally, “all under Heaven,” of which China perceived itself to be the very center. Thus, China’s name, *Zhongguo*, denoted a sense of “the central country” or Middle Kingdom which embraced the whole world known to it. Such traditional Chinese perception of its place in the world is what Western historians have meant by the term, “Sinocentrism,” which is used to characterize traditional China’s relations with other nations generally. Of course, China’s self-image as the center of the world is a false idea in modern geographical terms. Throughout history, however, such idea accorded closely with the facts of East Asian experience, and had seemed to be reinforced by practical reality. *Id.* at 1–5.

5. IMMANUEL C.Y. HSÜ, *THE RISE OF MODERN CHINA* 14 (1975) [hereinafter HSÜ, *RISE*].

6. Since time immemorial, the conduct of China’s “foreign affairs” had been directed under the so-called Sino-centralism based on Chinese cultural supremacy and an idea of all-embracing unity. See Fairbank, *supra* note 3, at 2. This traditional world outlook was further legitimized by Confucianist political philosophy that advocated peace and harmony in a hierarchical and anti-egalitarian social order. See *id.* at 1. Until the arrival of expansionist Western imperialistic powers on the Chinese scene in the middle of the 19th century, China’s foreign relations had been managed under an indigenous system known as the “tributary system,” whereby China, occupying the patriarchal position, assumed the leadership and, in return, tributary states came into contact with China as part of the Chinese family of nations, but in a subordinate position. *Id.* at 2–5.

unequal treaty regime.<sup>7</sup> In the process of destroying the traditional Chinese world order and its institutions, the Western powers not only used strong warships and efficient guns to “put down China’s resistance by force,” but also endeavored to enlighten the Chinese with Western ideas and institutions.<sup>8</sup> A significant aspect of this latter attempt was the formal introduction of the European system of international law into China.<sup>9</sup>

After the signing of the Conventions of Peking in 1860, the imperial court of the *Qing* Dynasty accepted the bitter reality that China had no alternative but to learn to live with the West.<sup>10</sup> As Sino-Western relations entered a new phase of a decade-long era of peace and cooperation, Chinese officials who took charge of foreign affairs became aware of the necessity of having some knowledge of international law to deal with the West on a regular basis.<sup>11</sup> In 1863, a leading official of the Office of Foreign Affairs (*Zong-li ya-men*) asked the American Minister, Anson Burlingame, to recommend an authoritative work on international law that Western nations recognized.<sup>12</sup> The Chinese need for international law was further evidenced by Prince Gong’s memorial to the court in August 1864, asking for imperial sanction of an appropriation of the printing of the translated Henry Wheaton’s *Elements of International Law*,<sup>13</sup> which reads in part:

Your ministers have found that the Chinese spoken and written language is learned with care by foreigners without exception. Among them, the cleverest go even further and immerse themselves in studying Chinese books. When a case is argued or discussed, they can usually base themselves on Chinese legal codes . . . . Unfortunately, the regulations of foreign countries are all written in foreign languages and we suffer from being unable to read them. And it will still take some time for the students in the *Tung-*

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7. See Chen Tiqiang, *The People’s Republic of China and Public International Law*, 8 DALHOUSIE L.J. 3, 6 (1984).

8. *Id.*

9. See *id.* at 4.

10. See HSÜ, RISE, *supra* note 5, at 214–19.

11. IMMANUEL C.Y. HSÜ, CHINA’S ENTRANCE INTO THE FAMILY OF NATIONS 125 (1960) [hereinafter HSÜ, ENTRANCE].

12. *Id.* at 127.

13. HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 18 (1863). In 1861, Prince Gong (Yi Xin) was made the chief of the newly founded Tsungli Yamen, commonly known to the Western powers as China’s Office of Foreign Affairs. HSÜ, ENTRANCE, *supra* note 11, at 108, 125.

*wen Kuan* (School of Foreign Languages) to master the foreign languages thoroughly . . . We have learned that there is such a book as called *Wan-kuoLü-li*, “Laws and precedents of all nations.” Yet when we wanted to seek it directly, and entrust its translation to the foreigners, we were afraid that they might wish to keep it confidential and not have it shown to us.<sup>14</sup>

The Qing court was not alone in realizing the importance of learning Western international law. Having seen numerous Chinese fumbles in diplomatic transactions, foreigners were also conscious of the need of introducing their international law into China so that the Chinese officials could comprehend the rules by which a semi-colonial state was supposed to abide.<sup>15</sup> It was William A. P. Martin, an American missionary and sinologist, who assumed this task.

Even when he served as an interpreter to American Minister William B. Reed in 1858, Martin came up with the idea of translating a work on international law into Chinese.<sup>16</sup> He originally intended to translate Vattel’s *Le droit des gens* when Ward, the American minister to China, recommended Wheaton’s *Elements of International Law* as being more modern and equally authoritative.<sup>17</sup>

Wheaton served the United States as a career diplomat in Europe for almost two decades. His *Elements of International Law*, published in 1836, was the first systematic and large-scale treatise on international law by an Anglo-American author. Based on the author’s rich diplomatic experiences and extensive scholarly studies, the book focused on diplomatic transactions, cases, and other historical precedents. Wheaton’s reasoning impressed readers with its straightforward style and impartiality and was frequently cited in American court decisions and state papers. No less than 15 American and English editions have been published.<sup>18</sup> This wide readership reflected the high esteem that the American conception of international law held at the time.

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14. 3 QINGDAI CHOU BAN YIWU SHIMO [HISTORY OF THE MANAGEMENT OF BARBARIAN AFFAIRS OF THE QING DYNASTY], 1184–85 (Beijing: Zhonghua Shuju Press) [hereinafter MANAGEMENT OF BARBARIAN AFFAIRS]. For an English translation, see SSU-YÜTENG & JOHN K. FAIRBANK, CHINA’S RESPONSE TO THE WEST, A DOCUMENTARY SURVEY 1839-1923, at 97–99 (1965).

15. HSÜ, ENTRANCE, *supra* note 11, at 126.

16. *Id.* See also W.A.P. MARTIN, A CYCLE OF CATHAY 222 (1897).

17. MANAGEMENT OF BARBARIAN AFFAIRS, *supra* note 14.

18. *Id.* at 234–35.

In Martin's opinion, Wheaton's book was a full and impartial digest, and as such it found its way into all the cabinets of Europe.<sup>19</sup> Martin felt that the Chinese would benefit from a translation of this work.<sup>20</sup>

When Martin began his translation in 1862, he was encouraged by Robert Hart, then inspector-general of Chinese Customs, and he was able to secure the help he needed from Chinese scholars for the translation. Originally, Martin wanted to show the Chinese the Western concepts and principles by which international relations were conducted. He did not expect any sponsorship from the Qing court. In the spring of 1863, he wrote to the American Minister, Anson Burlingame, proposing to complete the translation so it could be used by the Chinese government. Burlingame gave Martin encouragement and assured Martin that he would assist him in bringing the translation before the officials of the Qing court. In June of that year, Martin set out for the north and brought the translated passage with him. At Tianjin, he was met by the Qing court minister-superintendent of trade. Looking over Wheaton's manuscript, the minister-superintendent was impressed with its acknowledgement of the needs of China in handling its new relationships, and promised to write on the subject to the court.<sup>21</sup>

Through Burlingame's efforts, Martin obtained an interview with four top officials of the Court's Office of Foreign Affairs on September 11, 1863.<sup>22</sup> The Office welcomed the manuscript right away. "This will be our guide when we send envoys to foreign countries," one of them said.<sup>23</sup> Martin assured the officials that "this book would be appropriate reading for all countries having treaty relations. But because its text [the Chinese version] and meaning do not go very intelligible and satisfactory, he requested our [Chinese] corrections and revision for the purpose of publication."<sup>24</sup>

Prince Gong had already learned about the translation from Burlingame and was secretly anxious to read it. Upon studying it, he found it useful but hard to comprehend, as he later reported to the court:

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19. HSÜ, ENTRANCE, *supra* note 11, at 127.

20. *Id.*

21. MARTIN, *supra* note 16, at 222, 233-34.

22. HSÜ, ENTRANCE, *supra* note 11, at 127-28.

23. MARTIN, *supra* note 16, at 233.

24. MANAGEMENT OF BARBARIAN AFFAIRS, *supra* note 14, at 1185.

Examining this book, I found it generally deals with alliances, laws of war, and other things. Particularly it has laws on the outbreak of war and the check and balance between states. Its words and sentences are confused and disorderly; we cannot clearly understand it unless it is explained in person.<sup>25</sup>

Eventually, four secretaries of the Court's Office of Foreign Affairs were appointed by the prince to help edit the text. After nearly six months of editing, the Chinese translation of Martin's manuscript was finally completed in the winter of 1864. The book is prefaced by a two-page essay describing the various nations in the world, followed by two simple maps of the Eastern and Western hemispheres that do not appear in the original Wheaton.<sup>26</sup> It also contains two Chinese forewords.<sup>27</sup>

Although the edited Chinese text is in good, semi-classical style, which posed no problem for the Chinese *literati*,<sup>28</sup> the accuracy of Martin's translation still leaves much to be desired by today's standards. In fact, Martin's work is not a translations in the strictest sense, but rather a paraphrased interpretation of Wheaton, which strongly reflects the translator's own perspective of international law.<sup>29</sup> Many Chinese terms were presented by the translator in an imprecise, though understandable manner, and are outdated today.<sup>30</sup> Moreover, at times Martin's renditions were so free that they actually constituted explanations rather than translations; for instance, "Congress of Verona" was rendered as "Four countries controlling Spain."<sup>31</sup> Hsü also compares an excerpt of Martin's work with the original passage from Wheaton, in which the lack of universality of international law is discussed. Wheaton, after quoting the views of Grotius, Bynkershoek, Leibnitz, and Montesquieu, says:

There is then, according to these writers, no universal law of nations, such as Cicero describes in his treatise *De Republica*, binding upon the whole human race—which all mankind in all ages and countries, ancient and modern,

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25. HSÜ, ENTRANCE, *supra* note 11, at 128.

26. *Id.*

27. *Id.* at 134.

28. *Id.* at 129.

29. *Id.*

30. *Id.* Hsü in his book gives a short list as an example to show discrepancies between the terms used by Martin and those used at the present time. *Id.* at 130.

31. *Id.*

savage and civilized, Christian and Pagan, have recognized in theory or in practice, have professed to obey, or have in fact obeyed.”<sup>32</sup>

Martin’s rendition of this paragraph, when literally re-translated into English, reads as follows:

Judging from them there is no universally practiced law as is said in Te-li [De Republica], for there has never been a case that is accepted by all nations at all times, barbarian or civilized, within or without the Church.<sup>33</sup>

Such imprecise translations, according to Hsü, ran through the book.

Nonetheless, Martin’s work is still praiseworthy, if one considers the fact that the general meaning of the original Wheaton is not lost. The book is titled *Wanguo Gongfa* (萬國公法) in Chinese, meaning Public Law of All Nations, because Martin held that international law “is commonly used in various nations and is not a monopoly of any single state. Moreover, it is like the laws and regulations of the various states, hence it is also called *Wanguo Lü-li* (萬國律例),” meaning laws and regulations of all nations.<sup>34</sup> Today, however, the term “international law” is translated as *Guoji Fa* (国际法), or the law between states, a term created by Dr. Mitsukuri Rinsho of Japan in 1873 after Martin’s translation was introduced there in 1865.<sup>35</sup>

## II. REACTIONS TO THE FORMAL INTRODUCTION OF INTERNATIONAL LAW INTO CHINA

While Martin’s manuscript was in the process of being edited at the Office of Foreign Affairs in 1864, a diplomatic incident occurred that gave Chinese officials an opportunity to test the usefulness of Western international law.<sup>36</sup> In that year, Otto von Bismarck’s Prussia fought Denmark in the Second Schleswig War. In March, the Prussian minister to China, Guido von Rehfues, known to the Chinese as Li Fusi, arrived in China on a warship. Finding three Danish merchant ships off Dagu Kou (a sea port near Tianjin), von Rehfues seized them as a war prize. After that, he sent a letter to the

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32. WHEATON, *supra* note 13, at 17.

33. W.A.P. MARTIN, WANGGUO GONGFA [Public Law of All Nations] 61.

34. HSÜ, *supra* note 11, at 129.

35. *Id.*

36. *Id.* at 132.



superintendent of trade at Tianjin, giving notice of his arrival and asking for a date to be received by the Office of Foreign Affairs. Upon the report of both the request and the seizure, the Office immediately protested the Prussian minister's action. The protest was motivated by the fear that if China remained indifferent towards the seizure, it would constitute China's acquiescence to the claim that the area of water in question was the high seas, which, according to Western international law, belongs to no country.<sup>37</sup> Prince Gong explained this to the court:

Foreign countries have the view, that oceans and seas over 10 *li* [one marine league] from the coast, where it is beyond the reach of guns and cannon, are common area of all countries. [The ships of] any country may come and go or stay in that area at will.<sup>38</sup>

The Office of Foreign Affairs insisted that the seizure of the Danish ships took place in China's "inner ocean," a Chinese equivalent to the Western term of "territorial sea" and constituted an extension of a European war to an area under China's exclusive jurisdiction. Prussian minister von Rehfues argued that the European law of war allowed the seizure because it was far enough from the Chinese coast. To this, Prince Gong replied that the place was not the high seas but China's territorial waters:

The various [inner] oceans under China's jurisdiction have, as a rule, been specifically stipulated in all her peace treaties with the foreign nations, and in the peace treaty with your nation, there is such a term as 'Chinese ocean.' You know this more clearly than any other country and how can you say it is beyond your comprehension? As to the European law of war, China cannot be obliged to know all.<sup>39</sup>

Prince Gong further argued that the detention of ships that belonged to one foreign country in China's territorial waters by another foreign country engaged in hostilities with the former was an act of "despising China" and that the Chinese protest was "not for Denmark but for preserving China's rights."<sup>40</sup> Prince Gong

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37. *Id.* at 133.

38. MANAGEMENT OF BARBARIAN AFFAIRS, *supra* note 14, at 1144.

39. HSÜ, *supra* note 11, at 133. Martin translated 'maritime territory' as "ocean area within the jurisdiction of a nation," a less concise definition than "inner ocean." *Id.*

40. *Id.*

reinforced his protest by notifying the Prussian minister that these actions were unacceptable to China and, unless the three Danish ships were released, no reception of the Prussian minister would be possible. Von Rehfues saw the seriousness of the situation, released the Danish ships and paid a compensation of \$1,500 for the third. The incident ended peacefully.

The Chinese officials that handled this dispute did not expressly quote Wheaton's book with respect to jurisdiction over territorial waters. But it is beyond doubt that Martin's translation of Wheaton's *Elements of International Law* influenced their combined use of the principle of territorial waters, China's treaty relations with the West, and the refusal to recognize von Rehfues' ministerial status.<sup>41</sup> This diplomatic victory thus proved the usefulness of Martin's manuscript. By this time, Prince Gong was ready to submit to the court a memorial, asking for its sanction of an appropriation for the printing and distribution of Martin's translation. In the memorial, Prince Gong stated:

Your ministers find that [the contents of this] book on foreign laws and regulations is not basically in complete agreement with the Chinese systems, it nevertheless contains sporadic useful points. For instance, in connection with Prussia's detention of the Danish ships in Tientsin harbor this year, your ministers covertly used statements from that law book in arguing with [Von Rehfues]. Thereby, the Prussian minister acknowledge his mistake and bowed his head without further contention. This seems [conclusive of its usefulness].<sup>42</sup>

The imperial sanction was duly granted: five hundred taels (a varying unit of weight used in East Asia, usually one tael is around 38 grams, or 1.75 ounces) were appropriated for publication and three hundred copies were distributed to the provinces for the use of local officials.

The immediate Chinese response to Wheaton's work was far from encouraging. Although they were satisfied with the work done by Martin and Burlingame, the officials in the Office of Foreign Affairs were worried about the true intentions of these foreigners. They were also skeptical of the value of the book as a whole. They feared that this product of seemingly useful Western legal learning

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41. *See id.* at 133–34.

42. *Id.* at 134.

might be a Trojan Horse.<sup>43</sup> The Chinese mistrust accounts for why, in handling the case of the seizure of the Danish ships, they did not expressly quote Wheaton as authority to support their arguments.<sup>44</sup> Such mentality was evident if one looks into Prince Gong's same memorial:

[Martin said] that it (this book) should be read by all countries having treaty relations with others. In case of dispute it can be taken for reference and can be quoted . . . . Your ministers forestalled his attempt to get us to follow this book, by telling him at once that China has her own laws and institutions and that it is inconvenient to consult foreign books. Martin, however, points out that although the *Ta-Ching Lü-Li* has now been translated by foreign countries, China has never compelled foreign countries to act by it. It cannot be that when a foreign book is translated into Chinese, China should be forced to follow it. Thus he has pleaded repeatedly . . . .

Your ministers think that his purpose is two-fold, firstly, to boast that foreign countries also have laws, and secondly, to imitate men like Matteo Ricci in making a name in China.<sup>45</sup>

Thus, it is apparent that their deep-rooted suspicions of the West, coupled with their diehard image of the traditional Chinese universal overlordship,<sup>46</sup> made it difficult for the Chinese officials to accept international law as a body of legal principles and rules for regulating relations between states on the basis of sovereign equality and independence. Chinese officials' need for the introduction of Western international law did not stem from their belief in the value of the legal system per se; instead, they viewed their study of Western law

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43. T.F. Tsiang, *Bismarck and the Introduction of International Law into China*, 15 CHINESE SOC. & POL. SCI. REV. 98, 100 (1931).

44. *Id.* Tsiang maintains that with or without the translation of Wheaton, the *Yamen* officials would have protested against extending the sphere of Prussian-Danish military activities to Chinese waters, but with Wheaton before them, they found their own wishes supported not only by Chinese practice but also by a body of laws which Western nations called "international." With this additional support, they pressed their case all the more strongly. *Id.* at 101.

45. MANAGEMENT OF BARBARIAN AFFAIRS, *supra* note 14.

46. See Li Zhaojie (James Li), *Traditional Chinese World Outlook*, 1 CHINESE J. INT'L L. 20, 53 (2002). This is an expression used to characterize the traditional Chinese perception of the world, which assumed that China remained the center of civilization and that the Chinese form of civilization was superior. *Id.* Noticeably, such superiority was not one of more material power but of culture. *Id.* at 25.

as a study of the enemy. As Hsü observes, knowing “one’s enemy was the first step toward winning the battle.”<sup>47</sup>

Along the line of playing off the Western barbarians against one another Prince Gong entered his measured conclusion in his masterly memorial: “This book (Martin’s translation) contains quite a few ways of controlling and bridling the consuls which may be useful . . .”<sup>48</sup>

Indeed, Western international law was “not basically in complete agreement with the Chinese system.”<sup>49</sup> Acceptance of this exotic legal learning of Western barbarians would amount to the abandonment of the long-honored traditional Chinese systems and institutions. Amid the strong xenophobic atmosphere of the era, even a very narrow-minded pragmatic attitude toward the usefulness of international law had to be couched in precautionary terms to avoid possible attacks from the die-hard conservatives of the court.

However, the publication of the translated Wheaton’s *Elements of International Law* marked the beginning of the systematic and formal introduction of Western international law into China. It was an epoch-making event in that it “enabled the Chinese to have a first glimpse of what was called international law in the West.”<sup>50</sup> It signified China’s open recognition of the existence of strong and independent nations beyond China. Given the time-honored and persistent Chinese claim to universal overlordship, this recognition amounted to a significant departure from their traditional perception of the world. Regardless of his motivation, Martin’s contribution to this great event has had a lasting effect. As a reward for Martin’s pace-setting undertakings, the Qing court appointed him president and professor of international law at China’s first foreign language school, Tongwen Guan (serving from 1869 until 1894) and the first chancellor of the Imperial University of Peking (serving from 1898 until 1900), the predecessor of today’s Peking University.<sup>51</sup> Martin also received many other high honors from the Chinese.

As for foreigners, the formal introduction of Western international law into China met with a mixed response. Believing that international law was the best fruit of Western civilization,

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47. HSÜ, ENTRANCE, *supra* note 11, at 135.

48. MANAGEMENT OF BARBARIAN AFFAIRS, *supra* note 14, at 1185.

49. *Id.*

50. Chen, *supra* note 7, at 6.

51. HSÜ, ENTRANCE, *supra* note 11, at 136

Martin saw his translation of Wheaton as a vehicle for bringing the heathen Chinese government closer to Christianity. Thus, upon learning of the Chinese success in applying their knowledge of international law to the case of the seizure of the Danish ships, he heartily congratulated the Chinese on their ability to digest new concepts and ideas which had been hardly known to them in the past two thousand years.<sup>52</sup> Martin even thought that his work might “stand second in influence to the translation of the Bible!”<sup>53</sup>

In keeping with Martin’s optimistic tone, Burlingame signaled his approval by telling the U.S. State Department about Martin’s remarkable success “in getting the Chinese government to adopt and publish Wheaton’s international law.”<sup>54</sup> Secretary of State William Seward praised Burlingame for what he had done, and was thrilled that China was inclined to respect the obligations of international law.<sup>55</sup> He said that “the learning and zeal of the Chinese Government in connection with this matter cannot be too highly commended.”<sup>56</sup> The British minister in Beijing, Frederick Bruce, lent his support and encouragement to Martin from the beginning, saying that “the work would do good by showing the Chinese that the nations of the West have principles by which they are guided, and that force is not their only law.”<sup>57</sup> A Russian minister told Burlingame that his government wished to see China become closer with the family of nations and subject to the obligations of international law.<sup>58</sup>

While these Western diplomats viewed Martin’s work positively, others strongly condemned the formal introduction of Western international law into China. They were horrified that China might be in possession of some elementary knowledge of international law.<sup>59</sup> Indeed, Martin reported that M. Klecskowsky, *chargé d’affaires* at the French legation, shouted to Burlingame: “Who is this man who is going to give the Chinese an insight into our European international law? Kill him—choke him off; he will make us endless trouble.”<sup>60</sup> The unofficial Western trading community in China was also

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52. *Id.*

53. Mary Boggs, William Alexander Parsons Martin, Missionary to China, 1850–1916 (1949) (unpublished M.A. thesis, McCormick Theological Seminary)

54. HSÜ, ENTRANCE, *supra* note 11, at 136.

55. *Id.*

56. *Id.*

57. *Id.* at 137.

58. *Id.*

59. Chen, *supra* note 7, at 7.

60. HSÜ, ENTRANCE, *supra* note 11 at 138.

ambivalent towards the work. As the self-appointed vanguard and promoters of Western civilization in the East, they assumed a patronizing attitude towards the Chinese acceptance of their international law. On the other hand, as beneficiaries of the unequal treaty regime, they were apprehensive that supplying the Chinese a legal instrument might be used to roll back the newly acquired political and commercial privileges and to prevent the exaction of further concessions.<sup>61</sup> A *North China Herald* article characteristically reflects this ambivalent sentiment:

Whether we are supplying weapons, which may at some future period be directed against ourselves, or which will only be turned to the acquisition of new conquests, cannot at present be decided. To stem the stream while it is still near its source, and guide it into proper channels should now be our aim.<sup>62</sup>

Indeed, as indicated by this short passage, foreign residents in China began to regret that the Chinese had discovered “those flowery means of diplomacy where they so highly excelled” and admitted that “we must make up our minds to see the Chinese in future contesting acts to which they are opposed on grounds which we ourselves recognize.”<sup>63</sup>

### III. FAILURE TO APPLY INTERNATIONAL LAW IN DEFENSE OF CHINA’S INTERESTS

In 1867, Martin returned to the United States for two years to study international law and political economy at the University of Indiana, where he earned a doctorate.<sup>64</sup> After he returned to China in 1869, the *Qing* court designated him president of the *T’ung-wen kuan*.<sup>65</sup> Martin added a variety of subjects to the eight-year curriculum, including international law.<sup>66</sup> In 1879, the school

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61. *Id.* See also Jerome Alan Cohen, *Chinese Attitude Toward International Law—and Our Own*, in CONTEMPORARY CHINESE LAW: RESEARCH PROBLEMS AND PERSPECTIVES 285 (Jerome A. Cohen ed., 1970).

62. NORTH CHINA HERALD, May 21, 1864, at 82.

63. MARK MANCALL, CHINA AT THE CENTER: 300 YEARS OF FOREIGN POLICY 188 (1984).

64. HSÜ, *supra* note 5, at 336.

65. *Id.*

66. *Id.* The first three of the new subjects were devoted to linguistic preparation, while the next five covered scientific and general studies. In 1879, 163 students were enrolled in the program. “The quality of students, however, was rather low, since few good Manchu or Chinese families would send their sons, with the result that a considerable portion of the student body consisted of middle aged mediocrities enrolled for a pension.” *Id.*

enrolled nine students in the program of international law,<sup>67</sup> and in time it produced a number of distinguished diplomats.<sup>68</sup> China also began to send students to Europe and America to study a variety of topics including international law. Ma Jianzhong, for example, pursued a doctoral degree in international law in France from 1876 to 1879. After returning to China, he provided valuable service in international affairs to Viceroy Li Hung-chang.<sup>69</sup> His expertise in international law apparently helped the Office of Foreign Affairs avoid many possible diplomatic blunders.

Sino-Western relations during the second half of the nineteenth century forced Chinese officials to abandon their traditional attitude towards foreign relations and to learn to conduct foreign affairs on the basis of international law. In 1864, Ding Jichang, the Shanghai Daotai, skillfully and firmly rejected several extra-legal commercial requests from foreigners by declaring that China had no treaty-based legal obligations to honor such requests.

In 1873, Viceroy Li Hongzhang cited Wheaton's words of how newly arrived diplomats present their credentials to persuade Emperor Tongzhi to receive foreign diplomats. Li's advice soothed the emperor's fear that he might personally have to negotiate with the foreigners and that open dispute might occur at the court. Wheaton's teachings also guided the Chinese through the conclusion of a commercial treaty with Peru in 1874. During the negotiation the Chinese officials insisted on reciprocal most-favored-nation treatment, as recommended by Wheaton.

Beginning in 1876, China sent its permanent diplomatic representatives abroad. While treaties formed the basis of many of these legations, those in Washington and St. Petersburg were noticeably not. The American and Russian Treaties of Tianjin merely stipulated the right of the United States and Russia to establish legations in China, without giving China the right to reciprocate. Thus, the Chinese legation in the United States and Russia rested on the general principles of international law, not on treaties.<sup>70</sup>

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67. *Id.* at 336–37.

68. Yen-P'ing Hao & Erh-Min Wang, *Changing Chinese Views of Western Relations, 1840-95*, in 11 *THE CAMBRIDGE HISTORY OF CHINA* 162 (John K. Fairbank & Kwang-Ching Liu eds., 1980).

69. *Id.* at 197.

70. HSÜ, *supra* note 11, at 186.

By the 1880s, China had established diplomatic legations in the most of the leading Western nations.<sup>71</sup> China was also invited to attend the sixth meeting of the Association for the Reform and Codification of the Law of Nations in 1878.<sup>72</sup>

This association, founded in Brussels in 1873, expressed a strong interest in extending international law to the Far East in 1876 and 1877 and invited China and Japan to participate in its future meetings. Guo Songtao, China's first minister to England, represented China and praised the association for its efforts to improve the law of nations "for the benefit of all governments and peoples."<sup>73</sup> He said he was "very desirous of attaining a knowledge of the science, in the hope that it will be beneficial to my country" even though China did not fully recognize the rules of international law. The Association elected Guo as honorary vice-president in recognition of China's inclusion. The Association later elected Guo's successor in London, Zeng Jize, a famous Chinese diplomat of the time, to the same post.<sup>74</sup>

Despite disagreements and divergent views on international law among Western writers, China often referred to Western international law in conducting its foreign affairs and indicated its willingness to learn more about the new field.<sup>75</sup> By the time the Qing dynasty was overthrown in 1911, China had become a participant in the Western state system and was conversant with its institutions, processes, and norms.<sup>76</sup> China also attended the Hague Peace Conferences of 1899 and 1907 and joined the Universal Postal Union. Hence, this period of modern Chinese history saw the growth of the need for more knowledge of international law.<sup>77</sup>

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71. *Id.* They are England, France, Germany, Japan, Peru, Russia, Spain, and the United States. *Id.*

72. HSÜ, *supra* note 11, at 206.

73. *Id.* at 206-07.

74. *Id.*

75. *See id.* at 128.

76. HSÜ, *RISE supra* note 5, at 468-70. *See generally* Weiching W. Yen, *How China Administrates Her Foreign Affairs*, 3 AM. J. INT'L L. 537 (1909).

77. Beginning from 1876, Martin translated several other works of international law with assistance of his students at the *Tongwen Guan*. HSÜ, *supra* note 11, at 138. These works include: THEODORE WOOLSEY, *INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW* (1877); L'INSTITUT DE DROIT INTERNATIONAL [INSTITUTE OF INTERNATIONAL LAW], *LE MANUEL DES LOIS DE LA GUERRE* [THE MANUAL REGARDING THE LAW OF WAR] (1897); and WILLIAM EDWARD HALL, *A TREATISE ON INTERNATIONAL LAW* (1903). *Id.* He helped students translate the following: GEORGE FRIEDRICH DE MARTEN, *LE GUIDE DIPLOMATIQUE* [GUIDE TO



It is beyond doubt that, through these translations, Chinese officials improved their knowledge of international law. Moreover, their limited diplomatic experience also tended to vindicate usefulness of international law as an instrument for defending China's interests.<sup>78</sup>

Many Chinese officials were even entranced by the idea of the omnipotence of international law. Guo Songtao, for example, was a great enthusiast of international law, believing that China must rely on international law and the treaty system while dealing with other nations.<sup>79</sup> He made favorable comments on international law in his *Chronicles of a Mission to the West*: “[The Western powers] created the law of nations; they emulate with each other in faithfulness and righteousness, and lay particular emphasis on friendship among nations; they are reasonable and courteous; they add decorum to substance; they are far better than the states during the Spring and Autumn period.”<sup>80</sup>

Cheng Kuan-ying, a compradore-reformer of the time, had such high regard for international law that he discussed the topic in the very first essay of his book on reform, *I-yen*. He examined the principles and usefulness of international law in greater detail in later editions.<sup>81</sup>

Another exemplary advocate of international law was Viceroy Li Hongzhang, who, for a long time, was in charge of China's foreign affairs. In his foreword to the translated Hall's *Treatise on International Law*, he stated: “Public [international] law is the law of all the nations in the world. When the law is abided by, the world is in order; when the law is violated, the world is in chaos.” In his opinion, Hall's treatise “presents the law clearly and fairly, and should be looked up to as the standard by [Chinese] negotiators in the future.”

In order to enforce international law, Chen Qiu, another public figure in the reform-minded literati, proposed in 1893 that the world's nations establish a world organization. He predicted that his

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DIPLOMACY] (1876); JOHANN KASPAR BLUNTSCHLI, DAS MODERNE VÖLKERRECHT [MODERN INTERNATIONAL LAW] (1880). *Id.*

78. See JEROME ALAN COHEN & HUNGDAH CHIU, PEOPLE'S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY 8 (1974).

79. HSÜ, *supra* note 11, at 181.

80. Chen, *supra* note 7, at 7.

81. Yen-P'ing Hao & Erh-Min Wang, *supra* note 68, at 197.

proposal would materialize in thirty years. In 1898, Pi Yung-nien and T'ang Ts'ai-ch'ang established a small society known as the Association of International Law Studies.<sup>82</sup>

Kang Youwei, the leader of the 1898 radical reform movement (One-Hundred-Day Reform), also felt that China's foreign relations should be established on the international law principles of sovereign equality and independence. According to him, "[i]n the whole earth, China is only one of fifty-six countries," and "[t]oday [the states of the world] compete with each other rather like [the separate Chinese states] at the period of the Spring and Autumn and Warring States (722–221 BCE), and there is no longer a unified rule as under the Han, Tang, Sung and Ming dynasties."<sup>83</sup> Therefore, Kang believed that different nations on the earth should possess equal rights in dealing with each other. On that basis, he advocated that the *Qing* court should reject the traditional Sino-centric world view and should follow international law in dealing with other countries.<sup>84</sup>

Yet this candle of the Western legal learning did not light much of the darkness. Despite the improvement of their knowledge of international law, Chinese officials failed to make active use of this exotic legal learning in throwing off the yoke of the unequal treaty regime. As illustrated by Hsü, reasons for such failure were multidimensional.<sup>85</sup>

First and foremost, effective application of international law for recovering China's lost interests and rights would require abandoning the traditional Chinese ways of thinking and the time-honored Chinese *tizhi* (basic structure of the state and society).<sup>86</sup> Unfortunately, the Chinese officials were by no means ready to do that. The die-hard conservatives at the court, who powerfully manipulated public opinion, vehemently attacked the introduction of international law into China. "They asserted that they had heard of transforming the barbarians by the Chinese way of life, but never of changing the Chinese with the barbarians' ways," wrote Hsü.<sup>87</sup> As self-claimed defenders of the Chinese heritage and jealous guardians

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82. *Id.* & n.133.

83. WOLFGANG FRANKE, CHINA AND THE WEST: THE CULTURAL ENCOUNTER, 13TH TO 20TH CENTURIES 109 (R.A. Wilson trans., 1967).

84. *Id.*

85. HSÜ, *supra* note 11, at 200–06. In China, "public opinion" was considered the prevailing opinion of educated intellectuals. *Id.* at 200.

86. *Id.*

87. *Id.* at 201.

of the principles of the Chinese *li*, they denounced the acceptance of international law as an un-Chinese activity, traitorous to the national tradition and un-filial to the ancestors.

Thus, those who showed interest in this body of the Western learning would risk being condemned as advocates of Westernization and envoys to the West. They were seen by opponents of international law as “ingratiating themselves with foreigners,” “serving the barbarians,” “having clandestine relations with the enemy,” or “sinners against Confucian heritage.”<sup>88</sup> Such a strong anti-foreign attitude does not appear to have stemmed “from a realization of the dangers of [Western] imperialism, but from a feeling of insecurity about their privileged position.”<sup>89</sup>

Self-motivated anti-foreignism arguments successfully created the impression that foreign affairs were a dangerous business and to associate with it was to betray one’s decency. Thus, in his preface to Martin’s translation of Wheaton, Zhang Sigui, a member of the Office of Foreign Affairs, had to compare the leading Western nations to the contending states of the Warring States Period in ancient China, which were considered heresy in some quarters.<sup>90</sup> Moreover, even though the more progressive mandarins realized that the Western challenge was inescapable and that China must learn from the “barbarians” if it was to survive, they saw the value of Western international law only within the context of maintaining and strengthening the traditional Chinese way of life and institutions.<sup>91</sup> Accordingly, international law was regarded no more useful than restraining “wild” foreign consuls and avoiding diplomatic *faux pas*.<sup>92</sup> Such limited application of international law could by no means forestall further aggression of foreign imperialism, let alone recover China’s lost rights and interests.

In addition to the lack of political will, the failure to apply international law for the defense of China’s rights and interests was

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88. *Id.* at 201–02.

89. *Id.* at 202.

90. *See id.* at 208. During the period of Spring and Autumn (772–476 BCE), of thousands of vassal states created by the founder of the *Zhou* dynasty (founded in 770 BCE), only 160 were left; among those 160 vassal states, only 12 were the most important. They absorbed each other through wars until 221 BCE when *Qin*, the most powerful state, unified all other warring states through military conquest. Thus, in Chinese history, the Warring States Period refers to that from 476 to 221 BCE.

91. *See* Hsü, *supra* note 11, at 138–45.

92. *Id.* at 145.

attributable also to the unfavorable cultural milieu.<sup>93</sup> The traditional Chinese perception of the world order never developed the concept of state sovereignty in its modern sense. Law was primarily considered as personal rather than territorial. Such ideas as territorial jurisdiction or national rights were thus characteristically lacking in the Chinese management of foreign relations. Within this historical context, the Chinese accepted doctrines, rules, and practices of Western international law as their temporary and expedient response to the challenge posed by expanding foreign imperialist powers. As Hsü points out, the Chinese granted foreign powers privileges, such as extraterritoriality, one-sided most-favored-nation treatment, fixed tariffs, free navigation of China's internal waters, and leased territories at many port cities in China without any sense of serious loss of China's state sovereignty and national rights.<sup>94</sup>

Of course, no one was ready and willing to make these concessions that would be otherwise condemned as gross violations of the principle of state sovereignty in the twentieth century. In fact, the Manchu rulers bitterly resented being forced to grant foreign powers these concessions at gun point, for it hurt the Chinese pride. Yet, the Chinese officials did not regret the loss of these rights as much as they regretted the way in which they were lost. As a result, their desire for revenge was far stronger than their will to recover the loss of rights. Confining themselves to this historical tradition, Chinese officials merely realized the usefulness of international law for restraining the "wild" foreign consuls, but they never attempted to go further to challenge the basic *raison d'être* of their "wildness."<sup>95</sup>

Years later, even when the evils of these concessions became all too obvious, the Chinese officials still failed to take active measures to remove them.<sup>96</sup> The historical experience taught the Chinese that external troubles were caused mainly by internal weakness.<sup>97</sup> Thus, "[i]f China was strong, barbarian problems would be solved before they arose."<sup>98</sup> Under such historical guidance, the more urgent and basic solution to the barbarian problem was to put China's own house in order under the Self-Strengthening Movement rather than to make piecemeal efforts to apply Western international law to recover

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93. *Id.* at 139.

94. *See id.* at 138–41.

95. *Id.* at 141–42.

96. *Id.* at 141.

97. *Id.* at 144.

98. *Id.*

China's lost rights and to rescind the unequal treaty regime.<sup>99</sup> “[A]t a time when foreign assistance and cooperation were needed for self-strengthening and the suppression of domestic rebellions, a movement to cut foreigners’ privileges would be impolitic.”<sup>100</sup>

The Alcock Convention of 1869, the first “equal” treaty that China negotiated with a Western power, best illustrates this attitude. The convention officially revised the 1858 Treaty of Tianjin with England. China could have taken this opportunity to apply its knowledge of international law in an attempt to remove extraterritoriality, the most-favored-nation clause, and the tariff restrictions from the treaty, but made no such attempt. They merely tried to improve the conditions within the framework of the treaty. As a result, the revised treaty only made moderate changes to the most-favored-nation clause and tariff restriction.<sup>101</sup>

But the Office of Foreign Affairs already felt gratified with their “accomplishments.”<sup>102</sup> Of course, what they had accomplished turned out to be nothing but paltry amelioration within the vast yoke of the unequal treaty regime. No attempt was ever made to throw off the yoke itself. Little wonder that the British minister Rutherford Alcock saw it as “a matter of congratulations” that the Chinese did not “insist upon” the abolition of consular extraterritorial jurisdiction, which was known to be their “cardinal” desire.<sup>103</sup> According to his judgment, “no country or Western government has ever before made such liberal concessions to foreign trade.”<sup>104</sup>

By the late nineteenth century, it became all too evident that the *Qing* dynasty by and large had fallen into an irretrievable decline.<sup>105</sup> Internal rebellion and external aggression and humiliation, coupled with political mismanagement, had so weakened and degraded the

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99. *Id.*

100. *Id.*

101. *Id.* at 141. The most-favored-nation clause was only conditionally limited by Article 1 of the Convention, which allowed that, in order for British subjects to participate in the advantages accorded by the Chinese to other powers, they must also accept the conditions under which such accordance was made. The tariff restrictions were slightly relaxed to allow China to increase the export duty on silk and the import duty on opium. *Id.* (citing 1 MARITIME CUSTOMS, TREATIES, CONVENTIONS, ETC. BETWEEN CHINA AND FOREIGN STATES 478–83 (2d ed. 1917)).

102. Yen-P'ing Hao & Erh-Min Wang, *supra* note 68, at 76–77. As the revised treaty did not satisfy the British demands, British government later refused to ratify it. *Id.*

103. HSÜ, *supra* note 11, at 141.

104. Yen-P'ing Hao & Erh-Min Wang, *supra* note 68, at 77.

105. HSÜ, *supra* note 11 at 144.

dynasty that its imminent failing was just a matter of time.<sup>106</sup> In the time of what the Chinese call “the pre-ordained finale,” survival, rather than improvement of its lot, became the most central and urgent concern.<sup>107</sup> With diplomatic failures coming one after another, a sense of futility regarding China’s position set in.<sup>108</sup> Thus, their eventual mastery of international law made the Chinese increasingly aware of the limited value of this legal learning for a country which lacked the military, political, and economic power to defend itself.<sup>109</sup> Cui Guoying, a Chinese diplomat, said in his *Diary of a Mission to the United States, Japan and Peru*: “International law is just like Chinese statutory law—reasonable but unreliable. If there is right without might, the right will not prevail.”<sup>110</sup> Such a sentiment of futility was also characteristically expressed by Zheng Guanying, a reformer at that time:

Public [international] law draws its force from unreliable principles. Whereas powerful [states] can enforce it to restrain [the wrong-doers], weak [states] are bound to forebear being wronged. Thus, only by working with a will to make itself strong will a nation be benefited by it [international law]; if a nation remains weak and dejected, how can it be helped by international law?<sup>111</sup>

The pervasive feeling of helplessness made the Chinese fear that any attempt to invoke international law to recover China’s lost rights would necessarily entail a treaty revision, which in turn would place China in an even more disadvantageous position, for it might open new opportunities for foreigners to exact more demands. Thus, the Chinese had no desire, let alone concrete plans, to take advantage of their knowledge of international law to assert China’s sovereign rights and to abrogate the unequal treaty regime. They directed their energy and attention to ferret out the foreigners’ next moves in order to devise means of blocking them. They had a pious hope that China could be left alone to work out its salvation in its own way. The best they could do was to keep the status quo by persuading foreigners to adhere to the existing treaty system and by citing international law to

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106. *See id.* *See also* HSÜ, RISE, *supra* note 5, at 468–70.

107. HSÜ, *supra* note 11, at 144.

108. *See id.* at 141.

109. *See id.*

110. COHEN & CHIU, *supra* note 78, at 10.

111. GUOJIFA [International Law] 18 (Wang Tieya ed., 1981).

avoid diplomatic faux pas which otherwise might give foreigners the pretext to exact new demands.<sup>112</sup>

Within this passive and defensive atmosphere, Chinese officials regarded treaty revision as a one-way affair.<sup>113</sup> It was an occasion only for the foreigners to make new demands, not for the Chinese to reduce the foreigners' rights. All China could do was to bargain with the foreigners about the new concessions.<sup>114</sup> Even reform-minded and well-informed officials, such as Li Hongzhang, took the view that once the treaty ratifications were exchanged, nothing more could be done about it.<sup>115</sup> Guo Songtao had the shallow belief that, in dealing with foreign nations, China must rely on international law and the treaty system imposed upon China by foreign powers.<sup>116</sup> As he wrote in 1866, "[i]f Westerners abide by the treaties whereas we do not, then the injustice rests with us."<sup>117</sup> When the Chinese came to realize that treaty revision could also be two-way affair and used in China's favor, political considerations seem to have prevented them from employing such dynamic maneuvers.<sup>118</sup>

In 1888, for instance, the United States enacted the Chinese Exclusion Act, which violated the four Sino-American treaties concluded between 1844 and 1880. As such, China could have justifiably taken counter measures by refusing to honor those treaties. The Chinese minister to Washington pointed out that the American violation of an important treaty stipulation released China from the duty to observe all its previous treaties with the United States. The United States recognized that China was entitled to denounce these treaties. However, the Chinese officials' fear of trouble was so overwhelming that they did not even consider using the opportunity to denounce those unequal treaties or at least revise them to China's advantage by invoking the principle of *rebus sic statibus*.<sup>119</sup>

Viewed from a larger perspective, the reason for the Chinese failure to apply international law in defense of China's interests may lie in its failure to adequately cope with the Western impact and to initiate modern reforms. Until the end of the nineteenth century, there

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112. HSÜ, *supra* note 11, at 143–44.

113. *Id.* at 143.

114. *Id.*

115. *Id.* at 142.

116. Yen-P'ing Hao & Erh-Min Wang, *supra* note 68, at 164.

117. *Id.*

118. COHEN & CHIU, *supra* note 78, at 10.

119. *Id.*

was a conspicuous absence of internal efforts to turn the country into a modern nation state.

There was only a strong and deep, if subdued, vindictive desire to avenge the burning of the Summer Palace and the hurried flight of the Emperor Xian Feng to Rehe in 1860. One day, the mandarins rationalized, the self-strengthening movement would enable China to efface these dynastic humiliations and drive away the foreign devils, but until that day the [unequal] treaties must be endured as facts of life.<sup>120</sup>

Thus, in the days when might was stronger than right, and without the dynamic motivating and supporting power of nationalism, international law could hardly serve as an effective legal weapon to recover China's lost sovereign rights and to bar further aggression of foreign imperialism. Its only conceivable function was as a diplomatic reference book that the Chinese officials might use to restrain the "wild" and "craftiest" foreign consuls and avoid diplomatic blunders.

Of course, another factor that helps explain the Chinese failure to use international law in recovering China's lost rights and asserting its sovereign equality and independence was the attitude of Western powers toward international law in their relations with China. In this respect, the prevailing view of the West in the nineteenth century was much like the antique Chinese zoning theory in that "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."<sup>121</sup>

To these three zones, or spheres, the "civilized nations" accorded three types of recognitions: "plenary political recognition, partial political recognition and natural or mere human recognition."<sup>122</sup> The sphere of plenary political recognition extended to European and American states, along with their colonies that were inhabited by white men.<sup>123</sup> The sphere of partial political recognition extended to Turkey, Persia, China, Siam, and Japan.<sup>124</sup> The rest of mankind

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120. HSÜ, ENTRANCE, *supra* note 11, at 144.

121. 1 JAMES LORIMER, INSTITUTES OF LAW OF NATIONS: A TREATISE OF JURAL RELATIONS OF SEPARATE POLITICAL COMMUNITIES 101 (1883).

122. *Id.*

123. *Id.* at 101–02.

124. *Id.* at 102.



belonged to the sphere of mere human recognition: “It is with the first of these spheres alone that the international jurist has directly to deal.”<sup>125</sup> Countries like China did not belong to the category of the so-called “civilized” nations, which were not bound to apply the positive law of nations to savages or even to barbarians as such.<sup>126</sup>

As alleged by the 1916 edition of Wheaton’s *Elements of International Law*, China “lacks certain attributes essential to regular and complete membership of the family of States, governed by, and enjoying the privileges of, the system of general international law.”<sup>127</sup> Oppenheim in his 1905 edition of *International Law* affirmed this view, except that he down-graded the position of China even further.<sup>128</sup> He divided states into five classes: (1) European states; (2) American states, Liberia and Haiti; (3) Turkey; (4) Japan; (5) Persia, Siam, China, Korea, and Abyssinia.<sup>129</sup> As to the fifth class, he remarked:

However, their civilization has not yet reached that condition which is necessary to enable their governments and their population in every respect to understand and to carry out the command of the rules of International Law.<sup>130</sup>

Based on this Eurocentric theory, which justified Western imperialist and colonial expansion, the “uncivilized” were excluded from the operation and benefits of the whole system of international law. The Western powers introduced this Western legal learning into China, but they did so only as part of their efforts to destroy the traditional Chinese world order and place China under the domination of the Western world order. As a contemporary Chinese historian puts it, the Western powers attempted make the Chinese follow the rules that a semi-colonial state was supposed to follow.<sup>131</sup>

As early as 1834, Lord Napier of Great Britain advised his government before his death: “I feel satisfied your lordship will see the urgent necessity of negotiating with such a [Chinese] government, having in your hands at the same time the means of compulsion; to

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125. *Id.*

126. *Id.*

127. WHEATON’S ELEMENTS OF INTERNATIONAL LAW 20 (Coleman Phillipson ed., 5th ed. 1916).

128. Chen, *supra* note 7, at 5.

129. *Id.*

130. *Id.*

131. *Id.* at 4–5.

negotiate with them otherwise would be an idle waste of time.”<sup>132</sup> These words would guide the action of foreign imperialists in their expansion and aggression in China. Every foreign government—British, French, Russian, German, or Japanese—that had come in conflict with China from 1839 to 1945 followed these words.

Thus, in their actual pursuit of interests in China, foreign imperialist powers rarely took international law into account. They first opened China, put down its resistance by force, and then imposed on it unequal treaties at gun point. They conducted all relations with China by reference to these unequal treaties. Although their demands were often couched in terms of the Western system of international law, they never intended to apply the law to their relations with China as they did among themselves. Their application of international law can only be interpreted as being based upon the belief that China had no rights worth their respect and that they were free to impose upon China their terms, which had to be accepted without China’s demur. It was against this background that international law was first formally introduced into China. It was not an easy introduction. It was nothing less than a traumatic encounter that created lasting memories of humiliation, domination, and oppression by foreign powers under the unequal treaty regime.

Paradoxical as it may seem, international law, so vital and beneficial to the relations among states with a European background, proved more destructive than constructive to the Chinese. Having experienced decades of foreign aggression and humiliation, the Chinese could hardly find reasons to trust that the Western powers would apply international law in an even-handed manner while dealing with China.

It was the challenge of survival in the face of national subjugation and extinction at the hands of Western imperialism that forced the Chinese to accept such international law concepts as sovereignty, nation, state, independence, and equality. In the Chinese quest for national salvation and regeneration, external aggression as invited by the internal decay became a focal point. Hence, the Chinese made serious efforts to bring international law into full play in their struggle to shake off the yoke of the unequal treaty regime and to create and maintain a strong and unified China—a China that is no longer the “central realm” based on Confucian culture, but a nation state with a rightful place in the family of nations.

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132. CHONG SU SEE, *THE FOREIGN TRADE OF CHINA* 125 (1919).

Today's achievements are built upon yesterday's experience. The Chinese are a history-conscious people. Given the state's pivotal role in advancing China's cultural greatness and in maintaining its territorial integrity, contrasted with a century of foreign humiliation, oppression, and domination, the Chinese sovereignty-centric perspective on international law is hardly surprising. Indeed, ever since the overthrow of the *Qing* dynasty and the subsequent founding of the republic in 1911, the ability to maintain China's sovereignty over its internal and external affairs has become the *raison d'être* of any Chinese government, regardless of ideological persuasions.<sup>133</sup> Today, the teaching, research, and dissemination of international law has become part of China's efforts of a peaceful rise. The perennial concern with its status, security, and territorial sovereignty, as shaped by its historical legacies, still affects China's legal behavior in the conduct of its foreign relations.

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133. It is remembered that, even during the heyday of Sino-Soviet alliance in the 1950s, Chinese leaders made it clear that China's policy was to form an alliance on the basis of sovereign equality and independence rather than a petition for membership in the bloc. Premier Zhou Enlai repeatedly admonished that:

the Chinese people must use their own brain for thinking and their own legs for walking. . . . We adhere to a basic position in the conduct of China's foreign affairs . . . that is to maintain China's national independence. No country is permitted to intervene in China's internal affairs.

Dangdai Zhongguo Waijiao [Diplomacy in Contemporary China] 30 (Xue Mouhong ed., 1986).