Introduction

It was 1878 when for the first time a Chinese and Japanese delegate attended a professional meeting of international lawyers. That year, Kuo-Taj-In (Songtao Guo) and Kagenori Wooyeno (Ueno), attended a session of the Association for the Reform and Codification of the Law of Nations, later renamed International Law Association. Founded in 1873 in Brussels by a group of liberal lawyers, reformists and philanthropists, the International Law Association exists until today as one of the profession's more important organizations. The founding, at the end of the nineteenth century, of this and other professional organizations like the *Institut de Droit International* marked the beginning of international law as a liberal reformist project.[1] Advancing the rule of law in international relations, this project involved the enactment of international rules and the creation of international courts and organizations. It also involved the emergence of an autonomous international legal profession, progressively separated from diplomatic circles and from the representation of the interests of individual states.

The late nineteenth century international lawyer, departing from diplomatic practice and state interest, sought to transcend the European balance of power as the principle organizing interstate relations. Instead, liberal international lawyers believed in an international community governed by law. Transcending sovereign self-interest, this was a cosmopolitan project. Was it also a cosmopolitan project in relation to the participation of non-Western delegates in international law meetings and conferences like the one of 1878, and more importantly, was it

[1] M. Koskenniemi, *The gentle civilizer of nations: the rise and fall of international law, 1870–1960* (Cambridge University Press, 2002), pp. 39–41, 57–67.

cosmopolitan in relation to the inclusion of non-Western nations into the realm of international law? Was the international community to be governed by law European or universal? If the international community had in fact boundaries, what were the rules governing inclusion and exclusion? And what were the rules governing relations between states and polities beyond the realm of international law?

In 1878 there were no clear answers to these questions. In the inclusion of non-Western members to the International Law Association, however, we may find some initial answers suggesting international law's cosmopolitan vocation. Among its founding members the Association counted not only renowned European lawyers such as Auguste Visscher from Belgium, Johann Caspar Bluntschli from Switzerland or Travers Twiss from Britain, but also David Dudley Field from the United States and Carlos Calvo from Argentina, two delegates from extra-European nations. Moreover, the Japanese minister at Rome, Masataka Kawase attended the second meeting and a Russian, Vladimir Bezobrazov, joined the Association at its third meeting.[2] It was in 1878, at the sixth meeting held in Frankfurt, that Songtao Guo and Kagenori Ueno, the Chinese and Japanese delegates, addressed the Association for the first time.

Kagenori Ueno (1845–1888) was extremely aware of the importance that his participation had as a sign of the inclusion of Japan into the international community and as a sign of the universality of international law.[3] Ueno opened his speech as follows:

> I desire to take the first occasion which presents itself to assure you the pleasure and honour which I feel in having been permitted to join your admirable and useful Association. Its aims are cosmopolitan, the benefits it seeks to distribute are cosmopolitan. It is therefore right that its members should be chosen from among all the nations of the world.[4]

On the other hand, the experience that Guo had acquired as China's first minister to Britain and France had made him very conscious not only about the inconsistencies between the unequal treatment to which China was subjected and international law's principle of sovereign equality, but

[2] *Association for the Reform and Codification of the Law of Nations Report of the Conference*, 1 & 2 (1873–1874), 53; *Association for the Reform and Codification of the Law of Nations Summary of the Proceedings* 3 (1875), 36.
[3] *Association for the Reform and Codification of the Law of Nations Report of the Conference* 6 (1878), 38–41.
[4] *Ibid.*, 38–9.

also about the possibilities that international law could offer to overcome unequal treatment.[5] Guo affirmed:

> I am very desirous of attaining a knowledge of this science [international law], in the hope that it will be beneficial to my country. I think it my duty to express the high esteem which I entertain for this Association and my great pleasure in joining it, and hope that by this means the relations of China with other countries may be improved.[6]

The first words of both the Chinese and Japanese delegates were introductory words of courtesy, followed by high hopes on the possibilities international law could offer to confront their states' main preoccupation, that is, securing the abrogation of the treaties concluded with Western states that had imposed unequal terms and extraterritorial jurisdiction.[7] Hopes were rapidly shattered.

Immediately after Guo and Ueno concluded their remarks, David Dudley Field, an American lawyer, reformer and one of the founding members of the Association, asked to take the floor. The proceedings of the meeting reports Field observing that:

> In many Eastern countries . . . it was necessary to uphold the capitulations, owing to the procedure and modes of punishment used by the native tribunals being intolerable to citizens of the West. He instanced that, until recently, crucifixion downwards had been common in Japan. In China, he said, he had himself seen the torture applied . . . So long as there was not something like a parity of civilisation in the East and West, the consular courts, or some analogous institution, must be maintained.[8]

Field's defence of the superiority of Western civilization was as unsurprising as was his readiness to deduce legal consequences out of cultural differences. That capitulations and inequality had to be maintained was a predictable answer for someone like Field. For the international law that emerged during the late nineteenth century was predicated on the distinction between civilized and uncivilized nations and on the exclusive recognition of sovereign autonomy and equality to nations believed to be civilized, namely Western nations. In fact, as Luiggi Nuzzo has shown, Field did travel to China and around the world and moreover invoked his experience to sustain the standard of civilization in the well-known

[5] J. D. Frodsham, *The first Chinese embassy to the West; the journals of Kuo-Sung-T'ao, Liu Hsi-Hung and Chang Te-Yi*, translated by J. D. Frodsham (Oxford: Clarendon Press, 1974).
[6] *Association for the Reform* 6 (1878), 40–1. [7] *Ibid.*, 38–41. [8] *Ibid.*, 41.

1875 report by the *Institut de Droit International* on the applicability of European international law outside the realm of Christian nations.[9]

Were Guo and Ueno invited to Frankfurt only to be reminded about the exclusively Western character of the international community? That is what emerges from Field's response. Late nineteenth century international law was not cosmopolitan. In the eyes of late nineteenth century jurists, the international community governed by law was a community of civilized nations. Western international lawyers, furthermore, assigned to themselves – as Martti Koskenniemi has put it – the role of 'the legal conscience of the civilized world'.[10]

Legal scholarship has only lately and slowly come to terms with the colonial and imperialist legacies of international law. The story about Field's response would fit well within this trend showing the colonial and imperialist origins of key international law concepts and doctrines, such as sovereignty, *uti possidetis* or the standard of civilization.[11] However, the exchange between Ueno, Guo and Field shows something more than Western lawyers simply formulating the rules and doctrines justifying unequal treatment vis-à-vis non-Western sovereigns, and something more than non-Western international lawyers accepting these rules and doctrines as fixed and given. This was in fact an exchange of opinions, for Ueno replied to Field declaring that: 'crucifixion was now happily abolished in Japan, and that that country was quickly mastering the enlightened notions of the West'.[12] Ueno did not contest the idea of a standard of civilization deriving from international law, as any official would have argued prior to the arrival of Western powers ready to use force in order to open to trade a non-Western nation. But Ueno was part of Meiji era Japan, which after defeat was undergoing rapid modernization, including the appropriation of international law. Ueno does not contest the standard, but contested Japan's place among uncivilized nations. This was an exchange of opposing views articulated in a common language of international law.

As the end of the century was approaching, exchanges like this, in which non-Western actors used the language of international law to resist foreign domination, became more and more common. The participation of

[9] L. Nuzzo, *Origini di una scienza: diritto internazionale e colonialismo nel XIX secolo* (Frankfurt am Main: Vittorio Klostermann, 2012).
[10] Koskenniemi, *Gentle civilizer*, pp. 11–97.
[11] See Koskenniemi, *Gentle civilizer*, pp. 98–178 and in general A. Anghie, *Imperialism, sovereignty, and the making of international law* (Cambridge University Press, 2005).
[12] *Association for the Reform* 6 (1878), 41.

non-Western lawyers and diplomats, internalizing and appropriating the international legal discourse, and finally becoming international lawyers marked a significant departure in the history of international law. It was obviously not the first time that scholars, lawyers and politicians debated and disagreed about the legality of Western domination in the non-Western world. Remember, for example, the famous Valladolid dispute (1550–1). Summoned by Carlos V, Bartolomé de Las Casas and Juan Sepúlveda debated over the Spanish titles in the New World.[13] But during the sixteenth century, natural law offered a universal language only in theory. In practice, although the dispute considered the nature of the indigenous and the titles over native-American lands, the convener, the audience and the opponents were all Europeans.

The exchange of 1878 was similar to the Valladolid dispute in that both were conveyed in the language of law, a universal language offering, at least in theory, an arena for social resistance. An arena that, unlike other realms of social life, is defined by its formal commitments to logical consistency, generality and impartiality, constraining rulers and ruled and affording to the ruled concrete avenues to sustain social struggle and resistance.[14] The 1878 exchange was different because only during the course of the nineteenth century international law became a regime with a global geographical scope. Moreover, it was only towards the end of the century that non-Western elites appropriated the Western international legal discourse and became versed international lawyers. Only then could international law become an actual arena for resistance and only then a global history of international law was truly inaugurated.

The trajectory of Guo, who attended the Frankfurt meeting as China's minister to Britain and France, offers a good example. Songtao Guo (1818–1891) one of the leading reformist figures in the diplomatic circles of late Qing China (1644–1912), became in 1876 the first permanent diplomatic representative of China in the West.[15] Almost thirty years before, in 1842, following the defeat of China in the First Opium War (1839–42), Britain and China signed the treaty of Nanjing, opening a number of Chinese ports to foreign presence and trade. While Qing officials of the time were

[13] See L. Hanke, *All mankind is one; a study of the disputation between Bartolomé de Las Casas and Juan Ginés de Sepúlveda in 1550 on the intellectual and religious capacity of the American Indians* (Northern Illinois University Press, 1974).

[14] E. P. Thompson, *Whigs and hunters: the origin of the Black Act* (London: Penguin books, 1975), pp. 258–69.

[15] I. C. Y. Hsü, *China's entrance into the family of nations: the diplomatic phase, 1858–1880* (Cambridge, MA: Harvard University Press, 1960), pp. 206–7.

troubled by the fact that the Queen of England, 'a female barbarian' was named alongside the Emperor, unequal terms such as tariffs and extraterritorial jurisdiction passed unnoticed.[16] Only later, during the 1870s, did the perception of the treaty of Nanjing and other similar treaties change, in great part due to the influence exercised by Guo, who openly expressed that 'the West should treat China as equal' and that 'Westerners in China should fall under the jurisdiction of the Chinese local authority'.[17] Thus, these treaties began gradually to be seen as a humiliation and half a century later began to be described as unequal treaties.

This transformation was not only gradual, but also entailed a slow process of learning and appropriating international legal thought. Guo's first steps were followed by the Zongli Yamen (Tsungli Yamen), the first centralized office of the Qing Court to deal with foreign affairs, established in 1861 under Prince Gong. In 1864, under the auspices of the Zongli Yamen and Prince Gong, the first international law book, Henry Wheaton's *Elements of International Law*, was translated and published.[18] W. A. P. Martin, the American Presbyterian missionary in charge of the translation was later appointed to teach the Law of Nations at the Tongwenguan, the Interpreters College, becoming China's first professor of international law. In 1898, when the Imperial University of Peking replaced the Tongwenguan, Martin was appointed as the president of the university and international law gained an exceptionally pre-eminent role.[19] The first Chinese lawyers undergoing Western legal training joined the foreign office, like Wu Tingfang, a Hong Kong lawyer trained in the University of London and called to the bar at Lincoln's Inn.[20] Many others followed, including most prominently Vi Kyuin Wellington Koo (1888–1985), who studied in Columbia University, was enlisted by the Republic to give legal advice to the Chinese delegation at the Paris Peace Conference of 1919 and later became judge at the International Court of Justice (ICJ). Although the path opened by Tingfang and later by Koo was followed by many others,

[16] D. Wang, *China's unequal treaties: narrating national history* (Lanham, MD: Lexington Books, 2008), p. 24.
[17] *Ibid.*, p. 25.
[18] L. Liu, 'Legislating the universal: the circulation of international law in the nineteenth century' in L. Liu (ed.), *Tokens of exchange: the problem of translation in global circulations* (Durham, NC: Duke University Press, 1999), p. 136.
[19] P. L. Hsieh, 'The discipline of international law in Republican China and contemporary Taiwan', unpublished paper (2013), pp. 9–10.
[20] *Ibid.*, p. 7.

the attempts by the Chinese government and their lawyers to abrogate unequal treaties failed until the Second World War.

This book explores this and many other stories about the expansion and appropriation of international law outside the West as well as instances in which Western and non-Western international lawyers interacted and disagreed about the interpretation of international rules and doctrines. From the disagreement about who had met the standard of civilization in the nineteenth century, as the exchange of 1878 shows, to the meaning of non-Western states' sovereign autonomy and equality at the turn of the century, in the interventions of Luis Drago and Ruy Barbosa, the Argentinean and Brazilian delegates to the Second Hague Conference of 1907, who respectively defended the autonomy and equality of smaller states, to the disputes about extending the scope of self-determination to non-Western nations under foreign rule during the first decades of the twentieth century, in the petitions sent to the Paris Peace Conference of 1919 and then to the League of Nations, by lawyers and activists ranging from W. E. B. Du Bois from the Pan-African movement, to Deskaheh, Chief of the Six Nations, to Abd-el-Krim, leader of the Rif insurgent nation and Ras Tafari, Crown Prince of Ethiopia, as well as other leaders of nationalist parties from Egypt, India, Korea or Syria; these stories narrate a history of international law from the point of view of the interactions between Western and non-Western nations and their international lawyers, from the point of view of the interactions between the centres and peripheries of the world.

This history begins in 1842 with the signing of the treaty of Nanjing and ends in 1933 with the adoption of the Montevideo Convention. These two treaties signal the beginning and culmination of an era. Nanjing marks the beginning of an era in which a particular European discourse, the international legal discourse of the nineteenth century, was appropriated and then transformed by non-Western states and their lawyers. Montevideo marks a culmination in the appropriation of international law thinking, in that appropriation of the modern discourse was followed by the semi-peripheral transformation of basic rules of international law.

The year 1842 symbolizes the opening of the non-Western world to trade and foreign presence, by force – the Opium war – and law – the treaty of Nanjing. This treaty is a token for the series of unequal treaties imposed from Japan to the Ottoman Empire as well as the regime of diplomatic protection operating in Latin America and beyond. The law that justified the opening of non-Western nations under unequal terms, nineteenth century classical international law, was detrimental to the

non-Western world. Moreover, after a show of force or actual military defeat, semi-peripheral nations had little room for manoeuvre. It was under this predicament that semi-peripheral nations sought to internalize, use and appropriate international law. Doing just that, however, semi-peripheral transformed international law into a universal legal discourse and regime. The year 1933, on the other hand, symbolizes the successful appropriation and transformation of international law, for the Montevideo Convention marked the dissolution of the standard of civilization, replaced by a formal definition of statehood and doctrine of recognition. This book is about what happened between 1842 and 1933: what follows are some of the main stories.

PART I · *MESTIZO* INTERNATIONAL LAW

This is a history of international law. It explores the origins and development of the international legal order we live in today. But the stories that follow are different from those narrated in conventional histories. The stories retold here are different in at least three respects. They are part of a *global* and *intellectual* history of a *mestizo* international law.

Conventional histories of international law are deeply Eurocentric.[1] Centred in the West, conventional histories not only have defined borders: from Grotius to Lauterpacht, from the Thirty Years War, to the World Wars, from the Treaty of Westphalia, to the Treaty of Paris, to the League and the United Nations, but also present a teleological trajectory: from a European to a universal international law.[2]

This book delves into a different, non-Eurocentric account of that same story. It does not restrict the gaze to a few European states and Western jurists, who have devised and set up rules and institutions to govern international relations, but examines the trajectories and contributions of a larger number of nations and lawyers across the globe. Therefore, no

[1] Martti Koskenniemi has recently described the Eurocentric nature of the history of international law: 'Europe served as the origin, engine and telos of historical knowledge'. M. Koskenniemi, 'Histories of international law: dealing with Eurocentrism', *Rechtsgeschichte*, 19 (2011), 152–76, 158.

[2] Among others, German historian Wolfgang Preiser has noticed the Eurocentric nature of the history of international law. In a book where he sets out to study the history of non-Western legal orders, he states: 'Up to now, the history of international law has been predominantly preoccupied with the law that in the European world developed into an interstate order, and that from there has, since the beginning of modern times, expanded over the world'. W. Preiser, *Frühe völkerrechtliche Ordnungen der außereuropäischen Welt: Ein Beitrag zur Geschichte des Völkerrechts* (Wiesbaden: F. Steiner, 1976), p. 7. Non-European international legal orders are only considered relevant if they came into contact with the European world: *ibid*., p. 8.

references will be made to international law's deemed founding fathers, be they Vitoria, Grotius or Vattel, in the sixteenth, seventeenth and eighteenth centuries. On the contrary, we will explore the work and life of non-Western jurists. Some of them are quite renowned, like Friedrich Martens, the nineteenth-century Estonian/Russian jurist, after whom the 'Martens clause' was named, or like Alejandro Alvarez the famous twentieth-century ICJ dissenter. Others are more known as politicians or activists, than as players in a history of international law, like Nobuaki Makino, the Japanese plenipotentiary to the Paris Peace Conference who put forth the racial equality clause, and Marcus Garvey, the Pan-African intellectual from Jamaica who sent several petitions to the Peace Conference and the League of Nations. Yet others are relatively unknown, like Gustavo Guerrero, Constantin Sipsom and Chao-Chu Wu, the Salvadorian, Rumanian and Chinese delegates to the 1930 Hague Codification Conference who defended, against Western delegates, a restrictive doctrine of state responsibility, and like the Iranian delegate to the League of Nations, Arfa-ed-Dowleh who, advocating a more inclusive organization, helped the Six Nations and other delegations in their attempts to be heard at the League's Assembly.

None of these stories goes back to the time of the conventional founding fathers. As already mentioned, this history starts in 1842, at the time when international law started to acquire a global geographical scope. Before that, if there is history of international law, it is the history of different – geographically and culturally disconnected – regional legal orders. This book explores how an international legal order and discourse circumscribed to Europe universalized. In this sense, it is a global history that takes an 'international turn' to explain the history of international law.[3]

Narrating a global history of international law demands neither identifying a starting point in Europe (or in another distant past outside Europe), nor studying how the original idea unfolded because of the involvement of Western states, their lawyers and thinkers. Instead, this book suggests that international law emerged out of the interaction between Western

[3] I take this definition of global history as 'the history and pre-histories of globalization, the histories of objects that have become universalized and the links between sub-global arenas' from David Armitage, who furthermore identifies a 'desire to go above or beyond the history of nationally defined states and state-bounded nations' among historians taking an 'international turn': D. Armitage, *Foundations of modern international thought* (Cambridge University Press, 2013), p. 18.