

Pär Cassel, Harvard University, pcassel@fas.harvard.edu.
Working draft: do not circulate or quote without the permission of the author.

Executing Extraterritoriality: Sino-Japanese Relations under the Treaty of Tianjin, 1871-95

Pär Cassel

Paper presented at the conference “Chinese Cities in Transition: The Next Generation of Urban Research: Part 4” in Shanghai, 7-9 July 2005.

On a Nagasaki street in 4 November 1881, following a drunken brawl over a woman and an unsettled debt, 34 year-old Chinese barber Wu A'er 吳阿二 cut down Furukawa Yoshimasa 古川吉正 with a knife. Wu quickly fled the scene, but he soon came to his senses and realized he had committed a serious mistake. Hoping to get a more lenient punishment, Wu decided to give himself up to the authorities.¹ The competent authority in this case was not the Nagasaki Police Department, but the Qing consul, Yu Xi 余璠. Having obtained a deposition from the repentant offender, Yu contacted the public prosecutor in the Nagasaki district court, Kawano Michitomo 河野通倫, and the two of them started to hear witnesses and collect evidence.²

Unlike many other episodes in the treaty port era, the Wu A'er Case has not made its way into the vast literature on extraterritoriality in China and Japan. If it were not for a passing mention in *Nihon gaikō bunsho* and some scattered records in the Diplomatic Records Office in Tokyo, we would know nothing of the case, which was adjudicated under the Sino-Japanese Treaty of Tianjin 1871. On the face of it, the Wu A'er case was just another extraterritorial case in the 1880s, and most scholarly treatments of the Treaty of Tianjin have tended to treat it as more or less derivative of the other treaties that China and Japan had concluded with Western countries.

An earlier version of this paper was presented at the Fifth Annual Harvard Graduate Student Conference on International History (ConIH), Cambridge, MA, 18 March 2005. I wish to thank Prof. Philip A. Kuhn, Prof. Andrew Gordon, Prof. Mark Elliott and Konrad Lawson for having read drafts of the paper and given valuable comments. Needless to say, the responsibility for the contents of the paper belongs to me.

¹ Wu A'er's deposition to Consul Yu Xi, 4 November 1881. *Gaimushō kiroku* (Diplomatic Records' Office of Japan) 4.25.135.

² Note from Yu to Kawano. *Kiroku* 4.25.135.

However, when the treaty is put under closer scrutiny we realize that the extraterritorial arrangements significantly differed from that of the other “unequal treaties.” First of all, both Chinese and Japanese enjoyed mutual extraterritorial privileges in each other’s countries. Moreover, the treaty laid down a number of restrictions on the practice of extraterritoriality. Mixed cases involving both Chinese and Japanese were to be prosecuted jointly by the consul and the local authorities. The extraterritorial privileges of Chinese and Japanese were largely limited to the treaty ports and local authorities had the right to kill offenders who absconded into the interior if they resisted arrest.³

The distinctiveness of this extraterritorial arrangement is much more significant than it might appear at first sight. If, as is often argued, extraterritoriality was a Western innovation, then we would expect the extraterritorial provisions in the treaty to be more or less identical to the unequal treaties, save for the reciprocity. However, the fact that the extraterritorial privileges under the 1871 Treaty are significantly different from those of other treaties prompts us to look for the context in which those differences are best understood.

³ For the official Chinese and Japanese texts of the treaty, see Kaijō Gijutsu Anzenkyoku, *Treaties and Conventions between the Empire of Japan and Other Powers*, revised edition, (Tokyo: Printed at the “Kokubunsha” Printing Office by order of the Foreign Office, 1889), pp. 77-86. For an unofficial translation of the treaty, see *Treaties, Conventions, etc., between China and Foreign States*, 2 edition (Shanghai: The Statistical Department of the Inspectorate General of Customs, 1917), vol. 2, p. 507-14.

Legal pluralism in Qing China and Meiji Japan

As I have argued elsewhere, there is an indigenous institutional genealogy of extraterritoriality in China.⁴ The conquering group of bannermen, the majority of whom were Manchus, lived far away from their ancestral homeland and in segregated areas which they were not allowed to leave without permission. Just like foreigners in the treaty ports, the Manchus were “resident aliens” and many of the Manchu garrisons were located in close proximity to the coastal cities which would subsequently become treaty ports.⁵ Although bannermen and their dependents in principle were subject to the same laws as Han Chinese and ultimately were under the same jurisdiction as the rest of the population, they could only be punished by banner authorities. Whenever a Han Chinese and a Manchu were involved in a “mixed” criminal suit (*jiaoshe anjian* 交涉案件), the case had to be tried by the local district magistrate and a “judicial sub-prefect” (*lishi tongzhi* 理事同知) in a joint trial (*huishen* 會審, *huixun* 會訊). The judicial sub-prefect was almost always a Manchu himself, and anecdotal evidence suggests that he tended to favor the Manchu party.⁶

When foreigners started to arrive in Guangzhou in the latter half of the 18th century, the number of legal cases involving foreigners increased accordingly. When a legal case involved foreigners only, Qing authorities did not concern themselves with the adjudication of the case, since it did not insist on exclusive jurisdiction within its territory.

⁴ Pär Cassel, “Excavating Extraterritoriality: The ‘Judicial Sub-Prefect’ as a Prototype for the Mixed Court in Shanghai,” *Late Imperial China* 24, no. 2 (Dec. 2003): 156-82.

⁵ Mark C. Elliott, *The Manchu Way: The Eight Banners and Ethnic Identity in Late Imperial China* (Stanford: Stanford University Press, 2001), p. 268ff.

⁶ Ding Yizhuang, “Qingdai lishi tongzhi kaolüe,” in *Qingzhu Wang Zhonghan xiansheng bashi shouchen xueshu lunwenji*, edited by Chang Jiang (Shenyang: Liaoning daxue chubanshe, 1993), pp. 263-74.

But whenever a Qing subject was the victim at the hands of foreigners, Qing officials claimed jurisdiction. Such claims were increasingly resented by British merchants, who abhorred Chinese penal practices, especially the doctrine of collective criminal responsibility.⁷ The conflict was only resolved after the first Opium War of 1839-42, when the Qing empire concluded a series of treaties with Britain and other foreign powers which seemed to place foreigners under the exclusive jurisdiction of national consuls. However, it became increasingly clear that Qing authorities did reserve the right to intervene in Sino-foreign mixed cases, basing themselves on their understanding of cases in which more than one jurisdiction was involved.⁸

The clearest manifestation of the Qing preference for joint trials was the fact that Qing officials readily cooperated with the British in setting up the Shanghai Mixed Court in May 1864 in order to try mixed cases where Chinese were defendants. Qing officials accepted foreign participation in the sentencing of Chinese who had committed crimes against foreigners, and the rules for the Mixed Court that they drew up with the British looked strikingly similar to the statutes regulating mixed trials between Manchus and Han Chinese. Moreover, the Qing official who was deputed to the Mixed Court was a sub-prefect, which strongly suggests that the above-mentioned judicial sub-prefect was used as a template for the Mixed Court in Shanghai. However, Qing officials also expected that the foreign consuls would reciprocate this concession by giving a Qing magistrate a share in the judgment of foreigners who had committed crimes against Chinese. Their

⁷ R. Randle Edwards, "Ch'ing Legal Jurisdiction over Foreigners," in *Essays on China's Legal Tradition*, edited by Jerome Alan Cohen, R. Randle Edwards and Fu-mei Chang Chen (Princeton, NJ: Princeton University Press, 1980), pp. 222-69.

⁸⁸ Thomas Wade to the Earl of Denby, 14 July 1877. Quoted in Anatol M. Kotenev, *Shanghai: Its Mixed Court and Council* (Shanghai: North-China Daily News & Herald, 1925; reprint, Buffalo, NY: Wm. S. Hein & Co., 1987), p. 81.

hopes were dashed, but the Mixed Court was accepted as a legitimate institution in the Qing legal order and it was not repudiated as such until after the Xinhai revolution in 1911.⁹

Japan also had a rich tradition of plural jurisdictions, but two major differences distinguished the Japanese from the Chinese experience in this regard. First, plural jurisdictions involved social groups rather than ethnic,¹⁰ and second, the Japanese had little experience of co-opting foreigners into their legal order.¹¹ The Tokugawa order was already being called into question before the first “unequal treaties” were concluded, and by the time China and Japan entered into treaty relations in 1871, a powerful momentum of reform and centralization ensured that Meiji statesmen would not be likely to look into Japan’s past to find models to accommodate demands for extraterritorial privileges. On the contrary, one of the first acts of the new government was to abolish the old “feudal” status system and to create a unified citizenry in which only nominal status distinctions existed. Clearly, there was no place for special privileges for foreigners in such a legal order. Furthermore, politically active Japanese quickly realized that domestic legal reform was not only a means to achieve the coveted objective of treaty revision; treaty revision could also be used as a lever to push for one’s political agenda. As one scholar has pointed out, treaty revision played an important part in the emergence of “mass politics” in early Meiji Japan.¹²

⁹ Cassel (2003), p. 174.

¹⁰ For more on how the status system worked in Japan, cf. Daniel V. Botsman, *Punishment and Power in the Making of Modern Japan* (Princeton, NJ: Princeton University Press, 2005).

¹¹ For more on the Japanese experience of dealing with foreigners, cf. for instance Derek Massarella, *A World Elsewhere: Europe’s Encounter with Japan in the Sixteenth and Seventeenth Centuries* (New Haven, CT: Yale University Press, 1990); James B. Lewis, *Frontier Contact between Chosōn Korea and Tokugawa Japan* (Richmond: Curzon, 2000).

¹² Akira Iriye, “Japan’s Drive to Great-Power Status,” in *The Cambridge History of Japan: The Nineteenth Century*, edited by Marius B. Jansen (Cambridge, UK: Cambridge University Press, 1989), p. 737ff.

In other words, an understanding of the dynamics of the domestic political and legal orders of China and Japan is imperative if one wants to fully understand the reception of extraterritoriality in the two countries. This might seem obvious, since extraterritoriality by its very definition is the projection of one national legal order into an alien environment. Nevertheless, most academic treatments of the topic have taken the domestic setting as a known quantity and dealt with extraterritoriality in China and Japan as a question of adaptation to modern international relations and international law.¹³ There is a great deal of value in such an approach, but analyzing it in this way makes China and Japan stand out as passive recipients of an international legal order. However, the fact that the Treaty of Tianjin 1871 was not concluded under coercion makes it an ideal setting to explore the contrast between how an emerging “modern” legal order and a more “traditional” order understood extraterritoriality, since both the Chinese and Japanese were free to formulate their own demands and did not just respond to outside stimuli. This paper is both a new narrative in the history of the treaty ports and an analysis of how these conflicting orders clashed.

The Treaty Port System and the Treaty of Tianjin 1871

When the first treaty ports were opened in Japan in the late 1850s, there was already a small Chinese community in Nagasaki.¹⁴ In the wake of the opening of Kobe and Yokohama, Chinese communities started to grow there as well. The Japanese, on the

¹³ Immanuel C. Y. Hsü, *China's Entrance into the Family of Nations: The Diplomatic Phase, 1858-1880* (Cambridge, MA: Harvard University Press, 1960); John Peter Stern, *The Japanese Interpretation of the "Laws of Nations," 1854-1874* (Princeton, NJ: Princeton University Press, 1979).

¹⁴ Nakamura Tadashi, “Sakoku jidai no zainichi Kakyō: Tōtsūji ni tsuite,” *Shigaku kenkyū*, no. 77-79 (1960): 493-505.

other hand, were slow to move into the Chinese treaty ports after restrictions on overseas travel were lifted in the 1860s. By 1876, only 45 Japanese lived in the International Settlement in Shanghai, compared to 1231 Chinese residents in Yokohama the same year.¹⁵

The legal status of Chinese in Japan and Japanese in China was ambiguous, since there existed no official treaty relations between the two countries. Moreover, both Chinese and Japanese authorities were initially reluctant to any responsibility over non-represented foreigners, so the first initiative to eliminate this ambiguity came from the foreign consuls. In 1864, the British consul Harry Parkes and the Qing circuit intendant agreed that the newly established Mixed Court in Shanghai would assume jurisdiction over non-represented foreigners in the Shanghai area.¹⁶ Similarly, three years later, when Parkes was the British Minister to Japan, he obtained an agreement from the *Bakufu* that “The Governor of Kanagawa [*Kanagawa bugyō* 神奈川奉行], acting with [...] such advice as he may obtain from Foreign Consuls will exercise jurisdiction – both criminal and civil – over the subjects of China...”¹⁷ Similar agreements were soon reached in the other treaty ports.

Some Japanese officials did not want to wait for the problem of jurisdiction to solve itself and lobbied the *Bakufu* to investigate direct links with China in the interest of

¹⁵ Zhu Rong, “Shanghai kyoryū Nihonjin shakai to Yokohama Kakyō shakai no hikaku kenkyū,” in *Yokohama to Shanghai: Kindai toshi keiseishi hikaku kenkyū* (Yokohama: Yokohama kaikō shiryō fukyū kyōkai, 1995), p. 402f.

¹⁶ Kotenev (1925), p. 61f.

¹⁷ Hayashi Shōzō and Ishii Ryōsuke, eds., *Hōki bunrui taizen* (Tōkyō: Naikaku Kirokukyoku, 1891-94; reprint, Tōkyō: Hara Shōbō, 1988), vol. 25, p. 84. See also Usui Katsumi, “Yokohama kyoryūchi no Chūgokujin,” in *Yokohama-shi shi*, (Yokohama: Yokohama-shi, 1963), p. 861f. Tabohashi Kiyoshi, “Nisshin shin kankei no seiritsu,” *Shigaku zasshi* 44, no. 2 (February 1933), p. 165.

trade.¹⁸ The first attempt to open negotiations was made as early as 1862, when the newly purchased ship *Senzaimaru* 千歳丸 sailed to Shanghai, carrying Japanese businessmen and officials. The representative of the Shogunate, Numa Heirokurō 沼間平六郎, met the Shanghai grain intendant Wu Xu 吳煦 and asked to open a Japanese consulate.¹⁹ Qing authorities did not want to commit themselves to any written agreement and Numa returned to Japan without a treaty. The governor of Nagasaki made another two attempts in 1864 and 1868, but local Qing authorities were only prepared to accept the status quo, allowing Japanese to trade in the open ports just like other non-represented foreigners, stopping short of entering into any kind of permanent arrangement.²⁰ Clearly, the old strategy of trying to open diplomatic relations by negotiations at the local level did not work because of the limited mandate of local officials to devise new policies.²¹

The establishment of the Meiji régime provided an opportunity to address the problem at a national level. In September 1870, the Japanese government dispatched the twenty year-old court noble Yanagihara Sakimitsu 柳原前光 (1850-94) to China to broach the idea of formal treaty relations. The Qing foreign office, the Zongli yamen 總理衙門, initially rebuffed his request, but Yanagihara managed to persuade the Yamen that it was in the best interest of both China and Japan to conclude a treaty without Western involvement. Yanagihara reached an agreement with the Zongli yamen that a Japanese mission would arrive the following year with full powers to negotiate a treaty of

¹⁸ Joshua A. Fogel, "The Voyage of the *Senzaimaru* to Shanghai: Early Sino-Japanese Contacts in the Modern Era," in *The Cultural Dimension of Sino-Japanese Relations: Essays on the Nineteenth and Twentieth Centuries* (Armonk, NY: M.E. Sharpe, 1995), p. 83.

¹⁹ Chow Jen Hwa, *China and Japan: The History of Chinese Diplomatic Missions in Japan, 1877-1911* (Singapore: Chopmen Enterprises, 1975), pp. 23-30. The trip of *Senzaimaru* is more known for Takasugi Shinsaku's travelogue. Cf. Fogel (1995).

²⁰ Chow (1975).

²¹ Wang (1981), p. 9f.

amity and commerce. Completely on his own initiative, he also left a draft treaty, which was modeled on treaties that Japan and China had concluded with the United States, Britain, France, Russia and Prussia.²²

Pending the arrival of the next Japanese mission, leading Qing statesmen started to memorialize the throne, debating the utility of concluding a treaty with Japan. The governor of Anhui, Ying-han 英翰, led the charge against a treaty. First of all, Ying-han suspected that the timing of the Japanese démarche suggested that the Tokyo government was trying to profit from the recent diplomatic crisis following the murder of French missionaries in Tianjin. Furthermore, Ying-han feared that concluding a treaty with Japan would threaten the Sinocentric tributary hierarchy in East Asia and upset relations with Korea.²³

The governor-general of Jiangsu and Anhui, Zeng Guofan 曾國藩 (1811-72), and the governor-general of Zhili, Li Hongzhang 李鴻章 (1823-1901), responded forcefully to the resistance of more conservative officials. In his memorial to the throne, Li pointed out that in contrast to Liuqiu, Annam and Korea, Japan had not maintained tributary relations with China for centuries. It would be futile to postpone a treaty until the Japanese would demand one with force or in alliance with the Western powers.²⁴ On his part, Zeng pointed out that in contrast to the small number of Chinese going to the West (*Taixi* 泰西) Japan had a large Chinese community. Therefore, he saw no objections to following

²² Fujimura Michio, “Meiji shonen ni okeru Ajiya seisaku no shūsei to Chūgoku: Nisshin shūkō jōki sōan no kentō,” *Nagoya daigaku bungakubu kenkyū ronshū* 44: *Shigaku*, no. 15 (1967), pp. 10-13. Wang Xi, *Li Hongzhang yu Zhong-Ri dingyue, 1871* (Taipei: Zhongyang yanjiuyuan jindaishi yanjiusuo, 1981), p. 57.

²³ Baoyun, ed., *Chouban yiwu shimo - Tongzhi chao (YWSM-TZ)* (Beiping: Beiping bowuyuan, 1923; reprint, Taipei: Guofeng chubanshe, 1965) 79:4-8. Cf. Chow (1980), p. 36f. As conservative as Ying-han may have been, he was apparently right in fearing that Korea would interpret a treaty with Japan as a sign of weakness. Cf. Martina Deuchler, *Confucian Gentlemen and Barbarian Envoys: The Opening of Korea, 1875 -1885* (Seattle: University of Washington Press, 1977), p. 14f.

²⁴ *YWSM-TZ* 79:47-48.

Western precedent and sending consuls to Japan, where they would “restrain” (*yueshu* 約束) the Chinese community and set up mixed courts (*huixunju* 會訊局) to adjudicate mixed cases.²⁵ Confident that Chinese punishments were the only adequate way of maintaining order in the Chinese community, and well aware that the very same punishments were the object of foreign criticism, he suggested that serious offenders be repatriated to China for punishment in order to avoid derision from foreigners. He also expressed himself in favor of a fixed tariff, but he strongly suggested that a treaty should not contain any most-favored-nation arrangement (*yiti junzhan* 一體均霑), which would allow Japan to share the same privileges as the other treaty powers.²⁶ By advocating a treaty without a most-favored-nation clause, Zeng clearly intended to disentangle the Sino-Japanese Treaty from the cobweb of treaties that both China and Japan had concluded with the Western powers. More importantly, the lack of a most-favored-nation arrangement would also mean that the Japanese would not be able to claim unilateral extraterritorially by invoking that principle.²⁷

Li and Zeng’s suggestions were approved by the throne, and two of Li’s lieutenants, Ying Baoshi 應寶時 and Chen Qin 陳欽, were commissioned to carry out preparations for a formal treaty with Japan. Ying made research into the treaties that Japan had concluded with the United States, Britain, France and the Netherlands. Among other things, he noted that the Japanese treaties were stricter than the Chinese as regards

²⁵ Tsiang T’ing-fu and many other scholars after him has translated *huixunju* as “consular courts,” instead of mixed court. Tsiang, T’ing-fu (Jiang Tingfu), “Sino-Japanese Diplomatic Relations, 1870-94,” *Chinese Social and Political Science Review* 17, no. 1 (April 1933), p. 7. If consular courts were what Zeng had in mind, he would have most likely used the well-established terms *lingshi yamen* 領事衙門 or *lingshi gongtang* 領事公堂.

²⁶ *YWSM-TZ*, 80:9-13.

²⁷ The French jurist Georges Soulié de Morant has given one of the most exhaustive treatments on the question to what extent extraterritoriality could be changed by most-favored-nation treatment. Soulié de Morant, Georges. *Exterritorialité et intérêts étrangers en Chine* (Paris: Paul Geuthner, 1925), p. 33ff.

the right to travel to the interior of the country. Thus it was concluded that on the basis of reciprocity, China should not grant Japanese the right to travel to the interior.²⁸

Meanwhile, Chen started to integrate the above suggestion into the treaty. The Yanagihara draft provided for extraterritorial privileges for Japanese citizens, but was vague regarding the rights of Qing subjects, something that was clearly not acceptable for the Qing government. Chen changed this to make the treaty to conform to the Qing understanding of extraterritorial jurisdiction: extraterritoriality should be granted mutually and mixed cases were to be tried jointly by the consul and local official. Crimes committed in the interior could in certain cases be dealt with by local authorities alone, without the interference of the consul. In other words, in contrast to the extraterritorial privileges that were defined by the “unequal treaties,” the extraterritorial immunities granted under the 1871 Treaty had a *territorial* dimension: it was not only the nationality of the person committing a crime which determined jurisdiction, but also where a crime was committed..²⁹

Chen also suggested that the Consuls not be called *lingshi/ryōji* 領事 as they were in the Japanese drafts, but *lishiguan* 理事官, or simply *lishi* 理事. The reason for this was twofold. First of all, Chen noted that the local Japanese official (*difangguan* 地方官) who would be the counterpart of the consul did not have the rank of a “circuit intendant” (*daotai* 道臺), but that of “prefect” (*zhifu* 知府) or lower. In China, the local counterpart of a foreign consul was usually a circuit intendant. The failure of the Japanese to comply

²⁸ Tsiang (1933), p. 8f.

²⁹ It is true that some of the first treaties, such as the Sino-American (3 July 1844) and Sino-French (24 October 1844) treaties appeared to restrict consular jurisdiction to the five treaty ports. However, all such ambiguities had been carefully excised from the treaties that were concluded after the second Opium War 1856-60.

with this norm would be demeaning for the Qing consul, which is why Chen suggested that the consuls be given the rank of a prefect. Secondly, by giving the Qing consul a different name, Chen wanted to make a clear departure from the treaties that had been concluded with the West and break new ground (*biekai shengmian* 別開生面).³⁰ Firmly placing them within the Qing institutional order, the Qing consulates would be called *lishi fu* 理事府 in official communications from the consulates.³¹

From the above, it is evident that some of Chen's suggestions were based on a superficial understanding of the new Japanese administrative system, which was being introduced in Japan at the time and would culminate in the summer of 1871. The administrative units that went under the Sino-Japanese terms for "prefecture" (*fu* 府) or "district" (*ken* 縣) in Japan were much larger in terms of population than their Chinese counterparts. Nevertheless, his suggestions show how inclined Qing officials were to think in term of terminological equivalence.³² By advocating the term *lishiguan* for the Qing consul, Chen also established a direct link to other Qing institutions for the adjudication of interethnic disputes such as the Mixed Court in Shanghai, which was initially called *lishi yamen* 理事衙門, and the judicial sub-prefect (*lishi tongzhi*), which was often referred to as *lishi ting* 理事廳 or *lishi fenfu* 理事分府. Ying Baoshi and Zeng Guofan improved on Chen's draft and in April 1871, Ying was able to present a draft treaty to the *Zongli yamen*.³³

³⁰ Wang (1981), p. 59-60.

³¹ Note from Qing consul in Yokohama, *Kiroku* 7.1.8.6

³² For a more exhaustive discussion on the significance of equivalence, which differs in some respects from my own, cf. Lydia Liu, "Legislating the Universal: The Circulation of International Law in the Nineteenth Century," in *Tokens of Exchange: The Problem of Translation in Global Circulations*, edited by Lydia Liu (Durham, NC: Duke University Press, 1999), p. 152f.

³³ Wang (1981), p. 87f.

Unbeknownst to the Chinese, who had taken the Yanagihara draft as an expression of official Japanese policy, Yanagihara had acted on his own initiative and had no authority to present any draft.³⁴ In preparation for the fully accredited mission to China, the Japanese government chose to commission the Western-trained jurist Tsuda Mamichi 津田真道 (1829-1903) to draw up an official draft treaty. Tsuda was personally committed to both Japanese domestic legal reform and treaty revision with the West, but he had no moral qualms about drafting an unequal treaty with the Qing government, which many reformists like him regarded as beyond the pale of modern civilization. Tsuda drew up a draft based on the Chinese treaty with the Kingdom of Prussia, even more unequal than the apocryphal draft that the Chinese had spent a year revising. This would have put Japan on a par with other Western nations in its relations with China. In contrast to the Chinese arrangements with territorially limited, mutual extraterritorial rights and mixed courts, the Japanese asked for extraterritorial arrangements that were modeled on Western treaties.³⁵

This was the draft the fully accredited Japanese envoy Date Munenari 伊達宗城 (1818-92) presented when he arrived in Tianjin in September 1871 to negotiate a treaty. Not surprisingly, when the Qing negotiators learned about the new Japanese draft, they became very upset. Ying and Chen informed the Japanese delegation:

When you sent your draft to us last year, we found several clauses unsatisfactory, but the rest of it was acceptable. Now your side has come forward with an entirely

³⁴ Tabohashi (1933), p. 170.

³⁵ Fujimura (1967), pp. 16-21.

different draft and wants to discard the earlier one. Your conduct amounts to a breach of faith even before signing a treaty!³⁶

Much to the dismay of the Japanese delegation, Ying and Chen produced their own draft and the Japanese were in effect given an ultimatum by the Qing delegation that it would be the Qing draft or no treaty at all. Date, who was a former daimyo and had little experience in diplomacy, felt that he had no other choice than to give in to the demands of the Qing delegation.³⁷ On 13 September 1871, the treaty was signed. The news of the treaty led to a minor diplomatic scandal when the delegation returned to Japan and Date Munenari was threatened with impeachment for having “exceeded his authority” (*ekken* 越權).³⁸ However, the scandal receded after a while, and henceforth the Japanese would call the treaty “a temporary treaty” (*kari jōyaku* 假條約) in order to show that they intended to revise it just like the intended to revise the treaties with the West.³⁹

Although the treaty itself has been the subject of a number of monographs over the years,⁴⁰ both Chinese and Japanese standard works are curiously silent on the 1871-96 period in Sino-Japanese relations in general and the actual application of the treaty in particular.⁴¹ One can safely say that the episode has receded into oblivion in diplomatic history. The only group of scholars that has produced works of any length on the topic

³⁶ The translation is taken from Key-hiuk Kim, *The Last Phase of the East Asian World Order: Korea, Japan, and the Chinese Empire, 1860-1882* (Berkeley, CA: University of California Press, 1980), p. 148.

³⁷ Fujimura (1967), p. 22.

³⁸ Fujimura (1967), p. 24.

³⁹ See for instance, *Shinbun shūsei Meiji hennen shi*, vol. 2, p. 90.

⁴⁰ Evidently occasioned by the publication of the *Chouban yiwu shimo*, Tabohashi Kiyoshi (February-March 1933) and Tsiang T'ing-fu (April 1933) published the two first full-length articles on the treaty. Fujimura Michio (1967) and Wang Xi (1981) have written the best monographs on the drafting of the treaties, drawing on newly available archival material. Chow Jen Hwa (1975) and Kim Key-hiuk (1980) have also written to seminal works that touch on the treaties.

⁴¹ Cf. for instance Inō Tentarō, *Higashi Ajia ni okeru fubyōdō jōyaku taisei to kindai Nihon* (Tōkyō: Iwata Shoin, 1995).

are Japanese local historians and scholars studying the overseas Chinese.⁴² The failure to integrate the history of 1871-95 Sino-Japanese relations into a larger framework is all the more curious, given the fact that the Chinese community constituted roughly half of the foreign population in the treaty ports in Japan prior to 1895.⁴³ Consequently, the extraterritorial privileges of the Chinese community arguably meant more in everyday life than the extraterritorial privileges of other foreigners.

Implementing the Treaty

As the Japanese community in China remained insignificant during the first decades under the treaty port system, most of the daily interaction between Chinese and Japanese took place in the Japanese treaty ports. The Japanese had an ambiguous relationship to their Chinese guests. Traditional Chinese culture still enjoyed high prestige in Japan and many Chinese held a powerful economic position in Japan. As one scholar has pointed out, “Chinese merchants enjoyed an almost exclusive monopoly in Japan’s trade with China.”⁴⁴ On the other hand, China’s treatment at the hands of the treaty powers was well known and many Japanese looked down on ordinary Chinese, who they regarded as “rude, villainous and outrageous” (*futudoki* 不屈, *murai* 無頼,

⁴² Usui (1963); Chen Laixing, “Tei Kōsho nikki ni miru Chūka kaikan sōkenki no Kōbe kakkyō shakai,” *Jinbun ronshū* 32, no. 2 (1996): 1-25 and Noriko Kamachi, “The Chinese in Meiji Japan: Their Interactions with the Japanese before the Sino-Japanese War,” in *The Chinese and the Japanese: Essays in Political and Cultural Interactions*, edited by Akira Iriye (Princeton, NJ: Princeton University Press, 1980): 58-73; Hishitani Takehira, *Nagasaki gaikokujin kyoryūchi no kenkyū* (Fukuoka: Kyūshū Daigaku Shuppankai, 1988).

⁴³ James E. Hoare, *Japan’s Treaty Ports and Foreign Settlements: The Uninvited Guests, 1858-1899* (Folkestone, Kent: Japan Library, 1994), pp. 20-23.

⁴⁴ Kamachi (1980), p. 66.

muhō 無法).⁴⁵ The Chinese community in Japan, for their part, often complained of overzealous policemen who harassed them, and some Chinese merchants appealed directly to the Qing government to send consuls to protect them.⁴⁶

The fledgling Meiji régime was quick to take over the *Bakufu*'s jurisdiction over the Chinese community and one of its first acts in 1868 was to introduce a system of "alien registration."⁴⁷ Consequently, when the Treaty of Tianjin was concluded in 1871, the projected net effect would be different in the two countries. In China, it meant that the jurisdiction over a numerically insignificant group of foreigners, which mainly resided in Shanghai, would be transferred from the Mixed Court to consuls from their own country. In Japan, on the other hand, the Treaty represented a retrograde step as regards the jurisdiction over significant portion of its foreign residents.

However, the change was not immediate, since the Qing government was slow in appointing consuls to Japan. Article IX in the Treaty of Tianjin did anticipate a situation without consuls and stipulated that local authorities were entitled to exercise jurisdiction over Chinese or Japanese sojourners in the absence of consuls. Therefore, the conclusion of the treaty initially brought about few real changes. The first test to this temporary arrangement curiously coincided with the conclusion of the Treaty of Tianjin and became a touchstone of Sino-Japanese relations. In 1870, a Chinese called Zhu Xi 竹溪 was arrested together with four Japanese accomplices for forging Japanese money. Since China and Japan were involved in negotiating a treaty, Japanese authorities felt that the best course of action would be to resolve the case at a political level and Yanagihara

⁴⁵ Hishitani, (1988), p. 285.

⁴⁶ Li Hongzhang, "Lun Qian'guan zhu Riben," 24 September 1875, in *Li Wenzhong Gong quanji*, edited by Wu Rulun (1905; reprint, [Haikou:] Hainan chubanshe, 1997), vol. 6, pp. 3010-11.

⁴⁷ Kamachi (1980), p. 61.

Sakimitsu managed to obtain an agreement from the Qing government that Zhu be executed for forgery – the usual punishment in both China and Japan.⁴⁸

The Japanese government sent its first regular envoy to the Qing imperial capital as early as 1873 to ratify the treaty and in November the same year it appointed its first regular minister to Beijing, Yamada Akiyoshi 山田顯義 (1844-92).⁴⁹ A number of events distracted the Qing government from sending envoys and consuls abroad: the Taiwan incident 1874, the demise of Tongzhi emperor and the accession of the Guangxu emperor.⁵⁰ The Japanese government was more than happy to comply with this state of affairs, since that meant that the Japanese authorities could continue to administer Chinese in Japan. The 1876 Margary incident eventually prompted the Qing government to send envoys and consuls abroad, including Japan.⁵¹ The Japanese government tried to persuade the Qing government to further delay the dispatch of consuls, but when they eventually were sent, Japanese authorities accepted their credentials.⁵²

In January 1878, Qing minister He Ruzhang 何如璋 and his deputy Zhang Sigui 張斯桂 announced their arrival to Japan in a *note verbale* to the Japanese foreign minister Terajima Munenori 寺島宗則 (1833-93). They thanked the Japanese government for administering Chinese merchants and announced that Fan Ximing 范錫明 would be sent to Yokohama shortly to assume jurisdiction over Qing subjects there as consul. Pending the appointment of Qing officials to Kobe, Nagasaki, Hakodate and Osaka, Chinese

⁴⁸ Usui (1963), pp. 869-78.

⁴⁹ Gaimushō Gaikō Shiryōkan, *Nihon gaikōshi jiten*, New edition (Tōkyō: Yamakawa shuppansha, 1992), p. 75.

⁵⁰ Douglas R. Howland, *Borders of Chinese Civilization: Geography and History at Empire's End, Asia-Pacific* (Durham, NC: Duke University Press, 1996), p. 41.

⁵¹ Hsü (1960), p. 176ff.

⁵² Chow, p. 48.

merchants residing in these ports would still be subject to Japanese authorities, in accordance with Article IX in the Treaty.⁵³

In the following years, Qing consuls were dispatched to the other treaty ports to assume their duties and Qing consular jurisdiction in Japan started to work in earnest. The curious appellation of *lishiguan* caused some confusion among Japanese authorities, and the central government in Tokyo had to send a clarification stating that for all practical purposes the Qing officials were to be considered as consuls.⁵⁴ The Qing consul was both a magistrate and a community leader who mediated between different groups. Anecdotal evidence suggests that the Qing consuls preferred that the Chinese community solved its own problems and only exercised his consular authority in purely Chinese cases when they could not be settled out of court.⁵⁵ A further extension of the Qing order into Japan is evidenced by the fact that many headmen of the Chinese guilds were given nominal civil service ranks.⁵⁶

The relationship between Chinese and Japanese was mainly peaceful. Judging from the correspondence between the Qing consul and the Nagasaki prefect covering a ten-year period, there were very few cases of violent crime involving Chinese and Japanese. Most of the cases deal with opium, tax evasion, land transactions and illegal adoption. Westerners, such as Russians and Americans, were involved in violent crime to a larger extent than Chinese.⁵⁷

⁵³ He Ruzhang and Zhang Sigui to Terajima Nunenori, 14 January 1878. *Kiroku* 4.1.1.14.

⁵⁴ National Archives of Japan, 2A.033.09.

⁵⁵ Chen (1996), p. 24.

⁵⁶ Memorial from Qing legation, 2 February 1888, *LFZZ*, 3-164-7744-69 (microfilm reel 578)

⁵⁷ *Kiroku*, 7.1.8.4, vols. 1-5.

The Nagasaki Incidents

Homicide cases furnish the ultimate test of any extraterritorial régime. In the treaty port of Nagasaki, the usually explosive blend of sex, drugs and money produced a number of incidents that would bring out different interpretations of the Treaty. The first major test of the Sino-Japanese extraterritorial régime came in November 1881, when Wu A'er was charged with the murder of Furukawa Yoshimasa. The wife of the newly married victim, Komine Suzu 小嶺鈴, had been the concubine of Wu for some time. Having learned that she had had an affair with Furukawa, Wu had however dismissed her in the summer of that year. In mid-October, Komine had told Wu that she was no longer seeing Furukawa and she asked Wu to lend her some money to support her sick mother, with which Wu reportedly complied. On 4 November, Wu had learnt that Furukawa and Komine were holding a wedding party in Nagasaki. Feeling humiliated by what he saw as a breach of trust, Wu decided to take Komine to task for her behavior.⁵⁸ Needless to say, the reports of what actually happened when Wu arrived at Furukawa's house diverge, but since Wu admitted to having killed Furukawa, the major question was to decide to what extent this was a premeditated act. Supported by relatives of the victim, the Japanese prosecutor tried to make the case that the perpetrator should be charged with willful murder, since he himself had brought the lethal weapon – a knife – to the crime scene.⁵⁹ The Qing consul, on the other hand, chose to act on the fact that Wu had given himself up directly and that he confessed his crime without making any excuses. In his writ to the authorities on the Chinese mainland, he recommended that Wu be given a suspended

⁵⁸ Wu's deposition, 4 November 1881. *Kiroku* 4.25.135.

⁵⁹ Kawano to Yu, November 1881. *Kiroku* 4.25.135.

death sentence which would be converted to 100 strokes with the cane after which Wu would be exiled from his native village by 3000 *li*.⁶⁰ There are no records of any official Japanese protest against this verdict, but given the fact that the Japanese authorities had tried to indict Wu for intentional homicide, it is safe to assume that they were not pleased when he was sent to the Chinese mainland on 11 August 1883.⁶¹

Opium was one of the main sources of conflict between Japanese authorities and the Chinese community. Ever since the Japanese had been alerted to the evils of opium in the war of 1839-42, the drug remained a symbol of Chinese submission to Western imperialism. When the US envoy Townsend Harris negotiated a treaty with Japan in the late 1850s, he pointedly suggested the prohibition of opium in the 1858 treaty, and other nations followed suit. The Japanese authorities had worked out regulations with other treaty powers and they wanted to apply the rules to Qing subjects as well. One of the first things that the Japanese government raised with the Qing minister in Japan was the question of opium. The Qing minister had no objection in principle but argued that the Qing commissioner should be in charge of arresting offenders.⁶² The Japanese authorities went ahead with the rules without formal approval from the Qing minister and the fact that he never protested the move was widely interpreted as tacit consent.⁶³ All these ambiguities were brought to the open less than a month after Wu A'er had departed for China.

⁶⁰ Legal brief by Yu, 19 September 1882. *Kiroku* 4.2.5.135.

⁶¹ Telegram from foreign minister Inoue Kaoru to consul Kawakami Kin'ichi, sent 2 May 1887. "Zaigai hōjin hogo zakken," in *Dai Nihon Gaikō Bunsho (GKBS)* edited by Gaimushō chōsabu (Tōkyō: Nihon Kokusai Kyōkai, 1947), vol. 20, p. 468.

⁶² "Nisshin shūkō jōki tsūshō shōtei kaisei ni kan-suru ken," *GKBS* (1950), vol. 11, pp. 262-67.

⁶³ "The Late Affair in Nagasaki," *Japan Weekly Mail*, 29 September 1883, p. 528.

Perhaps as an expression of their dissatisfaction with the inadequate punishment of Wu, the Nagasaki Police Department decided to increase its police surveillance over the opium smoking of Chinese in Nagasaki. On the evening of 15 September 1883, plainclothes Japanese policeman Mine Susumu 峯進 and four constables entered a Chinese house in the foreign settlement to carry out an opium raid. When they entered the house they found two men smoking opium, but when the policemen tried to arrest them, they resisted on the ground that Japanese police had no legal right to enter a private Chinese residence without the assistance of the Qing consul. A fight then broke out between Japanese police and the Chinese residents in the area. Several Chinese were injured and one Chinese teenager, Wei Yi'ao 魏亦鰲, was allegedly slain by Mine Susumu in the mêlée. He was found outside the house by a Dr. Renwick and died later in the international hospital.⁶⁴

From the Chinese point of view, the whole incident was the result of legitimate resistance to an illegal arrest. As they saw it, the treaty placed Chinese under joint jurisdiction of both Chinese and Japanese authorities. The Chinese community was infuriated by this act of police brutality and the two headmen of the Fujian Guild (*Bamin dongshi* 八閩董事) petitioned the acting consul in Nagasaki, Guo Wanjun 郭萬俊, to prosecute the case. Wei was not even an opium addict; he had only been at the wrong place at the wrong time, they claimed.⁶⁵ Under strong pressure from the Chinese community, Guo showed remarkable zeal in making his own inquest into the case. He presented a full coroner's report with witnesses, which was forwarded to the Nagasaki

⁶⁴“The Late Affair in Nagasaki,” p. 528f.

⁶⁵ Petition from Fujian Guild to Guo Wanjun, 16 September 1883. *Kiroku*, 4.2.5.83.

authorities.⁶⁶ True to the Qing preference for joint procedures, a request for police assistance was presented, and the Qing minister protested the action of the Japanese policeman to the foreign ministry.

From the Japanese point of view, this was a question of enforcing law and order. True to an aspiring nation state, everything that happened within the territorial limits of its jurisdiction was of interest. Mine had acted in legitimate self-defense when carrying out his duties as a police officer. Consequently, the Japanese authorities were not particularly interested in cooperating with the Qing consul in the inquest.⁶⁷ On the other hand, they promptly asked foreign expertise for legal help. The French jurist Gustave Émile Boissonade (1825-1910) held that “foreigners in Japan who enjoy the privilege of extraterritoriality cannot claim to be more privileged than foreign ministers.”⁶⁸ The young American lawyer Henry Willard Denison (1846-1914) also wrote two reports in which he endorsed the actions of the Nagasaki police.⁶⁹

From the point of view of international law, the opinion of the two experts evidently made a lot of sense. The Qing diplomats were not denying that smoking opium was illegal for Qing subjects; they were only denying the right of Japanese police to enter Chinese homes at will. Police harassment was an urgent concern for many Chinese and extraterritorial privileges were regarded as protecting the legal integrity of Chinese in Nagasaki. Consequently, we find we find very little reference to international law in the Chinese documents. For the Qing consul and the Chinese community in Nagasaki, it was only a question of strict application of the treaty; any measure taken against Chinese

⁶⁶ Note from Guo to Nagasaki public prosecutor, with attachment. 20 September 1883. *Kiroku*, 4.2.5.83.

⁶⁷ Pou Lin Sing, “The Nagasaki Affair,” *Japan Weekly Mail*, 27 October 1883, p. 625.

⁶⁸ Opinion from Boissonade, 4 October 1883. *Kiroku* 4.2.5.83. The translation from the French is my own.

⁶⁹ Opinions from Denison, 8 October and 15 November 1883. *Kiroku* 4.2.5.83.

should be carried out jointly by Chinese and Japanese police. Disappointed with the way the “Nagasaki Affair” had been portrayed in a Yokohama newspaper, a member of the Chinese community in Nagasaki tried to bring home the point that the procedures laid down the treaty were essentially Chinese:

It is a pity that the Editor of the *Weekly Mail* was not aware before, that Mr. Koh [Guo Wanjun] is a Chinese official, and as a necessity, the inquest *should be conducted* entirely in the Chinese fashion.⁷⁰

As experts in international law, Denison and Boissonade were not particularly interested in the Chinese aspects of the treaty. In due course, however, other foreign observers became aware of the complexities of the Sino-Japanese Treaty and realized that it gave Chinese a different status than other foreigners in Japan. *The Japan Weekly Mail* noted in an article that:

...it has been openly stated, indeed the public generally appears to be persuaded, that the status of Chinese subjects living in Japan is exactly the same as that of all other foreigners. The treaty between China and Japan does not justify any such hypothesis. [...] Plainly this treaty places the Chinese in a position very different from that occupied by other nationals in Japan. The jurisdiction of the high contracting parties is concurrent, and in certain contingencies that of Japan alone is competent.⁷¹

⁷⁰ “The Nagasaki Affair,” p. 625. Emphasis in original.

⁷¹ “The Status of Chinese in Japan,” *Japan Weekly Mail* (27 October 1883), 623f.

While the debate was going on, the policeman was brought to justice and he was subsequently sentenced to five years imprisonment and an indemnity of \$4000 was paid to the relatives of the deceased. However, Mine only served two years in prison and was released on parole in 1886 because of his reportedly exemplary conduct in prison.⁷² This was protested by the Qing Minister in Tokyo, Xu Chengzu 徐承祖, who said that the matter should have been reported directly to the Qing Legation in Tokyo before any action was taken.⁷³ The foreign minister, Inoue Kaoru 井上馨, only responded that he had nothing to do with the matter and that the prison authorities had acted in due process.⁷⁴ The most lasting legacy of the incident was a further souring of relations between the Japanese authorities and the Chinese community. One Chinese newspaper in Shanghai claimed that the early release of Mine encouraged Nagasaki policemen to act even more outrageously.⁷⁵

In August 1886, frictions in Nagasaki mounted to a crescendo when four warships in the flotilla of Ding Ruchang 丁汝昌 made a stop in Nagasaki harbor on their way home from a visit in Vladivostok. Qing sailors were allowed to land in Nagasaki. On the evening of 13 August, an argument in a brothel between the owner and five Chinese sailors escalated to a violent confrontation between the Nagasaki police and liberty men two days later, which left two Japanese policemen and eight Chinese sailors dead, and several more wounded.⁷⁶ Both Japanese and Qing authorities were quick to blame the incident on each other and for a brief moment it looked as if the conflict would escalate

⁷² Note from foreign minister Inoue Kaoru to Qing minister Xu Chengzu, 3 March 1883.

⁷³ Xu to Inoue, 1 March 1883. *Kiroku* 4.2.5.83.

⁷⁴ Inoue to Xu, 3 March 1883. *Kiroku* 4.2.5.83.

⁷⁵ *Shenbao*, 25 August 1886. *Kiroku* 4.2.5.83.

⁷⁶ Kamachi (1980), pp. 69-71.

into a war between China and Japan. After mediation at the highest diplomatic level, however, the Chinese and Japanese agreed to set up a joint investigatory commission to prosecute the guilty. But the commission failed to indict any suspects and it was dissolved under mutual exchanges of vague promises that Chinese and Japanese suspects would be tried and punished by their own authorities. The immediate consequence of the incident was that the discussion of the abolition of extraterritoriality, which had been going on between the Zongli yamen and the Japanese minister in Tokyo, was postponed indefinitely.⁷⁷ When Ding Ruchang's naval force visited Kobe again in 1891, no Qing sailors were allowed to land so as to avoid any recurrence of the Nagasaki incident.⁷⁸

Murder in the City

In a way, the chain of events in Nagasaki gives the impression that a kind of jurisdictional battle was being fought between the Japanese authorities and the Chinese community. By comparison, the Japanese community in China remained small and judging by the scanty records left they were quiet, and no comparable incidents of mass violence took place in China. However, only a couple of months after the paroxysm of violence in Nagasaki, a case of homicide in Shanghai showed that the Chinese and Japanese stood as far apart as ever in the interpretation of how the boundaries between consular, local and mixed jurisdiction should properly be delineated under the terms of the Treaty.

⁷⁷ Yasuoka Akio, "Meiji 19 nen Nagasaki Shinkoku suihei sōtō jiken," *Hōsei Daigaku bungakubu kiyō*, no. 36 (1988): 41-94.

⁷⁸ Murata Seiji, ed., *Kōbe kaikō sanjūnenshi* (Kōbe: Kaikō sanjūnen kinenkai, 1898), vol. 2, p. 435f.

In April 1887, Fukumoto Makoto 福本誠 was arrested for killing a Chinese burglar when the latter was trying to run away from Fukumoto.⁷⁹ This incident immediately turned into a battle over jurisdiction and the meaning of the term joint trial (*huishen*). The Shanghai district magistrate Mo Xiangzhi 莫祥芝 intended to hold a joint trial in Shanghai in accordance with the treaty and summoned the Japanese consul Kawakami Kin'ichi 河上謹一 to start holding joint hearings in the case.⁸⁰ According to the Chinese interpretation of Article XIII of the Treaty of Tianjin, offenders in mixed suits had to be tried and punished in the country of the crime. However, the Japanese legal system had evolved since the conclusion of the 1871 treaty, and Japanese consuls had no authority to rule in cases of homicide. Consequently, Kawakami told Mo that he had no jurisdiction in the case and that Fukumoto had to be tried in the Nagasaki district court. The consul could only hold a preliminary investigation (*yoshin* 豫審) and then forward the evidence together with the defendant to the Nagasaki District Court, where the Qing consul could observe the proceedings (*kanshin/guanshen* 觀審).⁸¹

Mo was not particularly impressed with this line of reasoning. In 1869, the British consular court in Shanghai had executed a Briton who had murdered a Chinese; why could not the Japanese do the same?⁸² If the consul did not have authority to pass out sentences in severe criminal cases, why did he not forward the depositions (*gongci* 供詞) and his recommendation for punishment (*niban* 擬辦) to the Nagasaki court for approval

⁷⁹ Kawakami's report to foreign minister Inoue Kaoru, 21 April 1887. *GKBS*, vol. 20, pp. 458-60.

⁸⁰ Mo to Kawakami, 11 April, *GKBS*, vol. 20, p. 460

⁸¹ Kawakami to Mo, 12 April 1887, *GKBS*, vol. 20, p. 460f

⁸² Mo to Kawakami, 12 April 1887, *GKBS*, vol. 20, p. 461.

(*heding* 核定)?⁸³ Learning about these objections from the district magistrate, the Japanese foreign minister, Inoue Kaoru, decided to conjure up the ghost of Furukawa Yoshimasa, who had been slain by Wu A'er six years earlier. The foreign ministry forwarded a copy of the dossier on the Wu A'er case to Kawakami and told him that the fact that the Qing consul had sent the offender to the Chinese mainland for punishment had set a precedent.⁸⁴

There are no records remaining that tell us whether Mo responded to Inoue's quite plausible argument, but from Mo's reasoning we can conclude that his understanding of criminal procedure was based on the Qing "appellate system" of justice.⁸⁵ In this system, officials of lower rank obtained depositions and recommended punishments, which were executed at the place of the crime after they had been confirmed from higher authorities. This is arguably also how the Qing consul must have understood the adjudication of the Wu A'er case, save for the fact that his punishment was enforced in China. On the other hand, in the Qing legal order, it was not uncommon for sentenced criminals to be referred to higher authorities for further questioning, so the sending of Wu was not something strange in and of itself. In other words, from the Qing point of view it was just a question of sticking to the letter of the treaty, the extraterritorial provisions of which happened to conform quite well to Qing criminal procedure; if the Japanese government had changed its legal system to the effect that it was no longer able to fulfill its treaty obligation, that was of no concern to Qing authorities.

⁸³ Mo to Kawakami, 15 April 1887, *GKBS*, vol. 20, p. 462f

⁸⁴ Inoue to Kawakami, 2 May 1887. *GKBS*, vol. 20,

⁸⁵ Derk Bodde and Clarence Morris, *Law in Imperial China: Exemplified by 190 Ch'ing Dynasty Cases* (Cambridge, MA: Harvard University Press, 1967), p. 113-22.

Given the fact that Fukumoto was in the custody of the Japanese consul there was very little that Mo could do. After the preliminary hearings had been completed, Fukumoto was quickly spirited away to Japan. The Nagasaki court was in an apparent hurry to handle the case, because the Qing consul never had a chance to attend the hearing, probably because he got short notice. The court took notice of the consul's absence and on 30 June it acquitted Fukumoto of murder on account of the fact that he had acted in self-defense.⁸⁶

The whole conflict between Qing and Japanese jurisdiction was reenacted when a group of Japanese students killed a Chinese peddler on the evening of 3 July 1891 in the Western part of the Chinese city of Shanghai. On their way home that night, the Japanese were provoked by a dog which used to bark at them every time they passed. This time, they decided that they had enough of it and brought the dog to the owner, a peddler called Shen Guanfu 沈關福, who reportedly refused to listen to their complaints. The Japanese left in a huff and decided to procure some weapons with which they intended to intimidate Shen. Having returned to Shen with the weapons, a violent scuffle followed, which was witnessed by a number of people who were too afraid to intervene. When the Japanese left the scene, Shen was dying of several stab wounds. The Shanghai district magistrate Yuan Shuxun 袁樹勛 was alerted and managed to arrest three of the students, including two of the main suspects, Fukuwara Hanjūrō 福原伴十郎 and Omoto Jūtarō 尾本壽太郎.⁸⁷

⁸⁶ Sentence by Nagasaki Court (*Nagasaki jūzai saibansho*), 30 June 1887, *Kiroku* 4.2.5.110.

⁸⁷ The above narrative is based on "A Chinaman Killed by Japanese," *The North-China Herald and Supreme Court & Consular Gazette (NCH)*, 10 July 1891, p. 55f. *Kiroku*, 4.2.5.135.

Pär Cassel, Harvard University, pcassel@fas.harvard.edu.
Working draft: do not circulate or quote without the permission of the author.

The Japanese consul-general, Tsuruhara Sadayoshi 鶴原定吉, was summoned and witnesses were heard. This case could not possibly be construed as legitimate self-defense and local Qing authorities were determined to secure a fitting verdict through a joint trial. However, the Japanese consul declared that he had no authority to rule in the case; all he could do was to conduct a preliminary hearing in Shanghai and then send the suspect to Nagasaki for trial.⁸⁸ The debate between the consul and the magistrate was publicized in the Chinese press,⁸⁹ and soon the English-language press in Shanghai discovered what their colleagues in Yokohama had discovered eight years earlier: the criminal procedure defined in the Treaty of Tianjin differed substantially from other treaties. *North-China Daily News* published a comment on the murder case and upon quoting Article XIII of the treaty, the correspondent concludes:

The whole tenour [sic!] of the article points to the recognition of a very modified form of extraterritoriality : an offender is not to be tried by his Consul in the presence of the local authority, nor, as in the case of British subject committing a crime in China, is he to ‘be tried and punished by the Consul, or the other public functionaries authorised hereto’ according to the laws of his own country ; but he is to be tried by the local authority and the Consul together.⁹⁰

Nevertheless, the two defendants were sent to Japan under protest from the Qing authorities. When they arrived in Japan, the Qing minister in Tokyo tried to involve the

⁸⁸ *Kiroku* 4.2.5.135.

⁸⁹ A communication from Yuan to Tsuruhara was published in *Shenbao*, 1 September 1891. An abridged translation of the statement was published in *NCH*, 4 September 1891, p. 316.

⁹⁰ “The Alleged Murder by Japanese,” *The North-China Daily News*, 13 July 1891.

consul in Nagasaki, but Japanese authorities did their best to keep the Qing consul away from the trial and the result of the trial did not come as surprise. In early November, Fukumoto and Omoto were sentenced to three years' imprisonment each.⁹¹ Needless to say, the Qing authorities were infuriated by the verdict. A foreign newspaper noted that the light sentences were surprising, given the fact that not even the judge in Nagasaki "tried to disguise the fact that it was a premeditated murder." The correspondent concluded by saying that the outcome of the case was "not a reassuring instance" considering Japan's ambitions to revise the treaties.⁹²

Concluding remarks

Japanese and Qing authorities interpreted the extraterritorial provisions of the Treaty of Tianjin very differently, and the application of the treaty gradually became a source of serious friction in Sino-Japanese relations. Whenever a crisis occurred both sides found themselves back at square one, debating the very fundamentals of the treaty. Qing officials were of the opinion that they interpreted the treaty literally: they defended the extraterritorial rights of the Chinese community jealously, as well as their right to participation in joint trials. Qing statesmen were by no means ignorant of international law. Indeed one of the first envoys to Japan, Zhang Sigui, had written a preface to the Chinese translation of Henry Wheaton's *Elements of International Law*.⁹³ But Qing officials did not think that international law was the most useful guide on how to assist Chinese abroad. Consequently we find Qing consuls making coherent arguments about

⁹¹ Verdict from Nagasaki Court, 18 December 1891. *Kiroku* 4.2.5.135.

⁹² "The Murder in the City," *NCH*, 27 November 1891, p. 731f.

⁹³ Hsü, (1960), p. 186

extraterritoriality that only make occasional reference to international law.⁹⁴ The Sino-Japanese treaty was in form an innovation, but it did not “revolutionize” foreign relations as some scholars have argued.⁹⁵ It did not represent any repudiation of a tributary relationship between China and Japan, because such a relationship had not existed under the present dynasty; besides, China continued to maintain tributary relations with other neighbors in the region. Neither was the treaty a negation of the treaty port system as such.

From the Qing point of view, the 1871 Sino-Japanese treaty merely represented a limited extension of Qing rule into Japan. As such, it constitutes further evidence that Qing officials drew on their own legal system when accommodating foreign demands for consular jurisdiction. Thus, the Qing legal system unwittingly mediated the perpetuation of a system that Chinese nationalists would later deplore as being detrimental to Chinese sovereignty and Chinese national interests.

The contrast with Japan is very instructive. The Japanese government had set out very early to revise all “unequal treaties” and it refused to accord any special status to the Sino-Japanese treaty. Whenever problems occurred, they referred to expertise in international law. The Japanese government never accepted the Treaty of Tianjin 1871 as a permanent basis of intercourse with China and it is clear that it did its utmost to push the interpretation in its favor and to exclude what was regarded as undue Chinese interference. The problems were compounded by the fact that the very content of Japanese consular jurisdiction was a moving target since the Japanese legal system underwent a whole cycle of reform in the 1870s and 1880s. In 1871, the Japanese had

⁹⁴ “The Murder of a Chinese by Japanese,” *NDH*, 4 September 1891, p. 316.

⁹⁵ Kim (1980), pp. 149-50.

adopted a temporary penal code, which was modeled on Chinese law, and ten years later it adopted a European style criminal code.⁹⁶

The mutability of Japanese jurisdiction frustrated Chinese officials, who were only moderately interested in legal reform, and fostered suspicions about Japanese duplicity. It is indeed ironic that the Qing government objected to precisely those legal reforms that the Japanese had introduced to convince the Western treaty powers to abolish extraterritoriality. This presented Japanese policymakers with a tricky dilemma: failure to revise the treaty with China could potentially upset the revision of the “unequal treaties” with the West. If all other countries agreed to revise the treaties and China refused, that could lead to a domino effect of complications in terms of jurisdiction.⁹⁷

What the Japanese had not been able to obtain by peaceful means they would conquer by force in Sino-Japanese war of 1894-95. Just as Ding Ruchang’s once proud flotilla was one of the major losses of the war, Chinese extraterritoriality was one of the first casualties of the peace treaty. The onerous Treaty of Shimonoseki abolished extraterritorial privileges for Chinese in Japan, but it retained and expanded the same privileges for Japanese in China. As some jurists would later point out, one of the distinctive features of the new Sino-Japanese treaty was that it ruled out any mixed procedures whatsoever.⁹⁸ At the very point in time when more and more Chinese started to realize that China was at the losing end of the treaty port system, one of the former

⁹⁶ Paul Heng-Chao Ch’en, *The Formation of the Early Meiji Legal Order: The Japanese Code of 1871 and Its Chinese Foundation* (Oxford; New York: Oxford University Press, 1981).

⁹⁷ Memorandum from Inoue to Japanese minister Shioda Saburō, 18 April 1887. *GKBS*, vol. 20, p. 133f.

⁹⁸ Soulié de Morant (1925), p. 146f. Georges Padoux, review of Liu, Shih-shun, *Extraterritoriality, Its rise and Decline* (New York, Columbia University, 1925), *Chinese Social and Political Science Review* 10, no. 3 (1926): 755-63.

Pär Cassel, Harvard University, pcassel@fas.harvard.edu.

Working draft: do not circulate or quote without the permission of the author.

victims of the system gave it a new lease of life. Japan had now joined the rank of the treaty powers. A new chapter in Sino-Japanese relations was about to be written.