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Mestizo International Law

A Global Intellectual History 1842–1933

Arnulf Becker Lorca

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Chapter

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4 The expansion of nineteenth-century international law as circulation

When semi-peripheral international lawyers appropriated classical international law and the European legal tradition, they advanced a series of doctrinal positions, reinterpreting positivism, absolute sovereignty and the standard of civilization. But this appropriation was not only doctrinal. At the same time, it entailed the construction of a deeper set of assumptions – assumptions about the nature of an international world dominated by Western powers, about the fate of non-Western polities as newcomers, about modernization as an answer to the Western challenge to semi-peripheral independence and about international law as part of the modernizing and nation-building project. I would suggest understanding these assumptions as well as the mode of thinking about them through the language of international law as a distinctively semi-peripheral legal consciousness.¹

This semi-peripheral form of classical legal consciousness might be described as a *particularistic universalism*. Semi-peripheral jurists faithfully believed in the universality of international law as neutral and scientific knowledge and as a legal order where instituting sovereign autonomy and equality should attain validity on a global scale. However, semi-peripheral jurists' specific articulation of the universal rendered international law particular. Given their eagerness to be faithful to their own representations of international law's universality, in addition to the fact that international legal doctrine was a channel to support modernization or

¹ I borrow the concept of legal consciousness from Duncan Kennedy. 'The notion behind the concept of legal consciousness is that people can have in common something more influential than a checklist of facts, techniques and opinions. They can share premises about the salient aspects of the legal order that are so basic that actors rarely if ever bring them consciously to mind': Duncan Kennedy, *The rise and fall*, p. 5.

nation-building projects defined by the specific political predicaments faced in different parts of the globe, semi-peripheral lawyers' international legal thinking acquired a local or regional distinctiveness.

In other words, the distinctive semi-peripheral recombination of the central elements of classical international law – absolute sovereignty, positivism and the standard of civilization – contained a tension between the believed universality and neutrality of a scientific outlook and the centrality given to their respective national standpoints and interests. The former pulled the semi-peripheral internationalist towards a universalist jurisprudential approach to construe the meaning and definition of international law, and the latter pulled him in the opposite direction towards a particularist perspective from which to evaluate the impact of international legal doctrines and rules. For example, when Argentinean publicist Amancio Alcorta (1842–1902) challenged Carlos Calvo for neither giving adequate treatment to Argentinean interests nor recognizing the existence of American principles of international law, Calvo retorted:

these words entail a reproach that is not comprehensible for an Argentinean jurist who follows the world's scientific movement . . . As Argentinean I comply with the law of my country, but as an author of a book of universal jurisprudence, I have had to situate myself under a scientific point of view, seeking, if not a mode to uniform the principles, at least to reconcile the interests of all peoples.²

The desire to improve the international position of their respective polities by means of international law drove nineteenth-century semi-peripheral lawyers' hurried and faithful acquisition of knowledge about international law. As a result, semi-peripheral publicists adopted central tenets of the international legal tradition at face value, only subsequently adjusting the uses and interpretations to serve particular and local interests. Consequently, their belief in the universality of international law as the law between civilized states, for example, remained intact. This had a great impact on their professional sensibilities. In particular, the strategy of internalizing (rather than rejecting) the standard of civilization by demonstrating the civilized status of their countries in contrast to other non-European nations contributed to the absence of ideological cohesion between international lawyers from different nations and regions of

² C. Calvo, 'Polémica Calvo-Alcorta', *Nueva Revista de Buenos Aires*, 7 (1883), 629, 632–3. For a description of the disputes between universalist and particularist international lawyers in the Latin American context, see A. Becker Lorca, 'International law in Latin America or Latin American international law? Rise, fall, and retrieval of a tradition of legal thinking and political imagination', *Harvard Journal of International Law*, 47 (2006), 283–305.

the semi-periphery. The absence of bonds of solidarity resulted from the structure of the argument adopted by semi-peripheral publicists; that is, unequal treatment applies not to 'us' but to other 'less civilized nations'. As a result, I would argue that Latin Americans set themselves apart from their indigenous peoples; Japanese from the Chinese; Russians from the Ottomans; Ottoman elites from their own Islamists.

Non-European international lawyers who evaluated the history of their own political, legal or cultural contexts to demonstrate their participation in the civilized world were less inclined to recognize commonalities with other regions or states of the semi-periphery. Thus, the generation of semi-peripheral lawyers who accepted international law under the classical synthesis during the second half of the nineteenth century saw no reason to establish bonds of solidarity with one other, which is one of the features that set them apart from the generation of modern semi-peripheral international lawyers that followed. Assimilating the knowledge and mastering the arguments that would contribute to the task of getting European nations to recognize the legal personality of their states fostered a pragmatic sensibility that put non-European international lawyers under significant professional pressure. Once this pressure lifted, later generations of lawyers had more latitude to risk departing from the dominant perspective by deploying interpretations of international law that explicitly responded to the particularities of the history, culture and problems in their specific location. This partial detachment from European intellectual influence bolstered semi-peripheral international lawyers' confidence and made it possible to bond professionally and politically with international lawyers from other regions. This is the reason that I reserve use of the notion of *modernist resistance* to describe the legal consciousness of peripheral international lawyers of the inter-war period and describe semi-peripheral classical international lawyers of the second half of the nineteenth century as *universal particularists*.

I have thus far emphasized the global trends that explain the transformations international law underwent during the nineteenth century. I have highlighted the influence that European expansion and the consolidation of global markets had on the international legal regimes regulating interactions between Western and semi-peripheral states across the globe. I have also indicated that both the functional equivalences in the rules enacted by these legal regimes and European international lawyers' development of doctrines sustaining the inclusion of unequal rules in them explain the global character of the appropriation of European international law thinking in the semi-periphery.

The global character of this trend is not an excuse to forget that the appropriation of international law in places as dissimilar as Japan, Turkey, China, Russia or Mexico served a plurality of interests and agendas. That is, the specific characteristics of each context where this global trend was articulated explain the particularistic aspect of the semi-peripheral legal consciousness. International lawyers supported the modernization and Westernization of their polities, but the significance, impact and politics of these processes varied dramatically. To understand these differences, I now turn to a comparative study of the historical contexts in which European international legal thought was appropriated and in which international law became universal. Let us look at the three ideal types explored in the previous chapter. Considering them in chronological order, let us examine: first, the inclusion of newly independent sovereigns under formal equality; second, Western expansion through the forceful opening of weakened empires under legally and politically unequal relations; and, third, the effort of non-Western empires to seek re-admission to the international community.

Inclusion of newly independent states through recognition

Political elites in the semi-periphery, especially in the colonial territories that won the various wars of independence waged during the first half of the nineteenth century, considered the discourse of international law to be a fundamental building block in their nation-building projects. Once military means had secured independence, the authorities of the new states sought recognition of their sovereign autonomy as members of the international community from the main European powers and the United States. The desire for recognition primarily occurred following the partial dismemberment of the Spanish, Portuguese and Ottoman empires that created the Latin American republics and Greece.³

In contrast to Japan, Turkey and China, where the standard of civilization limited their admission into the international community and

³ The wars of independence at the beginning of the nineteenth century put an end to Spanish rule in Latin America and resulted in the creation of a number of new countries. Compared to Spanish America, Brazil followed a different trajectory, when in 1822 and with far less struggle it became a monarchy separate from Portugal. On the other hand, another group of independent countries (Greece, Montenegro, Romania) emerged from the defeat of Ottoman forces in the Greek war of independence and the Russo-Turkish war of 1877–8. However, I will only explore the use of international legal language to obtain recognition in relation to Latin America.

justified unequal treatment, in Latin America or Greece the doctrine of recognition performed an equivalent function. Recognition had vital political consequences. Western states did not grant recognition as a gratuitous concession. Instead, Spanish American states and Brazil had to vigorously pursue recognition of their statehood by European governments and the United States. By the 1820s, after declaring independence but during war against Spanish loyalists, some Spanish American governments had sent special envoys to London and Washington. These envoys fought arduously to establish formal diplomatic relations with European states and then, as we have seen above, to conclude treaties of friendship, commerce and navigation.

European recognition, in particular by Britain, was crucial to undercut support from the Holy Alliance for a Spanish incursion to regain control of its former colonies. Spanish American states also wanted recognition in order to increase European trade and investment as well as to improve the conditions under which they procured loans and arms from European bankers and merchants. Moreover, Spanish American envoys sought to establish diplomatic relations and sign general treaties not only with Britain and the United States, but also with France and other smaller European states.⁴

International politics were evidently at centre stage in the diplomatic struggle to obtain recognition and to determine the rules of international law that would regulate the interaction with governments that had been newly admitted to the 'family of nations'.⁵ Both their victories of the new Latin American republics and Greece in their wars of independence and their post-bellum success depended to a great extent on the self-interest of the great powers and particularly on the ascending role of Britain. For example, to prevent a relapse into colonial rule under the auspices of the Holy Alliance, Canning devised a policy of cooperation with the United States to recognize the Latin American republics under the latter's hegemony, as expressed in the Monroe doctrine.⁶ Similarly, Britain allying with Russia secured the independence of Greece from the Ottoman Empire.

⁴ Rodríguez, *Spanish America*, p. 93 and *passim*.

⁵ See generally Waddell, 'Latin American Independence', pp. 225–6.

⁶ See J. Davis, 'Britain and the European balance of power' in C. Williams (ed.), *A companion to nineteenth-century Britain* (Oxford: Blackwell Publishing, 2006), pp. 34–52, 37 and Waddell, 'Latin American Independence', pp. 213–15 ff.

However, the fight for recognition was also a diplomatic dispute fought on legal grounds.⁷ On the one hand, recognition challenged the Vienna Congress' principle of legitimacy as well as the conventional understanding of the doctrine of recognition itself. On the other hand, Latin American diplomats created a new dimension of controversy while negotiating general treaties of peace, commerce and navigation by discussing the type of economic and personal privileges that Latin American states would grant to foreign residents and the conditions under which they would confer them (whether unilaterally, under reciprocity, or with preferential treatment for the newly independent nations).

At the same time, publicists from Latin America, for example, not only invoked international legal arguments to secure recognition for the international legal personality of their newly independent states and to gain sovereign autonomy from the very same powers that made their independence possible – namely, Britain and the United States – but also reinterpreted and changed existing legal doctrines governing recognition. This pattern was also remarkably similar to the one followed by Greek international lawyers like Nicolas Saripolos, both regarding the use of the classical synthesis to buttress Greek independence and deal with the Ottoman Empire and the migration to Europe's intellectual centres.⁸ In Latin America, Argentinean lawyer Carlos Calvo, as we have seen, was the more prominent representative who attempted to exploit international law to promote the interests of the new American republics.

Since the Congress of Vienna, the international rules governing recognition had sanctioned the principle of legitimacy. The Spanish Chancellery was perfectly aware of this legal doctrine and used it in the diplomatic protests it presented to the European governments who were negotiating recognition and treaties with Spanish American 'rebel' governments, invoking the illegality of this course of action.⁹ In order to push for recognition, the Latin American states challenged the principle of legitimacy.

⁷ This was especially true in the case of Brazil, where '[i]ndependence . . . was won not on the field of battle but by diplomacy': A. Manchester, 'The recognition of Brazilian independence', *The Hispanic American Historical Review*, 31 (1951), 80–96, 80.

⁸ N. Saripolos, 'La question gréco-turque, ses commencements, ses progrès, et son état actuel', *RDI*, 11 (1879), 119–43, 133–5; N. Saripolos, 'La question gréco-turque après l'acte final de la conférence de Berlin', *RDI*, 13 (1881), 231–45, 239–43; see also A. Rivier, 'Notice nécrologique sur M. Saripolos par M. Rivier', *Annuaire de l'Institut de droit international*, 10 (1888), 52, 55–6.

⁹ W. S. Robertson, *France and Latin-American Independence* (Baltimore: Johns Hopkins Press, 1939), p. 560.

This challenge entailed a change in the international rules toward a conception of sovereignty based on a people's right to self-determination.¹⁰ Recognition, in the writings of Carlos Calvo, also challenged the traditional interpretation of the doctrine of recognition itself.

Calvo embraced the distinction between internal and external sovereignty that positivist international lawyers had introduced, though he employed the distinction to support a shift towards a declaratory rather than a constitutive conception of recognition. Calvo followed the conventional view in affirming that sovereignty emerges as soon as a society gives itself a government, creating the internal sovereignty of the state. Internal sovereignty exists and is exercised *de plano* from the moment that the state is constituted, and therefore does not require sanction by other states. Calvo also accepted an idea of sovereignty that requires other states to recognize a nation in order for it to be included in the international community, thereby sanctioning its external sovereignty.¹¹ But Calvo inverted the consequences of this doctrinal distinction – the separation of a colony affects the external sovereignty of the metropole. As long as the struggle for independence continues, uninvolved states have to observe strict neutrality in their relations with the metropole and with the colonies fighting for independence. However, Calvo warned that uninvolved states have the right to grant recognition to colonies when there is a protracted war of independence or when it has become *de facto* impossible for the metropole to regain control over its colonies.¹²

I have sketched above Calvo's tactical appropriation of international law. It is also important to emphasize Calvo's professional presence in Europe and the local – Latin American – distinctiveness of his semi-peripheral legal consciousness. Carlos Calvo's career is a paradigmatic example of the professional patterns that nineteenth-century semi-peripheral lawyers followed. After pursuing studies in Buenos Aires and Paris, Calvo began a diplomatic career that put him in contact with the most prestigious intellectual milieus of mid-nineteenth-century Europe.¹³

¹⁰ Self-determination was not a new concept. Its revival marked a return to the influence that the French revolution had exerted on pre-restoration international law. R. Redslob, 'Völkerrechtliche Ideen der französischen Revolution' in O. Mayer, *Festgabe für Otto Mayer zum siebenzigsten Geburtstag*, 29. März 1916 (Tübingen: Mohr, 1916), pp. 273–301.

¹¹ Calvo, *Le droit international*, p. 235. ¹² *Ibid.*, p. 241.

¹³ For an example of one diplomatic mission, in 1860 Calvo represented Paraguay in London with the main task of requesting reparations for the Paraguayan government in the Cansatt case. 'Calvo's success with the case opened the doors for him in the salons and intellectual circle of Europe': Obregón, 'Completing civilization', p. 96.

Calvo was remarkably successful.¹⁴ Precisely at the time when international law became a professional activity, Calvo achieved wide impact by publishing treatises both in Spanish and French, some of which had various editions and translations.¹⁵ In the prologue to the fifth edition of his treatise, Calvo notes the various translations and editions, commenting: 'Is it not the best proof of the usefulness of our work?'¹⁶

Calvo's success can be understood in the context of the transformations international law experienced during the course of the nineteenth century. I have argued above that international law both contracted and expanded its range of validity during that period. The geographical scope of international law shrank to govern exclusively the interactions between European, civilized and sovereign states – becoming the '*Droit publique de l'Europe*'.¹⁷ While international lawyers began to articulate the idea of international law, expressing the juridical consciousness of civilized peoples, they saw themselves as embodying this consciousness in the form of an internationalist spirit and a profession defined by universality and inclusiveness.¹⁸

This double shift – both conceptual and professional – required someone like Calvo. As an Argentinean in Paris, he reminded Europeans of a parallel history of international law in the New World and reinstated the universality that international law had lost after the demise of naturalism. European international lawyers welcomed Calvo's inclusion of material relating to the Americas. For instance, in his book review of Calvo's *Derecho internacional*, Gustave Rolin-Jaequemyns notes: 'But what gives him special value, is the important and altogether new role that in the examination

¹⁴ Calvo was founding member of both the *Institut de Droit International*, established in 1873 in Ghent, and the Association for the Reform and Codification of the Law of Nations, later renamed the International Law Association.

¹⁵ In 1868, Calvo published *Derecho internacional teórico y práctico de Europa y América* (Paris: D'Amyot, 1868), which he published in French, with four editions between 1870 and 1896. See, Calvo, *Le droit international*. The fourth edition was translated into Chinese and Greek, and an abridged edition was translated to English. This is what Calvo maintains in the prologue to the fifth edition of *Le droit international*, p. xii. Map 5 shows only Calvo's translation to French because the other translations could not be found.

¹⁶ *Le droit international*, p. xii; Obregón has discussed this quote in 'Completing civilization', p. 91 n. 178.

¹⁷ See C. H. Alexandrowicz, 'Doctrinal aspects of the universality of the law of nations', *BYIL*, 37 (1961), 506–15, 506. On the distinction between a universal law of nations and a European public law, see Guggenheim, 'Jus publicum europeum'.

¹⁸ For an account of this emerging disciplinary sensibility, see Koskenniemi, *Gentle civilizer*, pp. 11–97.

of his questions, he gives to historical American precedent'.¹⁹ A Latin American in Europe patently manifested European international law's universality and Latin America's civilized status as well as guaranteed the scientific impartiality of the international lawyers' doctrinal positions. Calvo himself was aware of the role that his foreignness served:

My venerable colleague Professor Heffter, assured me, during the visit I paid to him in 1878, that the impartiality of my doctrines and the fact that I am a foreigner, bestowed my work, in the German high courts of justice, with an authority that the works of nationals often lacked.²⁰

Latin Americans' singular history explains not only their elite's heavy reliance on the culture, tradition and values of 'Western civilization' to assert their own thoughts, but also their obsessive preoccupation with the recognition of their participation and contribution to the development of Western culture.²¹

International law was not immune from this general trend and shaped nineteenth-century Latin Americans' efforts to demonstrate the assimilation of the discourse of international law in ways that overemphasized the common religious substratum in order to assert membership in an international community of Christian nations.²²

¹⁹ G. Rolin-Jaequemyns, 'Derecho internacional teórico y práctico de Europa y América, por Carlos Calvo', *RDI*, 1 (1869), 294–6, 294.

²⁰ Calvo, 'Polémica', 635. The fact that Calvo mentions Heffter is remarkable. Heffter was renowned for maintaining that there was no single external public law (*äußeres Staatsrecht*) because there was no law extending its scope to all states and peoples of the globe. According to Heffter, law only developed and achieved validity within determined circles. Specifically, a general legal consciousness manifested itself only within Christian Europe and in the states with European heritage. In the European realm, Heffter insisted, this law has acquired the name of European public law. A. Heffter and F. Geffcken, *Das europäische Völkerrecht der Gegenwart auf den bisherigen Grundlagen* (Berlin: H. W. Müller, 1882), pp. 1–2.

²¹ L. Whitehead, *Latin America: a new interpretation* (New York: Palgrave Macmillan, 2006), pp. 1–18.

²² For example, when Spain seized the Chíncha Islands in Peru, Latin American authorities made diplomatic protests condemning the attack as not in accord with the practice of civilized nations. The Argentinean minister to Peru, D. F. Sarmiento, formulated his diplomatic protest using Christianity as a sign of civilization: 'The Republics of South America belong to the community of Christian nations which governs itself by international law; they exist by their own right, which they themselves have conquered, as proved by history, and secured by universal concurrence; whilst the people from whom they have served themselves can in no manner deny their existence, by urging the absence of Treaties or of explicit acknowledgement, after forty years renunciation of all pretension of dominion, and virtual approval of the Treaties of Ayacucho, which put an end to the war between the metropolis and its former colonies.' Don D. F.

However, the classical synthesis, as seen in the rules and principles of international law that Latin American appropriations brought about, did not simply reflect the legal order of the 'European Concert'. On the contrary, Latin Americans pushed to the forefront precepts that responded to the interests of their own countries. In the absence of this class of rules, they resorted to general principles of law to challenge the norms exclusively rooted in European state practice. What came to be known as the 'Calvo doctrine', for example, was an effort to argue – on the basis of classical international law's absolute sovereign autonomy and equality – that military as well as diplomatic interventions by European states in the domestic affairs of Latin American nations were unlawful. As shown above, Calvo reinterpreted the nature of the right to intervene as an exception to the principle of sovereign independence. Calvo claimed that the exception was only justified when exercised in Europe, for it followed 'a principle favourable to the development of civilisation'. In Latin America, on the contrary, intervention was unlawful since it was based on mere force.²³

Western expansion through the forceful opening of weakened empires

Elites in Asia felt a similar pressure to appropriate international law when they confronted the reconfiguration of the nineteenth-century world system under European and American hegemony.²⁴ Although weakened, for different geopolitical reasons some Asian empires did not fall under direct European colonial rule. Yet they were not powerful enough to oppose the forced opening of their territories to Western commerce and influence. By the 1850s, Japan, China and Siam had signed unequal treaties with European powers and the United States that not only guaranteed freedom of trade and religion, unilateral most-favoured treatment, and reduction of tariffs, but also renounced any claim to subject foreign residents to

Sarmiento to Señor Ribeyro, Inclosure 1 in No. 7, Accounts and papers of the House of Commons, State Papers, vol. XXXII (1864), p. 15.

²³ According to Calvo, affirming the principle of non-intervention gives foreigners recourse to the local tribunals where they have acquired domicile: Calvo, *Le droit international*, pp. 350–1.

²⁴ For example, Auslin has shown a parallel between Japan, Burma and Siam, in their dealings with Western powers and the efforts to renegotiate unequal treaties: Auslin, *Negotiating with imperialism*, pp. 22–5.

their legal order and judicial system, thereby recognizing the exercise of consular jurisdiction in their territory.²⁵

Japan

Japan saw its long-sustained policy of seclusion powerfully disrupted in 1853 with the arrival of an American expedition of ironclad steamers under the command of Commodore Matthew Perry, who proceeded to force the opening of Japanese ports to American trade.²⁶ After the conclusion of the US-Japan Treaty of Friendship of 1854, the Shogunate government felt pressured to rapidly acquire basic knowledge on the 'Western law of Nations' in order to handle the new relationship with the United States and European nations.²⁷

Moreover, Japanese elites and government officials were in a different position than their Latin American or Greek counterparts. By the time international law became an essential knowledge to the Latin American or Greek nation formation projects, the elite and lettered people of these new republics had strong links of cultural dependency with Europe. They were ready to tackle the appropriation of European international legal thought because they had already been travelling to Europe for a long time and had also long been immersed in the Western legal tradition. The situation in Japan, or for that matter in China, was quite different not only because there was no significant economic or cultural exchange with Europe before the nineteenth century – Europe was in fact peripheral to the East Asian economic system – but also because the region had, under Chinese leadership, established a long-standing, stable and independent political order that governed relations between autonomous

²⁵ For a study of these treaties in general see Craven, 'What happened to unequal treaties?'; for an extended treatment in relation to China, see Fairbank, *Trade and diplomacy* and D. Wang, *China's unequal treaties*; regarding Japan, see Auslin, *Negotiating with imperialism*.

²⁶ Starting in the sixteenth century, Japan had contact with Portuguese, Spanish, English and Dutch envoys and merchants. In 1638, however, the regime adopted a policy of seclusion to eliminate the impact of Christian missionaries, as evidenced by the fact that only Dutch and Chinese merchants were exempted from the prohibition and were only allowed to engage in restricted trade. R. P. Anand, 'Family of "civilised" states and Japan: a story of humiliation, assimilation, defiance and confrontation', *Journal of the History of International Law*, 5 (2003), 1–75, 8.

²⁷ See Auslin, *Negotiating with imperialism*, p. 1 and *passim*. Thereafter, Japanese officials resisted US pressure to extend the scope of the 1854 treaty by delaying negotiations. The Western intervention in China sent a powerful message which by 1857 caused Japanese elites to change their stance and sign a new treaty. Other Western powers rapidly followed suit. Anand, 'Family of "civilised" states and Japan', 12–13.

political entities via hierarchical relations, namely under a tributary system.²⁸

Consequently, European international law first had to be assimilated through direct importation. Japanese imperial authorities employed Western international lawyers to provide them with legal advice, teach international law to their young elites, and participate in the translation of classic international law textbooks. For example, between 1889 and 1892, the German-Swiss international lawyer Otfried Nippold was invited by the Japanese government to teach at the Society of German Sciences in Tokyo.²⁹ Moreover, the Japanese government employed an Italian, Alessandro Paternostro, to write an essay supporting Japan's full admission into the international legal community. Like the Japanese scholars we have seen, Paternostro highlighted the adoption of Western law as a sign of civilization.³⁰

China and Korea and, to a lesser extent, Siam and Persia also acquired and translated US and European international law textbooks and hired foreign experts in international law.³¹ For example, Gustave Rolin-Jaequemyns served as adviser to the Siamese government from 1892 to 1902. Searching for a successor to Rolin-Jaequemyns, Siamese officials did not trust European lawyers, because they could be co-opted by the French, and enrolled a series of American lawyers from Harvard, most prominently Francis B. Sayre.³²

After direct importation, Asian states sought to train their own international lawyers. The Japanese government sent some of its officials to Europe where they studied international law and then served as legal

²⁸ On Western Europe as peripheral to China, see A. G. Frank, *ReOrient: global economy in the Asian Age* (Berkeley: University of California Press, 1998).

²⁹ O. Nippold, *Wanderungen durch Japan: Briefe und Tagebuchblätter* (Jena: Mauke, 1893). Miyasaki lists a number of Westerners who served as legal advisers to China, Japan and Korea: Miyasaki, 'History: Far East', p. 807.

³⁰ Paternostro's article includes three annexes, one summarizing Japanese work on codification, another on teaching and legal culture, including the curricula of law schools, a list of professional societies and a list of law books translated from French, English and German, and finally an annex describing the organization of the foreign office: A. Paternostro, 'La revision des traités avec le Japon au point de vue du droit international', *RDI*, 23 (1891), 176–200, 193–200.

³¹ Fuji mentions the translation and publication of authors such as Hall, Westlake, Martens, Lawrence and von Liszt: Fuji, 'One hundred years', 29. See in general Map 5 showing the translation of Bluntschli (1856), Wheaton (1836), Martens (1882–3) and Calvo (1868).

³² P. Oblas, 'Treaty revision and the role of the American foreign affairs adviser, 1909–1925', *Journal of the Siam Society*, 60 (1976), 171–86.

advisers in Japan's diplomatic missions or participated in the first international meetings of the 1890s (mainly in the first Hague Conference). After Commodore Perry forced the opening of Japanese ports, the Shogunate decided that a group of Japanese students had to learn the sciences and knowledge of the victor. The plan to send students to the US was dropped when the American civil war broke out. Instead, the Shogunate requested the Netherlands to receive a warship with a group of Japanese students. Among them, two studied international law. Between 1862 and 1865, Amane Nishi (Shusuke) (1829–1897) and Mamichi Tsuda (Shin'ichiro) (1829–1903), from the Bureau for the Inspection of Barbarian Books of the Shogunate, studied Western law under Simon Vissering at the University of Leiden.³³ Translating and publishing his handwritten notes on international law in 1868, and teaching international law after his return, Amane Nishi (Shusuke) became the first Japanese international law scholar.³⁴

Some scholars have characterized the beginnings of international law in Japan as a period defined by the passive assimilation of Western legal thinking, which reflected the predominant ethos of the 'wholesale Westernization' of Japanese society.³⁵ As with studies on Latin American international law, studies on Japan assumed that Japanese international lawyers straightforwardly followed Western trends in international legal scholarship.³⁶ The story of nineteenth-century international law as the progressive defeat of naturalism by positivism is mirrored in the evolution of Japanese international law.

Many scholars think that the first generation of Japanese international lawyers adhered to natural law and made use of the analogy between natural law and Confucianism to render Western international

³³ 'Students studying in the Netherlands at the end of the Edo period', National Diet Library Japan, www.ndl.go.jp/nichiran/e/s2/s2.6.html.

³⁴ Miyasaki, 'History: Far East', p. 806; Fuji, 'One hundred years', 19.

³⁵ Early teaching and research of international law was, in the words of Onuma, 'practical, statism-oriented, Eurocentric and passive': Onuma, 'Japanese International Law', 23. Onuma argues that lawyers from nations that have entered the Eurocentric international society as 'late-comers' share a similar pragmatism, passivism and state-centrism in their understanding of international law: *ibid.*, 42. Along the same line, Yamamoto points out that Japan chose to 'accept and comply with the international legal order as it was', even if it had not taken part in its creation. Consequently, Japanese lawyers' approach was 'passive and conservative': S. Yamamoto, 'Japanese approaches and attitudes towards international law', *Japanese Annual of International Law*, 34 (1991), 115–24, 118.

³⁶ Jacobini, *Latin American writers*, pp. 38–76.

law understandable.³⁷ Nishi and Tsuda, the first Japanese who studied international law with Simon Vissering in Leiden, are deemed to have followed the natural law perspective of their master. Once back in Japan, Nishi taught ‘universal law of nations’ at the school of the Shogunate and published a translation of his notes of Vissering’s lectures. Kinji Akashi suggests that most Japanese scholars have thought that the first generation of international lawyers adhered to natural law because of the influence Nishi’s notes had on Japanese internationalists.³⁸ However, Japanese publicists imported European international legal thought due to a pragmatic need to achieve recognition from Western powers. They were not particularly inclined to examine international law’s conceptual underpinnings. Rather, Japanese internationalists followed the general trend by moving to positivism during the second half of the century, focusing their attention on doctrinal and practical aspects.³⁹ For example, Akashi has argued that the distinction between naturalism and positivism was of only marginal importance to Japanese practitioners for whom the description of international law’s substantive content was of much more relevance than the discussion about the theoretical foundations of the international legal order.⁴⁰

By the 1890s, after the first generation of Japanese international lawyers had acquainted themselves with the international legal discourse and with European intellectual circles, their assimilation of international law became less subservient. Thus, Japanese publicists, who had translated Western international law treatises and written international law treatises in Japanese and for the local audience, began to publish monographs in European languages and to participate in the profession’s European centres. For instance, Nagao Ariga studied in Tokyo and Berlin and upon his return to Japan taught international law, served as a legal adviser to the army during the War in China, participated in the First Hague

³⁷ It is possible to draw this analogy because until the first half of the nineteenth century natural law was not completely out of fashion, particularly in the Western international law literature that was translated to Japanese. See Hirohiko Otsuka, ‘Japan’s early encounter with the concept of the “law of nations”’, *Japanese Annual of International Law*, 13 (1969), 35–65, 45–6.

³⁸ Akashi, ‘Japanese “acceptance”’, pp. 3–5. However, Akashi criticizes this conventional interpretation: *ibid.*, pp. 5–7, 18–19.

³⁹ See Yamamoto, ‘Japanese approaches’, 118. Similarly, Fuji points out the influence exerted by the works of positivist authors such as Wheaton, Woolsey, Kent, Halleck and Bluntschli: Fuji, ‘One hundred years’, 20–2.

⁴⁰ Akashi, ‘Japanese “acceptance”’, pp. 5–7, 18–19.

Conference as a technical expert, and published in French on the international legal aspects of the wars against China and Russia.⁴¹

In 1897, the Japanese government sent Sakuyé Takahashi to study international law in Europe. Takahashi provides an extraordinary example of intellectual agency in the appropriation of international law. During his European sojourn, Takahashi not only published pieces in English, French and German but also sought the involvement of European publicists in matters crucial to the interests of Japan. For instance, in Germany Takahashi published a collection of articles written by renowned European international lawyers on the Sino-Japanese War.⁴² In Britain, Cambridge University Press published a book by Takahashi.⁴³ Takahashi managed to get T. E. Holland to write a preface and John Westlake to write an introduction for the book. Until 1899, the various editions of Holland's international law treatise had excluded Japan from the members of the 'family of civilized nations'.⁴⁴ In the third edition, for example, Holland affirmed that: 'within this charmed circle, according to the theory of international law, all States are equal. Without it, no State, be it as powerful and as civilised as China or Japan, can be regarded as a normal international person'.⁴⁵ After meeting Takahashi, Holland changed that passage in the 1900 edition to include Japan within the sphere of international law.⁴⁶ Conversely, as we will see, Westlake, one of the international lawyers most apologetic for British imperialism and the deployment of the standard of

⁴¹ Nagao Ariga, 'De la protection accordée aux chinois résidant au Japon pendant la guerre sino-japonaise', *RGDIP*, 2 (1895), 577–83; Ariga, *La guerre sino-japonaise*.

⁴² Many of the articles by Western authors were written under Takahashi's initiative: S. Takahashi (ed.), *Aeusserungen über völkerrechtlich bedeutsame Vorkommnisse aus dem chinesisch-japanischen Seekrieg und das darauf bezügliche Werk* ('Cases on international law during the Chino-Japanese war') (München: E. Reinhardt, 1900). The book included a selection of reviews of Takahashi's work in various European outlets.

⁴³ Takahashi, *Cases on international law*. In 1908, Takahashi also published a study on the Russo-Japanese war, both in London and New York: S. Takahashi, *International law applied to the Russo-Japanese war: with the decisions of the Japanese prize courts* (London: Stevens and Sons, 1908) and S. Takahashi, *International law applied to the Russo-Japanese war: with the decisions of the Japanese prize courts* (New York: The Banks Law Pub. Co., 1908).

⁴⁴ T. E. Holland, *The elements of jurisprudence*, 2nd edn (Oxford: Clarendon Press, 1882).

⁴⁵ T. E. Holland, *The elements of jurisprudence*, 3rd edn (Oxford: Clarendon Press, 1886), p. 322.

⁴⁶ 'Within this charmed circle, to which Japan has also some time since fully established her claim to be admitted, all States, according to the theory of international law are equal. Outside of it no State, be it as powerful and as civilised as China as Persia, can be regarded as a normal international person': T. E. Holland, *The elements of jurisprudence*, 9th edn (Oxford: Clarendon Press, 1900), p. 373. See also Map 6 for a visual representation of the expansion of international law according to the definition of the international community in different editions of Holland's treatise.

civilization against Japan, uneasily came to terms with the very presence of a Japanese scholar – rather than a barbarian – in Cambridge.

As in Latin America, Japanese efforts to assimilate international law depended on a broader commitment to a modernizing ideology. This aspect distinguishes Japan from China, where the appropriation of international law experienced greater challenges as the modernization project slowed down. In Japan, the role of international law as a modernizing tool and as a marker of civilization became stronger during the Meiji Restoration.⁴⁷ The parallel between Japan and Latin America in their use of international law as part of the modernization project is clear in the following example.

In 1888, Japan concluded with Mexico its first treaty of amity, commerce and navigation under conditions of absolute equality. According to Auslin, Japan's foreign minister, Ōkuma Shigenobu hoped that the 1888 treaty between Mexico and Japan would serve as a precedent for future negotiations.⁴⁸ And in fact, Japan thereafter used this treaty as leverage to renegotiate unequal treaties with Western states. The negotiation and conclusion of this treaty was a remarkable episode in semi-peripheral diplomatic history. Ota Mishima's study shows that, even though absent actual commercial interactions between Mexico and Japan, both nations, under Meiji and the Porfiriato, faced similar challenges. With a treaty between these two nations, Mexico was looking for equilibrium in its international relations vis-à-vis the United States, whereas Japan was trying to get its sovereignty recognized by European states.⁴⁹

Japan heavily relied on international law to pursue its policies, not simply as a consequence of the modernizing trend and the resultant Westernization of its legal institutions, but also because international law was appropriated in ways that made it seem useful for Japan in pursuing its own interests. International law served this purpose both in the context of the wars with China (1894–5) and then with Russia (1904–5) and at the end of the century while challenging the unequal treaties and justifying its own military expansionist and colonial policies. At the end of the century, Japan successfully renegotiated the unequal treaties it had

⁴⁷ Fuji, 'One hundred years', 19; Auslin, *Negotiating with imperialism*, p. 146 ff.

⁴⁸ Auslin, *Negotiating with imperialism*, p. 199.

⁴⁹ M. E. Ota Mishima, *México y Japón en el siglo XIX: la política exterior de México y la consolidación de la soberanía japonesa* (Tlatelolco, México: Secretaría de Relaciones Exteriores, 1976), p. 15; for an account of the negotiations, see *ibid.*, pp. 17–23.

concluded with core states. In 1894, Japan signed the first treaty under equality with Great Britain.⁵⁰ The unequal treaties signed with France, Germany, the United States and other European states were then also revised.⁵¹

Japan's success might be explained because of the military power it acquired, but also because, unlike its counterparts in China, Siam or Persia, whose governments relied more on foreign legal experts, Japan from very early on founded professional organizations, taught international law, and participated in international diplomatic events.⁵²

China

China, in contrast, had the misfortune of being either too strong to pay any significant attention to Westerners' law of nations before the nineteenth century, or too weak afterwards to appropriate the discourse of international law quickly enough to use it successfully to contain Western intervention. Before the nineteenth century, relations with the West were extremely limited. The use of Western legal language to regulate those interactions was quite innocuous, so that there was never a serious need for China to internalize and assimilate Western international law.

Before the nineteenth century, international law was invoked by Christian missionaries who entered China during the last part of the sixteenth century and by the Dutch in their contacts with Qing officials between 1662 and 1690. In both cases, Chinese authorities refused attempts to validate the European law of nations and depart from their Sino-centred tributary system.⁵³ China first entered into a formal agreement with a foreign country on equal terms when China and Russia concluded the Treaty of Nerchinsk in 1689. China agreed, for example, to reciprocate ritual observances to maintain the prestige of each civilization.⁵⁴ Chinese authorities appointed two Jesuits as translators and advisers precisely in

⁵⁰ See Anglo-Japanese Treaty of Commerce and Navigation of July 1894. See also Anglo-Japanese Treaty of Alliance of 1902.

⁵¹ Japan signed treaties under equality with: United States (22 November 1894); Russia (8 June 1895); Germany (4 April 1896); Belgium (22 June 1896); France (4 August 1896); Switzerland (10 November 1896); Spain (2 January 1897); Portugal (26 January 1897); Austria-Hungary (5 December 1897).

⁵² Akashi, 'Japanese "acceptance"', pp. 3–6.

⁵³ Z. Li, 'International law in China: legal aspect of the Chinese perspective of world order', unpublished SJD dissertation, Toronto University (1995), pp. 120–1; Gong, *The standard of 'civilization'*, pp. 132–4.

⁵⁴ Gong, *The standard of 'civilization'*, p. 134.

order to conclude a treaty on the basis of equality and reciprocity. Their role was to ensure that the negotiations were carried out in accordance with the principles of international law.⁵⁵

At the beginning of the nineteenth century, the situation changed dramatically. Immanuel Hsü, in his study on China's entrance into the family of nations, reconsiders the critique that modern Chinese scholars have frequently levelled against the Manchu government for its ignorance of international law in its early negotiations with the West. These scholars think that Chinese authorities were incompetent because they too easily signed away extraterritorial concessions, while being ridiculously obstinate about trivial formalities, which were ordinary diplomatic practices among Western states.⁵⁶ Hsü follows a different path, asking why Chinese authorities failed to use international legal arguments to assert China's sovereignty. On the one hand, Hsü stresses that the rules invoked to regulate the interactions between China and the Western powers were not part of general international law in the sense of conforming to the principles of sovereign autonomy and equality, but were contained in a series of unequal bilateral treaties that imposed daunting and exceptional limits on Chinese sovereignty. The general corpus of international law remained therefore unused in the regulation of Sino-Western interactions.⁵⁷ In this regard, Gong has proposed an alternative explanation of Chinese reluctance to give up the *kostow*, namely, the ritual by which foreign powers became a tributary of China. Rather than responding to an unreasonable and rigid formalism, China defended the *kostow* because recognizing foreign sovereigns as equals challenged its existing worldview.⁵⁸ On the other hand, Hsü and others have shown that Chinese authorities applied European international law without much success. It was not lack of legal knowledge on the part of Chinese officials, but the reality of power politics that explain Chinese disappointments.

In 1838, the Emperor appointed Lin Tse-hsü to lead the campaign to suppress opium trafficking and consumption in Canton. Since it was mostly

⁵⁵ T. Wang, 'International law in China', 227.

⁵⁶ I. Hsü, *China's entrance into the family of nations: the diplomatic phase, 1858–1880* (Cambridge, MA: Harvard University Press, 1960), p. 121.

⁵⁷ *Ibid.*, pp. 121–3.

⁵⁸ Gong, *The standard of 'civilization'*, pp. 130–3. Similarly, Liu contests the conventional suggestion that China's downfall is explained by its failure to abandon Sino-centric ways of thinking, especially its unwillingness to join free trade and to give up the tributary protocols and adopt modern European diplomacy: Liu, 'Legislating the universal', pp. 129–30.

English opium that was smuggled from India to China, Lin sought to find a justification to prohibit the opium trade in Western publicists' writings and consequently ordered the translation of a number of texts on the law of peoples. In particular, Lin requested the translation of passages from the English version of Vattel's *Le droit des gens* on the right to prohibit the entrance of foreign merchandise, to confiscate smuggled goods, and to wage war. In 1839, based on Vattel's writings, Lin declared opium to be contraband and wrote a letter to Queen Victoria requesting her to stop the opium trade. Using European international law proved futile when the First Opium War broke out, resulting in the Treaty of Nanking being concluded with Britain in 1842 after China's defeat. In exchange for a withdrawal of troops, Britain forced China not only to accept opium as legitimate merchandise, but also to open five ports to trade and residence of British merchants, to abolish the monopolistic trade system, to pay indemnity (compensating the loss of opium and British lives and covering debts owed to British merchants by Chinese merchants), to recognize extraterritoriality, to cede Hong Kong, and to fix tariffs. Britain obtained further concessions in a series of treaties that, as we have seen, came to be known as the treaty port system.⁵⁹

There was one isolated experience of an advantageous use of international legal arguments in the 1860s that yielded a short-lived ascendance of the study of international law. The famous 1864 translation of the *Elements of international law* by Henry Wheaton (1785–1848) is commonly seen as a watershed in the introduction of international law in China. The usefulness of the translation was tested the same year when the Prussian minister to China seized Danish ships as a prize of war. Chinese officials successfully argued that the ships were on Chinese territorial waters.⁶⁰ After the use of the translation during the incident, China began to teach international law and some diplomats specialized in international law. In 1876, for example, Chien-Chung Ma (Jianzhong Ma) (1845–1900) travelled to France, becoming the first Chinese student who obtained a *baccalauréat* and then studying law at the *École Libre des Sciences Politiques* in Paris. In 1898, two professional societies dedicated to the study of international law (in order to revise unequal treaties) were established, only a year after the foundation of the Japanese society of international law and well before the establishment of the American society of international law in

⁵⁹ Li, 'International law in China', pp. 124–33; Hsü, *China's entrance*, pp. 138–45; Gong, *The standard of 'civilization'*, pp. 136–46; and D. Wang, *China's unequal treaties*, pp. 11–16.

⁶⁰ Li, 'International law in China', p. 129.

1906. However, the cumulative disappointments that Chinese authorities suffered when applying international law forestalled the development and study of a discipline they considered to be useless.⁶¹

Compared to Japan of the Meiji Restoration, Russia of Peter the Great, or Turkey under the influence of the Young Ottomans – where international law became part of the modernization process – China lagged behind. The erosion of the Qing Dynasty's internal rule, which made the modernizing project impossible to undertake, became also an obstacle to the appropriation of international legal thought. This explains why purposeful appropriation of international law came only after the Emperor was overthrown. Even after the founding of the Republic of China in 1912, international law was still barely taught.⁶² For these reasons, there was considerable international legal activity during the nineteenth century, but no significant efforts by Chinese public servants to appropriate classical international law.⁶³

Significant international legal scholarship appeared only in the 1920s when Chinese lawyers who had been studying abroad, first in Japan and then in Europe, returned to China after having completed their legal education.⁶⁴ For example, it was not until 1929 that China's first international law textbook was published by Keng-shen Chou (Gengsheng Zhou).⁶⁵ Educated in Edinburgh and Paris and teaching at Wuhan University, Zhou became the father of modern international law, not only because of his textbook and other writings, but also because he then

⁶¹ T. Wang, 'International law in China', 236–7.

⁶² Li, 'International law in China', p. 210.

⁶³ Cheng argues that from the Qing Dynasty to the Kuomintang only a handful of treaties were written and that the few lawyers that studied international law focused mainly on the unequal treaties, 'since they followed indiscriminately the theories expounded and rules made by the imperialist powers for the imperialist powers, and given the subservient attitude of the then Chinese government, they could do very little to advance the Chinese cause': T. Cheng, 'The People's Republic of China and international law', *Dalhousie Law Journal*, 8 (1984), 3–31, 8. Dong Wang, on the other hand, argues that during the period of the first Republic (1912–28) foreign relations were for the first time 'taken over by a foreign-trained elite': D. Wang, *China's unequal treaties*, p. 35. Unlike Cheng, Wang maintains that both the Kuomintang and the Communist Party condemned the unequal treaties while disputing how they should be abolished: *ibid.*, p. 87.

⁶⁴ Hungdah Chiu discusses China's delay in producing modern international lawyers: H. Chiu, 'The development of Chinese international law terms and the problems of translation into English' in J. A. Cohen and H. J. Berman (eds.), *Contemporary Chinese law: research problems and perspectives* (Cambridge, MA: Harvard University Press, 1970), pp. 139–57.

⁶⁵ Hsieh, 'The discipline of international law', p. 18.

became the mentor of the leading international lawyer of the People's Republic, Tieya Wang.⁶⁶ In spite of being part of the first generation of Chinese lawyers who became international legal scholars and practitioners, lawyers like Zhou and Wellington Koo did not share the classical legal consciousness. On the contrary, these lawyers, who were mainly active between the 1920s and 1940s, shared the modern legal consciousness that defined the disciplinary sensibilities of international lawyers at the beginning of the twentieth century.

Inclusion in the 'family of civilized nations' through re-admission

Faced with the pressures resulting from European and American ascendance and the nineteenth-century configuration of a world economic system that gravitated toward the West, Russian and Ottoman ruling elites decided to modernize their political systems. Unlike the previous examples, in which classical international law was appropriated to advance, negotiate and secure inclusion in the emerging international order, the Russian and Ottoman Empires had maintained long-standing commercial, cultural and political – military and diplomatic – interactions with European states, even before the modern law of nations emerged in the seventeenth century.

During different historical periods, rules and legal instruments have framed the relationship between the Russians and the Ottomans, as well as their relationship with the European powers.⁶⁷ On the one hand, the Russian and Ottoman empires have constantly been a factor in the European political order, not only during the earlier periods when they exercised their military might over Europe, but also during the course of the nineteenth century, when they were part of the system of power equilibrium and the concert of European states. For example, Russia participated in the Congress of Vienna, and the Ottoman Empire was included in the treaty of Paris of 1856. On the other hand, at some points in this long history, European, Russian and Ottoman powers recognized each other as equals.⁶⁸

⁶⁶ *Ibid.*, p. 18 and R. St J. MacDonald, 'Introduction: Wang Tieya: persevering in adversity and shaping the future of public international law' in R. St J. MacDonald (ed.), *Essays in honour of Wang Tieya* (Dordrecht: Martinus Nijhoff, 1994), pp. 1–30, 5.

⁶⁷ Ago, 'Pluralism'.

⁶⁸ See K. H. Ziegler, 'The peace treaties of the Ottoman Empire with European Christian powers' in R. Lesaffer, *Peace treaties and international law in European history: from the late Middle Ages to World War One* (Cambridge University Press, 2004), pp. 338–64.

It seems counterintuitive to think that elites of these two non-European empires appropriated European classical international law in order to acquire membership in the international community, considering that the Russian and Ottoman empires had already been bound to Europe for centuries, through a series of treaties and the law of nations. However, as a consequence of the rise of positivism in European international law, the previous history of legal interactions between European, Russian and Ottoman powers was erased and Russian and Ottoman membership in the international community became contested.

I have argued, following Alexandrowicz, that the shift from naturalism to positivism redefined the types of interactions governed by international law. According to the natural law paradigm, politics across the globe were governed by the law of peoples simply as a result of their existence and interactions. Positivism, conversely, required polities to acquire legal personality as states in order to be governed by international law. States, furthermore, had to be linked through commercial, cultural, religious or political ties, in order to belong to the 'family of civilized nations' governed by law.⁶⁹ The changes brought about by positivism imposed on Russian and Ottoman lawyers (particularly for the latter as subjects of a non-Christian power) the burden of showing communal bonds between their respective states and the international community of civilized states.

Facing uncertainty about their membership in the European family of nations, and realizing the perils of a possible exclusion, Russian and Ottoman officials sought to assimilate classical international law with an eye towards securing re-entry. In addition to these transformations within the domain of legal doctrine, nineteenth-century European commercial expansion, economic growth, technical breakthroughs and military power put both the Russian and Ottoman empires under serious strain, threatening not only their borders and spheres of influence but also their domestic and long-established social and political forms of organization.

⁶⁹ This argument does not assume that naturalism was entirely superseded by positivism. To the contrary, both perspectives coexisted in the work of both early and late nineteenth-century European international lawyers. Lorimer, for example, believed that civilized states are governed by positive international law, whereas non-civilized states are governed by natural law. Only moral rules of good conduct but no positive legal obligations applied outside the 'family of civilized nations': Lorimer, *The institutes of the law of nations*, pp. 101–3. Moreover, authors of the European peripheries were slower to follow the turn to positivism, remaining attached longer to naturalism. See e.g. M. Torres Campos, *Elementos de derecho internacional público* (Madrid: Librería de F. Fé, 1890), pp. 58–9.

Russian and Ottoman ruling elites pushed forward vast projects of modernization, and both experienced similar opposition from traditionalist segments of the elite. The distinctive outcomes of these two cases, as compared to the ideal types discussed above, resulted from the fact that these empires were still powerful enough to participate militarily and politically in the European concert. It was the responsibility of international lawyers to translate the position of power enjoyed by the Russian and Ottoman empires into international law, thus ensuring their legal participation in the European concert.

At the same time, the adoption of the standard of civilization as a yardstick for the recognition of statehood presented Russian and Ottoman elites with an opportunity to justify not only the modernization and Westernization of their societies and political institutions, but also an expansionist policy. The Russian Empire, in particular, invoked its own civilized status to justify its tutelage over the conquered sovereigns in central Asia. In his study on Anglo-Russian relations in Persia, Firuz Kazemzadeh recounts how diplomats justified Russia's military expansion in central Asia. In 1864, Prince A. M. Gorchakov, the Chancellor under Nicholas I, sent a dispatch to Russian diplomats justifying expansion as an obligation of the more civilized states, a dispatch that 'became a landmark in the history of Russian diplomacy'.⁷⁰

The Ottoman Empire

There has been much discussion over when the Ottoman Empire entered the European concert or the 'family of civilized nations', based on a literal interpretation of the text of the treaty of Paris of 1856, the intention of the European and Turkish signatories, or alternatively on a surviving natural law substratum.⁷¹ This discussion misses the point, for it ignores the

⁷⁰ F. Kazemzadeh, *Russia and Britain in Persia, 1864–1914: a study in imperialism* (New Haven: Yale University Press, 1968), p. 8. Kazemzadeh quotes Gorchakov's dispatch: 'The position of Russia in Central Asia is that of all civilised States which are brought into contact with half savage, nomad populations, possessing no fixed social organisation. In such cases it always happens that the more civilised State is forced, in the interests of the security of its frontier and its commercial relations, to exercise a certain ascendancy over those whom their turbulent and unsettled character make most undesirable neighbors ...' *Ibid.*

⁷¹ See e.g. Nussbaum, *A concise history*, pp. 190–1; L. Oppenheim and H. Lauterpacht, *International law, a treatise*, 8th edn, 1 vol. (London: Longmans, 1955), p. 49; T. Toyoda, 'L'aspect universaliste du droit international européen du 19ème siècle et le statut

indeterminacy of the nineteenth-century doctrine and practice of recognition as well as the old legal rapports between European powers, Russia and Turkey.⁷² The second half of the nineteenth century marked a greater involvement of Ottoman officials with international legal issues, including old grievances with Russia, Austria, Britain and France over the control of the Black Sea and the Straits and the rights to free navigation. However, Ottoman rulers, unlike Russia or Japan, failed to form professional international lawyers. Instead, Ottomans relied on diplomats with some legal training and a Western outlook, such as Etienne Carathéodory, an ethnic Greek, and Gabriel Noradounghian (1852–1936), an ethnic Armenian. Because of their diplomatic functions, both wrote about international legal matters close to their professional practice. Noradounghian published a collection of treaties and a compilation of other legal documents from the Ottoman Empire's international relations.⁷³ Carathéodory wrote about the legal status of international rivers and freedom of navigation.⁷⁴ It was not until well into the twentieth century that international law started off as a discipline and that the discourse of international law was imported, following the reforms passed by the Young Ottomans first and by the Young Turks thereafter. Thus, as in China, by the time a Turkish international legal profession emerged in the first decades of the twentieth century, the discourse had shifted from classical to modern international law.

Russia

It might appear as utterly misguided to include the Russian Empire and publicists central to the development of international law such as Friedrich Martens within the semi-periphery of international law.⁷⁵ Russia certainly exerted power as a member of the Holy Alliance and its expansionism placed it in overt conflict with Britain over Central Asia and Persia. Friedrich Martens, on the other hand, was a crucial figure in the

juridique de la Turquie avant 1856', *Journal of the History of International Law*, 8 (2006), 19–37.

⁷² See J. C. Hurewitz, 'Ottoman diplomacy and the European state system', *Middle East Journal*, 15 (1961), 141–52.

⁷³ See e.g. G. Noradounghian, *Recueil d'actes internationaux de l'Empire Ottoman* (Paris: F. Pichon, 1897).

⁷⁴ E. Carathéodory, *Du droit international concernant les grands cours d'eau: étude théorique et pratique sur la liberté de la navigation fluviale* (Leipzig: Brockhaus, 1861).

⁷⁵ For a discussion of Russian international law in general, see W. Butler, *Russia and the law of nations in historical perspective* (London: Wildy, Simmonds & Hill, 2009).

development of humanitarian international law; a figure still remembered today when lawyers invoke the clause bearing his name, the ‘Martens clause’. Today we remember that, pending the codification of the law of war, the Martens clause recognized a supplementary or residual protection based on the ‘usages established between civilized nations’.⁷⁶ But we have forgotten that, using the distinction between civilized and uncivilized warfare, Martens revealed his semi-peripheral legal consciousness. Proclaiming Russia’s commitment to civilized warfare was itself a marker of civilization.

Russia was not at the forefront of the nineteenth-century expansion of European international law. I have suggested that classical international law expanded as a consequence of the emergence of a modern world economy centred in Western Europe and the United States. Polities that were not at the centre of the world economic system, but had enough resources, appropriated classical legal thought to improve their standing within the emerging international order as well as to deal with Western encroachments on their territories. Russians had good reasons to be anxious. Lauri Mälksoo has argued that in spite of Russian jurists’ efforts to internalize European international law, Western European authors questioned Russia’s standing as a civilized nation. In consequence: ‘[m]any Russians felt that the Western alliance against the country during the Crimean war (1853–6) or the Balkan wars of the 1870s were not the “usual” clashes between European great powers – they were alliances specifically against the influence of Russia and its dangerous “otherness”’.⁷⁷

To the extent that the world economic system did not consolidate around a division of labour and trade relations that favoured Russian interests, nineteenth-century Russia was semi-peripheral. Moreover, although Russia and the West shared a Christian heritage, Russia had followed its own path, marked by the Byzantine tradition and a feudal sociopolitical organization that led to the formation of a patrimonial empire. Therefore, as Mälksoo has suggested, when in the eighteenth century Russia broke out of her isolation and entered the European state system, Russian internationalists were intellectually dependent on Europe, thinking about themselves as ‘translators and transferors of Western European international law scholarship’.⁷⁸

⁷⁶ T. Meron, ‘The Martens clause, principles of humanity, and dictates of public conscience’, *AJIL*, 94 (2000), 78–89, 79.

⁷⁷ Mälksoo, ‘The history of international legal theory in Russia’, 219.

⁷⁸ *Ibid.*, 213. Moreover, Mälksoo argues that between Western and Russian international legal scholarship there has been not only a linguistic but also a mental divide. As a

Consequently, while neither downplaying Russia's participation in the European Concert, nor overlooking the professional recognition achieved by some Russian international lawyers, one might nevertheless interpret Russia's approach and use of international law as distinctively semi-peripheral. Russia used international law as a symbol of civilization in at least three different contexts: domestically, to support the modernization project; internationally (*vis-à-vis* Western powers) to secure international relations based on sovereign equality; and also internationally, to secure the unequal privileges classical international law bestowed on civilized states for the expansion in central Asia.

Domestically, nineteenth-century Russia had been engaged in a vast project of modernization since the reign of Peter the Great at the beginning of the eighteenth century. Modernization brought Western sciences to Russia, including law in general and international law in particular.⁷⁹ Specifically, under the reign of Alexander II (1855–1881), Russia supported the study of international law.⁸⁰ From then on, European international law textbooks were translated, and modern international law was taught in the newly founded universities, mostly by foreign professors.⁸¹

International law acquired an important place among Russian liberal elites, for it allowed them to openly support the principle of law within an autocratic society.⁸² But as in other parts of the semi-periphery, in which elites were divided between modernizers and traditionalists, Russian elites were divided between Slavophiles and Westernizers. Most Russian international lawyers, as in other semi-peripheral locations, were Westernizers who advocated Russia to open itself to Western culture and science, and opposed Slavophiles, who resisted Westernization, urging Russia to follow its own path.⁸³ It was not until the mid-nineteenth century, particularly after the defeat in the Crimean War (1853–6), that a

result, Russian jurists appear to be under the illusion of Russia's intellectual self-sufficiency. The flipside effect of the mental and linguistic divide is Russian scholars' overemphasis of the contribution of Russia to the development of international law: *ibid.*, 215.

⁷⁹ T. Långström, *Transformation in Russia and international law* (Leiden: M. Nijhoff, 2003), pp. 36–7.

⁸⁰ See P. Holquist, 'The Russian Empire as a "civilised nation": international law as principle and practice in imperial Russia, 1874–1898', National Council for Eurasian and East European Research (2004), available at www.ucis.pitt.edu/nceeer/2004_818-06g_Holquist.pdf.

⁸¹ Långström, *Transformation in Russia*, p. 41. ⁸² Holquist, 'The Russian Empire', p. 7.

⁸³ Långström, *Transformation in Russia*, p. 42; E. Myles, "'Humanity', 'civilisation' and the 'international community' in the late imperial Russian mirror: three ideas 'topical for our days'", *Journal of the History of International Law*, 4 (2002), 310–34, 313–14.

consensus in favour of Westernization emerged. Once again, the introduction of the rule of law, individual rights, and Western laws, institutions and legal thinking in general were crucial not only for the modernization project, but also in supporting Russia's assertion of civilized status.⁸⁴ Martens, for instance, like Latin American and Ottoman modernizers, deployed the civilized/barbarian distinction into the domestic context. As Mälksoo has noted: 'It was Russia herself who had to be gently civilised in the hands of Martens and other Baltic German/Russian international law scholars – Westernisers'.⁸⁵

Internationally, in ways similar to the experiences of other nations seeking entry into the international community, Russia also pointed to its behaviour vis-à-vis foreign nations to prove its civilized status. International lawyers guided Russia in order to behave in a civilized manner, waging wars humanely or pushing for breakthroughs in the development or codification of international law, demonstrating in the Hague Conferences more enthusiasm than the Europeans. International lawyers were also crucial in making Russia's civilized behaviour known among Europeans through their writings and through their direct participation in the transnational profession. Martens was the most prominent example.

Friedrich Fromholz Martens was born in 1845 in Pernov (Pärnu/Pernau), a town on the gulf of Riga in the province of Livonia.⁸⁶ Pustogarov has ascertained the Estonian origin of Martens, contradicting some German authors who affirm that he was a Baltic German.⁸⁷ Martens only adopted a Russian forename later on, when marrying and converting to the Orthodox faith. Even though he became known as Fedor Fedorovich Martens, according to Pustogarov, he continued calling himself Friedrich von Martens in German and Frederic de Martens in French.⁸⁸ The use of Western and Russian versions of his name point to Martens' commitment to both Russia's Westernization and imperial idea. Mälksoo has shown that Martens regarded the principle of nationality as unstable and dangerous; instead he believed that the state must respect the rights of citizens regardless of their national origin and the language they spoke.⁸⁹

⁸⁴ Myles, 'Late imperial Russian mirror', 313–14.

⁸⁵ Mälksoo, 'The history of international legal theory in Russia', 220.

⁸⁶ V. V. Pustogarov, *Our Martens: F. F. Martens, international lawyer and architect of peace*, William Elliott Butler ed. trans. (The Hague: Kluwer Law International, 2000), p. 7.

⁸⁷ *Ibid.*, p. 13. ⁸⁸ *Ibid.*, pp. 9–11.

⁸⁹ Lauri Mälksoo, 'The science of international law and the concept of politics. The arguments and lives of the international law professors at the University of Dorpat/Iur'ev/Tartu 1855–1985', *British Yearbook of International Law* 76 (2005) 383, 389.

Although born under extremely modest circumstances, and in spite of having been orphaned at an early age, Martens received a good education at a German school in St Petersburg and was admitted to the Law Faculty of St Petersburg University in 1863.⁹⁰ Upon graduation, Martens was offered to remain at the University to prepare for a professorship. When Martens suggested choosing the chair of criminal law, the Dean replied: “No, remain at the chair of international law. Then we will have our Martens”, alluding to the two noted European writers on international law . . . who bore this surname’.⁹¹ Martens finished his magister, went abroad attending lectures in Vienna, Heidelberg (by Johann Caspar Bluntschli) and Leipzig, received his doctoral degree in 1873 and became professor in 1876.⁹² Martens went on to become, among others, member of the *Institut de Droit International*, and Russian delegate to a number of conferences, including the First and Second Hague Conferences. At the time of his death in 1909, Martens had become immensely influential.⁹³

In spite of his professional achievements, I suggest interpreting Martens as a classical jurist of the semi-periphery. Martens repeated the conventional view maintaining that international law is limited to peoples having achieved the same degree of civilization.⁹⁴ Martens’ identification of civilization with European civilization was also conventional.⁹⁵ Moreover, similar to other semi-peripheral jurists we have seen, Martens affirmed that because of Russia’s own history as well as the introduction of reforms that led to modernization and Westernization, Russia developed social and political institutions akin to those in Europe. Russia, in consequence,

⁹⁰ Pustogarov, *Our Martens*, pp. 7, 14.

⁹¹ *Ibid.*, p. 19. ⁹² *Ibid.*, pp. 19, 20, 26.

⁹³ See for instance the obituary written by a famous British jurist: T. E. Holland, ‘Frederic de Martens’, *Journal of the Society of Comparative Legislation*, 10 (1909), 10–12.

⁹⁴ Martens, *Traité de droit*, p. iii. ‘The geographical and economic differences and the ones that define the diverse degrees of civilization of peoples, have an influence on their domestic development and on their law. International law cannot become a reality except among peoples who have achieved much the same degree of civil and political development, for it is only among them that the notion of law is identical’: *ibid.*, p. 20.

Martens later affirms that no civilized state can find all the elements of its life and fulfilment within its territory, which is why contemporary nations have established relations with one another: *ibid.*, p. 28.

⁹⁵ ‘Contemporary international law is the result of civilized life and of the knowledge about the law among European nations. As history demonstrates, the essential conditions of the international juridical order . . . are first encountered in Europe and, up to the present, they are far from existing among all states of the globe. Therefore, the effect of international law is only understood among the nations that have recognized the fundamental principles of European civilization, and that are worthy to be called civilized peoples’: *ibid.*, p. 238.

should be considered a member of the international community and a sovereign under international law.

What is distinctive in Martens is the way in which he pleads Russia's inclusion in the international community not just because of modernization but also because of religion. Russia and Europe were bound together by the Christian tradition, which was equivalent, in Martens' eyes, to Western civilization: 'I have the firm conviction that international relations and the principles of law that regulate them draw all of their importance and all of their force from the community of interests that unite civilized or Christian nations'.⁹⁶ It was also distinctive how Martens used the distinction between civilized and uncivilized peoples in order to justify Russian expansionism.

No different than other classical jurists, Martens insisted that nations lying outside the community of shared purposes, namely, the non-European entities that are deemed to lack mutual links of solidarity or interest and thus do not invite reciprocal relations, are excluded from positive international law. Contacts between sovereign states and uncivilized and savage peoples were for Martens *de facto* interactions subject to natural law.⁹⁷ Martens claimed that 'the social and political conditions under which Muslim, heathen or savage peoples live, render impossible the application of international law with these barbarous or half civilized nations'.⁹⁸ In contrast, Russia, according to Martens, was civilized.⁹⁹ Supporting Russia's expansionist policy in the Balkans and Central Asia, Martens disputed the inclusion of Asian states and Turkey in the international community of civilized peoples.¹⁰⁰ Martens viewed the absence of reciprocity that the capitulations stipulated in the relationship between European powers and Turkey, Persia, Japan or China as demonstrating their exclusion from the international community. Because these nations did not offer the guarantees necessary for the security of the interests and rights of foreigners, and did not implement essential transformations of the law and political and social regimes, Martens concluded that these nations should not enjoy the rights of civilized nations.¹⁰¹

⁹⁶ *Ibid.*, pp. ii–iii. ⁹⁷ *Ibid.*, p. 239. ⁹⁸ *Ibid.*, pp. 238–9.

⁹⁹ Holquist, 'The Russian Empire', pp. 4–6.

¹⁰⁰ See F. F. Martens, *Russie et l'Angleterre dans l'Asie centrale* (Gand: I. S. Van Doosselaere, 1879); F. F. Martens, *Das Consularwesen und die Consularjurisdiction im Orient*, H. Skerst trans. (Berlin: Weidmannsche buchhandlung, 1874).

¹⁰¹ Martens, *Traité de droit*, pp. 240–1. It is quite interesting that Martens indicates that when this moment of a similar degree of 'instruction and civilisation' is reached, international law will no longer be exclusively based on Christian principles, and will

As long as the international community was composed only of peoples belonging to the European civilization, new states had to appropriate the fundamental elements of Western culture for the international community to progress.¹⁰² Russia was a case in point in Martens' argument. Although Russia had engaged in commercial relations with England and Holland, signed treaties, and sent and received diplomatic missions from European states since at least the thirteenth century, Russia had not done enough to gain membership into the international community. Martens insisted that until the eighteenth century, Russia's internal social and political conditions made it impossible for a relationship with Western sovereigns to emerge on the basis of equality and reciprocity.

Martens wanted to persuade his readers (though without much discussion) that since the reign of Peter the Great and the consolidation of modernization during the reign of Catherine II, a change in domestic affairs had brought Russia into the international community of civilized nations. Martens' brief justification for including Russia within the international community might have made perfect sense to him: Martens' own professional success and recognition in diplomatic circles confirmed Russia's centrality in the European concert of nations. Martens, for example, was the author of the programme and a central figure in the First Hague Conference of 1899, which marked the beginning of the modern rules of warfare.¹⁰³ Tsar Nicholas II's initiative to advance humanitarian law and Martens' role in it might be seen as an illustration of Russia's commitment to Westernization. Contrary to what one might expect, Russia's determination to become a leading force in the advancement of humanitarian law and thus civilization did not contradict but rather endorsed Russia's expansionism, embodying a mission to civilize other nations. Similarly to the Japanese jurists who pointed to Japan's behaviour in warfare as a sign of Japan's civilized status, Martens also viewed Russia's active role in the development of humanitarian international law as a sign of Russia's place among civilized nations.

be obligatory beyond Christian nations. However, Martens warns that at that point, it will be necessary that peoples and societies under the rule of international law ensure 'reasonable conditions of human existence' in accordance with 'the secular civilisation of the European nations': *ibid.*

¹⁰² *Ibid.*, pp. 270–1.

¹⁰³ Daniel Marc Segesser, "Unlawful warfare is uncivilised": the international debate on the punishment of war crimes, 1872–1918', *European Review of History*, 14 (2007), 215–34; Myles, 'Late imperial Russian mirror', 318–23.

The expansion of international law as circulation

Martens became an important figure in professional circles. He sat on various arbitration tribunals, including the Anglo-Venezuelan arbitration of 1899, his treatises were translated and widely read, and he participated in professional debates that reached the public in the form of journalistic pieces, such as a piece on the tension between Russia and England over Central Asia.¹⁰⁴ Martens' participation in a professional dialogue of increasing global reach is a further indication of the process through which international law became universal.

Although trade relations had existed between some European and non-European nations as well as a considerable number of international legal regimes had governed their interactions well before the nineteenth century, during this century international relations intensified significantly.¹⁰⁵ During the nineteenth century, Western economic, political and military expansion was followed by the proliferation of bilateral treaties and the expansion of classical international law. I describe the expansion of international law as expansion by appropriation – rather than expansion by inclusion or imposition – because semi-peripheral jurists appropriated classical international law to support the inclusion of their polities in the family of nations. Moreover, I describe the process of international law's expansion by appropriation as process of circulation of people – diplomats, missionaries, armed forces personnel, law professors – carrying legal ideas and rules – in treaties, treatises, commentaries – to be used to both justify and resist the construction of a world economic and political system centred in the West.

Map 3 offers a visual representation of the nineteenth-century expansion of the international law profession, including lawyers from both centre and periphery. Let us briefly look at two examples illustrating the circulation of people and ideas within a global sphere of international legal practice. First, the translation of international law textbooks shows the appropriation and circulation of ideas. Second, an emerging transnational professional dialogue shows the transnational circulation of lawyers and scholars who notwithstanding unequal power relations between centre and periphery were reciprocally influenced.

Translation of textbooks

The patterns of translation of nineteenth-century international law treatises offer a material indication of the flow of international legal ideas.¹⁰⁶

¹⁰⁴ Martens, *Russie et l'Angleterre*. ¹⁰⁵ See Map 2. ¹⁰⁶ See Map 5.

It is unsurprising that following the unequal distribution of power and prestige ideas flowed from Europe or the United States to the rest of the world. However, this pattern also shows the efforts of semi-peripheral states to acquire international legal knowledge. Translating and publishing foreign textbooks was one of the necessary steps in the appropriation of classical international law.

In 1868, for example, Johann Caspar Bluntschli (1808–1881), the widely read and quoted Swiss international lawyer, professionally active in Germany, founding member of the *Institut de Droit International*, published an influential international law treatise.¹⁰⁷ Unsurprisingly, in 1870 Bluntschli's treatise was translated and published in France.¹⁰⁸ Only a year later, a Spanish translation was published, not in Spain but in Mexico, an indication that acquiring international legal knowledge was more important for Latin American states trying to secure independence, than for the decaying empire.¹⁰⁹ As one would expect, Japan under Meiji restoration was another place where Bluntschli's treatise was rapidly translated and published.¹¹⁰ In the course of only a few years, the treatise was published also in Greek, Russian and Turkish.¹¹¹ In China, W. A. P. Martin, the American missionary who had translated Wheaton's textbook, published the French edition of Bluntschli's treatise first in English and then in Chinese. Martin's edition was then translated into Korean.¹¹²

The translation of Bluntschli's treatise shows a pattern of how ideas travelled from core to periphery that mirrors prevalent international power relations.¹¹³ However, in this pattern we may also see some margin

¹⁰⁷ J. C. Bluntschli, *Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt* (Nördlingen: Beck, 1868). On Bluntschli see B. Baker, 'The method behind Bluntschli's "modern" international law', *Journal of the History of International Law*, 4 (2002), 249–92.

¹⁰⁸ J. C. Bluntschli, *Le droit international codifié*, C. Lardy, É. Laboulaye trans. (Paris: Guillaumin, 1870).

¹⁰⁹ J. C. Bluntschli, *El derecho internacional codificado*, José Díaz Covarrubias trans. (Mexico: Impr. J. Batiza, 1871).

¹¹⁰ J. C. Bluntschli, *Kokuhō hanron*, Hiroyuki Katō trans. (Tōkyōfu: Kondō Keizō, 1876).

¹¹¹ J. C. Bluntschli, *Ho diethnes kodix* (Athenai, 1874); J. C. Bluntschli, *Sovremennoe mezhdunarodnoe pravo tsivilizovannykh gosudarstv, izlozhennoe v vidie kodeksa* (Moskva: Indrikh, 1876); J. C. Bluntschli, *Hukuk-i beyeddüvel-i kanunu* (İstanbul: Vakit Gazetesi Matbaası, 1879).

¹¹² J. C. Bluntschli, *Bluntschli's International law*, C. Lardy, W. A. P. Martin trans. (Beijing: Tung Wên College Press, 1880); J. C. Bluntschli, *Gong fa hui tong*, W. A. P. Martin trans. (Beijing: Tong wen guan, 1884); J. C. Bluntschli, *Kongpop hoet'ong*, 1896 Chaeju chongnija p'an, W. A. P. Martin trans. (Hansōng: Hakbu P'yōnjipkuk, 1896).

¹¹³ See Map 5 showing the translation of Bluntschli's treatise as a visual representation of the expansion of international law.

for agency. First, it is worth remembering that flows in the opposite direction, from the semi-periphery to the Western centres, were in principle not necessary. Participating in the discipline's transnational discussion, semi-peripheral international lawyers wrote directly in one of the main European languages. The writings of semi-peripheral international lawyers explored above were mostly published in Europe in English, French or German. At the same time, semi-peripheral authors published textbooks in their respective countries and in their own languages. Rather than getting involved in the discipline's transnational debates, these works presented the general field of international law to their local audiences. Takahashi, for example, in addition to the work that we have seen published in English, French and German, wrote a textbook in Japanese.¹¹⁴ There was no need to translate the local semi-peripheral textbook back into the languages of the core.

Second, the degree of agency involved in publishing foreign books as well as in the practice of translation is not insignificant. Bluntschli, for example, was not involved in the translation of his treatise. In his diary, as Stefan Kroll has noted, Bluntschli expressed surprise and satisfaction for the visit that W. A. P. Martin paid him in 1881, bringing to Heidelberg 'a well printed' copy of 'my international law' in 'Chinese language and writing'.¹¹⁵ Bluntschli's diary presents a picture of an eminent European international lawyer who at the end of his life sees with some surprise his work reaching unexpected places. The arrival of a Japanese translation by a former Japanese student as well as the personal visit of the attaché from the Chinese legation in Berlin, were events Bluntschli considered worth registering in his diary.¹¹⁶

These entries in Bluntschli's diary as well as the global circulation of his textbook suggest that appropriating international law, and more specifically translating and publishing foreign texts, was an enterprise led from the semi-periphery. Moreover, translating Western treatises, especially into non-European languages like Chinese, allowed and required the translator to create neologisms, find isomorphic terms and even invent new terminology.¹¹⁷ For example, as Dong Wang has shown, the term 'unequal treaty', to describe the treaties that China concluded with

¹¹⁴ S. Takahashi, *Heiji kokusaihōron* (Tōkyō: Nihon Daigaku, 1907).

¹¹⁵ S. Kroll, *Normgenese durch Re-Interpretation: China und das europäische Völkerrecht im 19. und 20. Jahrhundert* (Baden-Baden: Nomos, 2012), p. 1; J. C. Bluntschli and R. Seylerlen, *Denkwürdiges aus meinem Leben* (Nördlingen: Beck, 1884), p. 488.

¹¹⁶ Bluntschli and Seylerlen, *Denkwürdiges*, p. 489.

¹¹⁷ See Kroll, *Normgenese durch Re-Interpretation*.

Western states at the end of the nineteenth century, was a term popularized by Chinese lawyers and diplomats during the first decades of the twentieth century.¹¹⁸ Stefan Kroll, Rune Svarverud, Lydia Liu and others have studied the process of reception, translation and reinterpretation of international law in China.¹¹⁹ These authors have shown how the process of translation of Western international law created a new language that had a great impact in China, but translation left also an imprint on the increasingly globalized discipline of international law.

Lydia Liu's path-breaking study on the reception of international law in nineteenth-century China conceives the translator as a diplomat who negotiates the outcome – the translated text – as a mode of exchange in the diplomatic and military intercourse between Western powers and China. Liu focuses particularly on the translation of Wheaton's treatise by W. A. P. Martin.¹²⁰

In the course of the publication of the different editions of Wheaton's textbook, it is possible to distinguish a parallel development. There is a correlation between the translation of the textbook in the semi-periphery and the new states the textbook considers as members of the family of nations. For instance, in the first edition of the treatise published in 1836, Wheaton circumscribes international law to the nations that are civilized and Christian.¹²¹ Wheaton considers the law of nations not as natural law applied to all states, but as law applicable only between certain states. There is in consequence no universal law of nations.¹²² In the sixth edition

¹¹⁸ Wang, *China's unequal treaties*, pp. 63–80.

¹¹⁹ See e.g. R. Svarverud, *International law as world order in Late Imperial China: translation, reception and discourse, 1847–1911* (Leiden: Brill, 2007).

¹²⁰ See Liu, 'Legislating the universal' and L. Liu, *The clash of empires: the invention of China in modern world making* (Cambridge: Harvard University Press, 2004), ch. 4, 'Translating international law'.

¹²¹ 'The law of nations, or international law, as understood among civilised, Christian nations, may be defined as constituting of those rules of conduct which reason deduced, as consonant to justice, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent': H. Wheaton, *Elements of international law with a sketch of the history of the science* (Philadelphia: Carey, Lea & Blanchard, 1836), p. 46. For a similar trend in Holland, Oppenheim and Westlake, see Map 6.

¹²² 'The ordinary *jus gentium* is only a particular law, applicable to a distinct set or family of nations, varying at different times with the change in religion, manners of government, and other institutions, among every class of nations. Hence the international law of the civilised, Christian nations of Europe and America, is one thing; and that which governs the intercourse of the Mohammedan nations of the East with each other, and with Christians, is another and a very different thing': *ibid.*, pp. 44–5.

of 1855, however, the sharp division is softened. The passage negating the universality of international law is replaced in 1855 by a paragraph that recognizes exceptions to the restriction of international law's scope of validity to Western nations.¹²³

In 1855, on the other hand, Wheaton affirms that the intercourse between Christian and non-Christian states brings into being a law of nations that is analogous to the European international law based on the progress of civilization founded on Christianity.¹²⁴ As examples of the application of the law of nations to this class of international relations, Wheaton enumerates the recognition and extension of the rights of legation in places like Persia, Egypt or the States of Barbary, the independence and integrity of the Ottoman Empire as well as its participation in the European balance of power and the diplomatic transactions between the Chinese Empire and Christian nations, whereby the former was 'compelled to abandon its inveterate anti-commercial and anti-social principles'.¹²⁵

In 1866, the abovementioned paragraph recounting the diplomatic intercourse between China and the Christian states of Europe and America is accompanied with a long footnote in which Richard Dana, the editor of the eighth edition, updates the text listing the treaties signed between Western and non-Western states, and making particular reference to the treaties that the United States had signed with states such as the Ottoman Empire, Japan, China, Siam, Tunis, Persia and Borneo. At the end of this enumeration, Dana inserts in the treatise an interesting comment of his own:

The most remarkable proof of the advance of Western civilisation in the East, is the adoption of this work of Mr. Wheaton, by the Chinese government, as a text-book for its officials, in International Law, and its translation into that language, in 1864, under imperial auspices. . . . Already this work has been quoted

¹²³ 'Is there a uniform law of nations? There certainly is not the same one for all the nations and states of the world. The public law, with slight exceptions, has always been, and still is, limited to the civilised and Christian people of Europe or to those of European origin': H. Wheaton and W. B. Lawrence, *Elements of international law*, 6th edn (Boston: Little, Brown, 1855), p. 16.

¹²⁴ *Ibid.*, p. 20. 'The more recent intercourse between the Christian nations in Europe and America and the Mohammedan and Pagan nations of Asia and Africa indicates a disposition, on the part of the latter, to renounce their peculiar international usages and adopt those of Christendom': *ibid.*, p. 21.

¹²⁵ *Ibid.*, pp. 21–2.

and relied upon by the Chinese Government, in its diplomatic correspondence with ministers of Western Powers resident at Peking.¹²⁶

Lydia Liu has noted the circularity of Dana's footnote. Universality and translation depend on each other: 'Wheaton's original text calls for translation because it possesses an inherent universal value, but it takes the existence of foreign translations to substantiate its universal claim. To aspire to the condition of the universal, the text demands universal recognition and demands being translated.'¹²⁷ The translation to Chinese has remained in the profession's imaginary as proof of Wheaton's universality and the universality of Western international law.¹²⁸

Western expansion into new areas of the world like China was achieved through violence, from war to gunboat diplomacy, but also through negotiating treaties and negotiating the knowledge underpinning those treaties. The differences between the 1836 and 1866 editions of Wheaton's treatise reflected the progressive weakening of the standard of civilization after the renegotiation of unequal treaties binding a number of semi-peripheral states. But the treatise itself had to determine and sanction the inclusion of specific states in the family of nations. And this determination was not irrelevant, for treatises were – as Wheaton himself observed – a relevant source of nineteenth-century international law.¹²⁹ The semi-periphery, as Dana's footnote suggests, could influence the delimitation

¹²⁶ H. Wheaton, R. H. Dana, *Elements of international law*, 8th edn (London: S. Low, Son and Co., 1866), p. 19.

¹²⁷ Liu, 'Legislating the universal', p. 158.

¹²⁸ For example, Andrew D. White (1832–1918), an American diplomat who was involved in the creation of the permanent court of arbitration at the first Hague Peace Conference and in convincing the philanthropist Andrew Carnegie to fund the construction of the Peace Palace in The Hague, recalled Wheaton when envisioning the building that would house the court. In a letter to Carnegie, White writes: 'I would have it a noble building, worthy of the donor, of the civilised world to which he gives it . . . the statue of Grotius should hold a central place . . . flanked on either side by those of his principal predecessors and successors in the evolution of international law . . . such as . . . our own Wheaton – whose book has been used at Oxford and was translated even into Chinese'. A. D. White to Carnegie, 5 Aug. 1902, Carnegie Papers, quoted in Davis, Calvin DeArmond, *The United States and the Second Hague Peace Conference: American diplomacy and international organisation, 1899–1914* (Durham, NC: Duke University Press, 1974), p. 94.

¹²⁹ Among the sources of international law, Wheaton lists the 'text-writers of authority, showing what is the approved usage of nations, or the general opinion respecting their mutual conduct'. Wheaton affirms that 'generally impartial in their judgement', international law writers 'are witnesses of the sentiments and usages of civilised nations': Wheaton and Dana, *Elements*, p. 14.

of the international society. In the example of Wheaton's textbook, semi-peripheral influence was achieved through translation. Meeting and talking to professionals at the core was another way semi-peripheral lawyers shaped international legal ideas.

Transnational professional dialogue

Transnational professional dialogue was established either through direct contact or by publishing books and articles in the discipline's main journals. The number of articles published by semi-peripheral authors in European journals as well as the number of reviews of their writings by prominent European lawyers is quite remarkable, if compared to contemporary international law. However, the influence that exchanges between lawyers from core and semi-peripheral had on the discipline in general is difficult to demonstrate. Let me focus on the renowned English international lawyer and Whewell professor of international law at Cambridge University, John Westlake (1828–1913) and offer two examples of possible semi-peripheral influences over Westlake's ideas, involving an indirect influence through writings and a direct influence through professional contact.

In 1887, Amancio Alcorta, an Argentinean lawyer, politician and intellectual, published in Paris his international law treatise. In the standard introductory section about the historical development of international law, Alcorta's treatise includes a reference to international law in Mexico and Peru. In between the Greek and Roman periods, Alcorta inserts the Azteca and Inca Empire and compares the Inca to the Roman Empire. Alcorta affirms that politically autonomous entities coexisted in pre-Colombian America. Based on this fact Alcorta justified the civilized status and membership of Latin American republics in the international community.¹³⁰

Recalling pre-Colombian coexistence between sovereigns was a rhetorical strategy invoked by Latin American intellectuals, regardless of the fact that after three centuries of colonial rule, independence from Spain had been achieved largely as a project of the creole elite in detriment of indigenous peoples. However, we may see this idea echoed by John Westlake. Discussing the treaties concluded with 'uncivilised tribes' Westlake

¹³⁰ A. Alcorta, *Cours de droit international public*, E. Lehr trans. (Paris: L. Larose et Forcel, 1887), vol. 1, pp. 202–13.

presents the following hypothetical: 'Let us suppose that officers or private subjects of a European state . . . advance into a region where they find no native government capable of controlling white men or under which white civilisation can exist, and where also no state has yet acquired the sovereignty under the rules which are internationally recognized between white men'.¹³¹ What happens when white men conclude treaties with the 'chiefs or authorities of uncivilised peoples?' – Westlake asks.¹³² Natives in such 'rudimentary condition . . . take no rights under international law' – Westlake responds.¹³³

Westlake affirms that these are the principles that European states have applied to deal with native inhabitants of the Americas north of Mexico. Westlake, however, declares that: 'with Mexico and Peru we have nothing to do. Those countries had attained a degree of advancement ranking them rather as states than as uncivilised tribes'.¹³⁴ One can speculate about the origin and intentions of Westlake's declaration considering Mexico and Peru as states. It is the case that Westlake's inclusion of these states under the civilized world was functional to the British policy of informal imperialism in Latin America. But it is also interesting that Westlake's own argument about the inclusion of Latin American states under international law followed an argument typical of Latin American scholarship.

Semi-peripheral lawyers also sought to directly influence international law at the core, paying visits to or studying under renowned European international lawyers. Sakuyé Takahashi, who arrived at Cambridge University to write about the Japanese position in the Chino-Japanese war, offers a good example. Takahashi, as we have seen above, not only asked T. E. Holland to write a preface, but also asked John Westlake to write an introduction to his book on the Chino-Japanese war, published in 1899 by Cambridge University Press.¹³⁵ Westlake and Takahashi may have inaugurated the tradition of European professors bestowing approval – by way

¹³¹ J. Westlake, *Chapters on the principles of international law* (Cambridge University Press, 1894), p. 143.

¹³² *Ibid.*

¹³³ The treaties in which natives cede sovereignty are not legitimate, because: 'a stream cannot rise higher than its source, and the right to establish the full system of civilised government, which in the cases is the essence of sovereignty, cannot be based on the consent of those who at the utmost know but a few of the needs which such a government is intended to meet': *ibid.*, p. 144.

¹³⁴ *Ibid.*, p. 146. ¹³⁵ Takahashi, *Cases on international law*.

of an introduction or preface – to the writings of semi-peripheral international lawyers. Westlake, at the time an eminent authority, had not long ago, in 1894, counted Japan among semi-civilized nations.¹³⁶ Having met Takahashi, Westlake seems to have happily fulfilled the request.¹³⁷ We may imagine Westlake to have been first surprised by the sight of an envoy of a semi-civilized nation strolling along the alleys of Cambridge. We may also imagine Westlake to have been surprised by the envoy's civilization. We may picture him changing his perception about Japan's place in the international legal order while getting to know Takahashi. What we definitely know is that Westlake's introduction no longer considers Japan among semi-civilized nations: 'Japan presents a rare and interesting example of the passage of a state from the oriental to the European class'.¹³⁸ Moreover, Westlake's new textbook published in 1904, continues to consider states like 'Morrocco, Turkey, Muscat, Persia, Siam and China' to be only partially admitted to the international society. These states are subject to consular jurisdiction because their 'civilisation . . . differs from that of the Christian world'.¹³⁹ On the other hand, Westlake affirms in 1904 that 'Japan has recently been raised from this class of states to the full community of international law. The consular jurisdiction there having been given up in pursuance of treaties with the European and American powers concluded with that empire, and which came into force in 1899'.¹⁴⁰

Finally, it is interesting to note that core international lawyers were not indifferent about the English endorsement of Takahashi's work and

¹³⁶ 'Our international society exercises the right of admitting outside states to parts of its international law without necessarily admitting them to the whole of it. Thus a large part of the relations between the European and American states on the one hand, and China and Japan on the other hand, is conducted on the footing of ordinary international law; but the former enjoy in the latter a consular jurisdiction, substituted for the rules of jurisdiction belonging to ordinary international law': Westlake, *Chapters on the principles*, p. 82.

¹³⁷ 'This book, of my friend Professor Takahashi . . . is a valuable monument of the history of the Far East, and the details with which it is enriched are the best testimony to the care with which Japan entered on a line of operations, naval and judicial, quite novel to her': Takahashi, *Cases on international law*, p. xvi.

¹³⁸ 'By virtue of treaties already concluded with the leading Christian states of Europe and America she will shortly be freed from the institution of consular jurisdiction, and in her recent war with China she displayed both the disposition and in the main the ability to observe western rules concerning war and neutrality.' *Ibid.*

¹³⁹ J. Westlake, *International law: Part I Peace* (Cambridge: University Press, 1904), p. 40.

¹⁴⁰ *Ibid.*, p. 41. See also Map 6 for a visual representation of the expansion of international law according to the definition of the international community in different editions of Westlake's treatise.

more importantly about the role that this endorsement may have had in Takahashi's reliance on English scholarship and probably the impact that this reliance may have in the global spread of international legal thinking. Antoine Pillet (1857–1926), a French scholar, for example, published a sympathetic review of Takahashi's book. While positive in relation to the book's central argument, Pillet disapproves of the influence that Holland and Westlake have exercised over Takahashi. 'They are English, they represent the English doctrine' – Pillet protests, pointing out that, developed in a nation too confident of its superiority, the English doctrine treats neutral states unjustly. Depending too much on English sources, Pillet believes that Takahashi has lost the authority that a 'sage eclecticism' could have offered. By more eclecticism, Pillet means giving more consideration to the continental doctrine of maritime international law, which is better suited than the English to protect the interests of Japan.¹⁴¹

The meaning of universality in public international law

Conventional international legal scholarship claims that international law is European and that this legal order achieved universality when the international society of European states expanded globally. International lawyers consider to be European both the international legal order that globalized during the nineteenth century and the international legal order that attained universality at the end of the century, not just because its conceptual outlook developed out of the European legal tradition, but also because European states, their lawyers and their diplomats were the primary historical actors. International law therefore was globalized either when Western states recognized non-European sovereigns as members of the international community, or when Western states used international law to justify formal colonial rule or informal imperialism in Africa, Asia or Latin America. Either way, this conventional history of international law in the nineteenth century covers only the ideas and doctrines developed by European and North American international lawyers and the rules of international law devised by European states to govern the foreign relations with other Western states.

The belief in the exclusively European nature of international law limits the scope of analysis and prevents an understanding of the global character of the historical processes through which international law became

¹⁴¹ A. Pillet, 'Cases on international law during the Chino-Japanese war (*Cas de droit international pendant la guerre sino-japonaise*)', *RGDIP*, 6 (1899), 335–6.

universal. How did international legal rules, doctrines and ideas expand their range of validity, why did they gain traction outside Europe and to what extent did international law change in the process of expansion?

The second part of this book has strived to answer these questions, offering a global history of the emergence of an international legal order of universal character, suggesting that globalization did not follow international law's geographical expansion through inclusion of new states or through Western imposition. This history shows that international law became universal when, in a process that was both global and multidimensional, non-European lawyers appropriated European international legal thought and established, along with Western international lawyers, a global profession that articulated a transnational legal discourse.

In the previous chapters I have argued that, by the dawn of the nineteenth century, a significant number of international legal regimes had governed, under some degree of formal equality, the interaction between some European and non-European sovereigns. During the nineteenth century, European publicists had shifted their conceptual understanding of international law to positivism. A series of new legal doctrines emerged from this theoretical shift supporting a change toward unequal treatment in the international regimes governing relations with non-Western sovereigns. For example, according to a constitutive (as opposed to a declaratory) doctrine of recognition, international personality – which granted the privilege of equal treatment – depended on a state complying with the 'European standard of civilization'. Semi-peripheral international lawyers contested the unfavourable change in the rules of international law by engaging with the doctrines and debates that justified the new rules.

This explanation of the process through which international law became universal, a story emphasizing non-Western appropriations of the European international legal tradition and the constitution of a transnational legal discourse, invites us to rethink the meaning of 'universality' as a term describing the transformations that the international legal order underwent during the nineteenth century. International lawyers have typically used the term 'universality' to describe the final stage in the progressive expansion of international law's geographical range of validity. This study, however, suggests that, during the nineteenth century, international law underwent transformations more significant than a mere geographical expansion. I propose to use the term 'universality' with three additional implications: to indicate changes in international

law's conceptual outlook, to describe the global aspects of the professionalization of international law, and to illustrate the transformations in the nature of the international legal discourse itself.

First, regarding the conceptual change, international law's space of validity, which had been theoretically reduced to intra-Western relations after the shift from naturalism to positivism, regained universality when semi-peripheral lawyers reinterpreted the doctrines of recognition and the standard of civilization, so that they became procedural, rather than substantive, limitations to the inclusion of non-Western states. I have shown that semi-peripheral international lawyers did this by disentangling the association between the ideas of the distinctiveness of European/Western statehood, the standard of civilization, and international legal personality. Their criticisms were therefore not directed at a standard of civilization, but rather at the malleability of this standard and the possibility – at least theoretically – of non-Western sovereigns internalizing it to support their international personality.

Second, semi-peripheral lawyers' appropriation of European international legal thought happened at a time when the practice of international law became specialized and turned into a distinctive profession forming a transnational community. During this period, professional activities undertaken by international lawyers became transnationally organized. As legal advisers serving their own foreign offices or foreign governments, international lawyers circulated globally, giving counsel, joining diplomatic negotiations, and becoming members of arbitration tribunals. As producers of ideas, international legal scholars published works that were translated into many languages and discussed around the world. As professionals, the first associations of international lawyers founded inside and outside Europe reflected a global constituency at the same time that the student bodies of European universities, where international law was taught, became increasingly cosmopolitan. The participation of semi-peripheral jurists and diplomats in the transnational professional community that emerged out of these events made it possible for this community to acquire a global character.

By the second half of the nineteenth century, semi-peripheral lawyers had become professional international law experts, negotiating, signing and invoking treaties, and insisting on compliance with these treaties. They had also discussed and contested established doctrinal positions, challenging extraterritoriality in Japan or China, or, in the case of Latin America, criticizing the doctrines supporting diplomatic intervention.

Yet it is not the mere participation of non-Europeans in the creation of international legal norms and concepts that makes the use, internalization and appropriation of international law interesting, but rather the ways in which these lawyers played with the discourse of international law, at times endorsing it while at other times being surprisingly critical – a strategic stance that I contend should be recovered by semi-peripheral internationalists today.

Third, one might believe that international law became universal only after having been articulated globally (by a transnationally constituted profession) and with some degree of inclusiveness (after semi-peripheral lawyers reinterpreted legal doctrines limiting the scope of the international community). If so, this international law would be qualitatively different from the law that Western powers unilaterally fashioned and imposed, which legitimized Western exercise of jurisdictional powers overseas and resolved disputes between Western states, particularly controversies emerging from conflicting colonial claims over territories overseas. This law became universal, because it not only enabled the Western powers to intervene politically and economically around the world, but also regulated and to some extent limited the mutual interaction between independent political organizations on a global scale.

During the course of the nineteenth century, semi-peripheral appropriations of international legal thought and the global circulation of rules, lawyers and legal ideas transformed existing international legal regimes into a universal international law. ‘Universality’, as a consequence, describes not only international law’s geographic expansion, but also doctrinal changes, the global professionalization of international lawyers, and the transformation of the nature and functions of the international legal discourse. These are the central arguments I have put forward in Part II of the book.