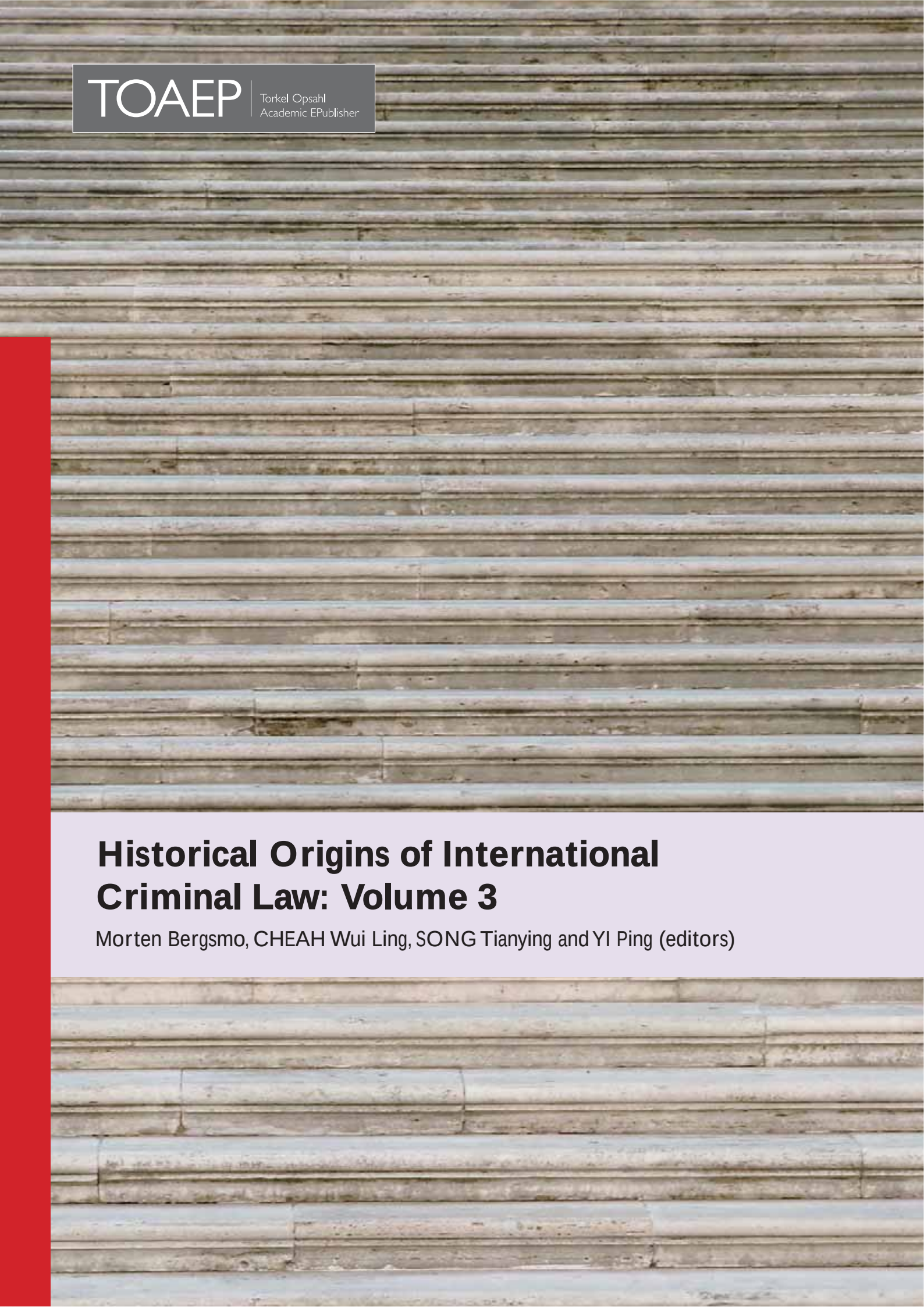

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6

International Criminal Law's "Oriental Pre-Birth": The 1894–1900 Trials of the Siamese, Ottomans and Chinese

Gregory S. Gordon*

6.1. Introduction

Conventional wisdom often traces the origins of international criminal law to the 1474 *ad hoc* prosecution for atrocities in Alsace of the Burgundian governor Peter von Hagenbach and then straight to the Nuremberg and Tokyo trials after the Second World War.[1] But this history ignores a remarkable decade at the end of the nineteenth century when three international criminal proceedings with links to the Orient took place: 1) in 1893 a French-Siamese Mixed Court sat in judgment of Phra Yot, a Siamese governor charged with the death of a French military commander;[2] 2) in 1898 International Military Commissions of four European powers prosecuted versions of war crimes and crimes against humanity arising from Muslim–Christian intercommunal violence on the Ottoman-controlled island of Crete;[3] and 3) in 1900 another International Military

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1 See, for example, Gregory S. Gordon, "The Trial of Peter von Hagenbach: Reconciling History, Historiography and International Criminal Law", in Kevin Jon Heller and Gerry Simpson (eds.), *The Hidden Histories of War Crimes Trials*, Oxford University Press, Oxford, 2013, p. 13, referring to the Hagenbach trial and noting that "the Westphalian order, already on the horizon, would foreclose any such future experiments [in international criminal trials] until Nazi brutality put a chink in the Westphalian armour and inspired an unprecedented transnational justice operation [at Nuremberg] in the wake of a truly global war".

2 See generally Benjamin E. Brockman-Hawe, "A Supranational Criminal Tribunal for the Colonial Era: The Franco-Siamese Mixed Court", in Heller and Simpson, 2013, p. 50, see *supra* note 1, describing the trial and situating it historically.

3 See generally R. John Pritchard, "International Humanitarian Intervention and Establishment of an International Jurisdiction over Crimes against Humanity: The National and In-

Commission, this one consisting of four powers from Europe, presided over the trial of some participants in the Boxer Rebellion for proto-crimes against humanity.[4] Significantly, and perhaps not coincidentally, these trials took place within the context of the founding of the late nineteenth-century peace movement and the Hague Conferences' transnational endeavour to codify humanitarian law and promote arbitration to resolve disputes. And like those movements, the effort to establish international criminal law, though far-sighted and revolutionary, was ultimately premature. It would take two world wars and unimaginable carnage for the strands of global peace, international humanitarian law and transnational criminal justice to blossom and take root in the fertile human rights soil of the late 1940s.[5]

Moreover, and also not coincidentally, the trials represented the apogee of European imperialism, that period during the late 1800s when industrialisation and gunboat diplomacy fuelled colonisation, especially in Africa and the Orient.[6] Significantly, the efforts at international justice during that century's final decade involved colonial powers sitting in judgment of subjugated or less powerful peoples in the Orient. Thus, in each case, the arguably progressive instinct for global co-operation was adulterated with the ostensibly baser motive of engaging in transnational power politics. That these nascent stabs at international criminal justice arose largely from imperialistic impulses is perhaps best corroborated by the behaviour of the European powers in the period that soon followed. In

ternational Military Trials on Crete in 1898", in John Carey, William V. Dunlap and R. John Pritchard (eds.), *International Humanitarian Law*, vol. 1: *Origins*, Transnational Publishers, Ardsley, NY, 2003, pp. 12–13, providing an overview of the Ottoman trials.

4 See generally Grote Hutcheson, "Report on the Paotingfu Expedition and Murder of American Missionaries at that Place", in *Annual Report of the War Department*, vol. 1, US Government Printing Office, Washington, DC, 1901, p. 460, reporting on the trial as an American military officer attached to the European expeditionary force responsible for prosecuting the perpetrators.

5 See generally Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, Knopf, New York, 1992, chronicling the trial of the major Nazi German war criminals before the International Military Tribunal at Nuremberg; Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, Oxford University Press, Oxford, 2011, giving an overview and analysis of the Nuremberg Military Tribunals.

6 See generally Barbara Bush, *Imperialism and Postcolonialism*, Pearson Longman, Harlow, 2006, p. 20, referring to the "New Imperialism" and noting that "a new wave of colonial acquisition opened up with the 'scramble' for Africa and the Far East after 1870".

the wake of the Great War of 1914–1918, although setting out a transnational justice framework in the treaties ending the war, the victorious Allies ultimately refused to put their vanquished fellow Europeans on trial before any international tribunals.[7] Imperialism and international justice were compatible at the turn of the century but Westphalian trepidations foiled far more crucial adjudications less than two decades later.

This chapter explores this little known "Oriental" episode in the formation of international criminal law and proceeds in four sections. Section 6.2. sets the historical context of the trials – the late nineteenth-century apex of European colonialism and relevant political developments in the Near and Far East. Section 6.3. then describes the origins of the three Oriental tribunals, including an overview of the noble and, at turns, cynical rationales that inspired the Great Powers to turn to adjudication efforts and international processes. The structure and operation of the tribunals themselves will also be discussed, including the defendants selected, the rules of procedure applied, the crimes charged, the defences raised and the verdicts issued. Section 6.4. then puts these trials into perspective. It examines the dawn of the European peace movement as curiously juxtaposed with the simultaneous twilight of European imperialism during the closing decade of the nineteenth century.

As will be demonstrated, in significant ways the trials that are the object of this chapter are the odd by-product of this confluence of international pacifism and aggression. To what degree did these tribunals anticipate subsequent developments in substantive and procedural international criminal law? Were the trials themselves the result of cynical machinations on the part of the Great Powers or a genuine attempt to provide for lasting peace or reconciliation through novel processes? How were the verdicts perceived by stakeholders? How should the answers to these questions impact on the development and practice of international law today? The chapter closes by considering these questions.

In the end, the chapter will conclude that colonial power erosion and attempts to preserve it, embryonic indigenous independence drives,

[7] See M. Cherif Bassiouni, "International Criminal Justice in Historic Perspective", in M. Cherif Bassiouni (ed.), *International Criminal Law*, vol. 3: *International Enforcement*, Martinus Nijhoff Publishers, Leiden, 2008, pp. 33, 35: "After World War I, the Treaty of Versailles provided for ad hoc tribunals, but none were forthcoming. […] the post-World War I experience showed the extent to which international justice can be compromised for the sake of political expediency".

and arbitral international dispute resolution advocacy underpin the fascinating formation of these proto-Nuremberg tribunals in such a unique place and time in history. They illuminate an unexplored but vital chapter of international criminal law's past but also provide invaluable insights into its present and future, including the potential spectre of a new imperialism as the International Criminal Court focuses its current work exclusively on Africa.

6.2. Setting the Context: European Imperialism in the Nineteenth Century

6.2.1. Overview

Imperialism has been defined as "the extension of rule or influence by one government, nation, or society over another".[8] There is ample evidence of it in the ancient historical record. The Mesopotamian, Egyptian, Assyrian, Persian and Roman empires all asserted dominion over regional rivals conquered in war or otherwise subjugated through intimidation or aggressive diplomacy.[9] Post-medieval European imperialism, which flowed from maritime exploration and the desire to develop trade,[10] was largely co-extensive with the post-Westphalian rise of the nation state and the after-effects of the Age of Discovery.[11] After a pause in expansion in the wake of the Napoleonic Wars and the subsequent Congress of Vienna,[12] the Industrial Revolution, fuelling demand for cheap labour, raw materials

[8] Barbara A. Chernow and George A. Vallasi (ed.), *The Columbia Encyclopedia*, 5th ed., Columbia University Press, New York, 1993, p. 1317.

[9] *Ibid*.

[10] George Edwin Rines (ed.), *The Encyclopedia Americana*, Encyclopedia Americana Corporation, New York, 1920, p. 527.

[11] *Ibid*.: "Imperialism was reborn in the West with the emergence of the modern nation-state and the age of exploration and discovery". See also Piet Strydom, *Discourse and Knowledge: The Making of Enlightenment Sociology*, Liverpool University Press, Liverpool, 2000, p. 100, referring to the "age of exploration and discovery and the subsequent colonialist and imperialist policies and practices of the European states"; William V. Spanos, *American Exceptionalism in the Age of Globalization: The Specter of Vietnam*, State University of New York Press, Albany, NY, 2008, p. xvi, describing "the nation-state system […] inaugurated by the Treaty of Westphalia in 1648 […] and the idea of national culture and the imperialism endemic to it".

[12] B.V. Rao, *History of Modern Europe: AD 1789–2002*, New Dawn Press, Elgin, 2005, p. 164: "So around the first half of the nineteenth century the European countries were tired of establishing new colonies".

and new markets, stoked new European colonial ambitions in Africa and Asia.[13]

For some, this era of "New Imperialism" still carried the traditional expansionist justifications of national pride – colonies were considered prestigious – and moral imperative as missionaries sought conversion to Christianity and Europeans zealously assumed the "White Man's Burden" of "civilising" inferior peoples.[14] Control was established through superior arms (especially the rapid-fire machine gun) and transportation (with modern navies on the oceans, steamboats on the inland rivers and railways on the ground). It was maintained through advances in medicine (such as using quinine, with its anti-malarial properties) and communications (primarily the telegraph).[15]

As a result of this New Imperialism, most of Africa and large swathes of Asia were taken over by European powers during the nineteenth century.[16] In Africa, the British asserted dominion over such wide-ranging territories as Nigeria, Gold Coast, Sierra Leone, Egypt, Kenya, Uganda, Swaziland, Zanzibar, Rhodesia and Somaliland. The French took possessions in Algeria, Tunisia, Mauritania, Senegal, Guinea, Mali, Ivory Coast, Benin, Niger, Chad, Central African Republic and Madagascar. German conquests in Africa led to the creation of German East Africa, German South West Africa and German West Africa. The Belgians estab-

[13] William J. Duiker and Jackson J. Spielvogel, *World History*, vol. 1: *To 1800*, Wadsworth, Boston, 2006, p. 572.

[14] *Ibid*.

[15] See Keld Nielson, "Western Technology", in Jan Kyrre Berg Olsen Friis, Stig Andur Pedersen and Vincent F. Hendricks (eds.), *A Companion to the Philosophy of Technology*, Wiley-Blackwell, Malden, MA, 2009, p. 27: "[Western] imperialism was much assisted by telegraphs, steam ships, efficient rifles, and railways"; Robert L. O'Connell, *Of Arms and Men: A History of War, Weapons and Aggression*, Oxford University Press, Oxford, 1989, p. 233, explaining that machine guns were so popular with British colonial forces because "from an imperialist standpoint, the machine gun was nearly the perfect laborsaving device, enabling tiny forces of whites to mow down multitudes of brave but thoroughly outgunned native warriors"; Daniel R. Headrick, *The Tools of Empire: Technology and European Imperialism in the Nineteenth Century*, Oxford University Press, Oxford, 1981, p. 71, emphasising the important role played by quinine in combating malaria and thereby enabling nineteenth-century Western imperial expansion.

[16] See generally Richard W. Bulliet, Pamela Kyle Crossley, Daniel R. Headrick, Steven W. Hirsch, Lyman L. Johnson and David Northrup, "The New Imperialism, 1869–1914", in *The Earth and Its Peoples: A Global History*, vol. 2: *Since 1550*, 5th ed., Wadsworth, Boston, 2011, pp. 739–57, tracing the origins and details of the New Imperialism.

lished the Belgian Congo. And a formal framework for the division of African possessions among European powers was erected at the 1884 Berlin Conference.[17]

In Asia, among others, the British colonised Afghanistan, Burma, Malaya, Borneo, Hong Kong, Kuwait and Bahrain.[18] Following up on earlier regional conquests, the Dutch subjugated much of modern Indonesia (then called the Netherlands East Indies).[19] And France created French Indochina out of acquisitions in Vietnam, Cambodia and Laos.[20] But the European powers had no equivalent of the Berlin Conference to regulate land-grabs in the Orient. And that would have implications that will be explained below.

6.2.2. French Colonialism and Indochina

France's colonial ambitions during this period are linked in significant ways to its defeat in the Franco-Prussian War of 1870–71. This French military debacle, which brought down Napoleon III, seriously bruised national pride and caused the successor regime, the Third Republic, to look beyond Europe in an effort to find national glory in Africa, Southeast Asia and Oceania (in particular, the colonies of French Polynesia).[21] These flames of imperial ambition were further fanned by the German Chancellor, Otto von Bismarck, who encouraged the French government to expand its overseas possessions in order to divert its attention away from retaking the territory of Alsace-Lorraine it ceded to the new German Empire at the conclusion of the Franco-Prussian War.[22] Related to this,

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17 Jeffrey Herbst, *States and Power in Africa: Comparative Lessons in Authority and Control*, Princeton University Press, Princeton, NJ, 2000, pp. 71–72.

18 Timothy H. Parsons, *The British Imperial Century, 1815–1914: A World History Perspective*, Rowman & Littlefield, Lanham, MD, 1999, p. 5.

19 Heather Sutherland, "Geography as Destiny? The Role of Water in Southeast Asian History", in Peter Boomgaard (ed.), *A World of Water: Rain, Rivers and Seas in Southeast Asian Histories*, NUS Press, Singapore, 2007, p. 43.

20 George Fetherling, *Indochina: Now and Then*, Dundurn Press, Toronto, 2012, pp. 10–11.

21 See Siba N. Grovogui, "Imperialism", in Bertrand Badie, Dirk Berg-Schlosser and Leonardo Morlino (eds.), *International Encyclopedia of Political Science*, vol. 1, Sage, Thousand Oaks, CA, 2011, p. 1155, explaining that "the New Imperialism was a matter of national pride [for] France after defeat in the Franco-Prussian war".

22 Geoffrey Wawro, *Warfare and Society in Europe, 1792–1914*, Routledge, London, 2000, p. 132: "Bismarck wanted France to forget the humiliating defeats at Sedan and Metz and focus instead on building an overseas empire to rival that of Great Britain".

French officers banished to existing colonial outposts after the 1870–71 military failure often annexed new chunks of territory on their own initiative, without any encouragement from Paris, in order to rehabilitate their reputations and earn promotions. The French government would then accept the new possessions after the fact.[23]

The key French politician sanctioning these developments and often pushing them forward was Jules Ferry, who served variously as Minister of Education, Minister of Foreign Affairs and Prime Minister during the late 1870s and first half of the 1880s.[24] Thanks to Ferry's public education reforms, French literacy increased dramatically and this helped whet the public appetite for stories about colonial conquest and adventure in an expanding French popular press.[25] This, in turn, contributed to French colonial aspirations during the early years of the Third Republic.[26]

In Asia, this imperialist enterprise was realised in the development of what would become French Indochina. Initial French incursions into the region were not by political design. Instead, the first contacts, in the seventeenth century, consisted of French merchants establishing trading posts in southern Vietnam, which was referred to as Cochin-China (the central region was referred to as Annam and the northern as Tonkin).[27] Roman Catholic missionaries followed them in an effort to Christianise the native population.[28] At the end of the eighteenth century, French religious leaders and traders arranged for military aid from Paris memorialised in the 1787 Treaty of Versailles, to assist Prince Nguyễn Ánh, who was attempting to regain power after losing it in a rebellion.[29] In exchange for French assistance, Prince Ánh agreed to let the French use the port of Đà Nẵng and take over Côn Sơn Island, on Vietnam's southeastern coast. With French arms and soldiers, Prince Ánh prevailed and ultimately be-

[23] Paul S. Reinsch, World Politics at the End of the Nineteenth Century: As Influenced by the Oriental Situation, Macmillan, New York, 1902, pp. 63–64; Yves Beigbeder, Judging War Crimes and Torture: French Justice and International Criminal Tribunals and Commissions (1940–2005), Martinus Nijhoff, Leiden, 2006, p. 44.

[24] Beigbeder, 2006, pp. 45–46, see *supra* note 23.

[25] Michael G. Vann, "The Third Republic and Colonialism", in Martin Evans and Emmanuel Godin (eds.), *France, 1815–2003*, Arnold, London, 2004.

[26] *Ibid*.

[27] Debbie Levy, *The Vietnam War*, Lerner, Minneapolis, MN, 2004, p. 7.

[28] *Ibid*.

[29] *Ibid.* See also Mark E. Cunningham and Lawrence J. Zwier, *The Aftermath of the French Defeat in Vietnam*, Twenty-First Century Books, Minneapolis, MN, 2009, pp. 10–11.

came Emperor Gia Long over all of Vietnam in 1802, which helped validate and strengthen France's presence in the region.[30]

Nevertheless, further French expansion was equally desultory. In addition to the ambition of individual French officers as noted above, much of the expansion had to do with colonial reactions to animus toward the occupiers after the death of Gia Long. The French missionaries and traders were often harassed and subjected to violence.[31] Paris's response to such attacks would result in imperial expansion. In particular, "a pattern was established […] when French soldiers, traders, or priests were attacked, the French [used revenge] as an excuse to extend their power [and the] Vietnamese were forced to surrender control over their land and to provide the French with special privileges".[32] In this way, by 1883, Gallic control was asserted over all of Vietnam and subsequently over the neighbouring provinces of Cambodia and Laos.[33] The entire region came to be known as l'Indochine française (or French Indochina).[34]

But French dominion over Laos merits special attention here. That came about as the result of a brief war in 1893 between France and the one remaining indigenous sovereign entity in the region, the Kingdom of Siam. The dispute between the two countries centred on territory along the eastern bank of the Mekong River referred to as the state of Chieng Keng (part of modern-day Laos).[35] The Siamese were convinced the territory belonged to them based in part on concessions given to them by the British. Influenced by politicians belonging to the lobbying group called the *parti colonial*, who wished for France to annex Laos and check potential British incursions into the area, Paris believed the land was within its sphere of control as a part of Vietnam.[36] When the demands of the French

30 Cunningham and Zwier, 2009, p. 11, see *supra* note 29.

31 Levy, 2004, p. 6, see *supra* note 27.

32 Thomas Ladenburg, "The French in Indochina", *Digital History* (http://www.digitalhistory.uh.edu/teachers/lesson_plans/pdfs/unit12_1.pdf).

33 Levy, 2004, p. 6, see *supra* note 27.

34 *Ibid*.

35 Patrick J.N. Tuck, The French Wolf and the Siamese Lamb: The French Threat to Siamese Independence 1858–1907, White Lotus, Bangkok, 1995, pp. 100, 104.

36 Sud Chonchirdsin, "Paknam Incident (1893): A Taste of French Imperialism", in Keat Gin Ooi (ed.), *Southeast Asia: A Historical Encyclopedia from Angkor Wat to East Timor*, vol. 1, ABC-Clio, Santa Barbara, CA, 2004, p. 1015. The *parti colonial* was not a political party in the traditional sense – it was more of a lobbying group of French politicians belonging to different political parties along the political spectrum, but united in their belief that

to surrender the territory, as communicated to Bangkok by the chief French government official in the area, Auguste Pavie, were rebuffed, the French sent a military force into the disputed area.[37]

The Siamese, mistakenly believing the British would come to their aid, offered resistance and fighting took place at various points along the Mekong and on Khong Island (situated in the centre of the capacious river).[38] In the course of the skirmishes, a confrontation between Siamese and French troops at Kham Mouon resulted in the death of a French police inspector by the name of Grosgurin.[39] The French believed the Siamese unjustifiably ambushed Grosgurin and his men and deemed as criminally responsible the Commissioner of the Kham Muon District, Phra Yot Muang Kwang.[40] Once the dispute was resolved via gunboat diplomacy in France's favour (with Laos handed to France as a concession), the French demanded that Phra Yot be put on trial – whence the origin of the first proceeding referred to in this chapter – the Franco-Siamese mixed tribunal.[41]

6.2.3. Incursions into the Ottoman Empire and the Situation in Crete

The Ottoman Empire was established by Turkish tribes in the late theirteenth cenutry in Asia Minor and ultimately expanded to cover vast tracts of land in parts of Europe, Asia and Africa.[42] But nineteenth-century European imperialism often advanced at the expense of Ottoman possessions

France should maintain and expand its colonial possessions. See Carl Cavanagh Hodge, *Encyclopedia of the Age of Imperialism, 1800–1914*, Greenwood Press, Westport, CT, 2008, p. 247: "Often lumped together under the general descriptor of *Parti Colonial* – a loose collection of political groups rather than a political organization […] these groups found a willing audience in the *Groupe Colonial*, a caucus of pro-colonial deputies in the lower house of the National Assembly".

37 Chonchirdsin, 2004, p. 1015, see *supra* note 36.

38 *Ibid*.

39 Charles Gosselin, *Le Laos et le protectorat français*, Perrin, Paris, 1900, pp. 88–89.

40 *Ibid*.

41 Georges Demanche and Édouard Marbeau, "Siam: Procès Phra-Yot", in *Revue française de l'étranger et des colonies et exploration*, 1894, vol. 19, p. 449.

42 Chernow and Vallasi, 1993, pp. 2036–37, see *supra* note 8.

on those continents, including ones in the Balkans, the Near East, the Caucasus, the Maghreb and the Horn of Africa.[43]

In the early 1820s, for example, Britain, France and Russia joined forces with Greek rebels to end Ottoman rule in Greece.[44] After the 1877–78 Russo-Turkish War and the post-conflict Congress of Berlin, which was presided over by various European powers, the Ottomans lost a significant portion of their territorial holdings.[45] Russia succeeded in claiming several provinces in the Caucasus, including Kars and Batumi, as well as the region of Bessarabia on the Black Sea. Austria-Hungary gained possession of Bosnia-Herzegovina and Britain was given Cyprus.[46] The Ottoman Empire was carved up even further in the following decade – this time in Africa. At the beginning of the decade the French invaded Tunisia from Algeria and stripped it from Ottoman control pursuant to the 12 May 1881 Treaty of Bardo.[47] In 1882 Egypt, which had also been a part of the Ottoman Empire, was invaded by combined British and French forces seeking to establish better European control of the Suez Canal.[48] Egypt would remain a British colony for the next four decades.[49]

All this set the stage for a further erosion of Ottoman dominion in 1898, when another group of European powers divested the Turks of the island of Crete, which had been in Turkish possession for over two centuries.[50] But administration of the island during the 1800s had not gone well for the Turks.[51] After a series of uprisings by local Greeks (at least one

43 *Ibid.*

44 Martin Polley, *A-Z of Modern Europe Since 1789*, Routledge, London, 2000, p. 62.

45 Mehrdad Kia, *Daily Life in the Ottoman Empire*, ABC-CLIO, Santa Barbara, CA, 2011, pp. 22–23.

46 *Ibid.*, p. 23.

47 William E. Watson, *Tricolor and Crescent: France and the Islamic World*, Praeger, Westport, CT, 2003, pp. 27–28.

48 Glenn E. Perry, *The History of Egypt*, Greenwood, Westport, CT, 2004, pp. 68–69.

49 James P. Hubbard, *The United States and the End of British Colonial Rule in Africa, 1941–1968*, McFarland, Jefferson, NC, 2010, p. 42: "In 1922, Britain declared Egypt independent". It should be noted, however, that "the British high commissioner in Cairo retained considerable powers and British troops remained". *Ibid.*

50 Allaire B. Stallsmith, "One Colony, Two Mother Cities: Cretan Agriculture under Venetian and Ottoman Rule", in Siriol Davies and Jack L. Davis (eds.), *Between Venice and Istanbul: Colonial Landscapes in Early Modern Greece*, American School of Classical Studies at Athens Publications, Princeton, NJ, 2007, p. 160.

51 *Ibid.*

during every decade that century – 1821, 1833, 1841, 1858, 1866, 1878, 1889, 1895 and 1897),[52] the so-called Great Powers of Europe – Russia, France, Italy, Britain, Germany and Austria-Hungary, forming a Council of Admirals – took over administration of the island (leaving the Ottomans as only nominal suzerains).[53]

These developments infuriated the local Turkish population and the situation remained quite volatile. In particular, they resented that a tithe was to be imposed on exports and administered by a Custom House to which a Christian had been appointed.[54] In reaction to this, on 6 September 1898 an unarmed group of Muslims tried to force their way into the associated revenue office in Candia. In repelling them, British troops found it necessary to open fire on the group. The Turks dispersed but returned with weapons and began killing non-Muslims – both British soldiers and Christian civilians.[55] This murderous Muslim mob, which was joined by Ottoman soldiers,[56] also slew the British Vice-Consul Lyssimachus Andrew Calocherino, captain of the British ship *Trafalgar*, who was burnt to death in his house with his family.[57] In all, 800 Christians, including British soldiers, were massacred.[58] The Ottomans were then expelled from Crete, which was eventually united with Greece.[59] But it is important to note here that the 6 September 1898 massacres led to that decade's second effort at international criminal justice that will be the focus of this chapter.

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52 Leonidas Kallivretakis, "A Century of Revolutions: The Cretan Question between European and Near Eastern Politics", in Paschalis M. Kitromilides (ed.), *Eleftherios Venizelos: The Trials of Statesmanship*, Edinburgh University Press, 2006, p. 16.

53 Davide Rodogno, *Against Massacre: Humanitarian Interventions in the Ottoman Empire, 1815–1914*, Princeton University Press, Princeton, NJ, 2012, p. 221.

54 Harry Thurston Peck, "Crete", in Frank Moore Colby (ed.), *The International Year Book for 1898*, Dodd, Mead and Company, New York, 1899, p. 230.

55 *Ibid*.

56 Rodogno, 2013, p. 221, see *supra* note 53.

57 *Ibid.* See also Pınar Şenışık, *The Transformation of Ottoman Crete: Revolts, Politics and Identity in the Late Nineteenth Century*, I.B. Tauris, London, 2011, p. 169, noting that Vice-Consul Calocherino was captain of the British ship *Trafalgar*; "Situation at Candia", in *Sacramento Daily Union*, 8 September 1898, reporting that "The British Vice Consul, Mr. Calocherino, was burned to death in his house".

58 Rodogno, 2013, p. 221, see *supra* note 53.

59 Kallivretakis, 2006, pp. 30–31, see *supra* note 52.

6.2.4. The Plundering of China and the Boxer Rebellion

China, home to one of the world's oldest civilisations, was under dynastic rule for thousands of years.[60] From the fifteenth to eighteenth centuries, as Europeans were sailing around the world in an effort to promote commerce, China severely restricted trade with the West.[61] But by the nineteenth century China's political and social infrastructure was crumbling and its relationship with the West was changing.[62] This decay has been attributed to a number of factors, including corruption, lack of reform, population growth and internal resurrections, but European economic exploitation certainly played an influential role.[63] In particular, it was responsible for the First (1839–1842) and Second (1856–1860) Opium Wars with Britain. The root cause of those wars lay in British efforts to open the Chinese market and redress a trade imbalance (largely owing to the British appetite for tea) by exposing the Chinese to Indian-cultivated opium, addicting them to it, and then selling it to them against the wishes of Chinese authorities.[64] When Chinese officials tried to block British opium merchants from the port in Canton and confiscated their wares, the British launched a naval expedition that, by 1842, had prevailed through superiority of modern arms.[65] The Chinese were forced to sign the Treaty of Nanjing (and the Supplementary Treaty of the Bogue), which forced

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60 Michael D. Swaine and Ashley J. Tellis, *Interpreting China's Grand Strategy: Past, Present, and Future*, Rand, Santa Monica, CA, 2000, p. 1, noting that China is "one of the world's oldest civilizations"; Michael Teitelbaum and Robert Asher, *Immigration to the United States: Chinese Immigrants*, Facts On File, New York, 2005, p. 17: "Much of Chinese history is composed of a series of dynasties […] China was ruled by dynasties for thousands of years".

61 David Emil Mungello, *The Great Encounter of China and the West, 1500–1800*, 4th ed., Rowman & Littlefield, Plymouth, 2013, pp. 5–7, noting that by 1787 Canton was the sole legal port for trade with the West.

62 Clive J. Christie, *Southeast Asia in the Twentieth Century: A Reader*, I.B. Tauris, London, 1998, p. 85, commenting on the "crumbling of the Manchu empire" in the "last decade of the nineteenth century".

63 Duiker and Spielvogel, 2006, p. 571, see *supra* note 13: "[The] Quing dynasty began to suffer from the familiar dynastic ills of official corruption, peasant unrest, and incompetence at court […] exacerbated by the rapid growth in population"; David S.G. Goodman, *China and the West: Ideas and Activists*, Manchester University Press, Manchester, 1990, p. 1, explaining scholars' perceptions that the "West came saw and conquered" China "in the wake of nineteenth century colonialism and the import of Western ideas".

64 Duiker and Spielvogel, 2006, p. 571, see *supra* note 13.

65 *Ibid.*, pp. 571–72.

them to open to British trade and allow residence at the ports of Jīnmén, Fuzhou, Ningbo and Shanghai. In addition, China was obligated to cede Hong Kong to Britain.

In turn, following the British example, other Western powers, including France, Germany and Russia, signed similar treaties with the Chinese that also exacted commercial and residential privileges. Nevertheless, in 1856 the Second Opium War broke out in response to an allegedly illegal Chinese search of a British-registered ship. This time, British troops were joined by French in the attack and once again the Chinese were forced to sign a humiliating accord – this time, the Treaty of Tianjin (1858) – to which France, Russia, the United States and Britain were parties. According to the terms of this treaty, China agreed to open 11 more ports, allow foreign legations in Beijing, permit Christian missionary activity and legalise the import of opium.

However, in the end, China tried to prevent the entry of Western diplomats into Beijing and fighting between China and the Western powers recommenced in 1859. This time, an infuriated Britain and France occupied Beijing and burned the imperial summer palace. The Chinese were then forced to sign the Beijing Conventions of 1860, which obligated them to reaffirm the terms of the Treaty of Tianjin as well as make additional concessions.[66] By the close of the century, Chinese resentment over these terms gave rise to the Boxer Rebellion.

The Boxer Rebellion was a violent anti-Christian, xenophobic movement that sought to eradicate European and Japanese influences from Chinese society from 1898 to 1900.[67] Its organisers were called the Yihetuan (or Yihe Quan) movement, which translates as the Righteous and Harmonious Group, and they came to be known in English as the Boxers. Many of them had been farmers who had to leave their homes after crop failures owing to a severe drought during that period. These dispossessed migrants wandered the countryside of northern China looking for food and blaming Westerners for their troubles. Along the way, they began learning the *yihe quan* style of martial arts. The students were taught that the new fighting technique conferred powers on its practition-

66 Chernow and Vallasi, 1993, p. 2015, see *supra* note 8.

67 Joseph Esherick, *The Origins of the Boxer Uprising*, University of California Press, Oakland, 1987, p. 154.

ers that made them invulnerable to knives and bullets.[68] By 1899 the rising popularity of the fighting style and beliefs, combined with hatred for the foreigners, contributed to violent attacks by Boxers against foreigners and Chinese Christians, primarily in the provinces of Zhílì, Shānxī and Shandong as well as Manchuria and Inner Mongolia.[69] This burgeoning uprising had the support of the Beijing government, primarily through Empress Dowager Cíxǐ, who favoured a last effort to expel the foreigners (as opposed to Emperor Guangxu, who preferred reform but was placed under house arrest by the more powerful Empress Dowager).[70]

The Boxers adopted the slogan "Support the Qing, destroy the foreigner".[71] And by the spring of 1900 they were prepared to carry out this threat on a much larger scale. In May Boxer lynch mobs murdered a large group of Chinese Christians and two British missionaries in Pao Ting Fu (Bǎodìng), the provincial capital of Zhílì (now part of Héběi province), located a little less than 150 kilometres southwest of Beijing.[72] The European powers in the Legation Quarter in Beijing ordered up troops from the coast.[73] Nevertheless, by June a force of nearly 150,000 Boxers, supported by the war party at court, occupied Beijing and surrounded the Legation Quarter, where nearly all foreigners had taken refuge.[74]

During June both the Japanese and German ministers were murdered.[75] Meanwhile, at various points around the countryside in northern China, massacres of Christians and foreign missionaries were still taking place.[76] For instance, at the end of June and beginning of July, 11 adult missionaries and four children were massacred in Pao Ting Fu with the complicity of Chinese civil and military officials.[77] On 30 June members

68 *Ibid*.

69 Chernow and Vallasi, 1993, p. 348, see *supra* note 8.

70 *Ibid*. See also Barbara Bennett Peterson (ed.), *Notable Women of China: Shang Dynasty to the Early Twentieth Century*, M.E. Sharpe, New York, 2000, pp. 359–60.

71 Diana Preston, The Boxer Rebellion: The Dramatic Story of China's War on Foreigners that Shook the World in the Summer of 1900, Berkley Books, New York, 2001, p. 31.

72 Lynn E. Bodin and Chris Warner, *The Boxer Rebellion*, Osprey, Oxford, 1979, p. 5.

73 *Ibid*.

74 Chernow and Vallasi, 1993, p. 348, see *supra* note 8.

75 William F. Nimmo, Stars and Stripes Across the Pacific: The United States, Japan and Asia/Pacific Region, 1895–1945, Praeger, Westport, CT, 2001, p. 47.

76 *Ibid*.

77 Arthur Henderson Smith, *China in Convulsion*, Fleming H. Revell, New York, 1901, pp. 610–11.

of the American Presbyterian Mission, along with three children of one of the missionary couples, were burnt alive in their dwelling.[78] The other missionaries, representing the American Board and the China Inland Mission, were variously shot, stabbed or beheaded the following day.[79] Dozens of their Chinese Christian servants were killed with them.[80]

Finally, the siege of the Legation Quarter in Beijing was lifted in August by an international force of approximately 21,000 British, French, Russian, American, German, Austro-Hungarian, Italian and Japanese troops and the Boxer Rebellion came to an end.[81] Of the besieged defending forces within the Legation Quarter, numbering fewer than 500, 65 had been killed (12 civilians) and 131 wounded (23 of them civilians).[82]

In the aftermath, the Western powers and Japan compelled China to sign the Boxer Protocol, pursuant to which 10 high-ranking Chinese officials were executed, the Chinese had to pay an indemnity of 450,000 taels of silver, modify commercial treaties in favour of the foreigners, and allow foreign troops to be permanently garrisoned in Beijing.[83] In addition, foreign troops were dispatched on "punitive expeditions" to various massacre sites in the northern Chinese countryside.[84] Remarkably, the Pao Ting Fu expedition resulted in the foreigners convening an impromptu international tribunal and holding a trial against Chinese officials deemed responsible for the Boxer massacres.[85] It was the only court proceeding adjudicating criminal liability in the aftermath of the Boxer Rebellion. And it is the subject of the third trial examined in this chapter.

78 *Ibid*.

79 *Ibid*.

80 Hutcheson, 1901, pp. 464–5, see *supra* note 4.

81 Nimmo, 2001, p. 46, see *supra* note 75.

82 Spencer C. Tucker, *Almanac of American Military History*, vol. 2, ABC-Clio, Santa Barbara, CA, 2013, p. 1196.

83 Patrick Taveirne, Han-Mongol Encounters and Missionary Endeavors: A History of Scheut in Ordos (Hetao) 1874–1911, Leuven University Press, Leuven, 2004, p. 540.

84 Peter Harrington, *Peking 1900: The Boxer Rebellion*, Osprey, Oxford, 2001, pp. 87–89.

85 Raymond Robin, *Des occupations militaires en dehors des occupations de guerre*, Carnegie Endowment for International Peace, Washington, DC, 1942, p. 202: "In Pao-ting-fu, on the other hand, an international tribunal composed of Frenchmen, Germans, and Englishmen was established, under the presidency of the French officer, General Boilloud [sic]".

6.3. The Trials of the Siamese, Ottomans and Chinese

6.3.1. The Franco-Siamese Mixed Court

As will be recalled, the French and Siamese were embroiled in a brief armed conflict regarding the possession of territory in modern-day Laos. The conflict ended when Siam agreed to France's ultimatum to remove Siamese troops from the disputed territory and acknowledge French ownership.[86] To hammer out the details, the parties met at the negotiating table in Bangkok in August 1893.[87] The French were represented by Charles-Marie Le Myre de Vilers, the former Governor of Cochin-China, and the Siamese by Prince Devawongse Varoprakar, the Minister for Foreign Affairs.[88] Foremost among the issues to be worked out concerned territorial possession in the disputed area. The upshot of the negotiations was that Siam renounced its claims to territory east of the Mekong River and to the islands in the river.[89] Siam also consented to a 25-kilometre-wide demilitarised strip along the west bank of the Mekong and promised not to fortify the provinces of Angkor and Battambang.[90] In addition to resolving these larger issues, the French and Siamese also negotiated terms for dealing with Inspector Grosgurin's homicide, which had come to be known as the Affair of Kham Muon.

In the end, a global resolution of all issues between the parties was memorialised in a 2 October 1893 Treaty between France and Siam with an attached Convention ('Franco-Siamese Treaty').[91] Article 3 of the Franco-Siamese Treaty (with an appended *procès-verbal*) provided for adjudication of the Affair of Kham Muon as follows: 1) Phra Yot would be first tried before a specially created Siamese domestic court; and 2) if

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86 Adrien Launay, *Siam et les missionnaires français*, Alfred Mame et Fils, Tours, 1896, p. 234.

87 *Ibid*.

88 Arthur J. Dommen, The Indochinese Experience of the French and the Americans: Nationalism and Communism in Cambodia, Laos, and Vietnam, Indiana University Press, Bloomington, IN, 2001, p. 18.

89 Ronald Bruce St John, "The Land Boundaries of Indochina: Cambodia, Laos and Vietnam", in *Boundary of Territory Briefing*, 1998, vol. 2, no. 6, p. 12.

90 *Ibid*.

91 Treaty between the Government of France and the Government of His Majesty the King of Siam, 3 October 1893 ('Franco-Siamese Treaty'); Dommen, 2001, p. 18, see *supra* note 88.

the French were not satisfied with the manner or results of those proceedings, they could cause to be convened a "mixed court" presided over by two French judges, two Siamese judges and a French president – in essence, a French majority with three French and only two Siamese judges.[92] Thereafter, feeling the adjudication process outlined in the treaty was unfair, the Siamese urged the French to consider creation of a mixed *international* court, presided over by neutral Dutch, American and British judges.[93] But that proposal fell on deaf ears so the Siamese signed into law a Royal Decree creating a Special and Temporary Court for the domestic trial of Phra Yot ('Royal Decree').[94]

6.3.1.1. The Special and Temporary Court

The Special and Temporary Court ('Special Court') was well designed, combining aspects of both Thai and European law. In particular, the "Court applied existing Siamese legal codes but operated according to procedural rules inspired by the laws of England and France".[95] Moreover, as set forth below, the accused was afforded important guarantees of due process and the French were granted the right to participate in the trial in a meaningful manner. Pursuant to Part I of the Royal Decree, Constitution of the Court, the bench would consist of one chief justice and six judges, all Siamese. In addition, two Siamese prosecutors were designated.[96] According to Part II, Preliminary Process, the accused was to be charged by the prosecutors via an Act of Information, which would inform the accused of the offences imputed to him and the punishments available under Siamese law. A representative of the French government was authorised to confer with the Siamese prosecutors regarding the content of the indictment.[97] For purposes of trial, Part III guaranteed the accused access to the evidence brought against him and translated into Sia-

92 Franco-Siamese Treaty, Art. 3. See also Brockman-Hawe, 2013, pp. 56–57, see *supra* note 2.

93 Brockman-Hawe, 2013, pp. 57–58, see *supra* note 2.

94 Royal Decree Instituting a Special and Temporary Court for the Trial of the Affairs of Tong-Xieng-Kham and Keng-Chek (Kham-Muon), in "Full Report, with Documentary Appendices, of the Phra Yot Trial before the Special Court at Bangkok", in *Bangkok Times*, 1894 ('Full Report'); see also Brockman-Hawe, 2013, p. 58, *supra* note 2.

95 Brockman-Hawe, 2013, p. 58, *supra* note 2.

96 Full Report, Part I, see *supra* note 94.

97 *Ibid.*, Part II.

mese, the right to counsel, cross-examination and the right to call witnesses.[98] The French were entitled to a translation of the proceedings into their language and had the right to cross-examine witnesses and give a closing statement independently of the prosecution. However, for the accused was reserved the right to address the Special Court last.[99] Part IV of the Royal Decree stipulated that the final judgment had to be in writing (but not necessarily translated into French) and that any decision as to the guilt or not of the accused had to be by majority. Interestingly, it did not specify burdens or standards of proof.[100]

The trial began on 24 February 1894 and was held in a relatively small room in one of the public buildings within the walled portion of Bangkok. Present in the courtroom, in addition to the accused (represented by two lawyers – one English, the other Ceylonese), the judges, the two Crown prosecutors, court clerks and interpreters, were a French advocate, French consul and French legal expert, who had travelled to Bangkok from Saigon to observe the case.[101] Before a packed courtroom, Phra Yot was arraigned on charges of premeditated murder, infliction of severe bodily harm, robbery and arson. He was informed that conviction could be punished by death, mutilation, scourging with 50 strokes, imprisonment (at the end of which term would be added "cutting grass for the elephants"!), and/or various fines.[102]

In the course of an eight-day trial (in other words, eight public session days – stretching from 24 February to 17 March 1894), with one witness called by the prosecution and seven by the defence (including Phra Yot himself), a clear narrative account of the events at Kham Mouan at last emerged.[103] For eight years prior to the incident in question, Phra Yot had been a Siamese Commissioner in the area of the disputed territory.[104] On 23 May 1893 a French Captain, Luce, arrived there with a contingent of Annamite soldiers, surrounded Phra Yot and ordered him to leave the

98 *Ibid.*, Part III.

99 *Ibid.*

100 *Ibid.*, Part IV

101 John MacGregor, *Through the Buffer State: A Record of Recent Travels through Borneo, Siam, and Cambodia*, F.V. White, London, 1896, p. 100. See also Full Report, "The Trial of Phra Yot, First Day", p. 1, *supra* note 94.

102 MacGregor, 1896, pp. 99–100, see *supra* note 101.

103 Brockman-Hawe, 2013, p. 61, see *supra* note 2.

104 Full Report, "Judgment", p. 56, see *supra* note 94.

territory. He refused. Luce then called in Grosgurin and 20 Annamite soldiers and ordered them to escort Phra Yot away from the disputed territory to Tar Outhene. Luce claimed the escort was necessary to protect Phra Yot from the local populace, who Luce claimed hated the Siamese Commissioner (whose possessions were also taken by Luce on the grounds that Luce was safeguarding them pending the parties' arrival at Tar Outhene). Phra Yot and certain of his underlings left with the escort, but Phra Yot stated he was doing so pending further instructions from his government, with which, he claimed, not to have been in communication to that point.

Midway to their destination, Grosgurin and his escort parted company with Phra Yot, with each party finding lodgings before the final leg of the trek to Tar Outhene. At that point, Grosgurin was informed by locals that Phra Yot was looking for men and weapons to fight the French. The locals claimed they learnt this through Phra Yot's interpreter, Luang Anurak. Two days later, Grosgurin came upon Luang Anurak at Kham Muon and arrested him. Phra Yot asked for Luang Anurak's release but this was refused. He then left for Tar Outhene on his own and encountered two Siamese officers accompanied by 50 soldiers, who informed Phra Yot that the Commissioner of Outhene had orders to fight the French and expel them from the area. On 3 June 1893 Phra Yot, the officers and 20 of the soldiers then went to Kham Muon and, standing in front of the house where Grosgurin lay in his sickbed, called for Grosgurin to release Luang Anurak, return Phra Yot's possessions and then leave the territory. Grosgurin communicated his refusal.[105]

Luang Anurak then broke free of his captors and fled the house. Shots were fired from inside the house and a Siamese soldier was struck (although the French claimed the first shot was fired from the outside – either way several Siamese soldiers were killed by bullets emanating from inside the house). The Siamese then conferred and decided to fire shots in return. In the exchange of gunfire, Grosgurin was shot and killed and the house caught fire. The Siamese took certain possessions from the house (including, presumably, those belonging to Phra Yot as well as the soldiers' arms) before it burnt down, during which time some of the Annamite soldiers and an interpreter were wounded by Siamese swords (other

[105] *Ibid*.

members of Grosgurin's Annamite escort – a dozen in total – were killed during the firefight).[106]

Having considered all the evidence, the Special Court decided to acquit Phra Yot. With respect to the maiming, arson and robbery charges, the Court found insufficient evidence linking those to any orders by Phra Yot.[107] And, in any event, regarding the supposed stolen goods, a portion of those were arguably Phra Yot's confiscated property that was being retrieved on Phra Yot's behalf.[108] Regarding the homicide charges, the Court held that the accused could bear no liability as the evidence indicated he did not issue orders to the soldiers who fired the shots.[109] Moreover, even if he had, the accused was not in charge of the soldiers who fired the shots, the Siamese military officers were. Therefore, even assuming the homicides entailed criminal liability (which the Court did not assume as it found the Annamites fired first and the Siamese had a duty to defend themselves), the officers would bear sole responsibility for the killings.[110] As a result, Phra Yot was acquitted of all the charges.[111]

6.3.1.2. The Franco-Siamese Mixed Court

Predictably, the French were outraged by the verdict and within three days asserted their right to convene the stipulated Article 3, Mixed Tribunal.[112] The Constitution of the Mixed Court provided that the adjudicative

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[106] *Ibid.*, p. 58.

[107] *Ibid.*, pp. 59, 61.

[108] *Ibid.*, pp. 59, 61–62.

[109] *Ibid.*, p. 60.

[110] *Ibid.*

[111] *Ibid.*, p. 62. The Special Court did not apply the law of war. It appears this was for political reasons as the French maintained that their assertions of dominion over the Laotian territory, as well as any Siamese resistance thereto, did not place the countries in a state of war. Brockman-Hawe, 2013, p. 63, see *supra* note 2: "[A] ruling by a Siamese court to the contrary would have endangered the fragile *détente* that had prevailed between the two powers since October 1893".

[112] Brockman-Hawe, 2013, p. 64, see *supra* note 2. See also The Case of Kieng Chek Kham Muon before the Franco-Siamese Mixed Court: Constitution of the Mixed Court and Rules of Procedure, "First Part: Constitution of the Mixed Court. – Rules of Procedure" (June 1894), ('Trial of Phra Yot'):

> On the 20th of March 1894, the Minister Resident of the French Republic at Bangkok informed the Siamese Minister of Foreign Affairs that the French Government had decided to submit the Judgment given by the

body would "be composed of a President, assisted by two Siamese Judges and two French Judges".[113] The prescribed Rules of Procedure then laid out a detailed trial framework in three stages.

In Stage One, which I shall call Preliminaries: 1) three days at least before the initial sitting, the Act of Accusation (compared to the more neutral Siamese Act of Information), drawn up by the public prosecutor (French by definition as the position was filled by the *procureur* of the Republic) would be provided to the Accused; 2) pursuant to a date and time chosen by the Court President, the Court would sit in a room in the French legation; 3) interpreters would be provided to assure all parties understood the different languages spoken in court; 4) the accused would then appear before the President, identify himself, be warned to "be attentive to what he is about to hear" and then have the Act of Accusation read to him; 5) the public prosecutor would then lay out the grounds of the accusation and then give a list of both the prosecution and defence witnesses; 6) the witnesses would then be sequestered in a specially designated room and thereafter appear in the courtroom only to give their evidence; 7) the accused, and then each witness one at a time, would be sworn in and examined; 8) after each witness would testify, the accused could respond to the testimony (presumably by addressing the Court directly) and put questions to the witness through the President (not directly through cross-examination); 9) the President would then have the right to question each witness and then each judge and the public prosecutor would have the same right, after asking for and getting leave of the President to question the witness; and 10) during the course of the whole proceeding, the President would have the right to hear all witnesses and obtain all information.[114]

In Stage Two, which I shall call Debates (essentially akin to closing arguments in the British courts): 1) after the hearing of the witnesses, the public prosecutor would address the Court and "develop before the Court the circumstances upon which the accusation is based"; 2) the accused and his counsel would then have the right to answer; 3) the public prosecutor would be allowed to reply but the accused or his counsel would

Siamese Court, on the 17th March, 1894, to a Mixed Court, according to the right given it by the Convention of 3rd October, 1893.

[113] Trial of Phra Yot, 1894, see *supra* note 112. As with the Siamese Special Court, no burden or standard of proof was referenced in the Mixed Tribunal's constituent document.

[114] *Ibid.*, pp. 3–4.

"always have the right to speak last"; and 4) the President would then "declare the debates closed".

In Stage Three, which I shall call Framing the Verdict and Deliberations: 1) the President would put questions "arising from the debates in these words: 'Is the accused guilty of having committed such a deed, with all the circumstances contained in the Act of Accusation?'"; 2) the President would then "put the question of extenuating circumstances"; 3) after the President would frame the questions, the accused and the public prosecutor would be able to "make any observations" on the way the questions were put; 4) the accused or the public prosecutor could then make objections to the way the questions were framed and the Court would then decide on the merits of the objections; 5) the President would then "order the Accused to retire"; and 6) the Court would then "withdraw to the Chamber of deliberations to deliberate upon the solution of the questions and the punishment to be awarded".[115]

The Rules of Procedure then defined the applicable crimes. They began with murder, which was described as "homicide committed voluntarily".[116] They then defined as "assassination" any murder committed with "premeditation or ambush".[117] They went on to define "premeditation" and spelled out details regarding accomplice liability. With respect to the punishment for homicide crimes, the Rules then specified that capital punishment would be imposed on "whoever shall be guilty of assassination, parricide, infanticide, or poisoning" or "murder […] preceded, accompanied or followed [by] another crime".[118] Finally, the Rules stipulated that, in cases of extenuating circumstances, the death penalty could be reduced to hard labour for life or for a time.[119]

It should be noted that the prescribed Rules of Procedure have more of the flavour of a French judge-focused inquisitorial proceeding (with the President controlling most aspects of the proceedings and the accused being called as the first witness) than the Siamese Special Court, which was more adversarial in character (allowing the parties to cross-examine wit-

[115] *Ibid.*, p. 4.
[116] *Ibid.*
[117] *Ibid.*
[118] *Ibid.*, p. 5. The Rules also set forth penalties for theft and arson.
[119] *Ibid.*

nesses directly, for example).[120] Also, the crimes, especially with respect to those tied to capital punishment (assassination, for example), were very French in flavour (known as *assassinat* in French).[121]

The trial opened on 4 June 1894. As set forth in the Rules of Procedure, the French prosecutor read the charging instrument, the Act of Accusation.[122] Its text reveals that, from the outset, the deck was stacked against Phra Yot. Contrary to the evidence adduced at the first trial, it avers that the Siamese Commissioner voluntarily submitted to being dispossessed and ejected from his post under armed escort.[123] It then alleges that he had a change of heart once the parties arrived at Kham Muon, where Luang Anurak was legitimately arrested. Phra Yot then gathered Siamese forces near Outhene (as opposed to encountering them by chance), led a "corps" of "over 100 armed men" (as opposed to a mere 20 from the first trial) to Grosgurin's temporary residence, and then, unprovoked and unrelated to Luang Anurak's arrest, gave the order to this "veritable small army" to start firing at Grosgurin and the Annamites.[124] After this premeditated massacre (leaving only two survivors – allegedly taken as prisoners and mistreated en route to Bangkok) and attendant arson, Phra Yot and his troops stole the remaining possessions of the murdered French contingent.[125]

The Act of Accusation acknowledges alternate versions of the facts "produced in the course of the inquiry and during the first trial of this affair" but asserts that "good sense and the concatenation of circumstances indicate" that this is "general and very confused evidence".[126] It then goes on to anticipate and refute Phra Yot's defences averring that "it is in vain […] that he has pretended, for his defence, that his first intentions, on his

[120] See Richard S. Frase, "Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?", in *California Law Review*, 1990, vol. 78, no. 3, pp. 539, 628, 673–74, noting that, at trial, defendants testify first in the French system and observing that "another distinctive feature of the French [system] is the active role of the presiding trial judge".

[121] Simon Chesterman, "An Altogether Different Order: Defining the Elements of Crimes against Humanity", in *Duke Journal of Comparative and International Law*, 2000, vol. 10, no. 2, pp. 328–29, discussing the French crime of *assassinat*.

[122] Trial of Phra Yot, 1894, pp. 6–7, see *supra* note 112.

[123] *Ibid*.

[124] *Ibid.*, pp. 8–9.

[125] *Ibid.*, p. 8.

[126] *Ibid*.

arrival at Kieng Chek, were of an absolutely pacific character, that he only came there as an interceder of Luang Anurak".[127] Based on all this, Phra Yot was then charged as an accomplice to murder, theft and arson (referred to as "wilful incendiarism").[128]

The Court then began to hear testimony. The evidence that emerged appeared largely consistent with that from the first trial but the French bullied and harassed witnesses to slant the facts as they wanted them presented. This excerpt from Phra Yot's time on the stand is representative of the tenor of the proceedings:

> Q. – Did Grosgurin explain to you why he arrested Luang Anurak?
>
> A. – He told me because Luang Anurak had spread certain alarming rumours at Kham Muon that the Siamese would return in force.
>
> *The President*. Grosgurin had a perfect right to arrest Luang Anurak after that, in self defence, for he was in an unknown country and only had a handful of men whose fidelity was doubtful. […]
>
> Q. – It is quite impossible to believe that Grosgurin who was sick and whose party was the weakest would be first to attack. The Siamese witnesses have stated that there were at least 100 men surrounding the house.
>
> A. – I have already stated that there were not more than 50 or 60 men, and the witnesses must have been mistaken.
>
> Q. – Grosgurin was very ill and it is quite incredible that he should have fired upon peaceful men, without any provocation.

On 13 June 1894 the Court found Phra Yot guilty of complicity in the murder of Grosgurin and members of his escort party but acquitted him of the theft and arson charges.[129] Not surprisingly, the three French judges voted in favour of the conviction and the two Siamese judges dissented – in fact, they refused to sign the final verdict form.[130] Nevertheless, the Court did not impose the death sentence in light of extenuating

[127] *Ibid.*, p. 9.
[128] *Ibid.*
[129] *Ibid.*, pp. 37–38.
[130] *Ibid.*

circumstances, to wit, that he did not take away "the life of a fellow creature with a view to gratify his cupidity and to satisfy a feeling of hatred or personal vengeance".[131] As a result, Phra Yot was condemned "to the punishment of 20 years hard labour" and ordered to pay the costs of the trial.[132] France wanted the defendant to serve his sentence in a French penal colony but, through a compromise brokered by the British, Phra Yot was confined in a Siamese prison.[133] Five years later, with French permission, Siamese King Chulalongkorn pardoned him and he was released.[134]

6.3.2. The Trial of the Ottomans Before the International Military Commissions

As described earlier, intercommunal violence on the island of Crete, then controlled by the Ottoman Turks, resulted in the murder of nearly one thousand Christians/British soldiers by a vengeful Muslim mob on 6 September 1898. A provisional government of Europeans (or Great Powers), directed by a Council of Admirals representing each of the resident powers – Russia, France, Italy and Britain (Germany and Austria-Hungary had since departed) – had to decide on appropriate justice measures. Prior to this bloodshed, on 31 August 1897, the Great Powers had created a Military Commission of International Police, using as its governing law the Italian Military Code, to handle crimes committed against international citizens (non-Cretans) on the island.[135] This would turn out to be an important cornerstone in the development of a justice solution.

6.3.2.1. Beginning of the Justice Process

The justice process began with officials identifying 172 potential criminal cases.[136] Based on these, 145 people were taken into custody in the imme-

131 *Ibid.*, p. 36.

132 *Ibid.*, p. 39.

133 Brockman-Hawe, 2013, p. 69, see *supra* note 2.

134 Walter E.J. Tips, Gustave Rolin-Jacquemyns and the Making of Modern Siam: The Diaries and Letters of King Chulalongkorn's General Adviser, White Lotus Press, Bangkok, 1996, p. 133.

135 Robin, 1942, p. 188, see *supra* note 85; Pritchard, 2003, pp. 12–13, see *supra* note 3.

136 *British Blue Book*, Turkey No. 7 (1898), No. 159, Telegram from Sir Herbert Chermside, British Military Commissioner, Candia, to the Prime Minister and Foreign Secretary, the Marquis of Salisbury, sent 7 October 1898.

diate aftermath of the massacres.[137] In the initial phase, to establish whether authorities had sufficient evidence to prosecute the suspects, Turkish and British Courts of Inquiry were established.[138] To the Great Powers, the Turkish Court of Inquiry appeared ineffectual as Turkish authorities seemed bent on pinning responsibility strictly on lower-level perpetrators and shielding from prosecution the massacre ringleaders.[139]

So the British Court of Inquiry served as the true screening mechanism. Its President was Major Reginald Henry Bertie of the 2nd Royal Welch Fusiliers.[140] Four other British officers also served on the Court: Major J.C. Conway-Gordon of the Highland Light Infantry; Harry Robinson, paymaster of HMS *Isis*; Royal Marine Captain J.H. Lambert of the HMS *Revenge*; and William Ernest Crocker, the assistant paymaster of HMS *Venus*, who acted as secretary to the Court. Reverend Thomas Henderson Chapman, chaplain to the forces, recorded the proceedings via shorthand.[141]

Although conducting proceedings in accordance with the *British Manual of Military Law*, this Court of Inquiry functioned rather akin to a French *juge d'instruction*, an investigating magistrate (somewhat of a cross between a prosecutor and judge), who is charged with conducting an impartial investigation to determine whether a crime worthy of a prosecution has been committed.[142] In serving this function, the British Court of Inquiry heard oral testimony from over 100 witnesses and considered more than 600 deposition transcripts. It disposed of 164 cases and authorised criminal trials for 36 suspects. Beginning on 25 September 1898, it completed its work in two months. In light of this volume, R. John Pritchard, the world's pre-eminent expert on the Cretan trials of the Otto-

137 *Ibid.*

138 Pritchard, 2003, p. 30, see *supra* note 3. Pritchard refers to an "International Court of Inquiry" being established but it appears that the British Court of Inquiry served as the initial screening mechanism for cases sent to trial before the International Military Commissions As will be explained below, the International Military Commission at Canea also used a *juge d'instruction* for screening.

139 *Ibid.*, p. 32.

140 *Ibid.*

141 *Ibid.* Interestingly, none of the members had any legal training or degrees.

142 *Ibid.*, p. 33; Jeremy Shapiro and Bénédicte Suzan, "The French Experience of Counterterrorism", in *Survival*, 2003, vol. 45, no. 1 p. 78. The *juge d'instruction* is not an advocate for the prosecution or the defence and, after making a decision to prosecute, simply hands her case over to the attorneys for adjudication before a *juge de siege* for trial. *Ibid.*

mans, notes that "from a modern perspective, the swiftness of the proceedings in Crete is their most marked characteristic".[143] This feat is all the more remarkable considering that the bulk of suspects were brought before this Court on bogus or extremely flimsy evidence. As Pritchard explains, the screening judges

> were often in considerable doubt as to why the suspects in their custody had been detained by the Turkish authorities, who seem to have been more interested in being seen to cooperate with the Powers in the weeks that followed the calamities of September 6, than they were in completing any paperwork. Put bluntly, the Turks had combed the district for suspicious characters but, in the majority of cases, had failed to charge those whom they apprehended with any offenses.[144]

6.3.2.2. The British Military Court

The actual trials themselves were conducted before two different judicial bodies. In the first place, prosecutions for the killings of British military personnel as war crimes in violation of the "laws and usages of war" (for example, customary international law) took place before a British Military Court (essentially a military court martial).[145] In the first part of October 1898, Colonel Herbert Chermside, British Military Commissioner and Commandant of the British troops on Crete, appointed Francis Howard, of the 2nd Battalion of the Rifle Brigade, as President of the Court.[146] The Court first tried seven Turks for the 6 September murder of five British soldiers – three men of the Highland Light Infantry killed near the Greek hospital and two outside of what was then called Candia's "new gate".[147] The trial took place on 13–15 October and, at its end, all seven defendants

[143] Pritchard, 2003, p. 34, see *supra* note 3.

[144] *Ibid.*, p. 53.

[145] See Instructions given by R.-Adm. Sir Gerard Noel to Col. Sir Herbert Chermside, 10 October 1898, NOE/10, Noel Papers, National Maritime Museum, Greenwich, United Kingdom: order by Britain's chief military commander on Crete to the officer in charge of the Candia sector to "convene a military Court-Martial […] to try all offenders, charged with having on the 6th [September] carried or used arms against the British forces".

[146] The names and number of other Court members are not known. Pritchard, 2003, pp. 35–36, see *supra* note 3.

[147] *Ibid.*, p. 36.

were convicted and sentenced to death.[148] At the gallows two days later, one British military observer with an imperialist mindset noted, in reference to the condemned Ottoman defendants and their compatriots in attendance: "In England a public execution is unthinkable; as an example to the fantastical hordes to the East it is often imperative for the common safety".[149]

Within days, another British Military Court tried, convicted and sentenced to death five additional Turks in connection with the homicides of British military personnel on the Candia harbour picket and at the British hospital.[150] At the same trial, the Court sentenced four other defendants to 20-year sentences of penal servitude and acquitted one other. Overall, the Court completed all its work in reference to these two separate trials, involving a total of 17 defendants, within the very compressed timeframe of 15 working days.[151] Although the trials were conducted quickly, Pritchard opines that they by no means constituted drumhead justice:

> The accused on trial at Candia were not undifferentiated nor were they jointly tried on any rolled-up conspiracy charges. […] it is clear that those convicted were connected up with specific crimes committed against particular victims. […] the investigations, arrests and trials of the accused took place while the events that gave rise to them were extremely fresh in the minds of witnesses.[152]

6.3.2.3. The International Cases

The international cases, involving attacks on Christian civilians (that is, the victims who were not British military personnel) were handled in one of three ways: 1) some were transferred by the British Court of Inquiry to an International Military Commission in Candia; 2) others were initially screened by a separate *juge d'instruction* (not connected to the Court of Inquiry) and those it passed on for trial were heard by a separate International Military Commission based in Canea; and 3) for less serious

[148] *Ibid.*, pp. 36–37.

[149] William Price Drury, *In Many Parts: Memoirs of a Marine*, Fisher Unwin, London, 1926, pp. 180–81.

[150] Pritchard, 2003, p. 39, fn. 66, see *supra* note 3.

[151] *Ibid.*, pp. 39–40.

[152] *Ibid.*, pp. 37–38.

crimes, certain suspects were brought to justice in "summary proceedings" – either by Captain Sir H.W. M'Mahon under his powers as British Military Governor of Candia to award sentences of up to 42 days' imprisonment (eight were punished this way) or by the summary powers of the "international military authorities", who could also order short prison sentences (13 suspects were punished this way).[153]

But why were international cases handled separately given that the British Military Court was already up and running? The answer, quite simply, is that the perpetrators funnelled through the international mechanisms had not committed crimes against any foreign or even domestic military forces. In other words, they had not committed war crimes, which, by that time in history, had some basis for prosecution in international law.[154] Logically, the next inquiry would be as to why a domestic court could not have prosecuted these cases. On one level, the answer is rather easy – the Ottoman Empire was being divested of all control of the island and, in any event, by September 1898 its judicial infrastructure had disappeared. That left the *ad hoc* European governing authorities. Digging deeper, however, it is not even clear that existing law, regardless of the forum, adequately dealt with these atrocities that were motivated by religious hatred and shocked the conscience of collective humanity. According to Pritchard:

> The problem arose of how to find a suitable means of prosecuting and punishing the culprits in a manner suitably expressive of the outrage felt by the international community. [The most eminent legal authorities] believed that if international tribunals were set up by the Council of Admirals, these would be "illegal" under international law […] [So the International Military Commission trials] were thought and in-

[153] *Ibid.*, pp. 40–65. Regarding the summary proceedings, see *id.* p. 49. Of all those arrested, 11 prisoners, regarded by the international authorities as notoriously "bad characters" but against whom nothing could be proved at trial, were not prosecuted by the British Military Court or the two International Criminal Tribunals but were summarily banished from the island for life. Some of them served short prison sentences before being exiled. The identities of the "international military authorities" in charge of these summary proceedings is not revealed by surviving documentation.

[154] See Mariya S. Volzhskaya, "*Kononov v. Latvia*: A Partisan and a Criminal – the European Court of Human Rights Takes a Controversial Stance on War Crimes", in *Tulane Journal of International and Comparative Law*, 2011, vol. 19, pp. 651, 653: "The earliest example of the international codification is 'Geneva law,' the collection of Geneva Conventions that provide an evolving set of concepts and definitions of war crimes from 1864".

> tended by those responsible for them to mark a new stage in international jurisprudence and statecraft. [These] were exactly the same considerations which were manifest in the declaration of May 28, 1915, by France, Great Britain and Russia in expressing their determination to bring to justice those responsible for perpetrating 'crimes against humanity and civilization for which all members of the Turkish government will be held responsible together with its agents implicated in the massacres' committed against the Armenians.' The 1915 declaration, commonly held to be the first time in which the concept was articulated, proved to be a damp squib. On Crete, however, there was an entirely different outcome in the closing months of 1898.[155]

6.3.2.3.1. The International Military Commission at Candia

Thus, a large portion of those suspected strictly of crimes against civilians were sent for trial by an International Military Commission in Candia convened by the British representative on the four-power Council of Admirals, Rear Admiral Sir Gerard Noel, on 21 October 1898 pursuant to a mandate, specially assigned to him at a 29 September Council meeting, which laid down the ground rules regarding custody of such suspects.[156] The Candia Commission's institutional antecedent, of course, was the Military Commission of International Police, referred to previously. And like this latter Commission, each individual chamber of which consisted of officers of the nationality controlling the sector, the International Military Commission was located in the British sector of Candia. So its members were British.

It is worth noting that the Council of Admirals, through Noel, conferred with the Ottoman Governor of Crete, Djevad Pasha, in advance of the International Military Commission's creation.[157] When informed that the members of the Commission at Candia sitting in judgment of the defendants would consist strictly of British officers (which was presumably true of the International Military Commission at Canea too), Djevad Pasha advocated for a panel of mixed nationalities, including Ottoman – somewhat parallel to the Siamese request of the French in connection with

[155] Pritchard, 2003, pp. 40–41, see *supra* note 3.

[156] *Ibid.*, p. 41.

[157] *Ibid.*

the Phra Yot trial. Like that of the Siamese, the Ottoman request was denied.[158] Nevertheless, with no options in the face of the power of the Concert of Europe, the Ottoman Sultan grudgingly gave his consent to the proposed trials before the International Military Commission at Candia (and by implication, at Canea).[159] It should be noted, however, that, notwithstanding the strictly British composition of the Commission panels at Candia and Canea, final approval of its verdicts and punishments had to be confirmed by the Council of Admirals.[160] In that sense, the Commissions still possessed some degree of international character.

The International Military Commission at Candia was created by means of a Convening Order published by Noel on 21 October. The Convening Order invested it with powers to

> judge, without appeal, on the basis of the British Military Articles of War, all acts arising contrary to the public security, as well as offences of every kind, to the prejudice of the land and sea international forces, and the personnel of the international gendarmerie, which may be committed by the native subjects of His Imperial Majesty the Sultan, or by foreign subjects in the territory occupied by the Great Powers.[161]

Permitting the International Military Commission to adjudicate "all acts arising contrary to the public security" gave it an extremely broad mandate. In practice, this translated into prosecutions for war crimes and a proto-version of crimes against humanity.[162] Its punishments ranged from various terms of imprisonment (with hard labour) to the death penalty.[163]

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158 *Ibid.*, p. 42. Two other Ottoman requests – that Ottoman attorneys be sent from Constantinople to assist the accused in their defence and that death sentences be commuted to life imprisonment in remote locations – were denied.

159 *Ibid.*, pp. 43, 55.

160 *Ibid.*, pp. 47–48. That provision was initially withdrawn at the request of Paris and Saint Petersburg but ultimately put back in. *Id.* p. 48.

161 Confidential Print No. 234, Sir Evan MacGregor, KCB, Permanent Under-Secretary of State at the Admiralty, to the Foreign Office, sent on 16 November, 1898, received on 18 November 1898, with relevant enclosures ('Confidential Print').

162 Pritchard, 2003, p. 43, see *supra* note 3, commenting on International Military Commissions having war crimes within their subject matter jurisdiction and observing that, in the early stages of the International Military Commissions' creation, the British remained "far less concerned with the punishment of those found guilty of crimes against humanity than with retribution upon those who had attacked the British forces". See also Beth Van Schaack, "The Definition of Crimes against Humanity: Resolving the Incoherence", in *Co-*

The Convening Order also declared that "the procedure of the Commission is to be that of a military court martial with any modifications which are considered by the President [of the Commission] as desirable to suit the special circumstances of the case".[164] In particular, based on the court-martial model, the International Military Commission's rules of procedure were governed by Queen's Regulations, set out in the British *Manual of Military Law*.[165] At the end of the nineteenth century, there were four different types of British courts martial: 1) the regimental courts martial (consisting of a panel of three members); 2) the district courts martial (also had three members but had wider powers than the regimental courts martial; 3) the general courts martial (minimum number of members was five – had the widest powers of punishment and could try an officer or soldier of any rank); and 4) field general courts martial (had the full powers of a general courts martial, although it could sit with a minimum of only three members – convened when accused was on active service or was stationed overseas).[166] Given that, as set forth below, the Commission had a President and four other members (thus five members total), and could issues death sentences, it appears to resemble most a general courts martial.[167]

The procedure in modern British courts martial is identical to that of a civil criminal court – and those of the nineteenth century were not terribly different.[168] This provides insight as to the rough outline of proce-

lumbia Journal of Transnational Law, 1999, vol. 37, pp. 787, 796, fn. 28: "These trials exercised jurisdiction over acts, such as the massacre of Christian compatriots by Muslim Cretans, that would later be termed 'crimes against humanity'".

163 Pritchard, 2003, p. 51, see *supra* note 3, detailing the sentences of men who were sentenced to various terms of imprisonment with hard labour, and *id.*, p. 42, indicating the International Military Commission could sentence to death those found guilty.

164 Confidential Print, see *supra* note 161.

165 Pritchard, 2003, p. 45, see *supra* note 3.

166 Stephen Stratford, "Courts Martial", in British Military and Criminal History in the Period 1900 to 1999 (http://archive.today/LWci6#selection-185.224-185.331).

167 See Pritchard, 2003, p. 42, *supra* note 3, referring to the availability of the "death sentence" and "capital punishment" for the International Military Commission prosecutions.

168 Ibid. See also John H. Aulick, Minutes of Proceedings of the Courts of Inquiry and Court Martial in Relation to Captain David Porter, David and Force, Washington, DC, 1825, p. 416:

> The course of proceedings, at British Courts Martial, is said to assimilate more nearly to trials for *high treason* in the Courts of common law: because prisoners, tried for that crime, have greater privileges allowed

dural stages before the International Military Commission. Consistent with what one would see in a typical Crown Court trial, the Commission process probably would have consisted of the following basic steps: 1) the clerk or the President would have read out the charge sheet stating the offences alleged; 2) the prosecution would then have made an opening statement setting out the basic facts; (3) the prosecution would then have put on its case via witnesses testimony (subject to cross-examination) – written affidavits and/or deposition testimony was admitted in certain instances when witnesses were not available (or even if available, perhaps just to save time);[169] 4) the defence case (same process as the prosecution except the defendant may have elected not to give evidence); 5) speeches by the prosecution and the defence urging conviction or acquittal; and 6) deliberation by the judges and passing of sentence.[170]

The surviving documentation from the International Military Commission trials does not reveal the exact identities of the British prosecutors (who would likely have been British military officers) or the defence counsel.[171] But it does tell us who served as members of the Commission at Candia. Admiral Noel appointed Lieutenant Colonel Rowland Broughton Mainwaring of the Royal Welch Fusiliers as the President. He was joined by Commander William Henry Baker-Baker of HMS *Illustrious*, Major S.G. Allen of the Royal Army Medical Corps, Captain Joseph Henry Lachlan White of the First Battalion of the Northumberland Fusiliers, and Lieutenant E. Henslow of HMS *Revenge*. Noel also appointed a Judge Advocate to advise the Commission members on pure matters of law (such as procedure and rules of evidence) – Captain Capel Molyneux Brunker of the 2nd Battalion of the Lancashire Fusiliers.[172] Pritchard explains:

> them by statute, than what are allowed in criminal prosecutions, for other offences. (emphasis in original)

[169] See Pritchard, 2003, p. 56, *supra* note 3, noting that deposition testimony of certain witnesses was collected.

[170] See UK Criminal Law Blog, "Crown Court Trial", setting out the steps in the procedure (http://ukcriminallawblog.com/crown-court-trial/).

[171] Pritchard, 2003, p. 45, see *supra* note 3. Given that "[local] lawyers would have been entirely unfamiliar with British military law", Pritchard suspects that defence counsel were selected from the ranks of fresh British troops who had arrived after the 6 September massacres. Although they would have had little or no legal training, they likely carried out their duties with great care, diligence and efficacy.

[172] *Ibid.*, pp. 43–44.

> In accordance with the practices of the time, these officers, like those on the preliminary Court of Inquiry, were selected for their fairness, steadiness and intellect. None of them were lawyers by training but all of them would have had a great deal of experience in the application of military law in courts martial, matters generally dealt with by officers selected as men of good sense, few lawyers.[173]

It should be noted that, despite the lingering intercommunal tensions on the island in the wake of the mass violence, no witness protection measures were put in place for the trials.[174] As a result, "there were difficulties in getting witnesses to come forward [and] many remained silent out of a well-justified fear of the consequences they would suffer if they gave evidence".[175] A portion of the International Military Commission testimony was presented by way of deposition and authorities often faced obstacles getting depositions from remote locations such as Athens, Piraeus, Syra and isolated villages in remote parts of Crete's interior.[176] Live witnesses, and all trial participants, were assisted by interpreters given that persons in the courtroom would have spoken English, Greek or Turkish.[177]

From 26 October to 5 November 1898 the International Military Commission at Candia conducted two separate trials. In total, 21 defendants were in the dock on war crimes and/or proto-crimes against humanity charges, which included the murder of the British Vice-Consul Calocherino.[178] In the end, the Commission sentenced five men to death and various others to terms of imprisonment (up to life). Three defendants were acquitted and a number of them were discharged before the conclusion of trial for lack of evidence.[179] The Council of Admirals confirmed the sentences immediately and all five of the death row prisoners were hanged on 7 November 1898.[180]

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[173] *Ibid.*, p. 44.

[174] *Ibid.*, p. 55.

[175] *Ibid.*, p. 56

[176] *Ibid.*

[177] *Ibid.*, pp. 56–57.

[178] *Ibid.*, pp. 48–51. It would seem the second trial focused more specifically on the murder of the British Vice-Consul and his family. *Id.* p. 51, fn. 89.

[179] *Ibid.*, pp. 51–52.

[180] *Ibid.*, p. 51.

Two of the defendants tried at Candia, also two of the men sentenced to death, are particularly noteworthy. One was Edhem Pasha, the Provincial Governor of Candia, the highest-ranking official to be tried by the International Military Commissions. The other was Churchill Bey, head of the local Ottoman gendarmerie. Both were found to be implicated in the 6 September massacres and were duly executed, notwithstanding their high rank.[181] The principle of liability for government officials for violation of international law is generally thought to have originated at Nuremberg.[182] But the International Military Commission trials on Crete were clearly an important antecedent.

6.3.2.3.2. The International Military Commission at Canea

The European Powers operated a second International Military Commission at Canea. It consisted of the pre-existing Military Commission of International Police converted into an International Military Commission. Available archives do not provide much additional detail regarding this Commission – for example, the identities of its panel members or the prosecutors and defence attorneys who appeared before it are unknown. However, we do know that, given its Military Commission of International Police roots, this Commission's procedures were governed by the Italian Military Code.[183] Thus, unlike International Military Commission at Candia which, as explained above, appears to have used procedures similar to those in British Crown Courts, for example, a more adversarial procedure, the Canea Commission procedure would have been more akin to the inquisitorial Continental European model previously analysed in connection with the Franco-Siamese Mixed Court in the Phra Yot trial. It seems that the Canea Commission was used to try crimes against humanity cases only (as opposed to war crimes cases) – these would appear to implicate murder, arson, rape and theft.[184]

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[181] *Ibid.*, pp. 59–60.

[182] See John W. Head, "Civilization and Law: A Dark Optimism Based on the Precedent of Unprecedented Crises", in *University of Kansas Law Review*, 2011, vol. 59, p. 1054: "They prosecuted Nazi War leaders at Nuremberg, to make them personally criminally liable for acts they carried out as government officials – the first time such a prosecution had ever even been conceived".

[183] Pritchard, 2003. pp. 12, 60, see *supra* note 3.

[184] *Ibid.*, p. 53: "In the end, 42 prisoners were taken to Canea for trial, all in relation to what today would classify as crimes against humanity".

And, consistent with the inquisitorial template, the Canea Commission's pre-trial screening included examination by a French *juge d'instruction*, Captain L. Berger of the French Marines.[185] In particular, after initial screening by the British Court of Inquiry, 60 of the cases were then sent on to Berger for further review.[186] Of these, 42 were transferred to Canea for trial. Another four defendants were transferred to Canea directly from the British Court of Inquiry.[187]

The Canea trials commenced on 19 November 1898 and were completed within three days. In the end, the International Military Commission sentenced 11 defendants to death (although, in light of efforts to mollify the Sublime Porte,[188] only two were actually executed – Haïder Imanaki and Arap Halil). The Commission also sentenced nine of the accused to life imprisonment.[189] Four were sentenced to terms of 15, 12, 10 and five years' hard labour, respectively. Two others were sentenced to two years' hard labour. Four more were sentenced to relatively short periods of imprisonment (that is, a simple loss of liberty without hard labour). Of those, one was sentenced to only a year in custody. Sixteen were acquitted and a number of those individuals were then banished from the island. The Commission found that, in two other cases, there was insufficient evidence to sustain a prosecution.[190]

6.3.3. The Trial of the Chinese after the Boxer Rebellion

It will be recalled that in the summer of 1900 violence erupted across China as the Boxers slaughtered foreigners in an effort to remove all traces of non-Chinese influence. In the countryside southwest of Beijing, at Pao Ting Fu, in the former Zhílì Province, 11 adult missionaries and four children, along with dozens of their Christian Chinese servants, were killed in horrific fashion. After the expatriate community in Beijing was rescued and order was restored there in August 1900, the Western powers had to decide about security and justice measures to be taken in the surrounding countryside, where Boxer crimes had also been committed.

185 *Ibid.*
186 *Ibid.*, p. 60.
187 *Ibid.*
188 *Ibid.*, p. 63
189 *Ibid.*, p. 60.
190 *Ibid.*

6.3.3.1. The Expeditionary Forces Sent to Pao Ting Fu

The Europeans opted to send two separate columns of soldiers from Britain, France, Germany and Italy to Pao Ting Fu as an expeditionary force. One would travel there from Beijing and the other from Tientsin (Tianjin), east of Pao Ting Fu and about the same distance away as Beijing (about 150 kilometres).[191] The decision to send the expeditionary force, as well as measures taken to muster, requisition and dispatch it, required approximately two months of planning. The idea was originally proposed in early September but was postponed for a variety of logistical reasons.[192] At first, it was thought to be a military necessity based on reports of Boxer legions still in force in the countryside and using Pao Ting Fu as a launching point for attacks.[193] But these reports were ultimately found to be unsubstantiated. The Chinese Court, which had fled Beijing and was in Shānxī Province had, by then, issued edicts ordering the people to suppress the Boxers and welcome the foreign troops. In fact, the Boxers were being rounded up by the Chinese authorities and punished.[194]

Nevertheless, there was at least one pressing security issue that required European intervention. A family of missionaries in Pao Ting Fu, the Greens, was allegedly being held hostage by (or, at least, were in the custody of) the *fanti*, the provincial treasurer and chief official in the city. The Green family had sent letters that made it out of Pao Ting Fu and reached Tientsin. The letters stated that the family was being mistreated and were in a wretched condition. They pleaded for help. The British commander in Tientsin had sent a message to the *fanti* warning him that if he did not treat the Greens properly he would be punished by death when the foreign troops arrived. Thus, although perhaps not, on its own, a justification for sending an entire expeditionary force, the Europeans were also interested in assuring the welfare of the Green family.[195] As it turned out, when the expeditionary force arrived, the Greens' condition had dete-

[191] Thomas F. Millard, "Punishment and Revenge in China", in *Scribner's Magazine*, 1901, no. 29, p. 190.

[192] *Ibid.*, p. 189.

[193] *Ibid.*, pp. 189–90.

[194] *Ibid.*, p. 190.

[195] *Ibid*.

riorated horribly. Within days after the foreigners reached Pao Ting Fu, the family's little girl had died and her father was on death's door.[196]

Apart from the harrowing situation of the Greens, the security situation had largely stabilised. So the expeditionary mission was then primarily reorientated toward justice objectives as the Europeans looked to investigate the June–July massacres and punish the responsible parties.[197] By the beginning of October, the expedition was ready to embark for Pao Ting Fu but the Germans had been late in arriving in China (having missed the crucial fighting in August) and requested that the parties delay again.[198] In the meantime, Russia, Japan and the United States declined to participate in the operation as they were reducing the number of their troops in China by that point.[199] So the two expeditionary forces – Tientsen and Beijing – consisted of soldiers from Germany, Italy, Britain and France.[200] After some additional delay, the forces, each division of which consisted of about 3,600 men, were finally ready to leave on 12 October 1900.

Much of the Tientsin division was still under the mistaken impression that Boxer forces were massing in the region and spoiling for a fight with any Europeans wishing to enter Pao Ting Fu.[201] As a result, that division's British and German commanders were formulating elaborate strategies for taking Pao Ting Fu.[202] Its French commanders were not as concerned and, while the others were busy planning, sent a battalion on a reconnaissance mission to the targeted city. When the British and Germans

196 *Ibid.*, p. 192.

197 *Ibid.*

198 *Ibid.*, p. 190.

199 "Pao-Ting-Fu Expedition: Australians Included", in *Sydney Morning Herald*, 13 October 1900, p. 9; Millard, 1901, p. 190, see *supra* note 191.

200 The Italians were unwilling participants. They had no real connection to or interests in China. But owing to their membership in the Treaty of Triple Alliance concluded in 1882 between Italy, Germany and Austria-Hungary, they were bound to German policy. See Ignazio Dandolo, "A Modern Anabasis: The Official Diary of Colonel Garioni, the Commander of the Italian Contingent in China (1900–1901)", in *Bulletin de l'École française d'Extrême Orient*, 1991, vol. 78, pp. 317, 331, describing "how limited […] the Italian adhesion to the idea of an international expedition [was]".

201 Millard, 1901, p. 190, see *supra* note 191. The division estimated, based on what it perceived as reliable information, that 80,000 Boxers, armed with rifles and artillery, blocked the way to Pao Ting Fu.

202 *Ibid.*, pp. 190–91.

learned of this, they feared the French would arrive in the city before they could.[203] In exchange for vague French promises to reconnoitre around the city rather than enter it, the British and Germans gave the French General, Maurice Bailloud, command of the entire Tientsin division. The French entered the city anyway![204]

As it turned out, the main contingent of the Tientsin division encountered no resistance en route to Pao Ting Fu.[205] Nevertheless, the division was delayed by dust storms and did not reach Pao Ting Fu until 22 October. It was three days behind the Beijing division, which, in turn had arrived a week after the French battalion had occupied the city. The Beijing division, commanded by the British Lieutenant General, Sir Alfred Gaselee, had an easier time of it. It too left on 12 October but, farsightedly, had not reckoned on continued Boxer resistance. And the division's journey to Pao Ting Fu was not hindered by dust storms. So it arrived at its destination on 19 October and remained billeted outside the city walls for three days.[206]

As the combined expeditionary forces were approaching the Pao Ting Fu gates, the *fanti*, escorted by other Chinese officials, greeted them and assured them that the city would be open to them and they would meet no resistance.[207] He also told them they would be provided with food, shelter and gifts and implored them not to sack, pillage or burn the city.[208] Gaselee, who had assumed command of the combined Tientsin-

[203] *Ibid.*, p. 191.

[204] *Ibid.* See also "Marching to Pao Ting Fu: How the Allied Forces Made the Expedition", in *Los Angeles Herald*, 13 December 1900, p. 3, referring to French "bad faith" and noting that Bailloud and his troops had "broken the promise that they would await other commands" ('Marching to Pao Ting Fu'). But see Hutcheson, 1901, p. 462, see *supra* note 4, relating that the French soldiers had "taken possession of the gates but had not entered the city".

[205] Millard, 1901, p. 191, see *supra* note 191. At some point during the trek, however, it was reported that "a regiment of Bombay cavalry hacked to pieces a hundred or so supposed [unarmed] Boxers".

[206] *Ibid*.

[207] Hutcheson, 1901, p. 462, see *supra* note 4.

[208] *Ibid.* But see Marching to Pao Ting Fu, 1900, p. 3, *supra* note 204: "[Upon entering Pao Ting Fu,] Europeans going through the city were received with insolent and insulting remarks, and on several occasions were the objects of spitting, a favorite form of insult".

Beijing expeditionary force,[209] replied that "action would depend upon circumstances" and that he would deal only with the highest officials.[210]

Finally, on 22 October 1900 the newly arrived and combined Tientsin-Beijing expeditionary troops were ready to enter the city and take command.[211] A military chief of police was appointed and Pao Ting Fu was then divided into four sectors with each of the four occupying forces guarding a section of the city gate (and assuming control of security in the sector corresponding to the gate location) – the British in the north, the Italians in the south, the Germans in the east and the French in the west.[212] The Germans, French and Italians quartered their men in their respective districts but the British troops remained in camp outside the city walls and assigned a skeleton force to provide the necessary police protection for its sector inside the city.[213]

6.3.3.2. Establishment and Operation of the International Tribunal

Even before these measures had been taken, while the Europeans were still gathered before the city gates, they put in place arrangements to investigate and prosecute perpetrators of the June–July massacre of the missionaries and their Chinese Christian servants. Given that the missionaries were American, it is curious that the United States refused to join the Europeans on this expedition. Nevertheless, an American officer, Captain Grote Hutcheson of the Sixth Cavalry, had been detailed to the expeditionary forces to observe and provide an American perspective. On 20 October, while the Beijing division was billeted before the gates of Pao Ting Fu and awaiting the arrival of the Tientsin division, Gaselee approached Hutcheson and asked him to opine on potential justice measures. Hutcheson suggested the European powers could establish a joint tribunal "to make an impartial examination into the conduct of the officials and any other accused persons".[214]

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209 "The Pao-Ting-Fu Expedition", in *Brisbane Courier*, 18 October 1900, p. 5: "Later information states that General Gaselee will take supreme command of the joint allied expedition after the junction of the two forces".

210 Hutcheson, 1901, p. 462, see *supra* note 4.

211 Millard, 1901, p. 192, see *supra* note 191.

212 *Ibid.* Hutcheson, 1901, p. 463, see *supra* note 4.

213 Hutcheson, 1901, p. 463, see *supra* note 4.

214 *Ibid.*

The suggestion was adopted and the following day the European powers created an international Tribunal to adjudicate the guilt or innocence of those implicated in the massacre of the missionaries and their servants.[215] After a preliminary investigation was conducted, five of the top-level leaders were identified as potentially guilty: 1) Ting Yung, the *fanti* (and provincial judge at the time of the massacres); 2) Kuei Heng, the chief Tartar official of the city; 3) Wang Chang-kuei, a Lieutenant Colonel of the Chinese army who was suspected of having stood by with his troops while the massacres were taking place; 4) Shen Chia-pen, the provincial judge at the time of the trial; and 5) T'an Wen-huan, the regional *tao-tai* (an official at the head of the civil and military affairs of a circuit in Imperial China).[216]

Since the trials were held in closed session, and in light of a corresponding paucity of retrospective accounts, details about the specific functioning and character of the Tribunal are not plentiful.[217] That said, certain important information is available. The Tribunal held its sessions in a building within the city and began hearing evidence on or about 22 October.[218] It consisted of five judges, who represented each of the nationalities in the expeditionary force: 1) Bailloud of the French army; 2)

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[215] *Ibid.* Several sources refer to the adjudicative body as an "international tribunal" or "international military tribunal". See, for example, Arthur Lorriot, *De la nature de l'occupation de guerre*, H. Charles-Lavauzelle, Paris, 1903, p. 341: "*À Pao-ting-Fu*, un tribunal international *composé de Français, d'Allemands, et d'Anglais fut organisé* (emphasis added); Mechthild Leutner and Klaus Muhlhahn, *Kolonialkrieg in China: Die Niederschlagung der Boxerbewegung 1900–1901*, Ch. Links Verlag, Berlin, 2007, p. 124: "*Ein* internationals Tribunal *erhielt den Auftrag, zu klären, unter welchen Umständen die Missionare gestorben waren*" (emphasis added); Robin, 1942, p. 202, see *supra* note 85: "In Pao-ting-fu, on the other hand, an *international tribunal* composed of Frenchmen, Germans and Englishmen was established" (emphasis added). It has also variously been referred to as an "international commission" and "international court of inquiry". See, for example, Hutcheson, 1901, p. 463, see *supra* note 4: "The next day, October 21, an *international commission* was instituted" (emphasis added); Marching to Pao Ting Fu, see *supra* note 204, noting that an "*international court of inquiry* was instituted" (emphasis added). It is referred to as an "international Tribunal" herein.

[216] Report of William W. Rockhill, Late Commissioner to China, with Accompanying Documents, Telegram from Edwin H. Conger, US Ambassador to China, to John Hay, US Secretary of State, 16 November 1900 47 (1901).

[217] Marching to Pao Ting Fu, 1900, see *supra* note 204: "The court sat behind closed doors and no correspondents were allowed to be present or even to be in the vicinity of the building in which the tribunal sat".

[218] *Ibid*.

Colonel D.G. Ramsey of the British (Indian) army; 3) Lieutenant Colonel Salsa of the Italian army; 4) Major von Brixen of the German army; and 5) J.W. Jamison, a civilian, who had been serving as the British consul in Shanghai.[219] Jamison had accompanied the expeditionary force from Beijing. He spoke fluent Chinese and was reputed to be well acquainted with the "customs and character of the Chinese people".[220]

The Tribunal chose Bailloud as its President.[221] Given that the majority of judges on the panel came from Continental European countries, and in light of Bailloud's own Gallic origins as well as his designation as President (akin to the position on the Franco-Siamese Mixed Court), it would be reasonable to assume the Tribunal operated more in line with the inquisitorial model. In other words, Bailloud would have likely exercised strong control with respect to the order and questioning of witnesses. The archives available do not indicate whether a specific prosecutor was appointed or whether the defendants were represented by counsel (even if such counsel was not legally trained). Interpreters were in the courtroom to offer their services.[222]

Based on available sources, we can piece together the trial's essential stages. It began with testimony establishing the specific sequence of events surrounding the June-July slaughter of the missionaries and their Chinese Christian servants. The Presbyterian missionaries, the Simcoxes and their three children, as well as Dr. and Mrs. Hodge, and Dr. George Y. Taylor, lived in a compound located in the village of Changchiachuang, approximately one mile north of the Pao Ting Fu city gate.[223] On

[219] Hutcheson, 1901, p. 463, see *supra* note 4. The available literature is not consistent with respect to the members of the Tribunal. A contemporary Italian chronicler, Mario Valli, identified different judges representing the British and Italians. He listed the British judge as one Captain Poole. As for the Italian judge, he described there being more than one. Italy was initially represented on the bench by a Major Agliardi. He was then replaced by a Captain Ferigo. And then, according to Valli, a Lieutenant Sambuy took the place of Ferigo. Mario Valli, *Gli Avenimenti in Cina nel 1900: e l'azione della R. Marina Italiana*, Urico Hoepli, Milan, 1905, p. 632. With respect to most of these judges, who would not appear to have had any legal training or background, their forenames are lost to history.

[220] Hutcheson, 1901, p. 463, see *supra* note 4.

[221] Lorriot, 1903, p. 341, see *supra* note 215.

[222] See Shirley Ann Smith, *Imperial Designs: Italians in China, 1099–1947*, Fairleigh Dickinson University Press, Plymouth, 2012, p. 40, indicating that interpreters were translating the words of the judges for the defendants and vice versa.

[223] Hutcheson, 1901, p. 463, see *supra* note 4.

30 June 1900, between 16:00 and 17:00, a violent mob, led by a local Boxer leader and reputed thug, Chu Tu Tze, surrounded the compound and began attacking it. All of the residents took refuge in one building and tried to defend themselves. All the buildings in the compound were burned but the missionaries put up a valiant defence, wounding 10 Boxers and killing Chu Tu Tze in the process.[224] But the missionaries eventually succumbed. As described by the American observer Hutcheson:

> Dr. Taylor addressed the crowd from one of the upper windows in a vain effort to induce it to disperse, but without avail, and the Boxers being without firearms, could not dislodge and secure possession of their victims. Finally, a successful effort was made to set fire to the building. Soon after the two young sons of Mr. Simcox, Paul and Francis, aged, respectively, about 5 and 7 years, rushed from the building into the open air to escape suffocation from the dense clouds of smoke. They were immediately set upon by the crowd, cut down, and their bodies thrown into the cistern. The other inmates of the house perished in the flames. The Chinese Christians and servants, to the number of perhaps twenty […] also perished.[225]

It was further established that the other American Board missionaries, Revd. Mr. Pitkin, Miss Morrell and Miss Gould, lived in a compound to the south of the city. Residing by them in another compound were the English missionaries, Mr. and Mrs. Bagnall of the China Inland Missionary of England, and their one child, as well as Mr. William Cooper. At approximately 07:00 on 1 July 1900 a group of Boxers, accompanied by a throng of bloodthirsty villagers, attacked the American Board compound. As before, all of the occupants of the compound gathered in one building, which was defended by Pitkin using a revolver. When he ran out of ammunition, the crowd poured into the house, seized the occupants and dragged them out. While a group of about 30 Chinese soldiers looked on, Pitkin was shot, beheaded and thrown in a pit with 10 Chinese Christians and servants who had also been murdered. Miss Morrell and Miss Gould had to endure another few hours of terror. The former fainted and was bound hand and foot and slung on a pole and taken to the city "as pigs are

[224] *Ibid*.

[225] *Ibid.*, p. 464.

carried in China".[226] Miss Gould was dragged into the city by her hair. Along the way, angry Chinese ripped and tore at the clothing of the two unfortunate women. They were brought to the Chi-Sheng-An Temple, and were soon joined there by the Bagnall/Cooper party. All of them were then maliciously interrogated by the Boxers to coerce admissions of "guilt".[227] Hutcheson then describes what followed:

> Late in the afternoon, about 6 o'clock, perhaps, the entire party was conducted out of the city. […] The following method was adopted: The hands were bound and held in front of the body, the wrists about the height of the neck; a rope was then tied about the wrists of the next person behind, thence about the neck, and so on. The child was not bound, but ran along clinging to his mother's dress. The end of the rope in front was seized by two men, and the doomed party, thus led in single file, all bound together like Chinese criminals, viewed by an immense throng of the populace, were led through the streets, passing out by the south gate to the place of execution at the southeast corner of the wall, between the moat and the wall. Here all were executed by being beheaded, except the child, which was speared by a Boxer.[228]

After ascertaining the details regarding the fate of the missionaries, the Tribunal then evaluated the individual guilt of the defendants. The historical record sheds the most light on the case of Ting Yung, the *fanti*. The Tribunal lodged the following specific charges against him:

1. He allowed to be posted in Pao Ting Fu, with his seal affixed to it, an Imperial proclamation encouraging the insurrectionary movement of the Boxers;
2. He castigated and dismissed other local officials who fought the Boxers and protected the Christians;
3. He failed, as requested by the British commander in Tientsin, to protect the Rev. Green and his family;
4. He failed to protect Rev. Bagnall and his family, notwithstanding his being specifically aware of the peril the

[226] *Ibid.*
[227] *Ibid.*
[228] *Ibid.*

> Bagnall party faced and thus he was indirectly responsible for their murders.[229]

Testimony at trial also determined that the day before the attack on the Simcox compound, Ting Yung had presented to Chu Tu Tze, the city Boxer leader and local ruffian, a gilt button. The button was worn by Chu Tu Tze during the Simcox attack. It was "in the nature of a decoration or badge of distinction, and was presented [as indicating appreciation] of the man's zeal and energy in the Boxer movement [and showing] a certain official sanction to the proceedings of that day and the following".[230]

Ting Yung testified on his own behalf and, at first, did not deny the allegations but did not confess either.[231] He answered questions evasively, claiming ignorance as to some of the allegations against him and asserting the defence of superior orders for others. Unfortunately for Ting Yung, the Tribunal was able to produce a telegram, which he had sent directly to the Court in Beijing. In it Ting Yung complained of "not having enough troops to wipe out the Christians" and recommended killing them because the Europeans would not be coming to their aid.[232] That sealed his fate.

An Italian observer of the trial, Luigi Barzini, provided a vivid description of the courtroom during Ting Yung's ordeal after being confronted with the incriminating telegram:

> The military tribunal interrogates the Fang-tai, a sort of city mayor, who is accused of having sustained the anti-European Boxers. Barzini describes in detail this stout little irascible man loudly declaiming his innocence. In a last-ditch effort to convince the "foreign devils" of his innocence, he grabs the table leg behind which the Western judges are seated in order not to be dragged out of the session when his questioning is over.[233]

The Tribunal also considered the case of Wang Chang-kuei, the Chinese army Lieutenant Colonel. Evidence presented at trial linked him directly to the murders of the Bagnall party. In his defence, he testified

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229 Valli, 1905, p. 632, see *supra* note 219.

230 Hutcheson, 1901, p. 464, see *supra* note 4.

231 Valli, 1905, p. 632, see *supra* note 219.

232 *Ibid*.

233 Smith, 2012, p. 40, see *supra* note 222. Barzini was a journalist so it is not clear whether an exception to the closed-door courtroom policy was made for him or whether he was given this account secondhand by a person or persons who were present.

that, to the contrary, he provided security for these missionaries and transported them to Pao Ting Fu under armed guard.[234] Once in the city, he claimed he transferred them to the care of other Chinese soldiers, who handed the victims over to the Boxers. It was the Boxers who then massacred them near the east gate of the city.[235] Wang Chang-kuei testified that he then witnessed the victims' violent deaths at the hands of the Boxers.[236]

The case against Kuei Heng, the Tartar official (or governor), was much more straightforward. The evidence brought forth before the Tribunal revealed he had clearly approved of the Boxers' agenda, throwing his full support behind them both before and during the attacks on the missionaries and their families.[237]

The evidence regarding T'an Wen-huan, the regional *tao-tai*, centred on his allegedly sending money and arms from Tientsin to the Boxers in Pao Ting Fu.[238] There was apparently no direct evidence implicating him in Pao Ting Fu crimes connected to the missionary massacres. Such evidence was similarly weak in respect of Shen Chia-pen, the provincial judge at the time of the trial but who had been prefect of the city at the time of the murders.[239]

Interestingly, the Tribunal also heard evidence against five alleged Boxers. But it found that these were commonplace criminals who had been taken from local prisons to be offered as sacrificial lambs to help quell European anger regarding the missionary deaths and deflect blame from higher Chinese officials.[240] The Tribunal saw through this ruse and

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234 Valli, 1905, p. 633, see *supra* note 219.

235 G.H.W. O'Sullivan, "Report on the Paotingfu Expedition and Murder of American Missionaries at that Place", in *Annual Reports of the War Department for the Fiscal Year Ended June 30, 1901*, 25 October 1900, p. 466. O'Sullivan was a Lieutenant Colonel and Staff Officer with the US Army who, like Hutcheson, was embedded as an observer with the Pao Ting Fu expeditionary forces.

236 Valli, 1905, p. 633, see *supra* note 219. But the record does not disclose why he did not intervene to help save them at that point.

237 *Ibid*.

238 O'Sullivan, 1900, p. 466, see *supra* note 235.

239 *Ibid*.

240 Valli, 1905, p. 633, see *supra* note 219, noting that this was a customary manner of obstructing justice used by local Chinese officials:

> The Chinese authorities always have on hand a few miserable citizens to sacrifice to angry Europeans, when they cannot find, or are trying to

remanded the suspects to local custody for further proceedings, if necessary. It also imposed a 10,000 taels fine on the parties responsible for bringing these individuals as suspects before the Tribunal.[241]

6.3.3.3. The Verdicts and Sentences

In the end, after sitting in session daily until 27 October, the Tribunal convicted Ting Yung, Wang Chang-kuei, Kuei Heng and Shen Chia-pen and sentenced them to death.[242] But, given the comparatively weaker case against Shen Chia-pen, the Tribunal punished him by recommending that he be removed from office, stripped of his rank, and held in military custody until a successor (as provincial judge) could be appointed and assume duties in the city. T'an Wen-huan was ordered to be transferred to Tientsin for trial there regarding his Boxer financing activities.[243]

In addition, as collective punishment for the massacres, the Tribunal recommended that: 1) the gates of the city be destroyed; 2) all pagodas and other buildings on the walls be burnt; and 3) the southeast corner of the city wall be demolished. Similarly, and apart from the Tribunal's order, on 27 October, in accordance with orders from Gaselee, two prominent temples were blown up – Cheng-Huang-Miao (the temple of tutelary divinity and considered the most important in the city and its loss being viewed as a disaster for city residents) and Chi-Sheng-An (where the Bagnall party members were held and interrogated prior to their murder).[244]

The executions were also carried out that day. Replete with gallows humour, Barzini describes the last moments of Kuei Heng, as he was being led to the execution site:

> shield from culpability, the real culprits. So, after the massacres of Tien-tsin, they executed a dozen criminals who had already been sentenced to death, and with the promise of a gift to their families, and of a beautiful coffin. That would have probably allowed the real perpetrators of massacres enough time to leave the jurisdiction and escape justice. The real killers, or at least many of them […] escaped the justice of the Europeans.

241 *Ibid*.

242 O'Sullivan, 1900, p. 466, see *supra* note 235.

243 *Ibid*.

244 *Ibid*.

> Another view of local humanity is the depiction of the governor, who has already been condemned to death by beheading. He is an old, completely deaf sixty-year-old man, who can only hear what is being said to him when his servant screams the words into his ear in a high-pitched voice. The scene, even though the executioner is not far away, takes on the slapstick quality of a comedy of errors. The judges ask a question; the interpreters translate it for the servant, who in a shrill voice screams it in the ear of the old governor:
>
> *Perchè – gli domandavano – avete concesso delle località nella vostra casa ai boxers per le loro riunioni?*
>
> *Mi figlio – rispondeva – è a Pechino da sei mesi.*
>
> [Why – they asked him – did you allow the Boxers to use some rooms in your house for meetings?
>
> My son – he answered – has been in Beijing for six months].[245]

Barzini then depicts the actual moment of the executions.

> The staging of the executions […] was not at all a gloomy sight. The colorful troops were lined up in their respective formations. The French light infantry with their excessive red pantaloons stood next to the German infantry in their gray overcoats and helmets topped with shiny metal spikes. The Indian cavalry and Italian sailors drew a straight punctuation mark, a sort of hyphen, as they stood in a row in between those old national and political European adversaries. […] Nothing gloomy about the look of things […] until the actual beheadings begin. But even these are treated humanely. […] The executioner is not cruel, cold-blooded, and evil; he is someone who probably has been bribed by the *yang quitze* (European devils) to chop off the heads of his superiors.[246]

[245] Smith, 2012, p. 40, see *supra* note 222.

[246] *Ibid*.

6.4. The Trials in Perspective: The Dawn of the European Peace Movement and the Twilight of European Imperialism

This chapter has so far chronicled three international criminal trials in one remarkable decade at the end of the nineteenth century. With the exception of the Hagenbach trial centuries earlier, the world had never seen anything like it. And for another half century it would see nothing like it again. Why did these trials all take place at that time and in that part of the world? Was it merely a coincidence? The historical context suggests it was not. Two overarching historical phenomena in particular played important roles in terms of bringing about these trials in the East: the dawn of the European peace movement and the twilight of imperialism.

6.4.1. The Dawn of the European Peace Movement

Reference in this chapter to the dawn of the European peace movement is rather broad. It is intended to encompass different strands of social activism in the second half of the nineteenth century that sought to curb the incidence of war and lessen its horrors. The genesis of the movement might be said to be the 1864 Geneva Convention.[247] The fruit of the labours of the International Committee of the Red Cross ('ICRC') founder Henri Dunant, a Swiss businessman who had stumbled upon the battlefield suffering of wounded but untended soldiers in the immediate aftermath of the Battle of Solferino in 1859. This event changed Dunant's life and he dedicated it to making war more humane by protecting those *hors de combat*, in other words, fallen soldiers or those otherwise no longer able to engage in the fight.[248] He founded the ICRC in 1863 and, the following year, organised the conference that adopted the first Geneva Convention, which established protections for wounded and sick soldiers.[249]

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[247] Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, 22 August 1864, Art. 6 (https://www.legal-tools.org/doc/59e0f5/; see also Dietrich Schindler and Jiří Toman (eds.), *The Laws of Armed Conflicts*, Martinus Nijhoff, Dordrecht, 1988, pp. 279–83).

[248] Tom Ruys and Christian De Cock, "Protected Persons in International Armed Conflicts", in Christian Henderson and Nigel D. White (eds.), *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello and Jus post Bellum*, Edward Elgar, Cheltenham, 2013, p. 375.

[249] *Ibid.*: "This Convention became the first [international codified] instrument […] of the law of armed conflict".

Following on this, in November 1868 Tsar Alexander II convened an International Military Commission in Saint Petersburg that drafted a declaration affirming that the only legitimate object of war should be to weaken the military force of the enemy.[250] As a result, the European signatories to the Saint Petersburg Declaration of 1868 agreed to prohibit certain kinds of projectiles and ammunition that caused excessive suffering.[251] Six years later, the Tsar again convened a group of European states to draft the Brussels Declaration of 1874,[252] memorialising and supporting certain fundamental customs and laws of war.[253]

All this set the stage for the Hague Peace Conference of 1899. Once again convened by a Russian Tsar, this time Nicholas II, its object was to seek "the most effective means of ensuring to all peoples the benefits of a real and lasting peace, and, above all, of limiting the progressive development of existing armaments".[254] Twenty-six nations were represented at the Conference, which was held in the seat of the Dutch government from

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[250] Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge University Press, Cambridge, 2010, pp. 49–50.

[251] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Saint Petersburg, 29 November 1868, reprinted in Schindler and Toman, 1988, pp. 101–3, see *supra* note 247. The preamble declaims:

> Considering:
>
> That the progress of civilization should have the effect of alleviating as much as possible the calamities of war;
>
> That the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy;
>
> That for this purpose it is sufficient to disable the greatest possible number of men;
>
> That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;
>
> That the employment of such arms would, therefore, be contrary to the laws of humanity […]

[252] Brussels Conference of 1874, I. Final Protocol, II. Project of an International Declaration concerning the Laws and Customs of War, 27 August 1874, reprinted in in Schindler and Toman, 1988, pp. 25–34, see *supra* note 247.

[253] Megan Eshbaugh, Note, "The Chemical Weapons Convention: With Every Step Forward, We Take Two Steps Back", in *Arizona Journal of International and Comparative Law*, 2001, vol. 18, pp. 209, 216.

[254] "Russian Note Proposing the Program of the First Conference", in James Brown Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907*, Oxford University press, New York, 1915, p. xvi.

May through June 1899. Although it failed to achieve its main objective, for example, the limitation or reduction of armaments, it adopted three Conventions and an equal number of Declarations, which, overall, generally codified and expanded on the principles set forth in the Saint Petersburg and Brussels Declarations (and adapted them to maritime warfare).[255] One of the treaties had a different focus, however. The Convention for the Pacific Settlement of International Disputes ('Pacific Settlement Convention') created the Permanent Court of Arbitration and marked a normative shift in international relations by aspiring to settle state differences not through war but through adjudication by judges and on the basis of respect for the law.[256] It also stipulated that "in questions of a legal nature […] arbitration is recognized by the Signatory Powers as the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle".[257]

Thanks, in part, to the Pacific Settlement Convention "the idea of resorting to international arbitration as a substitute for war was not new at the turn of the century".[258] And it was part and parcel of the European peace movement of the second half of the nineteenth century. Organised European efforts to *outlaw* war, like efforts to codify regulating it, date

[255] Alexander Mikaberidze, "Hague Conference, First", in Alexander Mikaberidze (ed.), *Atrocities, Massacres, and War Crimes: An Encyclopedia*, ABC-Clio, Santa Barbara, CA, 2013, p. 226.

[256] Convention for the Pacific Settlement of International Disputes, The Hague, 29 July 1899, Art. 15 (https://www.legal-tools.org/doc/b1e51f/), in *Statutes at Large*, vol. 32, pp. 1779, 1788–98, and Clive Parry (ed.), *The Consolidated Treaty Series*, vol. 187: *1898–99*, Oceana Publications, Dobbs Ferry, NY, 1980, pp. 410, 416–22 ('Pacific Settlement Convention'): "International arbitration has for its object the settlement of differences between States by judges of their own choice, and on the basis of a respect for law". Another Hague Conference in 1907 updated, revised and expanded the 1899 Conventions but the 1907 Conventions deal with the same subject matter and include a substantially similar Convention on the Pacific Settlement of International Disputes. Howard M. Hensel (ed.), *The Law of Armed Conflict: Constraints on the Contemporary Use of Military Force*, Ashgate, Aldershot, England, 2007, p. 47.

[257] Pacific Settlement Convention, Art. 16, see *supra* note 256.

[258] Christopher R. Rossi, "*Jus Ad Bellum* in the Shadow of the 20th Century", in *New York Law School Journal of International and Comparative Law*, 1994, vol. 15, pp. 49, 58. Of course, in line consistent with the dawn of the European peace movement, arbitrations to settle international disputes had been used with increasing frequency during the second half of the nineteenth century. Notable instances include the Jay Treaty Arbitrations (1794), the Alabama Arbitration (1871–1872), the Behring Sea Fisheries dispute (1893), and the British Guiana Boundary Arbitration (1897). Rossi, *id.*, pp. 58–59.

only from the middle of the nineteenth century.[259] The first "international" peace conference, which consisted of only European and American participants, was held in London in 1843.[260] It concluded with the adoption of two declarations, one favouring use of arbitration to settle international disputes and the other supporting the establishment of a congress of nations.[261]

After similar conferences in succeeding years, the peace movement "expanded significantly in the late nineteenth century".[262] By 1889, in conjunction with the *Exposition Universelle* and the opening of the Eiffel Tower, peace groups from around the globe gathered in Paris for what is considered the first "universal" peace congress. Subsequent congresses were held in each succeeding year leading up to the First World War.[263] At the third one, held in Rome, the participants agreed to set up a permanent headquarters in Bern, which began operations in 1892 as the International Peace Bureau.[264]

The following year, the Austrian peace activist Bertha von Suttner visited with her wealthy Swedish inventor friend, Alfred Nobel, and suggested he could bequeath part of his post-mortem wealth to honour advocates for peace.[265] Nobel apparently thought of von Suttner when he drafted his will, which, as revealed on his death in 1896, set aside money for a prize that would be given "to the person who shall have done the most or the best work for the fraternity between nations, for the abolition or reduction of standing armies, and for the holding of peace congresses".[266] This

[259] Chernow and Vallasi, 1993, p. 2091, see *supra* note 8.

[260] David Cortright, *Peace: A History of Movements and Ideas*, Cambridge University Press, Cambridge, 2008, p. 34.

[261] In subsequent conferences over the next couple of decades, final resolutions also included calls for disarmament. *Ibid.*, pp. 34–35.

[262] *Ibid.*, p. 38.

[263] *Ibid.*

[264] *Ibid.* The International Peace Bureau is still in operation today. Its website is located at http://www.ipb.org/web/.

[265] Michelle Benjamin and Maggie Mooney, *Nobel's Women of Peace*, Second Story Press, Toronto, 2008, p. 13: "In 1893, during Arthur and Bertha's final visit with Alfred, the three of them discussed how Alfred could guarantee that his money would continue to do good after his death". Nobel earned much of his fortune from having invented dynamite, blasting caps, smokeless gunpowder and blasting gelatin. Donovan Webster, *Aftermath: The Remnants of War*, Pantheon Books, New York, 1996, pp. 3–6.

[266] Benjamin and Mooney, 2008, p. 14, see *supra* note 265. Von Suttner herself won the award in 1905.

was the birth of the Nobel Peace Prize.[267] It was followed three years later by the first Hague Conference, the culmination of a decade's peace movement that stressed "the urging of international arbitration and mediation in disputes between nations".[268] Roger Alford explains the consequences of this:

> The great push for international arbitration had two major consequences. First, it drew together like-minded parliamentarians from different countries to work together to promote peaceful settlement of disputes. This led to the establishment of the Inter-Parliamentary Union, which in turn influenced the convening of the Hague Peace Conferences of 1899 and 1906. Second, the impetus for international arbitration was transformed quickly into a vision of a permanent international judiciary, starting with the Permanent Court of Arbitration and eventually extending to the Permanent Court of International Justice and the International Court of Justice.[269]

This push towards settling disputes via arbitration, and, by extension, through court proceedings, was thus a prominent feature of the decade in which the three sets of trials featured in this chapter took place.

6.4.2. Asia in the Twilight of Imperialism

However, as mentioned previously, imperialism was also a distinguishing characteristic of that decade. In fact, it was implicitly antithetical to the peace movement. Candice Goucher and Linda Walton point out that late nineteenth-century competition related to overseas colonial possessions "fueled tensions that on several occasions nearly led to war between France, Great Britain and Germany".[270] This was especially true in Asia. With respect to Africa, as noted earlier, the European colonial powers met

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[267] The first awards were conferred in 1901 and given to Henri Dunant and Frédéric Passy. John Stevenson, *The Nobel Prize: Facts You Never Knew About*, John Stevenson, n.p., 2013, pp. 24–25. Roger Alford refers to the early recipients of the Nobel Peace Prize as "parliamentary pacifists" and describes them as most notable for, among other things, "effectively promoting international arbitration". Roger P. Alford, "The Nobel Effect: Nobel Peace Prize Laureates as International Norm Entrepreneurs", in *Virginia Journal of International Law*, 2008, vol. 49, pp. 61, 72.

[268] Chernow and Vallasi, 1993, p. 2091, see *supra* note 8.

[269] Alford, 2008, p. 72, see *supra* note 267.

[270] Candice Goucher and Linda Walton, *World History: Journeys from Past to Present*, Routledge, Abingdon, 2013, p. 295.

at the conference table in Germany and methodically carved out mutually agreeable imperial boundaries pursuant to the 1884–85 Berlin Conference.[271] Colonial Asia was different – it did not have the equivalent of a Berlin Conference. And so imperial rivalries on this far-flung land mass led to even greater tensions than in Africa. As Richard Pomfret observes:

> The concept of Asia […] as a region is relatively modern. In various historical epochs, Chinese cultural influence has been widespread in East Asia and Indian culture has influenced much of Southeast Asia, but none of this was seen as integrating "Asia." Following the Portuguese voyages of discovery from Europe in the 1500s and the establishment of Manila in 1571 as the Asian capital of Spain's New World colonies, European powers […] built up empires in Asia. Although the outside trading nations sometimes collaborated or acquiesced, *these were competing rather than unifying*.[272]

6.4.3. Pacifism, Imperialism and the Oriental Pre-Birth Trials

6.4.3.1. The Franco-Siamese Trial

So what is the relationship between the nascent peace movement and this cresting wave of imperialism in the Orient? The three sets of trials examined in this chapter help explain. Imperialism is the clear subtext of the Franco-Siamese proceeding. The ill-defined border between French Indochina and British Burma led to the 1893 skirmish between the French and Siamese and, ultimately, Grosgurin's homicide.[273] France was outraged by the role Phra Yot played in Grosgurin's demise and, notwithstanding its public stance that its conflict with Siam did not constitute "war", seemingly saw shades of a war crime in the homicide.[274] Tensions between the

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[271] Gregory H. Maddox, *Sub-Saharan Africa: An Environmental History*, ABC-CLIO, Santa Barbara, CA, 2006, p. 121: "In 1884-1885, the Berlin Conference met to ensure an orderly division of Africa among the European powers".

[272] Richard Pomfret, Regionalism in East Asia: Why Has It Flourished Since 2000 and How Far Will It Go?, World Scientific, Singapore, 2011, p. 8 (emphasis added).

[273] See St. John, 1998, p. 12, see *supra* note 89: "Siam concluded a treaty in October 1893 which was dictated by France *but qualified to some degree by French recognition of the need to take British interests into account*" (emphasis added).

[274] See Brockman-Hawe, 2013, p. 70, *supra* note 2, granting that France and Siam never acknowledged that they were in a state of war but opining that "the conflict between France and Siam falls squarely within the modern conception of war, and crimes of the

two imperial powers flared and, through the British proxy, Siam, "brought Great Britain and France [to] the verge of war".[275]

But in this context, as part of the border settlement, rather than summarily placing Phra Yot before a firing squad, the French channelled the *fin de siècle* judicial settlement *Zeitgeist* and created what Benjamin Brockman-Hawe refers to as "the first modern supranational criminal tribunal".[276] In supporting this conclusion, Brockman-Hawe alludes to "the *ad hoc* nature of the Rules and their appearance in a legal instrument agreed to by two states, the presence of judges from two states on the tribunal, and Siam's agreement (however coerced) to 'mix' its jurisdiction with that of France".[277]

Interestingly, if not symbolically, on the final day of Phra Yot's first trial, when the verdict was announced and the judgment read, present in the courtroom were representatives of various European nations, including France, Britain, Portugal, the Netherlands and Austria-Hungary.[278] Was this Europe's way of assuring that an imperial dispute between two of its states (via a proxy) was resolved amicably? Was this akin to a small segment of a fragmented Berlin Conference for Asia but in a judicial forum? Posing such questions reminds us of what Brockman-Hawe refers to as the "motifs of imperialism" that run through the Phra Yot adjudicative proceedings.[279] At the same time, in light of the contemporaneous peace movement and its attendant push for arbitration to replace war, one appreciates Brockman-Hawe's wondering whether the 1893 trials in Bangkok may have been "inspired by the proliferation of neutral inter-state arbitral tribunals".[280]

6.4.3.2. The Trials of the Ottomans

The trials of the Ottomans on Crete bear similar indicia of this odd mix of imperialist and judicial-irenic leitmotifs. Significantly, determining con-

sort Phra Yot was accused of perpetrating are specifically prohibited by contemporary *jus in bello*".

275 MacGregor, 1896, p. 96, see *supra* note 101.

276 Brockman-Hawe, 2013, p. 71, see *supra* note 2.

277 *Ibid*.

278 Full Report, p. 55, see *supra* note 94.

279 Brockman-Hawe, 2013, p. 71, see *supra* note 2.

280 *Ibid.*, p. 69.

trol of Crete was considered an integral part of resolving what was referred to as the Eastern Question. John P. Dunn explains the significance of this historical phenomenon:

> Does the Ottoman Empire have a future? This was the "Eastern Question," an important issue in nineteenth-century diplomatic affairs. As no single answer evolved, great powers sometimes went to war – or became allies – in efforts to present their opinions on the matter. […] Defeat brought a final answer to the Eastern Question, as the Ottoman Empire was dismembered.[281]

In his analysis of the Eastern Question, Kahraman Sakul perceives the Great Powers attempting to create their own zones of influence in the Turkish realm through the pretext of protecting Christians. He observes:

> [The Great Powers claimed] the status of protector of a particular Christian subject people and [urged] the Sublime Porte to undertake political reforms. The Ottomans, however, viewed all attempts to advance the rights of particular Christian subject peoples through such diplomatic pressures as an encroachment on the rights of their sovereignty. They viewed European intervention in internal Ottoman affairs as a smokescreen that hid the Great Powers' ambitions to dismantle the empire.[282]

Sakul concludes that "simply put, the Eastern Question revolved around the question of how to eliminate the power vacuum in Eastern Europe, the Balkans, and the modern Middle East that emerged with the decline of the Ottoman Empire […] without harming the delicate balance of power in Europe".[283] And that was essentially the question hovering in the background of the 1898 international criminal trials on Crete. The Ottomans were being removed as part of the next phase of European incursion into the crumbling empire. But Crete was a small island outpost in the Balkans. In the previous decades, various European powers had asserted interests in it. By the time of the massacre of Christians on 6 September 1898, the Europeans decided to put aside existing imperial conflicts else-

[281] John P. Dunn, "Eastern Question", in Melvin E. Page (ed.), *Colonialism: An International Social, Cultural, and Political Encyclopedia*, ABC-CLIO, Santa Barbara, CA, 2003, p. 180.

[282] Kahraman Sakul, "Eastern Question", in Gábor Ágoston and Bruce Alan Masters (eds.), *Encyclopedia of the Ottoman Empire*, Facts on File, New York, 2008, p. 191.

[283] *Ibid*.

where and act in harmony with respect to adjudications of the Ottomans. As noted by Pritchard:

> This was, furthermore, a period marked by Great Power rivalries and suspicions, with French forces engaged in enterprises that might conflict with the British adventures in the Sudan, and with problems elsewhere in the Levant that threatened to break out into open conflict among the British, Austro-Hungarians, Germans and Russians. Crete, therefore, provided an opportunity to show that a joint enterprise […] could harmonize the European Concert.[284]

Once again, the international criminal trials on Crete arguably represented a judicial Berlin Conference-type settling of European differences on the frayed margins of a decaying Ottoman Empire. But it was also seemingly a by-product of the peace movement and constituted another late nineteenth-century expression of the preference for arbitral solutions to international relations problems among European powers. Additionally, the trials on Crete revealed that, in the dying days of the nineteenth century, the Europeans had developed an almost primal affinity for due process over drumhead justice. That instinct for justice was as farsighted as it was instinctive, since within its prescient remit was one of the future cornerstones of international criminal law offences – crimes against humanity. In the words of Beth Van Schaak:

> The 1907 Hague [Conventions] [which also included a revised Pacific Settlement Convention] [have their] roots in many respects in an International Military Commission staged on Crete in 1898 by the six Great Powers (Russia, France, Italy, Great Britain, Germany, and Austria). These trials exercised jurisdiction over acts, such as the massacre of Christian compatriots by Muslim Cretans that would later be termed "crimes against humanity".[285]

[284] Pritchard, 2003, p. 6, see *supra* note 3.

[285] Beth Van Schaak, "The Definition of Crimes against Humanity: Resolving the Incoherence", in *Columbia Journal of Transnational Law*, 1999, vol. 37, pp. 787, 796, fn. 28. In fact, only four European powers convened the trials – Britain, France, Italy and Russia. Germany and Austria-Hungary, which had been part of the international governance of the island before the 6 September 1898 massacre, were no longer part of the governing coalition.

6.4.3.3. The Boxer Rebellion Trial

Finally, after the massacres of Christians in the Boxer Rebellion, the two strands of imperialism and pacifism once again exerted an important influence on the creation and operation of the international Tribunal at Pao Ting Fu. In the first place, the colonial undertones in the Pao Ting Fu expedition were unmistakable. As related by Ignazio Dandolo, an Italian colonel, Garioni, who was with the foreign expeditionary force at Pao Ting Fu, described the imperialistic nature of the enterprise:

> Garioni says: "The French and Germans have taken care to furnish their troops with the most recent arms *in order to profit from the colonial enterprise* to experiment their newest offensive weapons, as it is difficult to demonstrate their efficiency on the home firing range. Furthermore, the French and Germans have provided their troops with the best material not only so that they don't look bad in comparison with the others, but also to show the power of the army to which they belong".[286]

Ultimately, however, French and German chauvinism gave way to the spirit of compromise regarding Boxer massacre justice efforts. The expedition to Pao Ting Fu was peripheral to the principal negotiations to resolve Boxer Rebellion issues that took place in Beijing and resulted in the Boxer Protocols. The latter did not provide for trials and stipulated summary execution for certain Imperial Chinese authorities in the capital. And none of the other outlying areas where the Western powers travelled to dispense post-Boxer justice established an international Tribunal.

It is rather amazing, then, that the expeditionary force in the tiny outpost of Pao Ting Fu came up with the idea. Seemingly by osmosis, the European officials there had evidently internalised and acted on the wisdom of their day that meaningful multilateral adjudication was superior to summary execution. That the judges of this international Tribunal took their charge seriously is demonstrated by their acquitting the alleged low-level Boxers brought before them and by their meting out individualised punishments, which ranged from the death penalty to dismissal and stripping of grade. This peripheral band of allies, perhaps influenced by an American staff officer, was subliminally guided by their better angels and they made history.

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[286] Dandolo, 1991, pp. 317, 331, see *supra* note 200 (emphasis added).

Still, the atavistic imperial instincts were also on display. In collective retaliation for the massacres, the Western allies did demolish precious cultural property at Pao Ting Fu and plundered its wealth. So, by the turn of the century, it appears that pockets of Western actors could boast of learning the most important lessons of the peace movement and applying the rule of law in international relations. But, as the twentieth century's impending world wars would demonstrate, they still had a long way to go.

6.5. Conclusion

Various experts have at times suggested that one or another proceeding before the Nuremberg and Tokyo trials have constituted the true original birth of international criminal justice.[287] But, to date, none has focused on the three sets of trials analysed herein, which took place during the last decade of the nineteenth century and involved transnational hotspots in the Orient. Some scholars have focused on the trials individually (for example, Brockman-Hawe and Pritchard), but none has looked at them as a contemporaneous and thematically linked group. And the post-Boxer Rebellion international Tribunal has been entirely ignored in international criminal law literature. This chapter has explained why these trials should be examined simultaneously and holistically as a defining moment in the development of international criminal law. And it has demonstrated why these subliminally seminal trials took place in the last decade of the nineteenth century, had links to Asia and were international in nature.

In different ways, each of the trials implicated resolution of uncertain power dynamics and territorial claims in the Orient. As we have seen, the trials were the fruit of a unique confluence of late-stage imperialism and embryonic pacifism. The imperialism explains why the European powers were in the various locations where the trials took place and why they sat in judgment of citizens from subjugated countries. And those citizens happened to be from the Orient because, unlike Africa with its Berlin Conference, imperialism in Eastern lands was never formally regulated by

[287] See, for example, Gordon, 2013, *supra* note 1, referring to the Hagenbach trial in this regard; Brockman-Hawe, 2013, *supra* note 2, on the Franco-Siamese Mixed Court; Pritchard, 2003, *supra* note 3, on the trials of the Ottomans on Crete; Jenny S. Martinez, *The Slave Trade and the Origins of International Human Rights Law*, Oxford University Press, New York, 2012, p. 148, noting that experts perceive "the International Military Tribunal at Nuremberg as the first international tribunal charged primarily with enforcing humanitarian norms" but suggesting that the antislavery courts preceded the IMT.

and among the European powers. So regulation in the East occurred in dribs and drabs, through *ad hoc* measures, including the trials examined here.

But pacifism played a role, too. Informing and motivating the budding European peace movement, it instilled in the colonial overlords a normative preference for multilateral and judicial dispute resolution. This was the age of international arbitration as the preferred non-bellicose choice for settling interstate disputes. And the trials considered here were arguably inspired by the arbitration ethos of the times.

Nevertheless, examining the modern international criminal law landscape, students of international law can understand how the trials were remarkably ahead of their time. The Franco-Siamese Mixed Court is in many ways procedurally reminiscent of the institution known as the Extraordinary Chambers in the Courts of Cambodia ('ECCC').[288] Apart from the obvious parallel in terms of Southeast Asian courthouse geography, both bodies used mixed rules and judges, were influenced by the French colonial legacy in terms of legal culture, and included much international input and participation.[289] In terms of the Franco-Siamese Mixed Court dealing with the assassination of one individual, it is evocative of the modern Special Tribunal for Lebanon ('STL'), which has focused exclusively on the assassination of Rafik Hariri and also bears the influence of French judicial culture.[290]

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[288] See Ricarda Popa, "The Contribution of the Extraordinary Chambers in the Courts of Cambodia to the Establishment of a Hybrid Tribunal Model", Research Paper, Faculty of Social Science and Philosophy, Philipps University, Marburg, March 2009, explaining the background and functioning of the ECCC.

[289] See John D. Ciorciari and Jaya Ramji-Nogales, "Lessons from the Cambodian Experience with Truth and Reconciliation", in *Buffalo Human Rights Law Review*, 2012, vol. 19, pp. 193, 206, describing the ECCC as "a mixed tribunal combining international and domestic laws, procedures, and personnel"; David S. Sokol, Note, "Reduced Victim Participation: A Misstep by the Extraordinary Chambers in the Courts of Cambodia", in *Washington University Global Studies Law Review*, 2011, vol. 10, no. 1, pp. 167, 175: "As a former French colony, Cambodian law is premised on the French model of criminal procedure"; Neha Jain, "Between the Scylla and the Charybdis of Prosecution and Reconciliation: The Khmer Rouge Trials and the Promise of International Criminal Justice", in *Duke Journal of Comparative and International Law* , 2010, vol. 20, pp. 247, 255, noting that the ECCC has been the product of "significant international participation".

[290] See Sandra L. Hodgkinson, "Are *Ad Hoc* Tribunals an Effective Tool for Prosecuting International Terrorism Cases?", in *Emory International Law Review*, 2010, vol. 24, pp. 515, 515, referring to the STL as "an *ad hoc* tribunal designed to address the assassination of Lebanese Prime Minister Rafik Hariri on February 14, 2005"; Chris Jenks, "Notice Other-

The International Military Commissions on Crete bear a remarkable resemblance to the Special Panels for Serious Crimes on East Timor.[291] Like the Special Panels, the International Military Commissions were set up to deal with one horrific paroxysm of violence on the eve of the departure from an island of an occupying power (Indonesia in the case of East Timor and the Ottomans in the case of Crete).[292] In both cases, the new "transitional authority" occupiers, the United Nations on East Timor and the Great Powers on Crete, set up panels with international judges (although the Special Panels included East Timorese).[293] And elements of the Panels' legal culture bore the hallmarks of the former Portuguese coloniser in East Timor just as the International Military Commission's incorporated European legal culture.[294] The Boxer Rebellion Tribunal, staffed by four victorious occupying powers in the aftermath of a war, makes one think, though on a much different scale, of the International Military Tribunal at Nuremberg, which was established 46 years later.

So, if we can see these tribunals as impromptu forebears of modern international criminal law institutions, why is it that international criminal justice lay essentially dormant after the great cataclysm of the First World War? If European powers were prepared to join forces and sit in judgment of perpetrators with respect to transnational offences during the last decade of the nineteenth century, why were they incapable of doing it in 1919–1920, after the abysmal atrocities of the Great War?

The precedent was certainly there. But the will was lacking. The trials from 1894 to 1900 involved European powers sitting in judgment of subjugated peoples: the Siamese, the Ottomans and the Chinese. Any true

wise Given: Will In Absentia Trials at the Special Tribunal for Lebanon Violate Human Rights?", in *Fordham International Law Journal*, 2009, vol. 33, no. 1, pp. 57, 66, fn. 44, indicating the STL is governed by Lebanese criminal procedure; Helen Chapin Metz (ed.), *Jordan: A Country Study*, Federal Research Division, Library of Congress, Washington, DC., 1991, p. 271, mentioning that the Lebanese legal system is modelled on that of the French.

[291] Suzanne Katzenstein, Note, "Hybrid Tribunals: Searching for Justice in East Timor", in *Harvard Human Rights Journal*, 2003, vol. 16, pp. 245, 253, providing background and information regarding the functioning of the Special Panels.

[292] Nancy Amoury Combs, "Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentence Discounts", in *Vanderbilt Law Review*, 2006, vol. 59, no. 1, pp. 69, 124–25.

[293] *Ibid.*, pp. 125–26.

[294] *Ibid*.

international trials post-1918 would have entailed European powers sitting in judgment of one another. And the Europeans were not ready for that. Only the unimaginable atrocities of the Second World War would finally convince those powers to bring their own to justice. And that was the genesis of the International Military Tribunal at Nuremberg.

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Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (editors)

This volume carries on the "comprehensive and critical mapping of international criminal law's origins" started by the previous two volumes. Twenty-seven authors investigate the evolution of legal doctrines and pertinent historical events, many in an attempt to inform contemporary theory and practice. Contributors include Narinder Singh, Eivind S. Homme, Manoj Kumar Sinha, Emiliano J. Buis, Shavana Musa, Jens Iverson, Gregory S. Gordon, Benjamin E. Brockman-Hawe, William Schabas, Patryk I. Labuda, GUO Yang, Philipp Ambach, Helen Brady, Ryan Liss, Sheila Paylan, Agnieszka Klonowiecka-Milart, Meagan Wong, Marina Aksenova, Zahra Kesmati, Chantal Meloni, Hitomi Takemura, Hae Kyung Kim, ZHANG Binxin, Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping.

Part 1 of the book further expands the landscape of international criminal law in terms of geography, time and diversity of legal concepts in their early forms. Parts 2 and 3 turn to the origins and evolution of specific doctrines of international criminal law. Part 2 explores four core international crimes: war crimes, crimes against humanity, genocide, and aggression. Part 3 examines doctrines on individual criminal responsibility: modes of liability, grounds of criminal defence, and sentencing criteria. The doctrine-based approach allows vertical consolidation within a concept. The chapters also identify common and timeless tensions in international criminal law, symptomatic of ongoing struggles, offering parameters for assessment and action.

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