CHAPTER 11

Sovereignty and "Civilization": International Law and East Asia in the Nineteenth Century

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Abstract

In nineteenth-century positivist international law, the language of "civilization," deployed for the purpose of both excluding and including members of international society, was to a great extent vague. "Civilization" in turn became an ideological window dressing for power politics. The lack of a clear standard of "civilization" did not prevent Japan from making full use of this vague language in its struggle for full membership in international society. China, by contrast, was relatively unaware of the essence of international politics at the time, and did not realize the important role of "civilization" in international relations. During and after the First Sino-Japanese War (1894–1895), Japanese intellectual and political elites wielded international law as a weapon to brand China as a "barbarous" nation that violated almost every rule of the law of war and to characterize Japan as a "law-abiding" and "civilized" state. As a result, Japan obtained full membership in international society shortly after the war, whereas China remained a "barbarous" country and was unable to abolish consular jurisdiction in its territory until 1943.

Keywords

positivism in international law – civilization – late Qing China – Meiji Japan – First Sino-Japanese War

The modern state system did not extend to East Asia until the nineteenth century. Before that, contact between the Western world and East Asia was quite limited, and thus there was no need to include China or Japan in the Western international legal system. However, by the nineteenth century,

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especially after the two Anglo-Chinese Wars (1839–1842 and 1856–1860) and the Perry Expedition (1853–1854), both the West and East felt a need to introduce international law into this region because of the substantial expansion of the world economic and political systems to this far end of the Old World. Soon afterward, through the medium of international law, intellectual and political elites in nineteenth-century China and Japan began to imagine (each in entirely different ways) a modern world order. The development and clashes of these imaginations resulted in the entirely different political fates of the two nations toward the end of nineteenth century and in the first half of the twentieth century.

This article examines this history through multiple subjects and multiple perspectives. These perspectives include those of the West, China, and Japan. First, the article will delineate the core features of nineteenth-century international society, the presentations of that society by Western international lawyers at the time, and their attitudes toward the relationship between Western international law and the non-Western world. Then, it will analyze how China and Japan in the latter half of the nineteenth century considered and accepted the entire body of international legal discourse and presentations. Following that, it will discuss how the respective understandings of the two countries concerning international law influenced their corresponding political and diplomatic actions, how those actions inevitably intertwined with each other, and how that had significant consequences for both East Asian and world histories. Also, interactions between Western and Eastern international lawyers, in particular between European and Japanese scholars, will be examined since they were of particular relevance to realpolitik. These three independent but at the same time interrelated perspectives will bring about a fuller understanding of the expansion (and the unfortunate events accompanying it) of nineteenth-century international society and its legal structure.

Looking at the broad background of the history of international law and international relations in the nineteenth century, it is clear that international law itself was (and is) a "pragmatic" discipline which paid close attention to actual international relations. Thus, the understanding of doctrines of international law in the nineteenth century and of the international legal imaginations of elites in China and Japan cannot be separated from the understanding of the complicated triangular political relations between the West, China, and Japan. Concretely speaking, on the one hand, most writings of Western international lawyers in the nineteenth century were based on their observations of up-to-date practice in international relations. Thus, from this perspective, it is of great importance to examine how international lawyers treated and defined a series of events in the history of East-West relations; how they considered,

adjusted, and readjusted relations between East Asia and the world; and how these responses and adjustments were connected with the political fate of East Asian countries. On the other hand, the different understandings of international law and the international order by elites in China and Japan were to some degree determined by their respective experiences and opportunities in the international arena. More importantly, these imaginations of an unacquainted world even affected diplomatic practice of the two states and left an imprint on the making of nineteenth-century international society. Thus, whether from the perspective of the West or East, there was always a mutual interaction between ideas of international law and practice in international relations. This interaction is certainly worthy of our attention.

"International Society" in Nineteenth-Century International Law

"Civilization"

In *The Anarchical Society*, Hedley Bull defined the concepts of "international system" and "international society" in the following way: "when two or more states have sufficient contact between them, and have sufficient impact on one another's decisions, to cause them to behave—at least in some measure—as parts of a whole," an international system is formed; "when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions," an international society is formed (Bull, 2002: 9, 13). For most of the nineteenth century, international society was connected with concepts like "the concert of Europe," since it was in Europe that the notion of international society originated. This linguistic phenomenon also indicates that historically international society was tightly related to a specific region, culture, and even religion, although people today consider it universal. Hence, Bull, a representative of the so-called English school of international relations, felt a need in his writings to first discuss two previously existing international societies, namely, "Christian international society" and "European international society," before he could discuss contemporary "world international society" (Bull, 2002: 26–36).

What this means is that before the ultimate emergence of a "world international society," something must have happened in history during which non-Christian and non-European political entities gradually transformed themselves into nation-states in the Western sense and were finally integrated into international society in the twentieth century, enjoying equal rights with

Western states (at least formally). From the perspective of the West, this history is "the expansion of international society" (see e.g., Bull and Watson, 1984). From that of the East, the same story is the "entrance into the family of nations" (see e.g., Hsü, 1960). It is natural that different subjects use different verbs ("expand" and "enter"). No matter the perspective, however, neither the West nor the non-West could bypass a common key in their narratives. This key is "civilization."[1]

At the same time, this story of "civilization" in the nineteenth century could not bypass international law. Before the emergence of modern international relations as an academic discipline, the defining and describing of the international order were undertaken by international law.[2] Thus, in the nineteenth century, the "European international society" in Bull's writing was also called the "community of international law." This community was composed of equal sovereign states which contacted one another through envoys and trade (as well as occasional wars). As Bull pointed out, these states shared several common values. At first, in the view of international lawyers at the time, the most important was Christianity. But when the "community" tried to extend itself to vast areas outside Europe, a problem emerged: the world beyond Europe was to a great extent non-Christian. Thus, international lawyers had to find a new and more "universal" value. This new value was "civilization." Gerrit W. Gong has pointed out that the concept of civilization played a dual role in the global expansion of international society/law in the last two centuries. First, "in response to the practical problem of protecting European life, liberty, and property in sometimes hostile non-European countries, the standard of 'civilization' guaranteed certain basic rights" and led to the rise of the system of consular jurisdiction. Second, "in response to the philosophical problem of determining which countries deserved legal recognition and legal personality in international law, the standard of 'civilization' provided a doctrinal rationale for limiting recognition in international law to candidate countries" that were regarded as "civilized" (Gong, 1984: 24).

In titling his well-known work *The Standard of "Civilization" in International Society*, however, Gong went too far. He asserted that there was once an explicit "standard" of civilization in international society/law, which provided an accurate mechanism for defining and limiting members of the "community of international law" and for including qualified candidates in that "community." Thus, it was the standard of civilization that made the emergence of a "world international society" possible. In other words, the standard of civilization was the core approach for the integration of modern international society. In Gong's view, this standard consisted of: 1) guarantees of life, liberty, and property (particularly of foreign nationals), 2) organized political bureaucracies

with adequate efficiency, 3) adherence to "generally accepted" international law and maintenance of effective domestic legal systems, 4) adequate and permanent avenues for diplomatic interchange and communications, and 5) conformance to accepted norms and practices of "civilized" international society, "e.g., suttee, polygamy, and slavery were considered 'uncivilized,' and therefore unacceptable" (Gong, 1984: 14–15). As a result, his work has given the impression that the mechanism of integration in international society in the nineteenth century was a perfect legal structure; as soon as non-Western countries met the standard of civilization clearly defined by jurists, they could receive a ticket to enter international society and could abolish several embarrassing institutions in their territories, such as consular jurisdiction; if they did not meet the standard, they had to wait.

Yet, if he had looked more closely, Gong would have been disappointed with international lawyers in the nineteenth century. "Civilization" was a concept that was rarely handled successfully by these lawyers, because it was very much related to a type of deep-rooted thinking. In another article of mine, in order to analyze nineteenth-century international lawyers' presentations of China, I examined treatises, articles, speeches, and academic conference records of international law in this period. My examination shows that these international lawyers tended to analyze international events within a framework of purely formalistic legal science rather than discuss substantial political or moral issues. For example, they rejected consideration of the legitimacy of the Opium Wars, but turned instead to questions such as whether it was permissible to use force to exercise the right to trade, what compensation standard for the confiscated opium should be followed, and what nationality the *Arrow* (a vessel which was a trigger for the Second Opium War) was. When considering the legality of treaties concluded between the West and China, they were only willing to discuss whether there was duress and false statements in the concluding processes, but ignored the fundamental reality of the asymmetrical (military) power between the West and East. Also, they did not care whether the content of the treaties was consistent with the principle of equal sovereignty in international law (Lai, 2012).

Likewise, on the extremely grand subject of the standard of civilization, international lawyers in that period were never able to provide a clear and common answer. Even worse (but unsurprisingly), some of them preferred to avoid this question altogether. Writings of various international lawyers during the whole period demonstrate this. For instance, in James Lorimer's view, only through assimilation of Christianity could non-Christian races really understand "that human nature which is common to them and to us" (Lorimer, 1883: 124). While Thomas A. Walker without any hesitation defined international law

as law among "civilized nations," he also felt it was difficult to define "civilization": "civilisation is a complex fact, the combination of advance with order, the condition, in brief, of a progressive society. The term is purely relative" (Walker, 1895: 1, 7). In Thomas J. Lawrence's work, some degree of "civilization" counted as the first element of qualification for membership in international society, yet "it is difficult to define the exact amount.… In matters of this kind, no general rule can be laid down" (Lawrence, 1895: 58–59); thus "each case must be judged on its own merits by the powers who have to deal with it" (Lawrence, 1901: 24). Lassa Oppenheim attempted to avoid vagueness, but his simple requirement for "civilization" could hardly have been accepted by his contemporaries and could hardly have been trusted by countries such as China, which were still floundering in the myth of "civilization": "a State to be admitted must, first, be a civilised state which is in constant intercourse with members of the Family of Nations" (Oppenheim, 1905: 31). Furthermore, international lawyers could not even reach a consensus on the *procedure* for non-Western states to enter the "family of nations": Walker required "regular recognition" without a specific definition of the term (Walker 1895: 7); William E. Hall by contrast asserted that "an express act of accession can hardly be looked upon as requisite" (Hall, 1895: 43); Lawrence argued that to win the recognition of the "family of nations," a state needs to receive either the acceptance of all existing members of that "family" or the acceptance of "the most important of them," which certainly included his homeland, Britain (Lawrence, 1901: 23–24). In the end, there was no such definite thing as a "standard" of "civilization."

Realpolitik in the nineteenth century in fact followed *raison d'État* rather than any legal standard. According to Martti Koskenniemi, a key reason for the failure of international lawyers to establish a standard was that European diplomats considered the problem of the international status of non-Western states only in pragmatic, concrete, and case-by-case circumstances. Each non-Western state's entrance into international society was based on concrete negotiations and agreements rather than any "standard." Since there were no rules in international practice, any attempt to sum up the standard of civilization in such practice was bound to fail (Koskenniemi, 2004: 134–35).

Nevertheless, while there was no standard of civilization, a discourse of civilization indeed existed. On one hand, this discourse legitimized the process of massive colonization by the West. On the other hand, it also gave non-Western countries the hope that decolonization might come to pass: once they achieved civilization (though nobody knew what that was exactly), it was likely they would abolish restrictions like consular jurisdiction, fixed tariffs, and unilateral most-favored-nation treatment. Throughout the nineteenth century, virtually all international lawyers used the term "civilization."

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It peppered the writings of Henry Wheaton, Theodore D. Woolsey, Robert Phillimore, Johann C. Bluntschli, James Lorimer, Sheldon Amos, John Westlake, Thomas A. Walker, Thomas J. Lawrence, William E. Hall, Lassa Oppenheim, and so on. All of them declared that the application of international law was limited to civilized states, and that non-Western states had to achieve the same degree of civilization as the West in order to obtain full subject status in international law (Yamauchi, 1996: 3–6; Lai, 2012: 135–41).

As a result, while the original attempt of international lawyers to establish a standard of civilization failed, they created a linguistic atmosphere of civilization. This atmosphere had practical implications, because it drew a line across the earth distinguishing the civilized part from the uncivilized, and endowed the two parts with completely different legal consequences. The Scottish international lawyer Lorimer described this line and its meanings in the clearest way:

> As a political phenomenon, humanity, in its present condition, divides itself into three concentric zones or spheres—that of civilised humanity, that of barbarous humanity, and that of savage humanity. To these, whether arising from peculiarities of race or from various stages of development in the same race, belong, *of right*, at the hands of civilised nations, three stages of recognition—plenary political recognition, partial political recognition, and natural or mere human recognition. . . .
>
> The sphere of plenary political recognition extends to all the existing States of Europe, with their colonial dependencies, in so far as these are peopled by persons of European birth or descent; and to the States of North and South America. . . .
>
> The sphere of partial political recognition extends to Turkey in Europe and in Asia, and to the old historical States of Asia which have not become European dependencies—viz., to Persia and the other separate States of Central Asia, to China, Siam and Japan.
>
> The sphere of natural, or mere human recognition, extends to the residue of mankind; though here we ought, perhaps, to distinguish between progressive and non-progressive races.
>
> It is with the first of these spheres alone that the international jurist has directly to deal. . . . He is not bound to apply the positive law of nations to savages, or even to barbarians. (Lorimer, 1883: 101–2)

Positivism

Positivism in international law arose at the same time as the emergence of the civilization discourse in international law and increasingly took the place

of the natural law school which had dominated in earlier centuries. To thinkers like Hugo Grotius, Samuel Pufendorf, and Emer de Vattel, who lived before the nineteenth century, international law was a part of natural law or could be derived from the latter, and the latter itself was an expression of absolute reason or God's will. Thus, international law had an a priori universality and could thereby be equally applied to all states in the world. All nations, whether in the West or non-West, were equal members of this universal human society (see Nussbaum, 1947: 114–18).

In contrast to this "transcendental" approach, positivism in nineteenth-century international law emphasized that international law was a product of the will of sovereign states, and that the content of this law could only be discovered in diplomatic practice, including treaties, conventions, and international usages. This new thinking had at least two political implications. First, international law did not possess an a priori universality. Rather, its universality could only be realized through historical practice. Before specific international legal practice had been extended to an area, that area did not belong within the scope of international law. Second, since positivism was a faithful academic copy of diplomatic practice, all international usages, no matter how morally questionable they appeared, were considered law as long as they were common and existing practices.

The connection between the civilization discourse in international law and positivism in international law has been the subject of debate. In the 1970s, Charles H. Alexandrowicz pointed out that because positivism in the nineteenth century abandoned several fundamental attributes of classic natural law doctrines, "international law shrank into an Euro-centric system" and "discriminated against non-European civilisations and ran on parallel lines with colonialism as a political trend" (Alexandrowicz, 1973: 6). Later, Gerrit Gong opposed this direct association of the two phenomena. In his view, although the standard of civilization appeared only in the nineteenth century, the "notion" of that civilization had already existed for centuries, and the standard simply populated such a notion with explicit legal concepts. Therefore, positivism could not be considered a key reason for the emergence of the standard of civilization. In addition, the practical value of so-called universal natural law was also suspect. Gong asked whether the "Family of Nations" before the nineteenth century, which Alexandrowicz had posited, existed in historical reality or merely in "the conceptions of European theorists" (Gong, 1984: 42–44). In our new century, Antony Anghie's view is similar to Alexandrowicz's: the distinction between "civilized" and "uncivilized" states was a "central feature" of positivism in international law. In his narrative, this positivism was necessarily connected with the "colonial encounter" in the nineteenth century, and

the mechanism of "civilization" was intentionally designed to deprive the non-Western world of equal rights. According to this view, which equated consequences with motives, international lawyers in the nineteenth century, in contrast to their naturalist counterparts in earlier times, were without question active apologists for imperialism and colonialism (Anghie, 2005: 32–114).

Regardless of the concrete attitudes of various international lawyers toward colonialism, it is undeniable that there was indeed a discursive affinity between positivism and the concept of "civilization." In contrast to the natural law school, which included all nations in international law, both positivism and the civilization discourse demanded geographical exclusion. The positivist view that international law existed only among Euro-American states which had constant diplomatic practice with one another was compatible with the doctrine that limited civilization to such states.

Furthermore, positivism in international law was a precise record of what had happened in the nineteenth-century international arena, and "civilization" was exactly an ideological package for this record. First, positivism emphasized that international law existed only among a limited number of states that had constant and regular diplomatic interchanges. The civilization discourse elaborated on this concept: international law could only be based on long-term diplomatic practice among Euro-American "civilized" states; "uncivilized" states outside Europe did not belong to the circle of international law because of their limited contact with "civilized" states. Second, and more concretely, as international lawyers had observed, "civilization" could also legitimize various unequal international legal institutions established between the West and East: since non-Western states lacked civilization or adequate civilization, their sovereignty needed to be degraded.

Additionally, it was because of an inherent characteristic of positivism that the concept of civilization could be absorbed into the theoretical system of international law and could exist there in a vague form. First, because of the supposed "non-political" character of positivism, international law at the time accepted wholesale the notion of a hierarchy of civilization popular in nineteenth-century Euro-American intellectual circles. Colonialism, accompanied by the discourse of civilization/barbarism, lay beyond the legal field to which international lawyers needed to pay attention, and instead existed in their minds as a fait accompli or pre-understanding, and thus was not seriously questioned in international legal discourse. Second, since international lawyers at the time failed to come up with a *theoretical* standard of civilization, but rather attempted to discover positive rules from *practice* among states, they were inevitably unable to establish a legal and explicit standard of civilization as long as international practice was completely determined by heterogeneous

political motives that did not recognize any rules. The concept of civilization in international law could thus exist only as a flexible linguistic mechanism.

In view of this affinity, the civilization discourse and positivism in international law went hand in hand in the latter half of the nineteenth century, and at that time both reached their pinnacles in doctrines of international law. Thus, a question highly related to this article is how nineteenth-century China and Japan considered and responded to this series of international legal doctrines.

Different Responses of China and Japan

China: "The Just Law of All Nations"

When China and Japan encountered the world, they also encountered the previously described image of international law. At the end of 1864, twenty-two years after the conclusion of the Treaty of Nanking (a crucial step in the Western mission of "civilizing" China), an American missionary, William A. P. Martin, completed a Chinese translation of his countryman Henry Wheaton's *Elements of International Law*. The job was supported by both the Qing court's Zongli Yamen (the office in charge of foreign affairs) and the U.S. minister in China, Anson Burlingame. This was China's first formal acceptance of Western international law.

However, "formal" did not mean "full." In order to make the Chinese more willing to accept Western international law and Western Christian "civilization," Martin changed the positivist original texts of nineteenth-century international lawyers to a natural-law style in his translation of Wheaton's book as well as in his subsequent translations of the writings of other international lawyers. The term *wanguo gongfa*, "the just law of all nations," was used to translate "international law," giving the impression that international law, as a legal system regulating relations among all states in international society, was as unshakable as the natural order. Applying Neo-Confucian concepts, such as *li* (principle), *xing* (nature), and *qing* (emotion), which were all compatible with Western ideas of natural law, to the description of international law also revealed Martin's efforts to beautify international law (Lin, 2009: 63–66; Lai, 2011: 3–12).

Martin's translations led to significant consequences. During the roughly thirty years from 1864 to 1894, most Chinese scholar-officials, unacquainted with foreign languages, had to rely on these translations to understand international law. Several Chinese students in European countries had indeed gained some knowledge of international law, but they did not leave academic writings on the subject and played a relatively limited role in China's foreign

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relations. In the Tongwen Guan (school for teaching Western languages), Martin's translations were the only textbooks on international law. This was a period without universities or law schools. At the same time, the Confucian belief in a harmonious and just world order, exemplified by concepts such as *tianli* (heavenly principles), *renqing* (human emotions), and *wangdao* ("the just way of pursuing power"), was to a great extent consistent with Western natural law thinking, which led generations of Chinese intellectual (and to some degree political) elites to accept Martin's natural law/Neo-Confucian image of international law (Lai, 2010: 42–77). In addition, also in Chinese traditional thought and practice was a unique hierarchy of "civilization" and "barbarism" with China itself on top (see Fairbank, 1968). Undeniably, China's own civilization discourse gradually collapsed in face of the ruthless struggle among modern sovereign states. But the old "Chinese world order" still haunted China's intellectuals, making the new and reversed civilization hierarchy unacceptable to them. Consequently, the Western concept of civilization dissolved in the late Qing natural law discourse of international law, or was even lost in a state of ignorance. As will be pointed out later, this to some degree had tragic consequences.

Japan: Bunmei kaika

Meiji Japan's road was different. At the beginning, however, the story of Japan was almost the same as that of China. Influenced by Martin's Chinese translations, which were imported from the cultural center of pre-modern East Asia, China, the Japanese understanding of international law remained the vague natural law/Neo-Confucian version in the 1860s and early 1870s. Nevertheless, the situation changed thereafter.

As early as 1862, the Tokugawa government had already sent fifteen students to Holland to learn about Western military technologies and politics. The courses of several students, for example, Nishi Amane and Tsuda Mamichi, included international law taught by Leiden University law professor Simon Vissering. After returning to Japan, Nishi even translated and published his lecture notes on international law in 1868 (Dudden, 1999: 171; Taoka, 1972: 6–10). With the help of these students/translators, nineteenth-century Japanese intellectuals and politicians had an opportunity to clearly see the essence of international law and international relations.

Japanese political elites also took action on their own. In December 1871 an official mission led by Lord Iwakura was sent to Western powers to study Western politics and to explain Japan's wish to revise the treaties containing consular jurisdiction, conventional tariffs, and unilateral unconditional most-favored-nation clauses. Kido Takayoshi, Ōkubo Toshimichi, and Itō Hirobumi were also members of the mission. The whole mission was prepared to use

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the knowledge of "the just law of all nations" they had learned to persuade the Western powers to give up their privileges in Japan (Owada, 1999: 354).

But they received only an indifferent reply. They first came to the United States. The secretary of state, Hamilton Fish, was sympathetic to the Japanese request for treaty revision, but refused to take any substantial action. Then the group went to Europe, where the powers were highly skeptical of the so-called sympathy of the U.S. The powers claimed that whatever new advantages the U.S. would obtain by the revision of its treaty should automatically be accorded to them because of the most-favored-nation clauses in existing treaties. At the same time, European states insisted on retaining all the old privileges in their own treaties, although the U.S. seemed willing to renounce them. The task of treaty revision thus ended in complete failure. The mission began to doubt the practical value of *bankoku kōhō*, "the just law of all nations" (Owada, 1999: 354).

What most shocked the members of the mission, however, was what was happening in the newly founded German empire. How could a small country in central Europe rapidly become a great power through blood and iron? The question fascinated all the members, and they were all eager for an answer. They went to Germany twice, whereas they visited no other country more than once. Both Ōkubo and Itō found the answer in speeches by Otto von Bismarck and Helmuth K. B. von Moltke. On March 15, 1873, Bismarck gave a welcome dinner for the Japanese mission and, in this speech there, reviewed the political experiences of his youth and then pointed out that although every country interacted with others on the basis of courtesy, this was merely an illusion; the truth was instead that the strong always subjected the weak; the law of nations existed for the benefit of great powers, and thus powerful states would use it when it was to their advantage; the great powers preferred military might to the law of nations if the latter did not serve their purposes; no matter how faithfully small countries observed the law of nations, they were still threatened again and again by the powerful (Masumi, 1988: 118–19; Owada, 1999: 354–55; Zhao, 2008: 42). The Japanese also attended a speech Moltke gave in the German parliament, and they cited his words in their records: "the principles of law, justice and freedom can only protect domestic conditions. To protect conditions among states, it is necessary to apply military force. In any case, the just law of all nations is only an ethic relying on force. It is only small countries that need to maintain neutrality. Great powers resort to force to protect themselves" (Zhao, 2008: 42).

While the task of revising treaties failed, the Japanese learned something unexpected from Bismarck and Moltke that drastically changed their attitude

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toward the "just law of all nations." Of course, the change in Japanese attitudes toward international law was gradual. But this Western experience from 1871 to 1873 was undoubtedly a milestone in that process (Owada, 1999: 353). While Fukuzawa Yukichi, who had a close relationship with Japan's political leaders (see Masumi, 1988: 159–60), had talked about international law as "the principle of heaven," "the just way," and "the right way of humans" in 1872 (Anchuan, 2004: 37), he changed his mind in *Tsūzoku kokken ron* (An Introduction to National Rights) six years later:

> With respect to treaties of peace and amity and the just law of all nations, they are indeed very beautiful words, but in the final analysis they are nothing but superficial protocols and names. The reality of the intercourse among nations is nothing other than a struggle for domination and an avid appetite for benefits. Facts all over the world, ancient and modern, can demonstrate that. Is it not common knowledge to everyone that it is impossible for a small country, poor and ignorant, to uphold its independence through treaties and just law? . . . A hundred volumes of the just law of all nations will not be equal to the power of a cannon. Numerous copies of treaties of peace and amity will not be equal to a box of gunpowder. Cannons and gunpowder are not used for upholding the reason that you assert, but for creating one where there is none. (Fukuzawa, 1981b: 57)

But this did not mean that the Japanese thereafter discarded international law. A contemporary Japanese scholar points out that the lesson they actually learned from that visit was that "international law was not so much a body of principles based on natural justice which the East could share in common with the West, as a bunch of technical rules to be manipulated. They might work to your advantage if you were sufficiently skillful, or they might work to your disadvantage if you were not skillful" (Owada, 1999: 356). Thus, positivism in international law was taken by Japanese political and intellectual elites to its most extreme conclusion. International law was an indispensable tool in Japan's "modernization," but not the only one. In the realpolitik of the nineteenth century, international law was attached to power and was a tool for legitimizing power politics. In essence, it could hardly be called "law," but was more like what Koskenniemi has called "international legal argument" (Koskenniemi, 2005: 58–69).

Likewise, Japan increasingly realized the importance of the term "civilization." As early as 1875, in his famous work *Bunmei ron no gairyaku* (An Outline

of a Theory of Civilization), Fukuzawa Yukichi fully accepted the hierarchy of nations based on degrees of civilization:

> With respect to civilization of the world today, European states and the United States of America are the most civilized states, Asian countries like Turkey, China and Japan are called half-civilized states, and Africa and Australia are called barbarous countries. This is already a common view of the whole world. It is not only that people in the West consider themselves civilized, but also half-civilized or barbarous people accept these labels and are willing to call themselves half-civilized or barbarous. The latter scarcely think that their situation can be better than those of Western states. (Fukuzawa, 1981a: 20)

Japan accepted this painful "fact" and accepted the corresponding theory of international law. Japan "accepted international law without questioning its validity or legitimacy, either in whole or in part, and strictly observed its rules" (Taijudo, 1975: 65). In order to be an equal member of international society, and in order to abolish consular jurisdiction, Japan had to achieve "civilization." The fact that the standard of civilization in international law was vague did not stop Japan from fleshing it out by packing it with multifarious elements (as long as they were from the West).

As a result, in Fukuzawa's writing, "civilization" tended to be an all-embracing category covering "institutions, literature, commerce, industry, wars, laws and politics." In all these fields, anything that promoted "civilization" was a good thing. And anything that impeded "civilization" was a bad thing. Therefore, "if civil wars and despotism can promote the development of the world's civilization, . . . people will forget half of their previous fear and will no longer condemn them" (Fukuzawa, 1981a: 47–48). Thus, on the road toward *bunmei kaika*, "civilization and enlightenment," nothing, including "the just way between heaven and earth" and "the just law of the universe," could prevent any state from resorting to any measure necessary.

Although the meaning of "civilization" was extremely broad, for Japan at the time the most important mission of "civilization" was to maintain Japan's national independence. For that goal, every imaginable method, including war, was permitted. Fukuzawa explained his image of the world:

> Thus, concerning relations among various states in the world from the perspective of civilization today, in private intercourse among their people, it is possible for people from afar to be welcomed as good friends, but intercourse among states follows only two rules. The first is to scramble

> for self-interest in peaceful times, and the second is to kill one another by weapons in wartime. In other words, the world today can be called the world of trade and wars. (Fukuzawa, 1981a: 227)

This image of the "civilized" world was far from that drawn by W. A. P. Martin. In Fukuzawa's theory of "civilization," war was inherently compatible with civilization. War was an indispensable tool for demonstrating national power, achieving national interests, and promoting civilization: "war is a tool for independent states to claim their rights, and trade is a sign of a state's brilliance" (Fukuzawa, 1981a: 228). This view of civilization was not in conflict with international law in the nineteenth century. According to Stephen C. Neff, positivist international lawyers at the time viewed war no longer as a tool for achieving any justice or protecting common values in international society, since "justice" or "common values" no longer existed. Instead, at the core of nineteenth-century international legal thought was an anarchical image of international relations in which war was an inherent and ingrained feature of international life. Now that the independent will of sovereign states was unlimited and such wills always collided with one another, waging war became a crucial tool for expressing a state's will and defending its interests. Reasons for making war were no longer examined by international lawyers. Instead, as long as a state observed the rules of the game after the outbreak of a war, it could be called "civilized." War became a legal institution. It was in this century that many rules in the law of war were created, such as the Declaration of St. Petersburg, the Lieber Code, the Brussels Declaration, and the Hague Conventions (Neff, 2004: 162, 186–87).

The First Sino-Japanese War: "Civilization" and "Barbarism"

Japan: A Warpath toward "Civilization"

In order to achieve "civilization" and become a member of the "community of international law," the Meiji government exerted almost unimaginable efforts, far more than any other non-Western country. Of its three basic national policies during the period, "civilization and enlightenment" was the most important. In the 1880s and 1890s, a constitutional monarchy imitating that of Prussia was established in the face of various kinds of domestic resistance, and codes of criminal law, civil law, and procedural law were gradually drafted and enacted with the help of foreign experts. These changes in domestic laws more effectively guaranteed the basic rights of foreigners in Japan, and thus the abolishment of consular jurisdiction was put on the agenda.

At the same time, the Japanese government also needed to carry out its promise to observe international law in the international arena. Japan's performance was in particular related to its several wars or armed conflicts with its neighbors since the 1870s. For Japan's "independence," wars were needed, and international law as a defense of its war record was also needed. The fact that Bismarck founded his German empire through three wars stimulated Japan's imagination, and Japan faithfully followed the path blazed by this great figure. Correspondingly, a significant feature of the history of international law in Meiji Japan was a disproportionate focus on the law of war. In 1874, troops were sent to Taiwan; in 1875, with the help of warships (the importance of Commodore M. C. Perry's fleet was not lost on the Japanese), Japan compelled Korea to conclude the Treaty of Ganghwa Island, which contained unequal elements like those in Japan's treaties with the Western powers; in 1882, in order to eliminate the pro-Qing group in the Korean court, the Japanese minister in Korea staged a coup. In each of these military or semi-military actions, relevant issues concerning international law had been researched for the purpose of proving that Japan's actions were legal and that Japan was "civilized" (Lai, 2010: 93–96).

As scholars have already pointed out, in the last decades of the nineteenth century, the conflicts between China and Japan on the Korean peninsula stemmed from China's attempt to maintain Korea's status as a vassal state of the Qing for the purpose of preventing Western and Japanese political and economic forces from expanding into China's own territory, and Japan's attempt to replace the old East Asian "world order" with international law among modern sovereign states and then to penetrate into Chinese territory through the peninsula after it formed an alliance with Korea (see Hamashita, 2003; Suganami, 1984: 195). The First Sino-Japanese War (1894–1895) can also be explained in a similar fashion. Nevertheless, from the perspective of "modernization," this war had more implications. Since the 1860s, both of the two states had put a great deal of effort into developing their military, industry, overseas trade, foreign relations, science and technology, and so on. A large-scale war between the two could perhaps be the best opportunity to test the actual effects of their respective efforts. In contrast to Japan, however, China lacked the slogan of "civilization and enlightenment." In view of that, Satō Shin'ichi has pointed out that the lack of this slogan signified China's relative reluctance to accept Western institutions and ideas, which resulted in its tragic failure in the First Sino-Japanese War (Satō, 1996: 15–17). This article goes further to demonstrate that it was China's lack of this slogan and relevant propaganda that enabled Japan to monopolize the "civilization" discourse in East Asia and deploy it

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to legalize its various acts during the war. At the time the voice of China was rarely heard.

Let's first return to Fukuzawa Yukichi, since he was almost the incarnation of Meiji Japan's *Zeitgeist*. As mentioned before, Fukuzawa believed that Japan could freely resort to war as long as war would promote "civilization." Thus, both before and during the Sino-Japanese War, he was an advocate of the war. When the conflict broke out, he organized a "patriotic association" and collected the second largest amount of war donations (Anchuan, 2004: 81–82, 94, 109–110). It was he who considered this war in the framework of the developmental history of "civilization" and called the war a struggle "between civilization and barbarism"; it was he who invented the notion that Japan represented "civilization" and China represented "barbarism." When the whole nation was aroused by its government's declaration of war against China, Fukuzawa explained the meaning of the war:

> Japan hoped to promote Korea's independence through reform toward civilization, and hoped that Korea could support Japan after reform. But the Chinese attempted to impede this stream of civilization, and even opposed us with force. Japan had to declare on China. This is the cause of the war. . . . This is indeed a war between Japan and the Qing, but in fact also a war between civilization and barbarism, and between light and dark. The outcome of the war will be highly related to the fate of civilization. If we Japanese people consider ourselves the most advanced part of the Eastern civilization, we must realize that the war is not simply one between two states, but one fought for the civilization of the world. We must have the determination to attack China and enlighten this uncultivated nation as long as is needed, until they truly repent and surrender at the door of civilization. (Fukuzawa, 1961: 500)

As far as international law during the war was concerned, Japan also needed to adopt the strategy and discourse of "civilization." The "civilization" of its domestic law was in principle completed, and was conveyed to Westerners through writings of Japanese jurists who wrote in European languages (Akashi, 2004: 11–12). Half of Japan's mission of becoming a "civilized" state and a member of the "community of international law" was completed. What Japan needed to do next was to behave well in the field of international law itself. Only through active observance and application of international law, in particular the law of war, could Japan demonstrate that it had attained "civilization" in international intercourse. In its previous wars, Japan had acted well.

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But they were only small-scale conflicts, and Japan needed a larger arena. A war with China was an excellent opportunity. By defeating such a big and "half-civilized" power, and by comparing its own behavior with China's "barbarous deeds" during the war, Japan could clearly show that it was "civilized."

Still, realpolitik played a role here. On July 16, 1894, fourteen days before Japan declared war, it concluded a new treaty with Britain, which stipulated that the latter would give up its consular jurisdiction in Japan in five years. Within a year, other Western powers subsequently concluded new and relatively equal treaties with Japan (Matsui, 1999: 10–11). The new treaties meant that the Western powers for the first time formally acknowledged that Japan had become "civilized," and that it had already attained semi-membership in the "community of international law." Yet if Japan had lost the war, or if Japan had behaved badly with respect to international law during the war, this would have meant that Japan was still not sufficiently "civilized," that the new treaties could be nullified, that the Western powers would insist on consular jurisdiction, and that Japan would still be outside the "community of international law." Thus, within this suffocating historical environment, Japan had no other choice but to pursue the course it had set for itself.

There is no need here to recount the course and outcome of the First Sino-Japanese War, a historical event recorded in innumerable history textbooks, academic treatises, articles, ukiyo-es, storybooks and other art forms, although images and judgments of this event from China, Japan, and the two Koreas stand in sharp contrast. What interests us here is international legal discourse during the war: how did Japan connect its every word and action with international law? How did it create an international legal rhetoric to prove that it was "civilized" and that it was qualified for equal membership in international society? How did the West, in particular Western academia, respond to this discourse? How did this discourse affect the historical fate of the two nations in international politics?

Japan: A Big Show

The language of international law existed everywhere. On August 1, the Meiji government declared war, and the emperor himself mentioned in his edict that Japan would observe international law. The urgent need for rules of warfare on both land and sea led to the publication of Ariga Nagao's *Just Law of All Nations in Time of War*, Hara Takashi's *Public Law of Land Warfare*, and Fujita Ryusaburō's *Just Law of All Nations on the Sea*, all of which constituted the Japanese military's reference books on combat according to international law. In the next year, when it was obvious that China was doomed to be defeated and Li Hongzhang went to Shimonoseki to conclude a treaty of peace with

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Japan, Nakamura Shingo's *Cases of Peace Negotiations* was published. What was more, in order to deal with the intervention of France, Germany, and Russia to prevent Japan from annexing China's Liaodong Peninsula through the newly concluded peace treaty, members of the House of Representatives compiled *Interventions, Arbitrations, Envoys during War and Capitulations* (Ichimata, 1973: 503). The Japanese packaged nearly every aspect of the war and made the war a showcase of their knowledge of international law.

But these works, written in Japanese, were mainly for the use of the Japanese government and military. Europeans did not understand Japanese and felt no need to read these writings. Thus, they were still unable to be sure that Japan had strictly followed international law. For that purpose, another series of writings emerged. They were written in European languages and their potential readers were Europeans. The legal counselor of the Japanese Second Army, Ariga Nagao, went to Europe soon after the war, and hastily finished his writings. As early as 1895 he wrote an article in French which elaborated on an imperial ordinance issued at the beginning of the war on protecting Chinese nationals in Japan (Akashi, 2004: 14–15). In 1896, he finished his French treatise *La Guerre sino-japonaise au point de vue du droit international* (The Sino-Japanese War from the Viewpoint of International Law), and translated it into Japanese in the same year (Ariga, 1903). Writings of the legal counselor of the navy, Takahashi Sakue (also known as Takahashi Sakuyé), emerged a bit later. He first came to England for academic training in international law, and then in 1898 he published a concise English paper, discussing several questions concerning prize law during war (Takahashi, 1898). In 1899, he published an English treatise, *Cases on International Law during the Chino-Japanese War*, which discussed that war from the perspective of the law of maritime war (Takahashi, 1899). In 1900, Takahashi published in German a collection of remarks on his treatise, which showed the influence of his book on Western academia (Takahashi, 1900). In the same year, as the Japanese representative in the International Law Association, he submitted that English treatise to the nineteenth annual conference of the association (International Law Association, 1901: 324–25).

All the works of the two authors, written in English, French, German, and Japanese, have a "descriptive" character. Both authors enumerated facts, legal provisions, declarations, military orders and cases, and rarely talked in a theoretical way. This is a typical positivist method. Ariga Nagao explained his method in this way: "my purpose in writing the book is to *record honestly* events occurring in the 1894 Sino-Japanese War from the perspective of the international law of war, in particular of various rules of land warfare" (Ariga, 1903: preface, 9, italics mine).

Ariga indeed recorded almost all cases of combat and non-combat that he experienced directly or indirectly during the war. As he described it, what had happened in the war was as follows: Chinese subjects in Japan and their property had been effectively protected by the Japanese government (chapter 3); the Japanese army had given medical aid to Chinese residents who had been accidentally injured during the war (section 19 in chapter 5); the Japanese army had handled bodies of dead Chinese soldiers in a humane way (chapter 8); the Japanese army had given medical aid to wounded captives (section 36 in chapter 9); the Japanese Red Cross had given medical aid to both Japanese and Chinese soldiers, which demonstrated its neutrality and generosity (chapter 10); the Japanese army had effectively distinguished military buildings from civilian ones, and had protected the latter (section 46 in chapter 11); the Japanese army had provided reasonable compensation for property requisitioned in occupied territories (sections 47–50 in chapter 11); the Japanese army had been extremely concerned with public health in occupied territories, and had done its best to prevent outbreaks of cholera and smallpox (section 57 in chapter 12); the Japanese army had given adequate attention to the protection of the nationals and property of neutral states (chapter 16).

Takahashi Sakue also described the Japanese army's adherence to international law:

> Thus Japan issued the ordinance protecting the Chinese staying in Japan, as mentioned above. She refrained from employing volunteers, as these did not belong to the regular army. She prohibited the use of privateers in reprisal, and strictly forbade plunder, even of the most trivial kind. More than that, she had [sic] the wounded prisoners as well nursed as her own men. She treated all prisoners with the utmost generosity. She governed the people of the occupied districts well, and set at liberty many thousand [sic] combatants, who surrendered at Wei-hai-wei. We will not venture to enumerate such instances because they are too numerous. (Takahashi, 1899: 3–4)

At the same time, according to Ariga and Takahashi, the Chinese army behaved badly. Ariga Nagao provided some evidence. He cited a speech made by the minister of the army which declared that China was still an "uncivilized" state because its soldiers had maltreated wounded captives (Ariga, 1903: 99–100). Chinese soldiers had kept the barbarous custom of taking the heads of enemy bodies (Ariga, 1903: 102). Chinese soldiers had even maltreated, killed, and then dismembered Japanese captives (Ariga, 1903: 116–17). Takahashi Sakue claimed that the Chinese government had required in its declaration

of war that all Japanese vessels (whether military or civilian) be destroyed (but he did not provide any real cases of China destroying any Japanese civilian vessels), and that China had killed not only combatants but also Japanese noncombatants staying in China (they were in fact spies who provided military intelligence for the Japanese army) (Takahashi, 1899: 3). Therefore, the antagonist facing Japan was "a nation which acknowledges no law of war, makes no provision whatever for the proper treatment of the private property of the subjects of a hostile state, and does not attempt by a resolute effort to restrain its troops from pillage and incendiarism even within its own territories" (Takahashi, 1899: 164).

Thus, this "descriptive" perspective fully "described" Japan's "civilization" and China's "barbarism"—a simple but stark contrast that reflected the two scholars' pride in their country's "civilization." In view of that, Ariga Nagao wrote in the beginning of his treatise that "the most important point in the war between Japan and the Qing was that one of the two belligerents observed the legal usages of war strictly, but it can scarcely be said that the other side took these usages seriously" (Ariga, 1903: preface, 9). In Ariga's view, the *Shina jin* (Chinese) in the war resembled the Turks, Arabs, and American Indians. By contrast, the *Nihon teikoku* (Japanese empire) faithfully observed the law of war, just like France, Britain, and Germany, which even caused casualties among Japanese soldiers. Japan's behavior was so exemplary that Japanese experiences could even be beneficial precedents for future combat among Euro-American states (Ariga, 1903: 24). In Takahashi's English treatise, he created a unity of "history" and "value" (to use Joseph Levenson's terms): "a law-abiding spirit, especially in war, has been from ancient times, as history shows, a characteristic of Japan" (Takahashi, 1899: 1). It was this native "civilized" characteristic that led to Japan successively adopting the most "civilized" usages of war from Europe (Takahashi, 1899: 157).

Yet all these expressions were overshadowed by the controversial Port Arthur incident. Japan's "civilized" appearance was called into question after Euro-American journalists had broken through the information blockade imposed by the Japanese army and had reported what had happened in that port to the outside world. Japanese ministers in Britain, France, Germany, Italy, Austria and the U.S. all realized the seriousness of the situation, and all sent telegrams to the Japanese foreign minister. In order to save the situation, the Japanese had to bribe the media on the one hand, and to openly explain away what had happened on the other hand (Qi, 1994: 529–36). Even after the war, both Takahashi and Ariga still felt the need to justify what the Japanese army had done in Port Arthur. Their methodology mattered. Indeed, the rhetoric of "recording honestly" that they adopted had a helpful effect. If these writings

did honestly record all believable events in the war, things not written in these books were then unreliable rumors.

Takahashi Sakue asserted that he had witnessed the entire battle on board a Japanese man-of-war just outside the harbor, and had visited the town soon after it was occupied. He used his personal experiences to disprove a report saying that the Japanese army had attacked more than ten junks laden with Chinese refugees when landing at the port. He only admitted that a very limited number of civilians had died due to stray bullets and gunfire during combat, which in his view was inevitable (Takahashi, 1899: 4–9). If even acts like attacking junks had not happened, then how could there have been a massacre lasting for four days?

Ariga Nagao gave more details about his experiences in the town. He admitted there had indeed been many dead bodies in streets, probably two thousand, but he insisted that only about five hundred of them had been bodies of noncombatants. What in his view was more important was that most of the dead were adult men and hardly any were women or children. He claimed he had seen only two dead women, one in a pool of water and the other in a street. All this demonstrated that the Japanese army had been dealing only with fleeing or still resisting Chinese solders. He went on to tell Western readers how the Japanese army had properly distinguished captives from civilians and how it had protected the life and safety of the latter (through hanging signs reading "do not kill this person" on people or on their doors). Finally, he summarized that "all these were true situations occurring in the downtown area of Port Arthur during the days after [November] 21" (Ariga, 1903: 108–11). But he still felt the need to explain further the two thousand bodies he had seen. In the end, he claimed the following: 1) when, on November 21, 1894, the Japanese army attacked Port Arthur, the ensuing battle had caused several civilian casualties since civilians had been mixed with Chinese soldiers in the town; 2) the Japanese army had had to deal with a large number of Chinese captives who were still attempting to resist or escape several days after the fighting. It was on these two points that his legal conscience prevailed over his sense of political necessity. He also criticized a reply given by the commander of the Second Army to the Imperial General Headquarters, which admitted the two facts that Ariga asserted but tried to provide reasons in order to evade responsibility. Ariga pointed out that the reasons provided by the army were in any case untenable in international law (Ariga, 1903: 118–26). This "neutral" strategy of writing made international lawyer Ariga Nagao more respectable and made the facts he narrated more reliable: only about two thousand people had died, most had been combatants, and almost none were women or children.

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Ultimately, all the "honest records" proved to the Europeans that Japan had attained "civilization" while China remained "barbarian." The Chinese never followed international law and their actions in the war were far from those of "civilized" states. By contrast, the Japanese emperor, the Japanese government, the Japanese army, and the Japanese people faithfully observed international law and their behavior in the war was exemplary. Japan had thus achieved "civilization" and entered the "community of international law." What had happened in Port Arthur could not be regarded as evidence of Japan's violation of morality.

China: A Feeble Voice

The other side in the war could only utter weak and self-contradictory statements. Zheng Guanying received a letter from a U.S. journalist describing what happened in Port Arthur. Zheng asserted that he had translated the letter into Chinese, had drawn 12 pictures about the massacre, and had collected several rules of the law of war and some stories about the humane behavior of famous generals on the battlefield. He compiled all the materials into a pamphlet and distributed it to the public (Zheng, [1921] 1982). However, more than a hundred years later, the pamphlet could not be found anywhere, but the writings of Ariga Nagao and Takahashi Sakue can be found in the libraries of many universities. In the winter of 1894, He Qi and Hu Liyuan were still repeating the language of W. A. P. Martin. The "just law of all nations" was regarded as *xingli zhi shu* (a book of nature and principles), and was consistent with *pingqing* (ordinary emotions). Concerning the war between China and Japan, which was then ongoing, He Qi and Hu Liyuan first criticized China's violation of international law. Of course, they also listed and criticized cases of Japan's violations. The two authors pointed out that even some Japanese elites and journalists admitted what had happened in Port Arthur. In view of the disappointing behavior of both sides, the authors hoped both states never repeat their errors (He and Hu, 1994: 121–24). Foreign missionaries in China also participated in debates about the war. Young J. Allen, an American missionary in Shanghai, repeated the words of the Japanese and condemned China's open violation of international law. Of course, Japan's behavior demonstrated its higher level of "cultivation" (Lin, [1894] 1998: 328–29).

The historical record shows that none of the Chinese ministers in Western states realized the harmfulness of Japan's monopoly of the "civilization" discourse. During the entire course of the war, their greatest contribution was ordering munitions for the Qing court (Qi, 1989: 218, 269, 452, 661). In this period, almost no Chinese was capable of applying international law or using

European languages to express China's experiences and views to Europeans. From the perspective of military strength, the gap between the two countries was not large. For instance, the total tonnage of fleets on both sides was quite similar (Wu et al.: 1989: 205, 207). But from the perspective of international legal discourse, the gap was huge. Late Qing China before 1895 did not have higher education, not to mention law schools. It did not have any professional international lawyers (the chair of the "just law of all nations" in the Tongwen Guan was occupied by W. A. P. Martin, who had a doctorate in theology rather than law) nor did it produce any real international legal treatises, not even academic articles on international law. Thus, the First Sino-Japanese War was not only a contest of military strength, but also one of (international legal) discourse. In both fields, China failed. The difference between the two contests was that China was oblivious to the existence of the latter contest and lost the game in a thoroughly insensitive way.

The West: Evaluating Students

Japan: Earning a High Score

Japan obtained quick results from its efforts. In fact, during the war, Western observers and journalists were already sitting on decks of British warships watching the action on both sides of the war. That groups of so-called "Orientals" wore Western-style uniforms, held Western-style rifles, and fought with Western methods of warfare was itself interesting. Europeans had sold warships and munitions to the two countries, and now they wanted to see the actual performance of their products. Since both states were candidates for the "community of international law," this war was also a suitable occasion for testing their level of "civilization." The test unquestionably needed the participation of Europeans.

The test results were available immediately. Soon after the war, Professor Thomas E. Holland of Oxford University, who later wrote the preface to Takahashi Sakue's English treatise, gave a speech on international law during the war. At the beginning of his speech, he pointed out the profound effect of this "great war": "it has destroyed the reputation of one empire and made that of another." Even before the war, China and Japan had already behaved differently. The former had not been ready to assimilate "the ethical ideas of the West" nor to enter the network of treaties that "so much facilitates the social life of the world." China had neglected to accede to the Geneva Convention. Chinese courts and codes had had no pretension to "justify the Western powers in resigning . . . the extra-territorial privileges enjoyed in the empire by

foreigners." In all these respects, the Japanese had behaved completely differently. Thus, regarding the relationship of the two countries with the "family of nations," "Japan was admitted on probation, while China was only a candidate for admission" (Holland, 1895: 387).

Holland went on to analyze the details of the war from two perspectives, namely, the law between belligerents and the law between belligerents and neutral states. In his analysis, he admitted that:

> [a]t Port Arthur, for once, there is no doubt that the behavior of the Japanese was detestable. Much may be pardoned of what occurred when the stronghold was first entered by its assailants. If a certain number of non-uniformed coolies, or if soldiers who had thrown off their uniforms, received short shrift, when found with rifles in their hands, what was done was not without the sanction of recent European precedent. But unfortunately the Japanese, officers and men alike, were carried far beyond what could be excused even by their finding the mutilated remains of their tortured friends exposed on the gateway of the town. For four days, after the first, the massacre of non-combatants, of women, of children, was continued in cold blood, while European military attaches [sic] and special correspondents sickened at the wholesale murders and mutilations which they could do nothing to prevent. It is said that at last but thirty-six Chinamen were left alive in the city. They had been spared only to be employed in burying their dead fellow countrymen, and each was protected by a slip of paper fastened in his cap, with the inscription: "this man is not to be killed." (Holland, 1895: 388)

Yet this exception did not disturb Holland's evaluation of Japan. Japan's overall behavior was praiseworthy. Holland emphasized that Japan had not employed privateers, had not used explosive bullets forbidden by the Declaration of St. Petersburg (China had been accused of firing such bullets), had done its best to prohibit the enlistment of "those two-handed swordmen the 'Samur[a]i'" (although some of them had accompanied the troops in the guise of coolies), and had treated peaceful inhabitants and foreigners properly, and that the Japanese army had dismissed in safety most of the Chinese soldiers who had not resisted after combat and had given medical aid to wounded Chinese captives (Holland, 1895: 388). Holland's conclusion was that "Japan, apart from the lamentable outburst of savagery at Port Arthur, has conformed to the laws of war, both in her treatment of the enemy and in her relations to neutrals, in a manner worthy of the most civilized nations of Western Europe. China, on the other hand, has given no indication of her acceptance of the usages of civilized

warfare" (Holland, 1895: 389). In his view, China's behavior was much to be regretted, especially since it had translated and learned international law and had employed Dr. W. A. P. Martin to teach the subject. China failed to observe the law of war because "the Chinese have adopted only what I have already described as the rudimentary and inevitable conceptions of international law. They have shown themselves to be well versed in the ceremonial of embassy and the conduct of diplomacy. To a respect for the laws of war they have not yet attained" (Holland, 1895: 389). Holland's words meant that Japan, through its conduct in the war, had already passed the West's test, was labeled "civilized," and thus had formally entered international society. The Japanese government was excited by the speech, and distributed its Japanese translation to Japanese officers (Yamauchi, 1996: 12).

Japan got what it had wanted. In 1899, consular jurisdiction in Japanese territory was abolished. In 1902, Japan and Britain concluded a treaty of alliance, which meant that Japan began to take a more active part in international politics. The victory in the Russo-Japanese War (on Chinese soil) during 1904–1905 meant that Japan was able to rival the great powers and, indeed, to become one of them. In addition, it is worth mentioning that in 1908 Takahashi Sakue's new English treatise, *International Law Applied to the Russo-Japanese War*, was published (Takahashi, 1908).

China: Flunking Out

The other student in the class was compelled to play the role of "barbarian" assigned to it by international lawyers from both Japan and Europe. It was the fate of this "barbarous" country toward the end of the century to suffer more encroachment on its territory by the great powers, to be embroiled in conflicts increasingly caused by Westerners, and to be penetrated by Western capital protected by more and more privileges.

Thus the "barbarians" did what was truly barbarous. There is no need to describe in detail what happened in the summer of 1900 in North China. What is worth noting here is that the killing of diplomats and the siege of legations in Beijing compelled international lawyers to ponder more deeply issues like the nature of this race, its potential for achieving "civilization," and its ultimate position in international law.

Relevant discussions started in Germany, said to be the most affected victim in the event (its minister was killed by Chinese soldiers in a clash near the German legation in Beijing). One of the leading public lawyers in the German-speaking world, Georg Jellinek, took part in the debate. In October 1, 1900, he published an article, "China und das Völkerrecht" (China and International

Law), in *Deutsche Juristen-Zeitung*, which in the following year was translated into English and published in the *American Law Review*. According to Jellinek, the view that China had fully accepted international law was "an entirely unprovable assertion." The fact was rather that "it has never given up its haughty political pretentions and fictions: it still imagines itself the primary empire, and it still regards foreign nations, according to its official theory, as vassals and satellites" (Jellinek, 1901: 59).

Moreover, Jellinek pointed out, China had not involved itself in the "greatest development" of the law of war. China took part in the Hague Conference "only in a very inferior way," and "it naturally has not ratified these conclusions." Thus, "China is not even formally obligated to the civilized world in this respect" (Jellinek, 1901: 61). As a result, China excluded itself from the "community of international law."

"So, the great historical spectacle of the combat of the civilized world with the vast Oriental power is enacted without the pale of international law," Jellinek wrote in the concluding paragraph. Thus, "this combat is governed entirely by politics." But "humanity should be exercised," "not because China can demand it as a right, but because it keeps the nations, who feel themselves the upholders of civilization, from sullying themselves before the judgment of history" (Jellinek, 1901: 61–62).

British international lawyers quickly followed suit. While Lawrence in 1895 was still optimistic about the possibility of China entering the community of international law (Lawrence, 1895: 4–5), by 1901 he had changed his mind and concluded that China should be excluded from that community: only Turkey and Japan were qualified (Lawrence, 1901: 4). His reasoning was revealed in the following sentence from his *Handbook of Public International Law*: "The attacks upon them [diplomats] in China in the summer of 1900 were an outrage of the grossest kind" (Lawrence, 1901: 81). Until the 1900s, British scholars were still editing and revising Henry Wheaton's *Elements of International Law*. The reviser of the 1904 edition added a new section titled "International status of non-Christian nations" to the first chapter of Wheaton's book. China and Japan in particular were mentioned here. Japan's achievement and its international status were both incontrovertible. In contrast, China's willingness to join international society was highly questionable. Although it had attended the Hague Conference, "the gross contempt for the comity of nations shown by the assault on the Pekin Legations in the following year, and the murder of the German minister and the Chancellor of the Japanese Legation, have gone far towards depriving her of what credit and status she had acquired" (Wheaton, 1904: 22–24). In the end, in Oppenheim's *International Law*, the formal members

of the "family of nations" were listed: 1) "the old Christian States of Europe," 2) "Christian States which grew up outside Europe," 3) "the Turkish Empire," and 4) Japan. The international status of states like "Persia, Siam, China, Korea, Abyssinia" was "doubtful," because "their civilisation has not yet reached that condition which is necessary to enable their Governments and their population in every respect to understand and to carry out the command of the rules of International Law" (Oppenheim, 1905: 32–33).

Conclusion

"Civilization" was a crucial but vague area of nineteenth-century international law. International lawyers of the time accepted without thinking the civilization discourse then popular in historical philosophy, sociology, and anthropology. They considered the validity of this discourse so self-evident that they almost never mentioned Hegel, Spencer, or Maine in their notes. Since this "civilization" essentially did not belong to the legal field, however, these positivists were unable or even unwilling to define it in a legal and clear way. Thus, they created an embarrassing situation: on the one hand, to abolish consular jurisdiction, fixed tariffs, and most-favored-nation treatment, non-Western states had to achieve "civilization"; on the other hand, all of international society and most international lawyers could not give a specific answer to the question of how to achieve the "civilization" that was required by international law since there had never been a clear standard. This led to the result that the noble term "civilization," which was originally used to regulate international politics, in the end became a tool of the latter and an accomplice in the competition for international plunder in the nineteenth century.

Until 1914, when "European public law" was about to be destroyed by a great crash of the European balance of power, international lawyers and their non-Western students were still confused about the standard of civilization. When there was no specific standard, in order to obtain full membership in civilized international society, non-Western states had to take every measure to make themselves unassailable in every aspect of civilization. Such measures included but were not limited to the reform of laws and politics, the active conclusion of international conventions, the active participation in international organizations and conferences, the positive observance of the law of war, and the transformation of "national character" as well as the defeating of a "barbarous" empire. Note that these were not part of any standard of civilization given by Western international lawyers, but rather answer sheets submitted by non-Western candidates. One of the most brilliant students used the same

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vague discourse of civilization to write a history that covered up the suffering of neighboring nations brought about by war.

Since there were no effective supra-national governing bodies, international politics in the nineteenth century was essentially dominated by the *raison d'État* of each sovereign state. As Friedrich Meinecke pointed out, the reason of the state required the violation of even the laws made by the state itself—let alone any "divine law" or "natural law"—in the case of "necessity" (Meinecke, 1957: 128). Thus, in modern Western political thought and practice, there was an eternal conflict between the belief in legal or ethical rules and the fetishism of historical and political facts (Meinecke, 1957: 344). The reason of the state appeared in concrete situations that were usually related to wars and diplomatic events among specific countries, and consequently there was no formal, predictable rule to figure out a strategy. Instead, decisions had to be made with regard for concrete facts, goals, and experiences (see Schmitt, 1985: 5–35). Positivism in international law, which also appeared in the nineteenth century, was to some degree a faithful reflection of this power politics. It was due to this thoroughly positivist nature, however, that international lawyers, who attempted to remold power politics through the language of international law, in the end functioned as ideological decorations of power politics.

The political consequences of this power politics and its relevant academic discourse are revealed by the story told here. The reality of international politics in the nineteenth century was ruthless, yet the concept of civilization in international law, which was said to be able to regulate that ruthlessness, was vague. To a great extent, China was unable to understand the essence of the world it newly faced and was unable to understand the role of "civilization" in the international order. Japan grasped this essence surprisingly quickly, and found its own living space in the vagueness of "civilization." The understandings and practice of international law and politics of the two states clashed with each other in the First Sino-Japanese War. In a struggle which was essentially one of power politics, Japan made full use of the language of civilization to qualify itself as an equal member of the "community of international law," while China was in a doubly passive position (politically and linguistically) and remained an "uncivilized" state deprived of full sovereignty. Consular jurisdiction in China was not abolished until 1943. All these perspectives and observations compel us to consider the following questions which are related to both the past and the present: how can people today and in the future construct a universal international society which contains specific and common values and which does not deny the cultural diversity of various nations? In constructing such a society, how can we avoid a repeat of the past disasters and conflicts discussed in this article? Finally, what responses and contributions

can nation-states, statesmen, and intellectuals make to this construction? These are perhaps everlasting and unavoidable questions.

Notes

1 For the history of the concept, see Williams, 1985: 57–60; Elias, 2000: 5–44; Gong, 1984: 45–53; Bowden, 2004.
2 Modern international relations came into being in the twentieth century (see Thompson, 1996).

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