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International Crime in the 19th Century Social Imaginary: Exploring the Development of the Conceptual Foundations of International Criminal Law and International Criminal Justice

A dissertation submitted in partial satisfaction of the

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in Political Science

by

Mackenzie H. Eason

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ABSTRACT OF THE DISSERTATION

International Crime in the 19th Century Social Imaginary:
Exploring the Development of the Conceptual Foundations of International Criminal Law and International Criminal Justice

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Doctor of Philosophy in Political Science
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Professor Anthony R. Pagden, Chair

In this dissertation, I examine the historical development of the conceptual foundations upon which the contemporary field of international criminal law and the politico-legal project of international criminal justice have been built. While the legal doctrines and institutional practices of contemporary international criminal law did not decisively emerge until the early- to mid-20th century, in this dissertation I show that the ideas behind this institutional shift were already well-worn by then. Employing the tools of intellectual history and legal sociology, I explore the ways in which legal actors (including lawyers but also state officials, diplomats, military officers, merchants, planters, sailors, and others) framed, enacted, and deployed three foundational legal ideas over the course of the 19th century. In Chapter 2, I examine the ways in which the concept of a supranational or universal crime (the idea of supranational or universal

crimes (acts whose commission merits both criminal accountability and the concern of publics and actors beyond the confines of any nation state) was used in public and political discourse over the course of the 19th century. Through a corpus analysis of over 6500 newspapers, pamphlets, and other quotidian texts containing phrases referencing one or another form of supranational or universal crime (e.g., "crime against humanity" or "international crime"), I show that these phrases were in common usage throughout the century and that they were generally used in ways largely similar to the way they are today, referring to "mass atrocities" and crimes whose commission or effects were transnational. In Chapter 3, I examine the ways in which legal actors experimented with the idea of international criminalization (the practices by which legal actors could define and establish certain forms of violence as "crimes of international concern") before and during the 19th century. In this, I focus in particular on the emergence and proliferation of suppression treaties, a key legal tool with which international actors experimented in creating and codifying new international crimes through bilateral or multilateral agreements, first showing that examples of this genre of treaties can be found as early as the 1640s – more than a century before the earliest example discussed in the existing literature – and then discuss how British advocates and policymakers adopted and adapted this previously obscure legal tool starting in the first decades of the 19th century as a means to internationalize the abolition of slavery and the slave trade. Finally, in Chapter 4, I examine the ways in which legal actors experimented with the idea of internationalized criminal adjudication (the practices by which states might go about holding individuals accountable for such "crimes of international concern") during the 19th century. To this end, I present four case studies in which political, military, and legal actors responded to alleged crimes of international concern by creating *ad hoc* internationalized courts and commissions of inquiry charged with adjudicating

the criminal responsibility of alleged perpetrators. Engaging in this kind of foundational study of the conceptual underpinnings of international criminal law and international criminal justice is worthwhile because popular understandings of international criminality during the 19th century, and efforts by legal actors to implement and apply this concept during this period, not only shaped the boundaries between legitimate and illegitimate violence in the Western social imaginary but also prefigured and constrained the ways in which these concepts are later taken up by professional legal actors and formalized as part of the contemporary international legal order.

The dissertation of Mackenzie H. Eason is approved

Asli U. Bali

Maximo Langer

Giulia Sissa

Davide Panagia

Anthony R. Pagden, Committee Chair

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2024

For Molly and Magnolia

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I have had the great fortune of working with many outstanding faculty during my time at UCLA. Chief among these, of course, are the brilliant and supportive scholars that constituted the committee assembled to review this project: Anthony Pagden, Davide Panagia, Giulia Sissa, Maximo Langer.

As my academic advisor and chair, and indeed the person who facilitated my return to UCLA after I completed my law degree, Anthony has been a consistent source of inspiration and encouragement since before I even started this doctoral program. I am grateful for our many conversations about the doing of history, the ideologies, and structures of empires both past and future, and how one might map changing concepts through centuries of international legal thought. Almost even more so, however, I am grateful for the classes we taught together. I learned more about how to craft an engaging lecture during those short terms than in any other teaching experience before or since.

Though Maximo is the one outside reviewer on this dissertation committee, he is also the member I have known the longest. Looking back, I cannot believe how much has changed in the years since I sat in his Criminal Law course as a 1L. But in all that time, I have never known Maximo to be anything but a curious and erudite interlocutor and a generous and patient collaborator. Working with him to (re-)build a comprehensive database of universal jurisdiction

cases deepened my understanding of international criminal law and co-authoring an article drawing on that work was a privilege and an object lesson in careful and committed scholarship.

Davide joined our department a year after I began my doctoral program and, as we work in rather different corners of our shared subfield, I didn't have much chance to work with him until I'd largely completed coursework. As soon as I did, though, I wished we'd met earlier. He is not only an insightful and provocative thinker, but also a dedicated friend and colleague. Even after personal commitments necessitated a move across the country before I'd finished my degree, Davide kept sending work my way. Those opportunities and lifelines – and our conversations about the professional realities of modern academia and the personal challenges it brings – were vital sources of connection and insight for me during my time in the wilderness and my transition to a new career in research outside the academy.

During our courses together and in myriad departmental events, I have learned so much from Giulia about both the content and history of various aspects of political theory but also the way that one can carry that theoretical curiosity and collegial engagement into the world. In other words, how one might *be* a theorist. I was so happy when, after a last-minute reshuffle of my committee, Giulia agreed to step in and work with me again. (And, on a completely different note, my family and I continue to treasure the baby blanket she sent as a gift when my youngest daughter was born. It is still very much in use.)

Finally, there is Aslı Bâli. Aslı's courses on international humanitarian and human rights law were a large part of what led me to center international law in both my law school and doctoral courses of study, and they continue to inform the values and commitments that continue to guide my professional work. My time working as her research assistant showed me how one can drag international law down out of the realm of hazy abstraction and put it to use in efforts to

address concrete human challenges. From the very start, Asli treated me as a colleague and friend, asking for my input on questions she was working through and celebrating milestones in our kids' early lives. (Look, Aslı, I finally finished it!)

Beyond these faculty mentors, a great number of colleagues and friends, both at UCLA and elsewhere, generously offered advice or read early drafts of parts of this project. Among my fellow graduate students, I'd like to thank Alex Diones, Cody Trojan, Megan West, Lucy Williams, and Kye Barker for their insights and moments of commiseration. And particular thanks go to Francesca Parente for being my closest cohort buddy and intellectual sounding board. Outside of UCLA, I'd like to thank many of the scholars I met through the various conferences and symposia where I presented on this project, including, in no particular order: Anne Holthoefer, Suwita Hani Randhawa, Christian Müller, Mark Berlin, and Nicole De Silva.

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reward for the years of demands, but I look forward to being more present with you all in the years to come. Thank you to my father and sister who now finally get to see me finish my last degree program, and to my mother and brother who are sadly no longer here to do so. Thank you also to my erstwhile but still parents-in-law, Andrew and Patricia Patterson. I am forever indebted to you both for the support and love you've shown to our young family. And to Melinda Patterson, I am a better person for having known you and I am so glad to be raising our kids with you.

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CHAPTER 1: INTRODUCTION

International criminal law has always been preoccupied with its own history. This may, of course, be due to its structural focus on the examination of evidence, testimony, and trial narratives – all tools for preserving and retelling the past. But it also seems to spring in part from a felt need to justify itself in the present.

Described by one of its most insightful critics as a contradiction in terms,[1] international criminal law sits ill-at-ease in the convergence between two legal disciplines, encompassing – in the words of one of its most ardent champions – the "international aspects of national criminal law" and the "criminal aspects of international law."[2] As a field, its lineage is far from unimpeachable, developing in fits and starts through repeated hybridizations of a constellation of ideas, doctrines and practices borrowed from various legal traditions. And yet, because of the gravity of the acts it is meant to address and its capacity to assign individual culpability for crimes that "shock the conscience of humanity,"[3] it is the area of international law perhaps most in need of solid foundations.

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[1] Georg Schwarzenberger, "The Problem of an International Criminal Law," *Current Legal Problems*, 1950, 265, Available at: http://books.google.com/books?id=am4hnQEACAAJ.

[2] M. Cherif Bassiouni, "The Penal Characteristics of Conventional International Criminal Law," *Case Western Reserve Journal of International Law* 15, no. 1 (1983): 27, https://heinonline.org/HOL/P?h=hein.journals/cwrint15&i=38.

[3] The United Nations Rome Statute of the International Criminal Court, Preamble. International Organizations, 2002. Web Archive. https://www.loc.gov/item/lcwaN0018822/.

Given this inherent justificatory instability, it should perhaps not be surprising that, until recently, most of the existing accounts of the historical development of the field of international criminal law have been professional histories – historical accounts written by and for lawyers working in this field – and have been framed and written in ways that both ground and justify the field. Many of these lawyerly histories, particularly those included in law school textbooks or written for a lay audience, begin their narrative with the 1945 Nuremberg International Military Tribunals at Nuremberg and Tokyo, presenting these "unprecedented" events as the field's founding moment.[4] Others eschew this foreshortened timeline, opting instead to link contemporary practices and institutions with events that occurred centuries or even millennia ago.[5] Despite their marked difference in scope, many of these professional histories have tended

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[4] *See, e.g.*, Y Beigbeder, *Judging War Criminals*, The Politics of International Justice (London: Springer, 1999), https://doi.org/10.1057/9780230378964; William A Schabas and Nadia Bernaz, eds., *Routledge Handbook of International Criminal Law* (Routledge, 2011). To be fair to the authors of those lawyerly histories that use this term in relation to 1945 International Military Tribunals, the practice of referring to these courts as "unprecedented" was something of a cliché as soon as they were established. Indeed, it was so common in journalism contemporaneous with the trials that commentator Max Radin called out its overuse as something akin to a verbal tic in a 1946 article in Foreign Affairs. *See* Max Radin, "Justice at Nuremberg," *Foreign Affairs*, April 1946, https://www.foreignaffairs.com/articles/germany/1946-04-01/justice-nuremberg.

[5] Some such accounts "trace" ICL's conceptual or doctrinal lineage back to the Middle Ages. *See, e.g.*, M Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application*, Historical Evolution and Contemporary Application (Cambridge University Press, 2011), http://books.google.com/books?id=FEuYZ_6QyTsC; M Cherif Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice," *Va. J. Int'l L.* 42 (2001): 81, http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/vajint42&section=9; Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (The New Press, 2013); Howard S. Levie, *Terrorism in War, the Law of War Crimes* (Oceana Publications, 1993). Others reach back beyond these medieval precedents, beginning their accounts in the practices of polities in Antiquity. *See, e.g.* Timothy L. H. McCormack, "From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime," in *The Law of War Crimes: National and International Approaches*, ed. Timothy L. H. McCormack

towards what Martti Koskenniemi has called "pedigree histories,"[6] explicitly or implicitly seeking to legitimize the present field of international criminal law by grounding its origins either in a politically uncomplicated moment of immaculate birth or in the hazy mists of the distant past. Building on this justificatory foundation, these idealized origin stories reinforce this framing by embedding the events and developments they address in the fabric of progress narrative,[7] not as historically contingent but as mere prologue to the formation of the field in its current state, itself cast as the culmination of the narrative, "its highest (though always incomplete) stage of flourishing."[8]

This tendency is entirely understandable, given the ideological commitments of the lawyers, jurists, and advocates that penned them – many of whom were writing during moments in which the field's prospects, and the prospects for the broader project of international criminal

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and Gerry J. Simpson (The Hague ; Boston: Kluwer Law International, 1997), 31; Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press, 2005), 9–72 (touching on historical practices that are "possible analogues to international criminal law" from Ancient Greece and Ancient India through Europe in the Middle Ages, the 17th, 18th, 19th and 20th centuries).

[6] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, 2001, 3, http://lib.freescienceengineering.org/view.php?id=450684.

[7] *See* Andre Vartan Armenian, "Selectivity in International Criminal Law: An Assessment of the 'Progress Narrative,'" *International Criminal Law Review* 16, no. 4 (August 18, 2016): 642–72, https://doi.org/10.1163/15718123-01604001.

[8] Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, 102. For an example of this, *see* Benjamin N Schiff, *Building the International Criminal Court*, 2008, http://books.google.com/books?id=cn1hngEACAAJ&dq=intitle:Building+the+International+Criminal+Court+inauthor:Schiff&hl=&cd=2&source=gbs_api (describing the ICC as the realization and "inheritor of the Nuremberg legacy").

justice, were looking rather dim.[9] The trouble is that while these kinds of bowdlerized narratives are compelling and can be useful in fostering political support for the universalist ideals, this kind of "law office legal history"[10] can also obscure elements of the past that could be useful to the present.

This insight seems to be behind a recent wave of "critical" and recuperative scholarship that has sought to "reconsider" the historical development of international criminal law and the broader politico-legal project of international criminal justice. These more recent histories –

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[9] *See, e.g.*, H. Donnedieu De Vabres' Introduction a L'etude Du Droit Penale Internationale (1922), at 10-40 (a text written after the collapse of efforts to effectuate international criminal justice for crimes committed during World War I). See also works written in the midst of the Cold War, including C. Fenwick, International Law (4th ed. 1965) at 8; and Bassiouni, M. Cherif, "An Appraisal of the Growth and Developing Trends of International Criminal Law," 45 Revue Internationale du Droit Penal 405 (1974) at 411. This style has – perhaps tellingly – also seen a resurgence in the last few years. See, e.g. Liu Daqun "International Law and International Humanitarian Law in Ancient China" in Morten Bergsmo, Cheah Wui Ling, and Yi Ping, eds., *Historical Origins of International Criminal Law: Volume 1* (Torkel Opsahl Academic EPublisher, 2014). *See also* Manoj Kumar Sinha, "The Manusmṛti and Laws of Warfare in Ancient India" and Emiliano J. Buis, "Between Isonomía and Hegemonía: Political Complexities of Transitional Justice in Ancient Greece" in Morten Bergsmo et al., eds., *Historical Origins of International Criminal Law: Volume 3* (Torkel Opsahl Academic EPublisher, 2015).

[10] The term "law office histories" refers generally to histories written by lawyers or jurists, but does so in a pejorative sense. This term is generally used to point out a certain historiographical carelessness that is characteristic of histories written by and for lawyers, or to describe the particular kind of selective or biased accounts of the past that lawyers tend to deploy in service of their doctrinal or policy arguments. When he coined the term "Law-office history," constitutional historian Alfred Kelly was referring to legal histories characterized by "the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered." Alfred H. Kelly, "Clio and the Court: An Illicit Love Affair," *The Supreme Court Review* 1965 (1965): 122, https://www.jstor.org/stable/3108786.

written not only by legal scholars[11] but also a growing cadre of political theorists and historians[12] – tend to use a more careful and critical historiographical approach to uncover and "rediscover" elements and events that prior histories have tended to downplay, omit, or ignore.[13] It is this body of scholarship to which this dissertation aims to contribute.

1 My Interjection

Much of this recent scholarship on the historical development of the legal field of international criminal law, and the larger politico-legal project of international criminal justice, emphasizes the importance of events and developments that took place in the aftermath of the First World War and in the earnest internationalism of the inter-war years,[14] decades before the

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[11] *See, e.g.*, Immi Tallgren and Thomas Skouteris, eds., *The New Histories of International Criminal Law: Retrials*, History and Theory of International Law (Oxford, United Kingdom: Oxford University Press, 2019); Frédéric Mégret and Immi Tallgren, eds., *The Dawn of a Discipline: International Criminal Justice and Its Early Exponents*, 1st ed. (Cambridge University Press, 2020), https://doi.org/10.1017/9781108769105; Edited by Neil Boister, Sabine Gless, and and Florian Jeßberger, eds., *Histories of Transnational Criminal Law* (Oxford, New York: Oxford University Press, 2021).

[12] *See, e.g.*, Sinja Graf, *The Humanity of Universal Crime: Inclusion, Inequality, and Intervention in International Political Thought*, 1st ed. (Oxford University Press, 2021), https://doi.org/10.1093/oso/9780197535707.001.0001; Samuel Moyn, "From Aggression to Atrocity: Rethinking the History of International Criminal Law," in *Oxford Handbook of International Criminal Law*, 2016, 1–32.

[13] This language of "reconsideration" and "rediscovery" is foregrounded in Kevin Heller and Gerry Simpson, *The Hidden Histories of War Crimes Trials* (Oxford University Press, 2013), http://books.google.com/books?id=9C1pAgAAQBAJ. A similar impulse seems to have been behind the prolific and ongoing series dedicated to reconsidering the history of the field being put out by Torkel Opsahl Academic Press. *See* Bergsmo, Ling, and Ping, *Historical Origins of International Criminal Law: Volume 1*; Morten Bergsmo, Cheah Wui Ling, and Yi Ping, eds., *Historical Origins of International Criminal Law: Volume 2* (Torkel Opsahl Academic EPublisher, 2014); Bergsmo et al., *Historical Origins of International Criminal Law: Volume 3*; Morten Bergsmo et al., eds., *Historical Origins of International Criminal Law (Volume 4)* (Torkel Opsahl Academic EPublisher, 2015).

[14] See, e.g. Mark Lewis, *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919–1950* (Oxford University Press, 2014), 3; Anne Holthoefer, "Constructing International Crime: Lawyers, States, and

violence that was adjudicated at Nuremberg. These accounts suggest that the doctrines and institutions that constitute the field of international criminal law today began to take shape as a result of building pressure among Allied publics to assign blame and exact retribution for the violence and destruction of the First World War. They pay close attention to the way in which this popular pressure spurred the slow but steady process of normative formation in which the "key ideas…of international crime and prosecution… [began to] gain acceptance both among states and international lawyers"[15] and thus an "international criminal legal system" began to be built.[16] They pay less attention, however, to where those "key ideas" came from. That is the question that I explore here.

As Nesam McMillan has pointed out, the historical development of international criminal law as a legal field, and international criminal justice as a politico-legal project, entailed various jurisprudential and institutional developments – i.e., "the development of international criminal laws and tribunals"[17] – but also a series of conceptual developments – i.e., "the imagination of distinctly 'international' forms of crime and justice."[18] Prior to the formation of the institutions, doctrines, practices, and professional identities that constitute the international criminal law, there had to emerge shared – to some degree – understandings of a number of basic conceptual

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the Origin of International Criminal Prosecution in the Interwar Period," *Law & Social Inquiry*, 2016, 4, http://onlinelibrary.wiley.com/doi/10.1111/lsi.12258/full.

[15] Holthoefer, Anne. "Constructing International Crime: Lawyers, States, and the Origin of International Criminal Prosecution in the Interwar Period." *Law & Social Inquiry*, 2016, at 3.

[16] Lewis, Mark. *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919–1950*, 2014, at 1-12, 14.

[17] Nesam McMillan, "Imagining the International: The Constitution of the International as a Site of Crime, Justice and Community," *Social & Legal Studies* 25, no. 2 (April 2016): 164, https://doi.org/10.1177/0964663915593626.

[18] McMillan, 164.

building blocks upon which any such system would have to rest.

These conceptual building blocks include, among others: a conception of supranational or universal crimes (acts whose commission merits both criminal accountability and the concern of publics and actors beyond the confines of any nation state); a conception of international criminalization (the practices by which legal actors could define and establish certain forms of violence as "crimes of international concern"); and a conception of internationalized criminal adjudication (the practices by which states might go about holding individuals accountable for such "crimes of international concern").

These understandings constitute the foundations upon which the modern international criminal law system (and the politico-legal project of international criminal justice) has been built and their emergence was a precondition – necessary but certainly not sufficient – for its development. As Stephen Wilf reminds us in his recent book on the role of "law talk" in the formation of American criminal law, "law as envisioned, formulated, and represented as a cultural artifact by a wide range of historical actors, including the common people" is precisely what "enables its later reinscription in official statutes and institutions."[19] Or, more concisely, law must be "imagined before it is enacted."[20]

The development of these conceptual components entailed a series of shifts and redistributions of the global (or at least Western) social imaginary – that "implicit 'background'

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[19] Steven Robert Wilf, *Law's Imagined Republic: Popular Politics and Criminal Justice in Revolutionary America*, Cambridge Historical Studies in American Law and Society (Cambridge [U.K.] ; New York, N.Y: Cambridge University Press, 2010), 7.

[20] Wilf, 7. ("By imagination, I mean something less passive than simply mentalité, inherited beliefs, or participation in legal culture. But it is also less ordered than ideology. What I discuss here is largely a nonprofessional discourse taking place in the public sphere as opposed to the bounded sphere of courts and codes.")

that makes possible communal practices and a widely shared sense of their legitimacy."[21] And these shifts and redistributions began to take place, not during the inter-war years or even the first decade of the 20th century, but across the span of the 19th century. It was during this earlier century that many of the elements of the institutional and professional infrastructure of international criminal law and international criminal justice came into being, including: the establishment of international law as a specialized profession;[22] widespread efforts to reform and harmonize domestic criminal laws, leading to the drafting and adoption of new national domestic criminal codes more amenable to trans-national cooperation of police and penal officials;[23] the proliferation of international and mixed commissions,[24] transnational advocacy networks, organizations of policy experts[25] and associations of legal professionals.[26] More importantly for

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[21] Duncan Bell, "Ideologies of Empire," in *The Oxford Handbook of Political Ideologies*, 2013, 539, https://doi.org/10.1093/oxfordhb/9780199585977.013.0012Oxford.

[22] See Koskenniemi, Martti. The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960, 2001, at 98-178. See also and Bassiouni, M C. "A Century of Dedication to Criminal Justice and Human Rights: The International Association of Penal Law and the Institute of Higher Studies in Criminal Sciences." DePaul L Rev, 1989.

[23] See Andreas, Peter, and Ethan Nadelmann. Policing the Globe: Criminalization and Crime Control in International Relations. Oxford University Press, 2006; Henze, Martina. "Crime on the Agenda: Transnational Organizations 1870-1955." Historisk Tidsskrift 2 (2009): 369–417; Padoux, G. "International Unification of Criminal Law." China Law Review 7, no. 1 (1934): 1–10.

[24] See Boisson de Chazournes, Laurence and Danio Campanelli. "Mixed Commissions." Max Planck Encyclopedia of Public International Law. Available at http://www.opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e65?prd=EPIL; and Megret, Frederic. "Mixed Claim Commissions and the Once Centrality of the Protection of Aliens," (unpublished, on file with author).

[25] See Radzinowicz, Leon. "International Collaboration in Criminal Science." The University of Toronto Law Journal 4, no. 2 (1942): 307. https://doi.org/10.2307/824150.

[26] Müller, Christian. "The Politics of Expertise," in Rodogno, Davide, Bernhard Struck, and Jakob Vogel, eds. Shaping the Transnational Sphere, 2015

this project, though, it is also during this period that the foundational ideas and practices that make up the theoretical infrastructure of contemporary international criminal law and international criminal justice begin to take on the conceptual, political, and ideological shape that would be familiar not only to international lawyers in the inter-war years but also to political and legal actors today.

In this dissertation, I foreground this under-explored dimension and period of the history of international criminal law and international criminal justice. Approaching this history using the tools of intellectual history and legal sociology, I explore the ways in which "legal actors" framed, discussed, and deployed "legal ideas" of international crime and criminality over the course of the 19th century.

In adopting this focus on "legal ideas" rather than legal rules (in the form of either doctrines or institutions),[27] I begin to "excavat[e] the various meanings" of these foundational ideas "as they were laid down" across decades, miles, and disciplinary boundaries.[28] This is useful because, even though the category of international crime and institutional practices of internationalized adjudication did not "decisively emerge"[29] until the early 20th century, the ideas behind this institutional shift were already well-worn by then. As with any "new form of knowledge," the concepts of international crime and internationalized adjudication were not

[27] I draw this useful distinction from Arnulf Becker Lorca, "43: Eurocentrism in the History of International Law," in *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012), 1034, https://doi.org/10.1093/law/9780199599752.003.0044.

[28] Armitage, David. 2017. Civil Wars. Knopf. at p. 238.

[29] Lewis, *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919–1950*, 24.

"without a line of precursors and a hazy ancestry of analogous practices and objectives."[30] Each of these ideas and emerging practices was both a site and a tool for political argumentation, and each represents a case in which a given legal actor found it useful to their interests to adopt the under-defined but morally weighted language of crime and criminality to describe, classify, and influence behaviors in the international and transnational context.

In adopting this focus on "legal actors" rather than lawyers or jurists, I widen the sphere of individuals whose ideas and utterances usually appear in this kind of conceptual legal history. Lawyers and jurists weren't the only "legal actors" who contributed to the process of "global legal ordering"[31] that resulted in the field of international criminal law and the project of international criminal justice as they stand today. Rather, especially during the formative prehistory during which its conceptual building blocks were taking shape, it was also the product of the interactions between and circulation of ideas and practices among more "unlikely legal actors"[32] – including political or government actors like state officials, diplomats, military officers, but also merchants, planters, sailors, pirates, captives, etc.[33] – that made assertions about the law, used it to accomplish their goals, and saw themselves as bound by or capable of

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[30] David Garland, "The Criminal and His Science: A Critical Account of the Formation of Criminology at the End of the Nineteenth Century," *The British Journal of Criminology* 25, no. 2 (April 1985): 111, https://doi.org/10.1093/oxfordjournals.bjc.a047507.

[31] Lauren A. Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800-1850* (Cambridge, Massachusetts: Harvard University Press, 2016), 119.

[32] Lauren Benton, "Legal Spaces of Empire: Piracy and the Origins of Ocean Regionalism," *Comparative Studies in Society and History* 47, no. 4 (October 2005): 723, https://doi.org/10.2307/3879340?ref=search-gateway:d8833cd47556f2e1e6433c6210a8a20f.

[33] Lauren Benton, "Abolition and Imperial Law, 1790–1820," *The Journal of Imperial and Commonwealth History* 39, no. 3 (2011): 356, https://doi.org/10.1080/03086534.2011.598737.

enforcing its requirements.[34] By adopting this broader method of selecting the relevant *dramatis personae* of this history, this study can explore the ways in which discourses and practices around international crime and adjudication were shaped by less-frequently acknowledged voices and in sites of argumentation other than the courtroom or lecture hall.

None of the examples and instances that I examine in the course of this project are presented, or should be taken, as evidence that a robust system of internationalized criminal law and adjudication existed during this century. Indeed, it did not. The world would have to wait at least another century or so for such a system to be built up. Instead, they should be read as moments in which individuals experimented with novel legal ideas, legal procedures, and legal institutional forms, all of which gestured in the direction of some ideal of criminal justice beyond or above the confines of the nation-state.

2 Stakes and Payoff

Engaging in this kind of foundational study of the conceptual underpinnings of international criminal law and international criminal justice is worthwhile because they continue to be vital and increasingly important tools for addressing threats to and violations of human

[34] This is partly because the disciplinary boundaries surrounding these professions shifted markedly during this period. Indeed, at the beginning of the 19th century, there were no international jurists or lawyers; the discipline of international law wouldn't be founded until at least the 1870s. *See* Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*. However before and even during the establishment of professionalized groups of international lawyers, there was an array of other professions whose members asserted the authority to interpret and apply international law or whose members understood their actions to be at least partly bound by international law. *See* Christian Müller, "The Politics of Expertise: The Association Internationale Pour Le Progrès Des Sciences Sociales, Democratic Peace Movements and International Law Networks in Europe, 1850–1875," in *Shaping the Transnational Sphere*, ed. Davide Rodogno, Bernhard Struck, and Jakob Vogel, 2015.

security around the world.[35] In the wake of large-scale human suffering, international and domestic courts empowered to investigate and prosecute international crimes can exert pressure on repressive leaders or actors accused of orchestrating widespread and systematic violence, hold them accountable and limit their ability to receive international support.[36] In the wake of atrocities, the jurists, advocates and investigators working to achieve international criminal justice can augment local efforts to build a sustainable peace by providing alternative venues for justice, amplifying the voices of victims, and contributing resources and expertise to help local officials re-establish the rule of law and document alleged atrocities.[37]

The inherent universalism of international criminal law and international criminal justice is what drives their utility in so many situations and contexts. This same universalism can also, however, elide another function that they play. In their doctrinal, institutional, and conceptual framings and limits, both international criminal law and international criminal justice implicitly determine which acts, harms, perpetrators, and victims *can* be legitimate objects of concern to the international community. In its explicit focus on those "crimes that are of the gravest concern to humanity,"[38] international criminal law implicitly figures both which kinds of injuries

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[35] Arguably international criminal justice institutions contribute to human security in all three general senses of the term: human rights, safety of peoples, and sustainable development. *See* Fen Osler Hampson, John B. Hay, and Holly Reid, eds., *Madness in the Multitude: Human Security and World Disorder* (Don Mills: Oxford Univ. Press, 2002), 170.

[36] Ramesh Chandra Thakur and Gareth J. Evans, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect*, Second edition (Cambridge New York: Cambridge university press, 2017), 132.

[37] For a discussion of these and the panoply of other goals that international criminal tribunals and advocates have set for various institutions of criminal justice institutions, see Mirjan Damaska, "What Is the Point of International Criminal Justice?," *Chicago-Kent Law Review* 83, no. 1 (2008): 329.

[38] "About the Court," accessed May 16, 2024, https://www.icc-cpi.int/about/the-court.

can be "be heard, read, seen, felt, and known"[39] as meriting this "gravest" concern and asserts the authority to speak on behalf of humanity itself. And neither of these figurations is without its pitfalls.[40]

This universalism can also elide another important point – namely that the practices, doctrines, and institutions of both international criminal law as a legal and juridical field[41] and international criminal justice as a politico-legal project are the product of centuries of historically

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[39] Jennifer Balint et al., *Keeping Hold of Justice: Encounters between Law and Colonialism* (Ann Arbor, MI: University of Michigan Press, 2020), 64, https://doi.org/10.3998/mpub.11323120.

[40] On the former, see the robust literature on issues of selectivity and bias in the selection of which kinds of harms whose commission is considered a legitimate issue of international concern. *See, e.g.,* Kamari Clarke, "Rethinking Africa through Its Exclusions: The Politics of Naming Criminal Responsibility," *Anthropological Quarterly* 83, no. 3 (2010): 628, https://doi.org/10.1353/anq.2010.0008; Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*; Christine Schwöbel-Patel, "The Core Crimes of International Criminal Law," in *The Oxford Handbook of International Criminal Law*, ed. Kevin Jon Heller et al., 1st ed. (Oxford University Press, 2020), 768–90, https://doi.org/10.1093/law/9780198825203.003.0034; N Boister, "The Exclusion of Treaty Crimes from the Jurisdiction of the Proposed International Criminal Court: Law, Pragmatism, Politics," *J Armed Conflict L*, 1998, http://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jcsl3&section=7; Ifeonu Eberechi, "'Rounding Up the Usual Suspects': Exclusion, Selectivity, and Impunity in the Enforcement of International Criminal Justice and the African Union's Emerging Resistance," *African Journal of Legal Studies* 4, no. 1 (January 1, 2011): 51–84, https://doi.org/10.1163/170873811X567970; Asad Kiyani, "International Crime and the Politics of Criminal Theory: Voices and Conduct of Exclusion," *NYUJ Int'l L & Pol* 48 (2015): 129–208; Patrick Robinson, "The Missing Crimes," in *The Rome Statute of the International Criminal Court: A Commentary*, ed. Antonio Cassese, Paola Gaeta, and John R. W. D. Jones (Oxford ; New York: Oxford University Press, 2002), 497–524.

On the latter, see the similarly robust literature examining the question of constituency and authority in international criminal justice. *See, e.g.* Frédéric Mégret, "In Whose Name? The ICC and the Search for Constituency," in *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, ed. Christian M. de Vos (Cambridge University Press, 2015); Immi Tallgren, "Who Are 'we' in International Criminal Law?," in *Critical Approaches to International Criminal Law: An Introduction*, 2014, 71–95.

[41] Frédéric Mégret, "International Criminal Justice as a Juridical Field," *Champ Pénal*, no. Vol. XIII (February 29, 2016), https://doi.org/10.4000/champpenal.9284.

contingent events. The recent efforts, discussed above, at re-examining that historical process of disciplinary and theoretical accretion have done much drive this point home.[42] But in this same effort, it is worth looking beyond the disciplinary and institutional boundaries of international criminal law and justice, and before even the first steps of their coalescence into coherent professional or doctrinal categories, to examine the formation and uses of the constituent concepts through which they are articulated. As will be discussed in the following chapters, popular understandings of international criminality, and efforts by legal actors to enact and deploy concepts like international criminalization and internationalized criminal adjudication, not only influenced popular understandings of legitimate and illegitimate violence but also prefigured and constrained the ways in which these concepts are later taken up by professional legal actors and formalized as part of the contemporary international legal order.

3 Chapter Outline

In each of the following three chapters, I explore the development of one of the conceptual underpinnings of the contemporary field of international criminal law and project of

[42] As have other critical engagements with the field, such as Tor Krever, "International Criminal Law: An Ideology Critique," *Leiden Journal of International Law* 26, no. 03 (2013): 701–23, https://doi.org/10.1017/s0922156513000307; Christine Schwöbel, "The Rebranding of the International Criminal Court," *Opinio Juris* (blog), October 28, 2016, http://opiniojuris.org/2016/10/28/the-re-branding-of-the-international-criminal-court-and-why-african-states-are-not-falling-for-it; Christine Schwöbel, *Critical Approaches to International Criminal Law: An Introduction* (Routledge, 2014); Kamari Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa*, The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa (Cambridge: Cambridge University Press, 2009), https://doi.org/10.1017/CBO9780511626869.

international criminal justice.

In chapter 2, I examine the ways in which the very concept of a supranational or universal crime – an act that is sufficiently problematic to be considered a crime and, by virtue of its unusually transnational nature or universal effects, merits the suspension of the usual rules of criminal jurisdiction, making its commission and punishment a legitimate "matter of international concern" – took shape in public and professional discourses during the 19th century. To do so, I draw on a corpus of over 6000 texts published over the course of the century, including not only monographs and professional texts but newspapers, magazines, and other everyday sources of print media, to examine the ways in which 19th century authors used various phrases invoking the notion of a supranational or universal crime – such as "crimes against humanity," international crime," or "crime against civilization." Through this archival examination, I explore the role that the concept of a supranational or universal crime played in Western public discourse long before the emergence of a formal international criminal legal system.

In chapter 3, I examine the ways in which legal actors experimented with the idea of international criminalization – the processes and practices by which international policymakers, advocates, and other interested parties create new crimes of international concern – before and during the 19th century. In particular, I examine the emergence and proliferation of suppression treaties, a legal tool with which international actors experimented to create and codify new international crimes through the use of bilateral or multilateral agreements. To this end, I begin by showing that examples of this kind of international agreement can be found from as early as the mid-17th century, over a century before the earliest example discussed in existing academic literature on the subject. I then discuss the explosive growth in the number of extant suppression

treaties starting in the early 19th century as British advocates and policymakers adopted and adapted this previously obscure legal tool as a means to establish a foundation in the international legal order for that country's efforts to suppress the African and Arab slave trades.

In chapter 4, I examine the ways in which legal actors experimented with internationalized criminal adjudication – the practices and processes by which national leaders, military officials, diplomats, and other interested parties use internationalized courts to address instances in which individuals are accused of committing crimes of international concern – during the latter parts of the 19th century and dawn of the 20th. This chapter lays out four case studies of *ad hoc* internationalized criminal courts in which political, military, and legal actors responded to alleged crimes of international concern: a Special Court established to hear an 1874 trial for piracy in the Malay kingdom of Kuala Langat; a French-Siamese Mixed Court convened in 1894 in Siam; the 1900 International Military Commission in Paoting-Fu China; and the 1905 International Commission of Inquiry for the North Sea (Dogger Bank) Incident. I then consider the historical significance and contemporary relevance of these and other early experiments in international criminal adjudication.

4 Theoretical Considerations: Defining Terms

The fields of international criminal law and international criminal justice are thick with legal jargon and terms of art, and the question of how to define and delimit many of them remains a contentious question among experts in the field. However, delineating terms is not the subject of this work, and we will take some central concepts as given. In the interest of clarity, though, I include this brief addendum that sets out how some of these terms are used in the course of this dissertation.

4.1 International Crimes (or Universal or Supranational Crimes):

Defining the concept of an international (or indeed universal or supranational) crime has proven to be no easy task. Some scholars have defined this category of crimes in reference to the institutions capable of adjudicating them, defining them as those crimes that are triable before international criminal tribunals or can be tried by any state under universal jurisdiction.[43] Others define them by reference to their gravity, shocking the conscience of the international community and offending the fundamental values or interests of the international community.[44] A growing plurality of legal scholars define them according to their doctrinal basis, limiting the category to those crimes that are directly criminalized by international law.[45] Even M. Cherif Bassiouni, among the most ardent champions of international criminal law, was forced to concede that there is no "agreed-upon definition of what constitutes an international crime, criteria for international criminalization, or how international crimes are distinguished."[46]

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[43] *See, e.g.*, Grant Niemann, "International Criminal Law and International Crimes," in *Handbook of Transnational Crime and Justice*, ed. Philip Reichel and Jay Albanese (SAGE Publications, 2013); Kriangsak Kittichaisaree, *International Criminal Law* (Oxford, New York: Oxford University Press, 2001).

[44] *See, e.g.*, Mark A Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, 2007), http://books.google.com/books?id=t17icd-sA4cC&printsec=frontcover&dq=inauthor:drumbl+intitle:Atrocity+Punishment+and+International+Law&hl=&cd=1&source=gbs_api; M. Cherif Bassiouni, *Introduction to International Criminal Law. 2nd, Rev. Ed.* (Leiden: Koninklijke Brill NV, 2013); Gerhard Werle and Florian Jeßberger, *Principles of International Criminal Law*, 4th ed. (Oxford University Press, 2020), https://doi.org/10.1093/law/9780198826859.001.0001.

[45] *See, e.g.*, Robert Cryer, "The Doctrinal Foundations of International Criminalization," in *International Criminal Law*, ed. M Cherif Bassiouni, vol. Volume I: Sources, Subjects and Contents (Martinus Nijhoff, 2008), 107–28; Roger O'Keefe, "Universal Jurisdiction Clarifying the Basic Concept," *Journal of International Criminal Justice* 2, no. 3 (September 2004): 735–60, https://doi.org/10.1093/jicj/2.3.735; Werle and Jeßberger, *Principles of International Criminal Law*; Kevin Jon Heller, "What Is an International Crime? (A Revisionist History)," *SSRN Electronic Journal*, September 2016, https://doi.org/10.2139/ssrn.2836889.

[46] Bassiouni, *Introduction to International Criminal Law. 2nd, Rev. Ed.*, 139.

This definitional challenge isn't helped by the fact that such crimes have been and continue to be referred to using a bewildering constellation of related, overlapping, but also distinct terms and phrases, including, but certainly not limited to: "universal crimes," "international crimes," "crimes against humanity"/"crimes against the law[s] of humanity,"[47] "crimes against civilization"/"crimes against the laws of civilization," "crimes against civilization and humanity,"[48] "crimes against the laws of nature," "crimes against the laws of nations,"[49] "crimes against international law," "crimes of international concern,"[50] "crimes of concern to the international community as a whole,"[51] crimes that have an "international element," crimes that

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[47] This phrase appeared in the final report issued by the 1919 Commission on Responsibilities. See Carnegie Endowment for Int'l Peace, *Report Presented to the Preliminary Peace Conference by the Commission on the Responsibilities of the Authors of War and Enforcement of Penalties 24* (1919) (reprinted in 14 *Am. J. Int'l L.* 95 (1920)), at p. 20.

[48] This phrase appears in the now-famous joint declaration by Great Britain, France, and Russia issued in May 1915 denouncing the Ottoman government's massacre of the Armenian population in Turkey. The text of this declaration can be found in: Papers Relating to the Foreign Relations of the United States 1915, Suppl. World War, Washington 1928, S. 981. *See* Kai Ambos, *Treatise on International Criminal Law*, vol. Volume 1: Foundations and General Part (OUP Oxford, 2013), 46.

[49] This phrase appears in Article I, Section 8, Clause 10 of the United States' Constitution: "[The Congress shall have Power . . .] To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."

[50] The first appearance of this term that I have been able to locate is in a 1921 address by Jesse S. Reeves to the Annual Meeting of the American Society of International Law. In that address, Reeves prefaces his address with the following: "A full consideration of the topic assigned to me should include (1) criminal jurisdiction ad hoc sought to be erected by the peace treaties; (2) jurisdiction over war crimes committed in the future; and (3) jurisdiction over crimes of international concern in times of peace." Later in his address, he uses the related term, "offenses of international significance and concern." *See* Jesse S. Reeves, "International Criminal Jurisdiction," *Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969)* 15 (April 27, 1921): 62, https://www.jstor.org/stable/25656612.

[51] Terminology/phrase used in the Preamble and in Articles 1 and 5 of the Rome Statute.

"are international by their very nature," "crimes against the peace and security of mankind," and finally for the Latin scholars among us, *delicta* or *crimina juris gentium*.[52]

Most attempts to parse this definitional morass and attempt to square the various definitional criteria offered up have been hampered either by vagueness or a conflation of multiple potential criteria.[53] We can see both of these tendencies, for example, in this definition from Terje Einarsen:

> Some crimes are particularly grave offences of concern to the world community as a whole. They may occur in the context of war or as part of a larger pattern of aggressive behaviour by powerful actors within a society. These crimes are often directly linked to abuse of political or military systems or to a lack of effective state institutions. Such crimes, which can be referred to as universal crimes, are also attacks on the rule of law and on human dignity. They typically constitute transgressions of various social and moral norms, including human rights. Human rights are universal in the sense that every person has and should enjoy them in a modern society. Similarly, no person should be exposed to universal crimes. However, these aspirations do not always correspond to legally binding rights and obligations, or to mechanisms of enforcement under international law.[54]

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[52] *See, e.g.*, Raphael Lemkin, "Acts Constituting a General (Transnational) Danger Considered as Offences Against the Law of Nations", Additional Explications to the Special Report presented to the 5th Conference for the Unification of Penal Law in Madrid (14 -20 October 1933), available at: http://www.preventgenocide.org/lemkin/madrid1933-english.htm.

[53] *See, e.g.*, M. Cherif Bassiouni, International Crimes: Jus Cogens and Obligation Erga Omnes, 59 Law & Contemp. ProBS. 63, at 69 (1996) ("certain crimes affect the interests of the world community as a whole because they threaten the peace and security of humankind and they shock the conscience of humanity.")

[54] (Einarsen, 2012, p. 4) (Earlier in the book, Einarsen also gives this short definition: "'International crimes', which may also be referred to as 'universal crimes' because of their inherent gravity and violation of universal values and interests, are attacks on the rule of law." (Einarsen, 2012, p. 2))

It is as if, in the interest of completeness and inclusion, Einarsen's definition has absorbed all the pathologies of the many definitions upon which it draws. If we look back to the first sentence of Einarsen's definition, however, we can see a gesture at what – I argue – is fundamentally behind all these other factors and descriptions.

A universal crime is simply a crime that is of universal *concern*. In other words, it is an act that, for one reason or another, merits the suspension of the general safeguards – or lifts the act above those safeguards – delimiting who (among states) is allowed to "take an [official] interest" in that act.[55] It is this concern – as in that of "a *concerned* observer" – is what legitimates any international action that might follow from this classification, such as marshalling of, or participation in, any collective effort to *suppress*[56] a given "crime of international concern" or to intervene, collectively or unilaterally, to adjudicate and punish in those involved in its commission.

For the purposes of this project, I adopt this broad framing of universal crimes. I use the phrase "international crimes" (and the cognate terms "universal crimes" or "supranational crimes") to refer to this broad category of "crimes of international concern" – acts that are sufficiently problematic to be considered a crime and whose transnational nature or universal

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[55] This is, in fact, the framing put forward by the United States Military Tribunal at Nuremberg, in a case called *In re: List and Others*, in which the opinion defines an international crime as "a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances." The Hostages Trial, US Military Tribunal at Nuremberg, 19 Feb 1948 (1953) 15 Ann. Dig. 632 at 636.

[56] A term commonly used in the context of two of the crimes commonly listed as being of universal concern, slave trading and piracy, generally employed to mean "to prevent," "to deter," or "to police." See Chapter 3.

effects make making their commission and punishment a legitimate "matter of international concern," thereby meriting the suspension of the usual rules of criminal jurisdiction.

I am aware that the phrase "crimes of international concern" has itself become a term of art, used by many commentators as another term for the lesser category of "treaty crimes" or "transnational crimes."[57] When I use it, however, I do so in its literal sense – to describe the full range of crimes, or acts of violence or cruelty, that are brutal or widespread enough to merit the attention of the international community.

4.2 International Criminal Law and International Criminal Justice:

Defining the content and boundaries of international criminal law also remains the subject of debate in academic and professional circles. This difficulty of coming to an agreed upon understanding of doctrinal or conceptual scope of international criminal law may be due in large part to its being fundamentally an amalgam of the international and the domestic, a product of combining "the penal aspects of international law and the international aspects of national criminal law."[58] It also may be due to the fact that, by bringing together the "institutional *practice and scholarship* of both international law and criminal law," any authoritative definition of international criminal law would require the support of both international lawyers and

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[57] *See, e.g.*, Neil Boister, "'Transnational Criminal Law'?," *European Journal of International Law*, 2003, 955, http://ejil.oxfordjournals.org/content/14/5/953.short.

[58] M. Cherif Bassiouni, *International Criminal Law, I*, Transnational Publishers, New York, 1986, p. 1. On this point, see Friedlander, Robert A. "The Foundations of International Criminal Law: A Present-Day Inquiry." *Case Western Reserve Journal of International Law* 15, no. 1 (1983): 13–25. at 17 (describing how ICL "represents a convergence of both public international legal norms and the international aspects of municipal criminal law").

domestic criminal lawyers, sets of actors bearing two different sets of professional identities, commitments and interests.[59]

For the purposes of this project, I use the term "international criminal law" in a similarly broad manner as I use the term "international crime" – to refer to on the one hand to all elements of the criminal law that are determined by international law, and on the other hand the various laws and practices involved in the internationalization of the frame of crime and punishment. International criminal law, in this sense, encompasses everything the practice and jurisprudence of international courts to the extraterritorial elements of domestic criminal law.

Although this kind of expansive understanding of the field of international criminal law has fallen out of favor over the last few decades, it is not without precedent. This broad understanding of international criminal law was still broadly supported by various authorities in the field until relatively recently,[60] and it still has a number of supporters today.[61] More

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[59] Tallgren, Immi. "Searching for the Historical Origins of International Criminal Law." In *Historical Origins of International Criminal Law: Volume 1*, Morten Bergsmo, et al. eds., xi–xxx. Torkel Opsahl Academic EPublisher, 2014 (emphasis added).

[60] The sharply limited and balkanized conception of ICL that has come to prominence today is much narrower than common understandings held three decades ago, and much narrower than understandings of what that term encompassed for over a century before that. This broader understanding of "international criminal law" was embraced by the International Law Commission in various editions of its Draft Code of international crimes, and was widely embraced by legal experts and state delegations present at the negotiations leading to the drafting of the Rome Statute of the International Criminal Court (ICC). *See*, "Draft Code of Crimes against the Peace and Security of Mankind" (1984), 2 UN YB Intl L Commission 89, 100; and Douglas Guilfoyle, "Transnational Crimes," in *The Oxford Handbook of International Criminal Law*, ed. Kevin Jon Heller et al. (791-810, 2020), 791–92.

[61] *See, e.g.*, Frédéric Mégret, "The Unity of International Criminal Law: A Socio--Legal View," in *The Oxford Handbook of International Criminal Law*, ed. Kevin Jon Heller et al., 2020, 829 (embracing "a definition that gets us closer to what ICL might properly be considered to be is one that covers all aspects of the criminal law that are significantly determined by international law. These include both directly and indirectly created international

importantly for the purposes of this project, this broad approach to defining the field fits with the ways that the phrase "international criminal law" seems to have been understood during the latter parts of the long 19th century.[62]

Along these same lines, I use the term "international criminal justice" in a similarly expansive sense to refer to the politico-legal project to apply the paradigm of "criminality"[63] to atrocities and other large-scale violations of human rights. This project encompasses the collective efforts of all the various victims, advocates, lawyers, and NGOs who have sought to use international criminal law to hold those who commit grave human rights abuses individually accountable, as well as the ideological belief in the transformative capacity of international law (both criminal and otherwise) that underlies each of these efforts.[64]

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crimes; the operation of international criminal tribunals, but also the complexities of extradition and judicial cooperation; as well as, arguably, elements of domestic criminal law that are heavily influenced by international law, such as titles to criminal jurisdiction or certain offences that are seen as closely connected to the protection of human rights"). *Also see* Immi Tallgren, "Searching for the Historical Origins of International Criminal Law," in *Historical Origins of International Criminal Law: Volume 1*, ed. Morten Bergsmo, Cheah Wui Ling, and Yi Ping (Torkel Opsahl Academic EPublisher, 2014), xiii. (defining international criminal law as encompassing a set of legal doctrines as well as "institutional practice[s] and scholarship of both international law and criminal law.")

[62] Writing in 1908, for example, R. Vambéry suggests that the definition of the "subject of international criminal law" is comprised by – among other things – the rules of international cooperation and "legal aid" in criminal enforcement (such as extradition), "those rules of law which oppose [or concern] the validity of the criminal law of one State as against that of another," and those rules of law based on international agreement which assure international protection to interests of an international character."[1](Vambery, 1908, p. 134

[63] Here I am presenting the paradigm of "criminality" – or "crime and punishment" – in much the same way that Thomas Skouteris understands "the notion of progress": as "one of these grand ideas that yield tectonic force and determine the way we speak to the world." Skouteris, Thomas. "The Idea of Progress." In *The Oxford Handbook of the Theory of International Law*, edited by Anne Orford, Florian Hoffmann, and Martin Clark, First Edition. Oxford Handbooks. Oxford, United Kingdom: Oxford University Press, 2016. At p. 639.

[64] In this, I draw on framings of the "international criminal law project" or the "international criminal justice project" presented by Immi Tallgren, David Luban, and others. *See, e.g.*, Immi Tallgren, "The Durkheimian Spell of

International Criminal Law?," *Revue Interdisciplinaire d'études Juridiques* 71, no. 2 (2013): 137, https://doi.org/10.3917/riej.071.0137 ("With 'ICL project' I understand broadly both the law and the institutional practice, processes and discourses, be it at the International Criminal Court [ICC], the International Criminal Tribunal for the Former Yugoslavia [ICTY], the International Criminal Tribunal for Rwanda [ICTR], other ad hoc and hybrid tribunals, or national prosecutions for international crimes, as well as the representations in civil society, academia and media"); Immi Tallgren, "Come and See? The Power of Images and International Criminal Justice," *International Criminal Law Review* 17, no. 2 (February 27, 2017): 262, https://doi.org/10.1163/15718123-01702007 ("'International criminal justice' refers broadly to the legal and political project and the institutional practices of adjudicating and punishing international crimes"); David J. Luban, "Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law," in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (Oxford University Press, 2010), 570–88 (defining the international criminal law project as "the momentous and radical project…[of] establishing a pure international criminal law of universal application").

CHAPTER 2: IMAGINING INTERNATIONAL CRIMES – UNIVERSAL AND SUPRANATIONAL CRIMES IN 19TH CENTURY POPULAR DISCOURSE

Chapter Abstract

In this chapter, I examine the ways in which the concept of a supranational or universal crime was used in public and political discourse over the course of the 19th century. This chapter begins with a consideration of the methodological and theoretical benefits of examining quotidian and ephemeral texts – such as newspapers, pamphlets, and journals – as sources in intellectual legal histories. It then turns to a brief survey of quantitative data showing the frequency with which terms like "crimes against humanity" and "international crime" were employed in the public press over the course of the 19th century, followed by a more detailed qualitative examination of the ways in which these phrases were deployed in various topical contexts. Finally, the chapter concludes with a discussion of trends, resemblances, and lessons that one can draw from the archival evidence laid out in this chapter.

1 Chapter Introduction

When discussing the historical development of international criminal law and international criminal justice, it is common for authors to make claims, even if just in passing, about the first use of one or more of the discipline's key phrases or terms of art. In the course of researching this chapter, for example, I came across at least a dozen instances in which scholars discuss the first use of the term "crime against humanity." In his characteristically thorough monograph on the evolution and application of the concept of crimes against humanity, the eminent international legal scholar M. Cherif Bassiouni writes that the "origin of the term … can

be traced back to a joint declaration of the French, British, and Russian governments, dated May 24, 1915" decrying the massacre of Armenians as a crime "against humanity and civilization."[1] Other scholars have contested this claim. Some suggest that the phrase was coined by journalist and politician George Washington Williams and first appeared in a series of open letters and pamphlets he published in 1890 condemning the treatment of Congolese natives under the rule of Belgian King Leopold II in the Congo Free State.[2] (Indeed, Sinja Graf asserts that Williams' letter was "the only recorded use" of this term in the whole of the 19th century.[3]) Others argue that its first appearance was in a provision of the 1860 Republican Party platform that described

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[1] Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application*, 1. More recently, ICL scholar Tilman Rodenhäuser doubled down on this claim, asserting that "the *notion* of 'crimes against humanity' emerged as a reaction to state crimes" and that its first use was in the same 1915 joint declaration cited by Bassiouni, in which "the governments of Great Britain, France, and Russia condemned Turkish massacres against the Armenian population in the Ottoman Empire as 'crimes of Turkey against humanity and civilization.'" Tilman Rodenhäuser, "The Historical Development of Crimes against Humanity and Jurisprudence of the Rwanda, Former Yugoslavia, and Sierra Leone Tribunals," in *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law*, ed. Tilman Rodenhäuser (Oxford University Press, 2018), 0, https://doi.org/10.1093/oso/9780198821946.003.0011.

[2] One of the more high-profile sources in which this claim appears is in Adam Hochschild's best-selling 1998 popular *Leopold's Ghost*, a part-historical and part-biographical account of Leopold's brutal subjugation of the Congo. See Adam Hochschild, *King Leopold's Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa* (HarperCollins, 1999), 111–12. See, e.g. Norman Geras, *Crimes Against Humanity: Birth of a Concept* (Manchester University Press, 2015), 4; James D. Fry, "Osama Bin Laden - The War Criminal," *International Legal Perspectives* 13 (2002): 16, https://heinonline.org/HOL/P?h=hein.journals/intlegp13&i=18; Yuri Mantilla, "ISIS's Crimes against Humanity and the Assyrian People: Religious Totalitarianism and the Protection of Fundamental Human Rights," *ILSA Journal of International and Comparative Law* 23, no. 1 (2017 2016): 77, https://heinonline.org/HOL/P?h=hein.journals/ilsaic23&i=87.

[3] Sinja Graf, "'A Wrong Done to Mankind': Colonial Perspectives on the Notion of Universal Crime," *International Relations* 31, no. 3 (September 2017): n. 33, https://doi.org/10.1177/0047117817723066.

slavery as "a crime against humanity and a burning shame to our country and age"[4] or in an 1842 treatise on maritime law by American legal scholar Henry Wheaton.[5]

As it turns out, none of these assertions about the origins of this term are entirely accurate. The term likely originated much earlier than any of these examples, having been adapted in translation from the French "*crimes de lèse humanité*" (a term that appears in both Voltaire's *Philosophical Dictionary* and Beccaria's tract *On Crime and Punishment*) some time in the late 18th century.[6] And the conceptual category of universal or supranational crimes – acts whose commission merits both criminal accountability and the concern of publics and actors beyond the confines of any nation state – existed in European political thought long before the advent of the 19th century.[7] Alongside the more well-known "paradigmatic" universal crime of piracy,[8] "tyranny" was widely considered an offense against the law of nature and nations – and

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[4] See, e.g. Richard Vernon, "Crime Against Humanity: A Defence of the 'Subsidiarity' View," *Canadian Journal of Law & Jurisprudence* 26, no. 1 (January 2013): 230, https://doi.org/10.1017/S0841820900006020. ("Everyone knows that crime against humanity eventually became a legal and philosophical topic because of one case. The phrase was first used, to my knowledge, in the 1860 platform of the U.S. Republican party (in connection with persistent vestiges of the slave trade), and another early use is often cited from an 1890 letter by the American writer George Washington Williams (in connection with atrocities in the Belgian Congo). We find sporadic uses and near-uses in the first half of the 20th century.")

[5] See, e.g. Jenny S Martinez, *The Slave Trade and the Origins of International Human Rights Law* (OUP USA, 2012), 115, http://books.google.com/books?id=HjqlpMGY_BoC. ("In his 1842 treatise Right of Visitation and Search, the prominent American international law scholar Henry Wheaton describes the slave trade as a "crime against humanity," which is so far as I know the first use of that term in international law.")

[6] William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals*, 1st ed (Oxford: Oxford University Press, 2012), 52.

[7] See generally, Graf, *The Humanity of Universal Crime*. (The earliest example that Graf devotes substantial analysis to is the treatment of "universal crime" in John Locke's Second Treatise of Government.)

[8] Robin Geiß and Anna Petrig, *Piracy and Armed Robbery at Sea* (Oxford University Press, 2011), 143, https://doi.org/10.1093/acprof:oso/9780199609529.001.0001. See also Alfred P. Rubin, "Legal Response to Terror:

one that could give rise to at least an imperfect duty to prosecute and punish – an imperfect duty to prosecute and punish as early as the 16th century.[9]

My intention in holding up these examples here is not merely to rebut assertions about the origins of this phrase by pointing to some earlier appearance as the *true* origin of this or that phrase. The search for such an "idol of origin"[10] is outside the scope of this project. Instead, I

An International Criminal Court," *Harvard International Law Journal* 43 (2002): 65, https://heinonline.org/HOL/Page?handle=hein.journals/hilj43&id=71&div=&collection=.

[9] The parameters of this offense, and the corresponding right or duty to punish, were core to early modern discourse in the just war tradition. Though not generally referred to using the term "crime," the act of tyranny – a ruler causing undue harm or death to their own subjects – was commonly discussed as an "*offense* against natural law" that could provide legitimate grounds for foreign intervention and for which leaders carried individual culpability. Early discussions of the offense of tyranny and the degree to which it could be used as a justification for the initiation of hostilities include the influential Huguenot tract, *Vindiciae contra tyrannos*, published anonymously in 1579 and Jean Bodin's 1856 *Les Six livres de la République*. On this point, see, e.g. Beate Jahn, "The Tyranny of the European Context: Reading Classical Political Theory in International Relations," in *The Cultural Construction of International Relations: The Invention of the State of Nature*, ed. Beate Jahn (London: Palgrave Macmillan UK, 2000), 95–112, https://doi.org/10.1007/978-0-230-59725-9_5. On the treatment of tyranny and the corresponding "the right to defend innocents from an unjust death caused by their own authorities" in the work of Francisco de Vitoria, see, e.g. Victor M. Jr. Salas, "Francisco de Vitoria on the Ius Gentium and the American Indios Conference: The Foundation of Human Rights: Catholic Contributions, Part I," *Ave Maria Law Review* 10, no. 2 (2012 2011): 331–42, https://heinonline.org/HOL/P?h=hein.journals/avemar10&i=335. On the relevance of this early modern conception of tyranny and contemporary theories of humanitarian intervention, see, e.g. J Muldoon, "Francisco De Vitoria and Humanitarian Intervention," *Journal of Military Ethics* 5, no. 2 (2006): 128–43, https://doi.org/10.1080/15027570600724529; Jahn, "The Tyranny of the European Context"; Alexis Heraclides and Ada Dialla, "The Origins of the Idea of Humanitarian Intervention: Just War and against Tyranny," in *Humanitarian Intervention in the Long Nineteenth Century* (Manchester University Press, 2017), 14–30, https://www.manchesterhive.com/display/9781526125125/9781526125125.00008.xml.

[10] This playful term was coined by Marc Bloch to describe the way in which the search for historical origins has "sometimes dominated [historians'] studies to the point of a hypnosis." Marc Bloch, Peter Putnam, and Marc Bloch, *The Historian's Craft*, Repr (Manchester: Manchester Univ. Press, 2002), 24.Bloch, Marc. The historian's craft. Manchester University Press, 1992. at 24.

include them as an illustration of how existing scholarship in this area has thought about the use of terms like "crimes against humanity" in the 19th century; namely that most authors have assumed that this and other terms describing supranational or universal crimes had never been used prior to the *fin de siècle*, or if they were coined earlier that their use was rare enough that it would be of scholarly interest to mention the few sporadic examples could be found.

In fact, as I will illustrate in this chapter, the phrase "crimes against humanity" was relatively commonplace in newspapers, speeches, and other avenues of the popular press and public discourse on both sides of the Atlantic throughout the 19th century. And although similar phrases like "international crime" or "crime against civilization," were never quite as common as "crime against humanity," examples of these can be found in the popular press as early as the first few decades of the century. The idea of supranational or universal crimes, thus, was likely familiar – or at least not completely alien – to the reading publics of both Britain and the U.S. throughout this period.

In this chapter, I examine the emergence and spread of the idea of a universal or supranational crime in British and American popular discourse over the course of the 19th century. To do this, I examine over 6500 examples, all published between 1800 and 1900, in which authors writing in newspapers, pamphlets, books, and other print sources describe actions or events that include one or more of the following key phrases: "international crime(s)," "crime(s) against humanity," "crime(s) against civilization," "crime(s) against the law(s) of nations," "crime(s) against the law(s) of nature," "crime(s) against international law," and "crimes against the law(s) of humanity." By analyzing the prevalence and context in which 19th century authors engaged in this kind of international criminal "law talk" in public discourse and the popular press, I illustrate the role that the concept of a supranational or universal crime

played in Western public discourse long before the emergence of a formal international criminal legal system.

Through this analysis, I argue that the idea of a universal or supranational crime was already well-established in the Western social imaginary and political/legal discourse by the early 19th century. Not only were phrases like "international crime" or "crime against humanity" in common usage – in a variety of contexts – throughout the 19th century, but they were also generally used in ways largely similar to the way they are today, referring to "mass atrocities" and crimes whose commission or effects were transnational.[11] The stakes of this point aren't merely a matter of lexicographic or archival accuracy. The fact that commentators and public figures commonly described acts of violence or subjugation committed elsewhere in the world using the rhetoric of supranational or universal criminality suggests that a core component of international criminal justice *project*[12] – the politico-legal shift towards applying the paradigm of "criminality"[13] to atrocities and other large-scale violations of human rights – was in full swing

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[11] This is not to say that the conceptualization of these crimes held by most 19th century authors was a particularly nuanced one or that most uses of these terms comport with contemporary legal doctrine, nor is it to say that that the public understanding of these terms and their implications were precisely the same during the 19th century as they are today. It is just to say that the concept of a supranational or universal crime was broadly legible and understandable to the rapidly growing reading public of the time.

[12] As mentioned in Chapter 1, I use the term "international criminal justice project" in this project to refer to the collective efforts of victims, advocates, lawyers, and NGOs to use international law to hold those who commit grave human rights abuses individually accountable, as well as the ideological belief in the transformative capacity of international {criminal} law that underlies each of these efforts.

[13] Here I am presenting the paradigm of "criminality" – or "crime and punishment" – in much the same way that Thomas Skouteris understands "the notion of progress": as "one of these grand ideas that yield tectonic force and determine the way we speak to the world." Skouteris, Thomas. "The Idea of Progress." In *The Oxford Handbook of the Theory of International Law*, edited by Anne Orford, Florian Hoffmann, and Martin Clark, First Edition. Oxford Handbooks. Oxford, United Kingdom: Oxford University Press, 2016. At p. 639.

long before international criminal law was consolidated as a distinct body of law.

This chapter proceeds in three sections. In the first section, I briefly discuss the method by which I gathered the corpus of 19th century texts being analyzed here and some methodological considerations regarding the use of the kinds of quotidian and ephemeral texts (e.g., newspapers, periodicals, etc.) in conceptual historiography. In the second, I present findings as to overall trends in the use of these terms over time and across publication types and then examine the ways in which these phrases were deployed across subject matter contexts. Finally, I conclude with a discussion of two notable takeaways that we can draw from the archival evidence presented here.

2 Method: Theories and Sources

In order to trace the rates and patterns with which terms like these appeared in public discourse throughout the 19th century, I compiled a dataset of historical newspapers, monographs, pamphlets, and periodicals published between 1800 and 1899 using two relatively new text and data mining (TDM) platforms – ITHAKA's Constellate[14] and the Sage Digital Scholar Lab[15] – that cater to digital humanities scholarship by, among other things, streamlining

[14] Constellate, developed by ITHAKA (the nonprofit organization behind JSTOR), allows users to search across corpora that include: JSTOR's archive of articles and pamphlets; the Portico Digital preservation archive; Chronicling America, an archive of digitized historical newspapers from across the U.S. operated by the Library of Congress; DocSouth (Documenting the American South), an archive of texts, images, and audio files related to the history of the American South; and the South Asian Open Archive, a digital archive of primary and secondary sources from and relating to South Asia.

[15] The Gale Digital Scholar Lab, a tool from Gale Cengage, allows academic users to search across all Gale Primary Source collections to which their host institution subscribes. Gale Primary Source collections addressed in the searches conducted for this project include: Nineteenth Century U.S. Newspapers; British Library Newspapers; Nineteenth Century Collections Online; Slavery and Anti-Slavery: A Transnational Archive; The Times Digital

the task of conducting broad-scale text searches and analyses across separate corpora of historical texts. These two platforms each allow users to search millions of pages of digitized historical newspapers, periodicals, pamphlets, monographs, and other historical sources.[16] Together, the corpora available through these two platforms cover a large part of the reading material published in the Anglophone world during the period in question.

Using these two TDM platforms, I conducted a series of searches for archival materials published between 1800 and 1900 that contained one or more of the following key phrases:[17] "international crime[s]," "crime[s] against humanity," "crime[s] against civili[z/s]ation," "crime[s] against the law[s] of nations," "crime[s] against the law[s] of nature," "crime[s] against international law," and "crimes against the law[s] of humanity." The inclusion of so many key phrases certainly complicated the data gathering and analysis process, but it was necessary given the subject matter. Investigating the historical emergence and development of a given concept over the course of a century is a difficult task to begin with. But it is all the more so when the

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Archive; Sabin Americana - History of the Americas, 1500-1926; Eighteenth Century Collections Online; Seventeenth and Eighteenth Century Burney Newspapers Collection; The Making of the Modern World; and American Historical Periodicals from the American Antiquarian Society.

[16] The Gale Historical Newspaper collection alone contains searchable scans of more than 18 million pages of historical newspapers and periodicals primarily published in the U.S. and Britain. See "Gale Historical Newspapers," accessed August 24, 2023, https://www.gale.com/primary-sources/primary-sources/historical-newspapers. The Chronicling America collection, searchable through Constellate, currently contains almost 20 million pages and includes issues of newspapers published across the U.S. as well as in overseas territories including Puerto Rico and the U.S. Virgin Islands. See "Chronicling America Reaches 50 States," The NewsMarket, accessed August 24, 2023, https://newsroom.loc.gov/news/chronicling-america-reaches-50-states/s/adfebd2e-eb78-4688-ba71-402f9404c1eb.

[17] The parenthetical pluralization of each of these terms is included to clarify that I used wildcard search modifiers in all searches to account for possible plurals. Similarly, I include the parenthetical in "civili[z/s]ation" to indicate that I combined search strings to account for the differences in British and American spelling of this term.

terminology used to refer to that concept has not yet fully coalesced.[18] In order to account for this, I adopted a strategy of triangulation, gathering sources that used any one of these seven key phrases.[19] While all these phrases are, of course, distinct in their theoretical derivation and technical meaning, they are all similar in that they all describe acts that are sufficiently problematic as to not only be classified as a crime, but as a crime distinct from the category of ordinary domestic crimes whose commission and punishment are legitimate matters of international concern.[20]

In order to more closely examine patterns and nuances in the usage of these terms, I reviewed a subsample of the texts in this archive (just over 12% of the total collection). In the course of this review, I sorted them according to the subject matter being discussed and noting the actions or events that relevant key phrase had been used in reference to. This methodological choice allowed me to generate a useful overview of the usage of these phrases during this period, and I believe that applying a similar method of analysis to the full range of texts in the archive would generate further insights into the development, spread, and regional or temporal variations

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[18] Indeed, the terminology around international crime and international criminal law is still in flux today. See, e.g. Heller, "What Is an International Crime? (A Revisionist History)."

[19] In addition to those seven, I also ran searches for instances of a number of similar phrases, including: "crimes of international concern," "crimes of concern to the international community as a whole," crimes that "are international by their very nature", "*crimina*" or "*delicta juris gentium*," and "crimes against the peace and security of mankind." For each of these additional terms, there were no results.

[20] This assortment was also chosen because it includes both phrases that describe a category of crimes by reference to some ideal or collective whole against which they are committed *or* a quality or moral ideal – e.g. "crimes against humanity" and "crimes against civilization" – and phrases that describe this class of crimes by reference to their being against some set of laws set above or aside from the laws of a given polity, or any particular polity – e.g. "crime(s) against the law(s) of nations," "crime(s) against the law(s) of nature," "crime(s) against international law," and "crimes against the law(s) of humanity."

in the usage of these terms. As such, further analysis of this textual archive, either through manual review or the use of algorithmic large-scale textual analysis tools would be a fruitful avenue for future research.

2.1 Precedents

The methods applied in this chapter have broad methodological support across a number of academic fields. In its focus on sources written by and accessible to non-experts, the analysis in this chapter is indebted to a number of methodological strains in legal and non-legal historiography, including in particular the "history of legal consciousness"[21] and the "social history of ideas."[22] In its impulse to highlight the ways in which non-experts use legal phrases

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[21] Assaf Likhovski, "The Intellectual History of Law," in *The Oxford Handbook of Legal History*, ed. Markus D. Dubber and Christopher Tomlins (Oxford University Press, 2018), 165, https://doi.org/10.1093/oxfordhb/9780198794356.013.9. ("…[T]he history of sites where legal knowledge was disseminated to lay persons. This topic is connected with a broader category – the history of legal consciousness: what did ordinary people know about law in different places in different times? How did people imagine law, and how did they talk about it? What ideas about law appeared in non-traditional sites and texts such as the public square, the coffeehouse, the theater or the cinema, and newspapers and magazines (those with a broad readership, but also those targeting specific audiences such as women or children)?") See also David M. Trubek, "Where the Action Is: Critical Legal Studies and Empiricism," *Stanford Law Review* 36, no. 1/2 (1984): 575–622, https://doi.org/10.2307/1228692. (Broadly defining "mass legal consciousness" as including "all the ideas about the nature, function and operation of law held by anyone in society at a given time.")

[22] The social history of ideas is a branch of intellectual history that concentrates on the social and cultural setting in which ideas are created, disseminated, and received. It is concerned with how ideas are shaped by the social, economic, and political conditions of the time, and how they in turn shape society. This subfield of the history of ideas is generally understood to have been introduced by Peter Gay in 1967 and expanded upon by Robert Darnton in 1971. See Peter Gay, "The Social History of Ideas: Ernst Cassirer and After," in *The Critical Spirit: Essays in Honor of Herbert Marcuse*, ed. Kurt H. Wolff and Barrington Moore (Boston: Beacon, 1967); Robert Darnton, "In Search of the Enlightenment: Recent Attempts to Create a Social History of Ideas," *The Journal of Modern History* 43, no. 1 (March 1971): 113–32, https://doi.org/10.1086/240591. That said, similar impulses to expand the scope of materials engaged with in conceptual historiography can be found at least a decade earlier. See, e.g. Alvar Ellegard,

and frameworks, it draws on a line of scholarship in legal theory and history examining the phenomenon of popular or colloquial "law talk."[23] And the motivating insight driving this chapter – namely that popular understandings of a given legal concept prior to its codification in

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"Public Opinion and the Press: Reactions to Darwinism," *Journal of the History of Ideas* 19, no. 3 (1958): 379, https://doi.org/10.2307/2708042.("This study is on the borderline between the history of ideas, as generally understood, and sociology, and thus may fitly be called social history of ideas. While the historian of philosophy focuses his interest on the ideas of philosophers, and while the historian of ideas has usually concentrated on the dominant ideas of each period ... the social historian of ideas studies the ideas, beliefs, and attitudes of everybody. ... His object will be to establish the penetration of the idea through the social fabric.") This corner of intellectual history has been rather sparse on the ground in the decades since, but it has not been without its supporters. See, e.g. Peter McPhee, "The Social History of Ideas, 1850–1880: 'The Moralization of the Masses?,'" in *A Social History of France 1789–1914*, by Peter McPhee (London: Macmillan Education UK, 2004), 229–45, https://doi.org/10.1007/978-1-4039-3777-3_13.

[23] By "popular law talk," I mean the use of terms, concepts, or stylistic features of law outside of legal contexts; generally by speakers who are not legal professionals and taking place in the public sphere. "Law talk," a phrase coined by Walter Probert in 1971 and further popularized by a series of articles and books by Austin Sarat and William Felstiner in the late 1980s, generally refers to discourse between lawyers or between lawyers and clients about aspects of the legal system. Walter Probert, "Words Consciousness: Law and the Control of Language Symposium: Law, Language, and Communication," *Case Western Reserve Law Review* 23, no. 2 (1972 1971): 374–92, https://heinonline.org/HOL/P?h=hein.journals/cwrlrv23&i=384; Walter Probert, *Law, Language and Communication*, American Lecture Series, Publication No. 853. A Monograph in the Bannerstone Division of American Lectures in Behavioral Science and Law (Springfield, Ill: Thomas, 1972); Austin Sarat and William L. F. Felstiner, "Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office," *The Yale Law Journal* 98, no. 8 (1989): 1663–88, https://doi.org/10.2307/796611.

More recently, though, "law talk" has been used to refer to something less specialized. In a 2019 paper on the #Me-Too movement, Lesley Wexler uses "law talk" to refer to the way that "participants in the #MeToo conversation often deploy legal definitions of victims and perpetrators, reference legal standards of proof and the role of legal forums, draw explicit or implicit comparisons to legal punishments, and derive meaning from legal metaphors and legal myths" – even when those participants are not lawyers and the conversation is taking place "in non-legal settings." Lesley Wexler, "#MeToo and Law Talk," *University of Chicago Legal Forum* 2019 (2019): 343–70. Wexler calls this phenomenon "colloquial law talk." Similarly, Stephen Wilf uses the phrase "popular law talk" to refer, roughly, to "a nonprofessional discourse taking place in the public sphere as opposed to the bounded sphere of courts and codes." Wilf, *Law's Imagined Republic*, 8.

law may and often do influence its content and limits after codification – draws on a multidisciplinary body of literature concerned with the process of "conceptual formation."[24] Finally, it also incorporates many of the theoretical and methodological insights presented in a number of recent articles that have similarly sought to track emergence and shift of particular concepts by methods of corpus analysis of historical newspaper archives and other similar sources.[25]

2.2 Analytical Benefits

[24] See, e.g. David Collier, Jody LaPorte, and Jason Seawright, "Putting Typologies to Work: Concept Formation, Measurement, and Analytic Rigor," *Political Research Quarterly* 65, no. 1 (March 1, 2012): 217–32, https://doi.org/10.1177/1065912912437162; Staffan I Lindberg, "Mapping Accountability: Core Concept and Subtypes," *International Review of Administrative Sciences* 79, no. 2 (June 1, 2013): 202–26, https://doi.org/10.1177/0020852313477761; Gregory Claeys, "'Individualism,' 'Socialism,' and 'Social Science': Further Notes on a Process of Conceptual Formation, 1800-1850," *Journal of the History of Ideas* 47, no. 1 (January 1986): 81, https://doi.org/10.2307/2709596.

[25] See, e.g. Tony McEnery, Helen Baker, and Vaclav Brezina, *Slavery and Britain in the 19th Century*, ed. Anna Čermáková et al., *Time in Languages, Languages in Time*, Studies in Corpus Linguistics (John Benjamins Publishing Company, 2021), https://doi.org/10.1075/scl.101.02mce; Claeys, "'Individualism,' 'Socialism,' and 'Social Science'"; Klaus von Lampe, "Not a Process of Enlightenment: The Conceptual History of Organized Crime in Germany and the United States of America," 2001; Joris van Eijnatten, "On Principles and Values: Mining for Conservative Rhetoric in the London Times, 1785–2010," *Digital Scholarship*, n.d.; Joris van Eijnatten and Ruben Ros, "The Eurocentric Fallacy. A Digital-Historical Approach to the Concepts of 'Modernity', 'Civilization' and 'Europe' (1840–1990)," *International Journal for History, Culture and Modernity* 7, no. 1 (November 2, 2019): 686–736, https://doi.org/10.18352/hcm.580; María José Marín and Camino Rea, "Researching Legal Terminology: A Corpus-Based Proposal for the Analysis of Sub-Technical Legal Terms," *ASp*, no. 66 (November 1, 2014): 61–82, https://doi.org/10.4000/asp.4572; Thomas Lansdall-Welfare et al., "Content Analysis of 150 Years of British Periodicals," *Proceedings of the National Academy of Sciences* 114, no. 4 (January 24, 2017): E457–65, https://doi.org/10.1073/pnas.1606380114; Chinmay Tumbe, "Corpus Linguistics, Newspaper Archives and Historical Research Methods," *Journal of Management History* 25, no. 4 (January 1, 2019): 533–49, https://doi.org/10.1108/JMH-01-2018-0009.

Traditionally, intellectual historians seeking to track the emergence and evolution of a given concept or question through time have tended to focus their attention on either the treatment of that concept or question in sources that are written by a rough canon of thinkers that are familiar to their field, sources written in formats and genres such as scholarly treatises or diplomatic correspondence that are generally understood as more likely to contain "serious" or "scholarly" thought, or most often, sources that satisfy both of these criteria. Legal historians commonly employ a similar approach, generally limiting their investigations to texts that fall into a narrow set of accepted formats (legal codes, court decisions, and treatises) by legal experts.[26] The fundamental assumption behind this traditional approach, as described by Martin Clark, is that by starting with a survey of the writings of "philosophers, theologians, poets, economists, legal and political theorists" – those intellectuals and elites who "considered, debated or introduced new versions of ideas, proposed visions of the world, and promoted or critiqued ideologies" – one can get a sense of "the semantic fields of a period: the conditions of possibility about what can be said, argued, understood and done at a particular time."[27] The expectation, then, is that the concepts and arguments that appear frequently or are presented systematically in the works of these intellectual elites can give us a sense of the ways these same concepts and

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[26] Indeed, in this the legal theorist or historian is even more constrained than the political theorist or intellectual historian. Contemporary political theorists and intellectual historians don't tend to limit which "political thinkers" they focus on based on their job title. The fact that neither Thomas Hobbes nor John Locke, for example, ever held formal academic appointments beyond that of a private tutor does not generally factor into the question of whether their work can be included in surveys of Western political philosophy. By contrast, legal theorists and historians tend to focus almost exclusively on authors who were trained and worked as lawyers or judges.

[27] Martin Clark, "Ambivalence, Anxieties / Adaptations, Advances: Conceptual History and International Law," *Leiden Journal of International Law* 31, no. 4 (December 2018): 760, https://doi.org/10.1017/S0922156518000432.

arguments might have been understood or presented in less rarified registers of society as well – from educational manuals to adventure fiction to campaign songs.

This expectation seems, prima facie, reasonable. There have been, to be sure, any number of recent examples of concepts being coined in one or another corner of academia, slowly permeating elite discourse, and then ultimately becoming part of the broader public discourse.[28] But is this always the case? In some cases, I'd suggest, this traditional approach, with its "trickle down" model of conceptual invention and spread, can lead us to overlook the other half of the causal arrow – namely, the ways in which the popular understandings/uses of a given idea influence the way it is framed when later incorporated/codified in academic/legal discourse. Stephen Wilf reminds us of this possibility in his recent book on "law talk" in early colonial America, arguing that "law as envisioned, formulated, and represented as a cultural artifact by a wide range of historical actors, including the common people, enables its later reinscription in official statutes and institutions."[29] Or, slightly more concisely, "law is imagined

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[28] The concepts of "intersectionality" and "institutional racism," now commonplace in public discussions online and in news outlets, were first used by scholars writing in specialized academic disciplines of employment law and political science respectively. For the first use of "intersectionality," see: Kimberle Crenshawt, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," *University of Chicago Legal Forum* 1989, no. 1 (1989): 139–67. For the first use of "institutional racism," see Stokely Carmichael and Charles V. Hamilton, *Black Power: The Politics of Liberation in America*, Vintage ed (New York: Vintage Books, 1992). See also the trajectory of ideas like "gender performativity" or even the current *bête noir* of the American right wing "Critical Race Theory" from specialized academic journals to becoming commonplace in mainstream political discourse in the latter 2010s and early 2020s. Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction*, Fourth edition, Critical America (New York: New York University Press, 2023), 4.

[29] Wilf, *Law's Imagined Republic*, 7.

before it is enacted."[30]

Examining how these terms were used in texts like newspapers – or similarly quotidian and ephemeral writings such as talks given to meetings of political interest groups, handbills, and fliers, or even the public comments of political figures – rather than focusing solely on the way they were used in academic writing or legal opinions allows us to observe a greater swathe of usage and opinion than is usually considered in conceptual historiography. Admittedly, as Joris van Eijnatten and Ruben Ros point out in a recent article adopting a similar method of corpus analysis, newspapers and other forms of "disposable text" may not permit or warrant close reading, given that the "density of conceptual understanding in newspaper articles is, generally speaking, much lower than in writings that are dedicated to intellectual reflection."[31] That said, if we engage them in the aggregate, practicing the kind of "distant reading"[32] permitted by the large scale TDM platforms, they can offer a useful sense of "the general development […] of the general language use that both feeds into, and draws on, more considered intellectual thought."[33] And, given that many of these ephemeral forms of text are serial in nature, running in some cases for decades, they can offer a longitudinal view of how different concepts were used over time.

Indeed, these points in favor of including ephemeral texts as objects of study in

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[30] Wilf, 7. ("By imagination, I mean something less passive than simply *mentalité*, inherited beliefs, or participation in legal culture. But it is also less ordered than ideology. What I discuss here is largely a nonprofessional discourse taking place in the public sphere as opposed to the bounded sphere of courts and codes.")

[31] van Eijnatten and Ros, "The Eurocentric Fallacy. A Digital-Historical Approach to the Concepts of 'Modernity', 'Civilization' and 'Europe' (1840–1990)," 687.

[32] On this concept, see Franco Moretti, *Distant Reading* (Verso Books, 2013).

[33] van Eijnatten and Ros, "The Eurocentric Fallacy. A Digital-Historical Approach to the Concepts of 'Modernity', 'Civilization' and 'Europe' (1840–1990)," 687.

intellectual history are all the more relevant in the context of the 19th century, given that newspapers and periodicals were by far the most commonly accessible form of media at this point. The publics of Western colonial powers were increasingly literate but were not necessarily increasingly educated – increasingly able to read, but not necessarily widely read. To a rapidly growing middle class across Europe, persons working in professions away from matters of global politics but who aspired, for reasons of prestige and propriety, to cultivate an awareness of global events, the national and international press was in many cases their primary or only source of information about events taking place on the other side of the world.

2.3 Limits

These large-scale digitized data sets provide an opportunity to look at patterns and prevalence in popular uses of language much more easily and with more granularity than would have been feasible just a few years ago – to easily navigate and analyze "a vast *terra incognita* of print."[34] That said, this method still has a number of limitations, two of which are worth mentioning here.

The first limitation is that of archival completeness and geographical scope. The historical sources analyzed in this chapter were published primarily in Britain and the U.S., with the occasional source published in other anglophone corners of the world. Expanding the analysis to other geographic regions and linguistic corpora was beyond the scope of this project, but would perhaps be a useful consideration, especially given how much of international politics and international legal discourse during this period were conducted in French and in various

[34] Miles Taylor and Michael Wolff, *The Victorians Since 1901: Histories, Representations and Revisions* (Manchester University Press, 2004), 201.

metropolitan centers on the European Continent.

That said, the sheer breadth of the corpus of American and British mass media, especially in the category of newspapers, available through TDM platforms like Gale Digital Scholar Lab and Constellate, does allow us a reliable sense of the linguistic patterns and rhetorical practices in public discourse in these two countries. Further, given the outsized role that Britain played in international law – in particular those areas of international law that involved the suppression and policing of practices commonly linked to maritime contexts, such as slavery and piracy – and in 19th century colonial warfare,[35] and the rising importance of both the United States and American missionary and social welfare societies in international affairs, these two countries are useful case studies in themselves as regards the development of international criminal "law talk" in Western public discourse more generally.

The second limitation is the accuracy of the optical character recognition (OCR) engines – the software that allows a scanned image to be converted to searchable text – used by repositories of digitized historical documents. OCR engines have improved markedly over just the last decade,[36] but it remains difficult for these software packages to process documents like

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[35] Indeed, British sea power over the course of the century was so dominant that, as Alfred Rubin has pointed out, "it is difficult throughout the nineteenth century to distinguish British interpretations of international law uttered for the purposes of self-justification … from statements of international law persuasive on all states participating in the international legal order as defined in Europe." Alfred P Rubin, *The Law of Piracy*, 1988, 201, https://archive.org/download/lawofpiracy63rubi/lawofpiracy63rubi.pdf. In effect, British statements of the law of the sea were often, in effect, *were* the law of the sea.

[36] See discussion of improvement of OCR engines and error correction in Jørgen Burchardt, "Are Searches in OCR-Generated Archives Trustworthy?: An Analysis of Digital Newspaper Archives," *Jahrbuch Für Wirtschaftsgeschichte / Economic History Yearbook* 64, no. 1 (May 1, 2023): 31–54, https://doi.org/10.1515/jbwg-2023-0003.

historical newspapers or periodicals as accurately as they would a book or newspaper published today. This is partly because most of the scanned document files in these repositories are not scans of original documents using current standards of imaging technology, but rather are low-resolution scans created in the 1990s of microfilm copies of original documents created in the 1980s.[37] And aside from the noise introduced by this technological mediation, the underlying documents themselves often have imperfections such as tears, smeared type, ink bleed-through, varying typographical quality, and layout inconsistencies – all qualities that one would expect from documents that were often printed hastily, with low cost margins, and intended to be disposable – that make it difficult for an OCR engine to reliably interpret them.[38] Given the length of the phrases being searched for here, the likelihood of false positives – sources that did not actually include an instance of one or more of the seven key phrases but were included in the search results anyway due to OCR accuracy – is low.[39] By contrast, false negatives – sources

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[37] See Matthew Christy et al., "Mass Digitization of Early Modern Texts With Optical Character Recognition," Journal on Computing and Cultural Heritage 11, no. 1 (January 27, 2018): 6:1, https://doi.org/10.1145/3075645. ("[T]he path to digitization was not ideal: these documents were imaged in the late 1970s, transformed into microfilm during the 1980s, and the microfilms digitized in the 1990s. Because of the state of reproductive technologies during the late 20th century, as well as the circuitous path to digitization (through microfilm), the image quality is very poor and bitonal, with no greyscale images available.")

[38] Christy et al., 6:2. Interestingly, even the typeset or font choices made by newspapers continue to have a significant impact on OCR errors. Early American newspapers and European newspapers throughout the 19th century were often printed in a Gothic typeface (also referred to as Fraktur or blackletter), a typeface that has generally been challenging for OCR to recognize. See Lenz Furrer and Martin Volk, "Reducing OCR Errors in Gothic-Script Documents," in *Proceedings of the Workshop on Language Technologies for Digital Humanities and Cultural Heritage* (Hissar, Bulgaria: Association for Computational Linguistics, 2011), 97–103, https://aclanthology.org/W11-4115.

[39] Despite this, I did conduct a number of stress tests on the sources in the corpus used for this chapter. Most notably, I manually reviewed a sample of over 2,000 of the sources gathered from both Gale's Digital Scholar Lab

that do actually include an instance of one of these phrases but, because the characters making up the passage containing the key phrase was not accurately processed, did not appear in the search results – is high.[40]

This limitation is an important caveat to the analysis in this chapter, and especially to the specific quantitative counts and ratios presented in the next section. While those numbers do give us some sense of the prevalence of international criminal "law talk" as a rhetorical practice in the U.S. and Britain, and the range of topics in which authors commonly used these terms, they should not be treated as reliable estimates of the incidence of this practice beyond those countries or even, for that matter, within them.

This caveat, however, is not all bad news. Because there is a much higher likelihood of false negatives than false positives when using keyword searching to find examples of longer phrases in these historical document repositories, this limitation actually counts in favor of the first argument being made here – namely that the use of phrases referring to one or another form of supranational or universal criminality was much more common during the 19th century than previously documented – because it leads us not only to be confident that the examples of this practice documented here are genuine but also to suspect that there are likely many more examples of this practice that could be found through further research.

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and Constellate and found only 8 false positives, most of which were the result of multi-column recognition errors in which one part of a given key phrase was situated at the end of a line in one column and the other part of that phrase being coincidentally located at the start of that same line in the adjacent column and the OCR software failing to recognize the column break.

[40] See discussion of the likelihood and consequences of these kinds of OCR-caused "misses" in Ian Milligan, "Illusionary Order: Online Databases, Optical Character Recognition, and Canadian History, 1997–2010," *Canadian Historical Review* 94, no. 4 (December 2013): 540–69, https://doi.org/10.3138/chr.694.

2.4 Stakes and Payoff

The claim that legal concepts – particularly those that have as much moral, rhetorical, and political charge as those related to international crimes – often have a rich life both outside of the courtroom and law books and prior to their codification in those legal contexts is neither novel nor controversial. Popular "law talk" provides a ready rhetorical and conceptual framework that people can employ in everyday conversations about moral and political issues.[41] Indeed, the pervasiveness of law talk as a register in which political discussions can be held, and the ways in which law is framed and used in non-legal texts form the basis for the multidisciplinary fields of Law and Society and Law and Literature respectively.

There are three reasons that popular law talk that invoked one or another conception of supranational or universal crimes, particularly when it appeared in the popular press over the course of the 19th century, is notable and worth further examination. First, as a number of legal historians have argued, popular understandings of legal concepts – whether held by non-lawyer public figures or by members of the reading public or "chattering classes" – often prefigure the way those concepts will later be codified. Put another way, the form and content that a given concept takes on in the context of popular law talk can and often does influence the specific form in which these concepts enter legal discourse and their subsequent usage.[42]

Second, patterns of colloquial "law talk" regarding criminality, especially international or universal criminality, tend to influence popular conceptions of legitimate and illegitimate violence. Describing a given act of violence as an international crime (or any of the other

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[41] Wexler, "#MeToo and Law Talk," 11.

[42] See, e.g., Wilf, *Law's Imagined Republic*, I.

roughly analogous terms I will be tracing in this chapter) has the effect of "draw[ing] a red line between normal politics and absolutely prohibited behavior that must be condemned by the international community at large."[43] It spotlights that particular instance of violence as meriting both condemnation and punishment. In doing so, though, this framing also implicitly legitimizes forms and instances of violence that fall short of this rhetorical red line, casting them as a part of "normal politics."[44] In this sense, the ways and instances in which this rhetorical frame was used matters because, as Nesam McMillan has pointed out, "different framings of harm have different ethical and relational consequences."[45] The discursive frame of international or universal crime is thus both affectively and politically important because it implicitly dictates which and what kinds of instances of violence "are deemed to matter and what social, political, and legal response they are seen to demand."[46] In other words, just as the representations that constitute

[43] Sinja Ursula Graf, "The Politics of Universal Crime: Inclusion, Authority, and Foreign Intervention in European Political Thought" (Dissertation, Ithaca, NY, Cornell University, 2015), 6.

[44] Graf, 6.

[45] Nesam McMillan, *Imagining the International: Crime, Justice, and the Promise of Community*, The Cultural Lives of Law (Stanford, California: Stanford University Press, 2020), 63.

[46] McMillan, 63.

any given "social imaginary"[47] both help to "constitute the social order"[48] and to limit what actions are legible and possible within it, I suggest that the framing and use of a given concept in the broader societal "legal imaginary" similarly enables and constrains the particular forms that it can take when it is taken up by professional legal actors and formalized as part of the legal order.[49] As such, examining the treatment of a given concept, or constellation of terms, in popular law talk and the "imaginative visions of … justice"[50] among non-experts can generate useful insights into the specific historical and social baggage those concepts carry with them.

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[47] Understood here as something akin to the way it is framed in Manfred Steger's recent *Rise of the Global Imaginary*, namely as the composite of "the macromappings of social and political space through which we perceive, judge, and act in the world," or to Charles Taylor's use of this phrase to refer to that "common understanding that enables us to carry out the collective practices that make up our social life." Manfred B. Steger, *The Rise of the Global Imaginary*, Political Ideologies from the French Revolution to the Global War on Terror (Oxford University Press, 2008), 6, http://books.google.com/books?id=0EL9cBiHdMsC; Charles Taylor, *Modern Social Imaginaries* (Duke University Press, 2004), 24. This shared social horizon of meaning – the "implicit background" assumptions of our social interactions – is, in David Bell's account, what makes "possible communal practices and a widely shared sense of their legitimacy" and the means by which we, the members of a given community, explain to ourselves and each other, how we "fit together, how things go on between us, the expectations we have of each other, and the deeper normative notions and images that underlie those expectations." Duncan Bell, "Ideologies of Empire," in *The Oxford Handbook of Political Ideologies*, 2013, 539, https://doi.org/10.1093/oxfordhb/9780199585977.013.0012Oxford.

[48] Samuel Moyn, "Imaginary Intellectual History," in *Rethinking Modern European Intellectual History*, ed. Darrin M. McMahon and Samuel Moyn (Oxford ; New York: Oxford University Press, 2014), 117.

[49] I take this point to be roughly analogous to the insight that J.G.A. Pocock was gesturing at when he wrote that "men cannot do what they have no means of saying they have done; and what they do must in part be what they can say and conceive that it is." J. G. A. Pocock, "Virtue and Commerce in the Eighteenth Century," ed. Gordon S. Wood and Gerald Stourzh, *The Journal of Interdisciplinary History* 3, no. 1 (1972): 122, https://doi.org/10.2307/202465. Just as, on Pocock's analysis, language both shapes and limits action by limiting what actions are thinkable and legible, the "legal imaginary" offers up a vocabulary and set of intellectual and rhetorical moves that both enable and constrain jurists and legislators.

[50] Wilf, *Law's Imagined Republic*, 193.

Third and finally, examining popular law talk during this period can offer some insight into the ways in which popular conceptions of law and morality played in what Martin Thomas and Richard Toye refer to as the "public political rhetoric of empire."[51] Examining popular and non-technical sources gives insight into the shaping of imperial imaginaries among the broader populace, and "the unspoken private assumptions and motivational factors"[52] that informed these imaginaries.

3 Examining the Data: How was the rhetoric of supranational or universal crimes used in public discourse?

3.1 Overall Patterns:

As discussed above, in the course of the research for this chapter I used two online meta-archives to compile a dataset of every newspaper article, periodical article, pamphlet, monograph, or other historical source published between 1800 and 1899 containing one or more uses of any of the following phrases referencing some form of universal or supranational crime: "international crime(s)," "crime(s) against humanity," "crime(s) against civili[s/z]ation," "crime(s) against the law(s) of nations," "crime(s) against the law(s) of nature," "crime(s) against international law," and "crimes against the law(s) of humanity."

Combining the results of searches for all seven of these terms using these two TDM platforms, I collected a dataset of 6,556 texts in which one or more of these terms of interest appear. In Table 1 below, I present an overview of this corpus of texts, showing the number of

[51] Martin Thomas and Richard Toye, *Arguing about Empire: Imperial Rhetoric in Britain and France, 1882-1956*, First edition (Oxford, United Kingdom: Oxford University Press, 2017), 2.

[52] Thomas and Toye, 2.

sources containing at least one instance of each key phrase and their mode of publication. At first glance, we can see that the phrase "crime[s] against humanity" appeared far more frequently than any of the other six phrases relating to international or supranational crimes – appearing nearly three times as frequently as the next most common of the key phrases and accounting for more than two thirds of the texts in this corpus. That said, while "crime[s] against civili[z/s]ation" was not as commonly used as "crime[s] against humanity," it still appears in well over 1000 texts published over the course of the century. Looking farther down the table, we can see that "international crime[s]," a term much more familiar to modern ears than almost any of the others considered here, appears nearly as frequently as "crimes against the law[s] of nations" and "crimes against the law[s] of nature." Finally, we see at the bottom of the table that the phrases "crime[s] against international law" and "crimes against the law[s] of humanity" were relatively uncommon, appearing in only 30 and 16 texts respectively.

Table 1: Instances of Phrases Relating to Universal/Supranational Crime by Source Type

Key Phrase	Newspaper	Periodical	Pamphlet	Monograph	Other	TOTAL
"crime[s] against humanity"	3026	687	88	407	13	**4221**
"crime[s] against civili[z/s]ation"	1041	87	5	35	1	**1169**
"crime[s] against the law[s] of nations"	173	27	2	170	16	**388**
"crime[s] against the law[s] of nature"	125	36	3	217	0	**381**
"international crime[s]"	283	27	9	29	3	**351**
"crime[s] against international law"	22	2	0	6	0	**30**
"crime[s] against the law[s] of humanity"	13	0	0	3	0	**16**
TOTAL	**4683**	**866**	**107**	**867**	**33**	**6556**

Looking to differences in frequency across different types of publications, we can see that most all of these phrases appeared far more often in newspapers than in any other publication type, with just two exceptions.[53] This overall pattern may in part be due to the relative differences in the numbers of distinct texts of each type contained in the meta-archives used to compile this archive, or differences in the frequency of publication among these publication types. Controlling, to some degree, for appearances of these terms in different editions of repeat publications, this archive includes articles drawn from 973 newspapers, 309 periodical titles, 107 pamphlets, 299 distinct monographs (i.e., not repeat, or different editions of the same monograph), and 33 other print sources. Roughly three quarters of these texts (4807) were printed in the United States, and the remainder (1749) were printed in the United Kingdom. Having examined a number of possible explanations for this, slight variations in linguistic usage between the two countries, I believe this is more likely a reflection of the composition of the archival repositories in which this research was conducted. The newspaper articles contained in the dataset include articles from 476 unique U.S. newspapers, as compared to only 56 unique British newspapers. This may be due to differences in archival completeness between repositories but may also be due to the larger number of regional newspapers published in the U.S. during this period.

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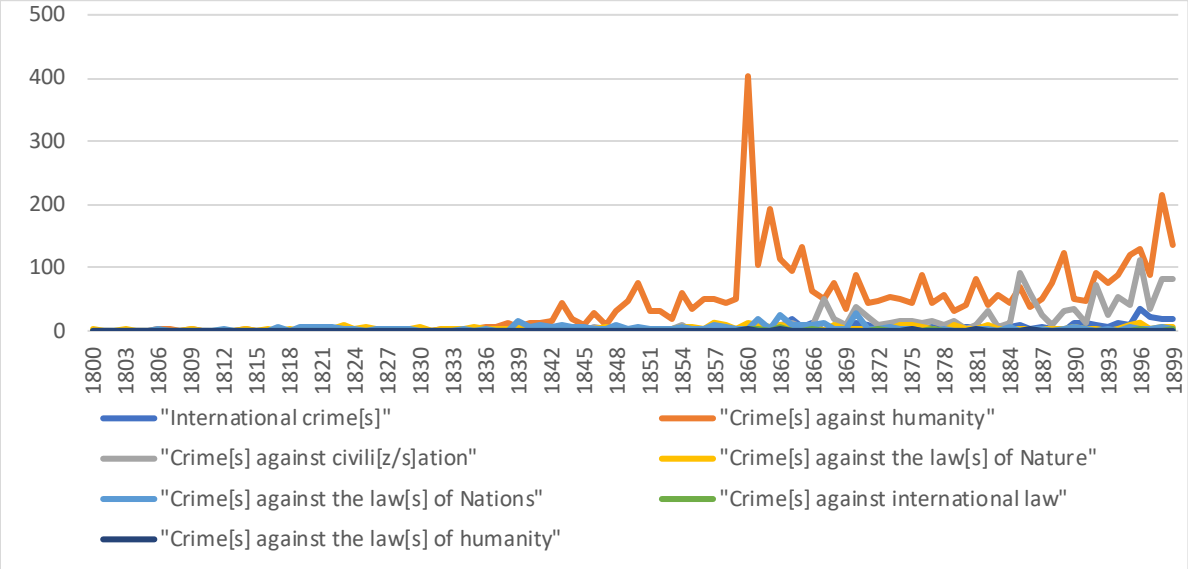
[53] These exceptions are "crime[s] against the law[s] of nations" and "crimes against the law[s] of nature," with the former appearing in nearly as many monographs as newspaper articles and the latter appearing in substantially more monographs than newspaper articles. (These two exceptions may, perhaps, be explained by reference to these two phrases being commonly used as terms of art among lawyers and jurists of the period, and thus more likely to appear in legal textbooks or jurisprudential monographs.

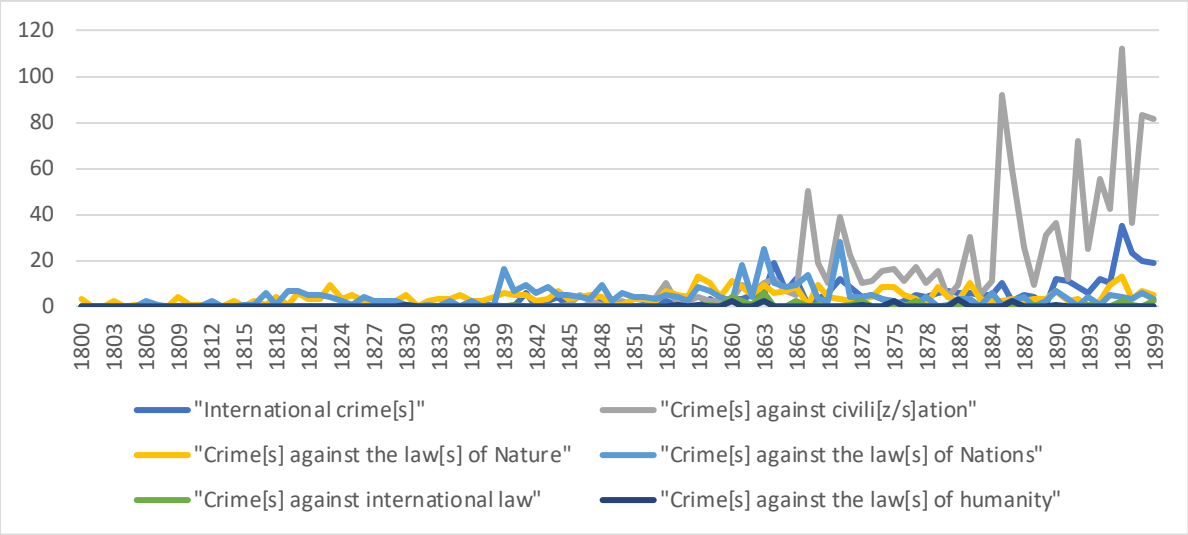
Figure 1: Instances of Phrases Relating to Universal/Supranational Crime by Year



As to patterns in the use of these phrases over time, Figure 1 presents the frequency with which each of the key terms appear each year between 1800 and 1899. As might be expected, given the overall frequency data discussed above, the phrase "crime[s] against humanity" appears much more frequently than any of the other six key phrases in every year of this span, apart from a brief period between 1884 and 1887 when it was edged out by uses of the phrase "crime[s] against civili[z/s]ation." Indeed, this discrepancy is so substantial that it is difficult to make out the patterns of usage of the other six terms during this period. To account for this, Figure 2 presents the usage data of the six other phrases alone.

While it is not immediately obvious given the variations between terms and across years here, taken together there is an overall trend towards greater frequency of usage of these terms as the century progresses. That said, there are a number of distinct points that merit exploration in the above figures. In Figure 1, we see that the use of the phrase "crime[s] against humanity" reaches a peak between 1860 and 1863 and remains relatively high for the subsequent few years. Upon examination, this can be attributed largely to newspaper coverage of the American Civil

Figure 2: Instances of Phrases Relating to Universal/Supranational Crime by Year (excluding "Crime[s] against humanity")



War, including articles written before the start of the war reporting on the buildup of tensions and warning against the prospect of an outbreak of hostilities. The growth in the use of the phrase "crime[s] against civilization" from the 1880s onwards, by contrast, does not seem to have been as clearly associated with any one single occurrence.

3.2 Usage Across Topical Contexts and Subject Matter

As outlined above, after compiling this archive of 6,556 19th century texts, I reviewed a representative sample of 800 of these sources (just over 12% of the total collection) and categorized them according to the context and subject matter in which the relevant key term had been used. In the following sections, I explore the ways in which the phrases referring to some form of supranational or universal crime were used. The subject matter categories addressed in these sections do not represent a full accounting of the topics covered in these texts, but they are

among the more common contexts and topic areas in which these terms appeared.[54]

3.2.1 Slavery

Slavery is among the most common contexts in which 19th century authors invoked the rhetoric of supranational or universal criminality over the course of the century. Nearly half of the sample of texts coded for subject matter (352 out of 800) included at least one instance of slavery being referred to as some form of supranational or universal crime. In 1839, for example, a writer for London's *The Morning Post* published an editorial arguing that Portuguese officials, by endorsing the "continued and increasing horrors of the African slave trade," were "guilty of a *crime against humanity* and justice so gross and revolting that its perpetrators may justly be regarded and treated as enemies of any civilised State."[55] An article in the *Hertford Mercury and Reformer* took a similar stance in an article from June 1850, reporting on a failed attempt to invade and overthrow the Cuban government backed and led by American "filibusters" seeking to annex the island and create "a new slave state" in the Caribbean.[56] In

[54] Other common topics not explored here, largely for reasons of time and space limitations, include violence against civilians outside the context of a declared war or overt hostilities, violence committed in the course of anarchist violence or terrorism (a category that overlaps somewhat with the previous one), colonial domination or subjugation (either as a general matter or as a subcategory of violence against civilians or noncombatants), and child labor or inhumane treatment of children. Further exploration of the use of phrases invoking supranational/universal criminality in these contexts would be a fruitful addition to this analysis in the course of future research.

[55] See "London, Tuesday September 10", *The Morning Post* (London, England), September 10, 1839; Issue 21413. *British Library Newspapers*, Part II: 1800-1900.

[56] "The Piratical Expedition against Cuba." Hertford Mercury and Reformer, 8 June 1850, p. 2. *British Library Newspapers*, https://link.gale.com/apps/doc/EZ3243423987/BNCN?u=uclosangeles&sid=BNCN&xid=df94b77d. Accessed 4 May 2021.

reporting on the exploits of "piratical expeditionary" force behind this benighted offensive,[57] the editors of the *Mercury and Reformer* pointed to it as an example of the destabilizing political effects of slavery, writing that slavery should be abolished not only because it was a "dire crime against humanity" but also because its abolition would remove "the motive of … criminal attempts [like this expedition] on the independence of neighbouring nations."[58] Just a few months later, a September 1850 column in the Leeds-based newspaper the *Northern Sky* reporting on the passage of the Fugitive Slave Act in the United States, entitled "American Man-Stealers," adopted a similar position, denouncing American pro-slavery politicians and supporters of the *Fugitive Slave Act* and describing slavery as "that accursed crime against humanity."[59] Two decades later, in 1862, a correspondent for London's Daily News decried efforts in the then-Confederate state of North Carolina to resurrect a law against teaching slaves to read or write, presenting it as proof of "the depth of injustice and crime against humanity which are necessary aids of slavery."[60] On August 17, 1872, the editors of *The Examiner* (a weekly London newspaper with a strong progressive/radical leaning) published a column on the East African slave trade in which they refer to slavery as both a "crime against humanity" and a

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[57] This event has since become known as the "Lopez Expedition". For further information on this attempt by U.S. nationals to colonize Cuba through a private "filibustering" initiative, see Antonio Rafael de la Cova, "The Kentucky Regiment That Invaded Cuba in 1850," *The Register of the Kentucky Historical Society* 105, no. 4 (2007): 571–615, https://www.jstor.org/stable/23387257.

[58] "The Piratical Expedition against Cuba." *Hertford Mercury and Reformer*, 8 June 1850, p. 2. *British Library Newspapers*, https://link.gale.com/apps/doc/EZ3243423987/BNCN?u=uclosangeles&sid=BNCN&xid=df94b77d. Accessed 4 May 2021.

[59] "American Man Stealers." *Northern Star* [1838], 9 Nov. 1850. *British Library Newspapers*, https://link.gale.com/apps/doc/Y3207557224/BNCN?u=uclosangeles&sid=BNCN&xid=b3781291. Accessed 4 May 2021.

[60] "America." Daily News (London, England), June 21, 1862.

"crime against human nature."[61]

This practice of referring to slavery using the rhetoric of universal criminality was not just apparent in relatively low-stakes speech contexts like newspaper columns and public speeches. It was also evident in the more formalized and official proceedings of parliamentary debate. Ample evidence of this can be found in, for example, the records of the British House of Common and House of Lords and both chambers of the U.S. Congress. Indeed, the first appearance of the phrase "crime against humanity" in the records of the British House of Commons was in connection to slavery.[62] In June 1840, Liberal MP William Ewart used this phrase in an address to the House of Commons arguing against a bill that would have eased restrictions on the importation of sugar from territories not under British control. Placing "foreign sugar" into direct competition with "sugar grown by free labour," Ewart said, would increase relative demand for sugar grown "in Cuba, in the Brazils, in Martinique, in Guadaloupe, and in every other country where slavery prevailed," and thus "would the fate of Africa be

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[61] "Political and Social." Examiner, August 17, 1872. *British Library Newspapers* (accessed May 7, 2021). https://link.gale.com/apps/doc/BB3201023447/BNCN?u=uclosangeles&sid=BNCN&xid=f48f8651.

[62] It should be noted here that there were a number of instances of MPs referring to slavery as an "*offence* against humanity" prior to this. One of the earliest of these, for example, can be found in a May, 1814 article in the *Morning Post* reporting the comments of George Ponsonby, MP (a lawyer and Whig politician) in which he argued that not only was slavery an "offense against humanity" but that, further, the attempt (then being made by Portuguese and Spanish anti-abolitionist voices) to justify slavery on "humanitarian" grounds had, by even making this disingenuous and preposterous argument, committed "a most disgraceful offence against humanity." These comments were made during the debate in the British House of Commons over how best to pressure Britain's Continental allies to also abolish the slave trade, and the "power" that he accuses of having tried to justify slavery on "humanitarian" grounds – i.e., that Africans needed to be enslaved for their own protection/provision – is likely Portugal. "House of Commons." *Morning Post*, May 4, 1814. *British Library Newspapers* (accessed April 13, 2021). https://link.gale.com/apps/doc/R3209504681/BNCN?u=uclosangeles&sid=BNCN&xid=f1a5ef18.

sealed." Liberalizing the trade in sugar, he predicted, would not just "perpetuate slavery, but add to that trade" and thereby "aggravate that great crime against humanity."[63]

Similarly, the first use of that phrase in the British House of Lords was also in the context of a debate over slavery and the suppression of the slave trade. In an April 1843 debate over a bill designed to bolster existing British slave-trade suppression efforts, Lord Thomas Denman argued not only that "slavery should be treated by every nation as a crime against humanity," but also that it was a "a crime against all nations" and that it could and ought to be "punished by every civilised power in the same way as piracy."[64] Denman's argument is notable for two reasons. First, as Lord Chief Justice he presided over the entirety of the British judicial system and held substantial formal and informal abilities – which he would go on to make good use of – to shape British jurisprudence on emerging issues like the policing of the slave trade. Second, Denmantook a rather more absolutist position than some of his colleagues, arguing that the responsibility to repress slavery (and by extension, piracy) was so pressing as to override any considerations of international comity. These crimes, he suggested, "should be repressed by each [nation] on its own responsibility, and *without reference* to the wishes or laws of another."[65]

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[63] "Sugar Duties (House of Commons Debate)" (Hansard, June 25, 1840), https://api.parliament.uk/historic-hansard/commons/1840/jun/25/sugar-duties.

[64] "Imperial Parliament." *Examiner*, April 15, 1843. *British Library Newspapers* (accessed May 11, 2021). https://link.gale.com/apps/doc/BB3200994652/BNCN?u=uclosangeles&sid=BNCN&xid=0672b50d.

[65] "Imperial Parliament." *Examiner*, April 15, 1843. *British Library Newspapers* (accessed May 11, 2021). https://link.gale.com/apps/doc/BB3200994652/BNCN?u=uclosangeles&sid=BNCN&xid=0672b50d. This broad position is consistent with Lord Denman's apparent dedication to campaigning against the slave trade, both in his official role and in the public press. To the latter point, a few years after this debate Denman published two widely circulated pamphlets on the issue, an anonymous pamphlet in 1847 called "The Slave Trade and the Press" and the 1849 "Two Letters to Lord Brougham on the Extinction of the Trade." That said, however, he also had a more personal reason to argue for this absolutist position. Three years earlier, his son, Captain James Denman, had led a

A similar pattern can be seen in the records of the American House of Representatives and Senate. In a speech to the U.S. House of Representatives in 1856, New Hampshire Representative Aaron Cragin argued that slavery should be "everywhere regarded as an evil, and a crime against humanity."[66] Representative Freeman H. Morse, an anti-slavery Whig from Maine, took this one step farther, introducing a resolution including a provision that described the slave trade as "against the moral sentiment of mankind and a crime against human nature."[67] While this particular wording might suggest that the point Morse was making was more moral than legal, the text that follows this passage makes it quite clear that Morse was not merely using the framing of "crime" here as moralistic hyperbole. "As the most highly civilized nations have made it a criminal offence or piracy under their own municipal laws," Morse said in testimony to the House, "it ought at once and without hesitation to be declared a crime by the code of international law." To this end, this provision goes on to request that the President negotiate an agreement with "the leading powers of Europe" under which the slave trade would be "declared

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British Naval expedition that had not only sunk a number of Spanish slaving vessels but also destroyed dozens of buildings in a Spanish-controlled settlement along the West African Gallinas River. Captain Denman's actions in sinking these "Barracoon" ships and destroying the Spanish "slave factory" were controversial, to say the least, both at home and abroad, and was promptly sued for damages by a set of Spanish investors. This was certainly in Lord Denman's mind while making the 1843 comments in the House of Lords reported here, given that the disposition of that civil suit against his son was another of the issues discussed by the House during that session. See Christopher Lloyd, *The Navy and the Slave Trade: The Suppression of the African Slave Trade in the Nineteenth Century* (Routledge, 2012), 56, et seq., https://books.google.com/books/about/The_Navy_and_the_Slave_Trade.html?id=rz4sBgAAQBAJ.

[66] "Speech of Hon. Aaron H. Cragin, of New Hampshire," *The National Era* (October 16, 1856), Volume 10, no. 511. Available at https://chroniclingamerica.loc.gov/lccn/sn84026752/1856-10-16/ed-1/seq-1/.

[67] *Journal of the House of Representatives of the United States*, Volume 56, p. 588 of 1464. Available at: http://memory.loc.gov/cgi-bin/ampage?collId=llhj&fileName=056/llhj056.db&recNum=587&itemLink=?%230560588&linkText=1.

a crime against international law, and brought under the ban of the united voice of civilized States."[68] Four years later, Senator Charles Sumner – a leading figure among the abolitionist Radical Republicans in the Senate – employed this same framing, describing slavery as a "crime against humanity" twice in the span of a one paragraph long resolution reaffirming his party's commitment to stamping out slavery extended beyond the specific context of the U.S. Civil War.[69]

The rhetorical framing of slavery and slave trading as an international or universal crime was so common, in fact, that it tended to carry over into arguments in which authors sought to append the label of slavery to other forms of constrained living or working conditions. In January 1852, for example, the editors of the Dublin-based *Freeman's Journal* warned their readership against entreaties being published in English newspapers at the time for Irish nationals seeking to leave Ireland to emigrate to Peru. Writing that the wages being offered to arriving Irishmen, and to another recently arrived group of laborers from China, were so low as to be considered "nothing else than the imposition of slavery in a modified form." After lambasting the efforts of the foreign "capitalists" behind these efforts to lure Irish workers to the

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[68] *Journal of the House of Representatives of the United States*, Volume 56, p. 588 of 1464. Available at: http://memory.loc.gov/cgi-bin/ampage?collId=llhj&fileName=056/llhj056.db&recNum=587&itemLink=?%230560588&linkText=1. Morse's 1860 resolution was discussed and widely applauded by anti-slavery societies of the era. See, e.g., "Report for 1859-60" Annual Report of the American Anti-Slavery Society. United States: American Anti-Slavery Society, 1861. At p. 30. Available at: https://www.google.com/books/edition/Annual_Report_of_the_American_Anti_Slave/jaE9AAAAYAAJ. ("Some attempts were made in Congress during the present session to supply the deficiencies of the existing laws. ... Mr. Morse, of Maine, offered, in the other house, resolutions ... recommending negotiations of making the [slave] trade a crime against international law.")

[69] *Journal of the Senate of the United States of America, 1789-1873*. Monday, February 8, 1864. Pp. 136-8.

New World – men whose "whole scheme is SLAVERY" (emphasis in original) – the editors of the *Journal* turned their attention to any Irish nationals involved in this dubious scheme against the Irish working poor, writing that "a frightful responsibility rests upon the men who … would commit such a crime against humanity and their country as to send them on such a mission of horrors."[70]

3.2.2 War

War was the next most common context in which the authors deployed the rhetoric of supranational or universal criminality. About one in six of the sample texts coded for subject matter (141 of 800) included at least one instance of warfare being referred to as some form of supranational or universal crime.

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[70] "Emigration to Peru." *Freeman's Journal*, 3 Jan. 1852. *British Library Newspapers*, link.gale.com/apps/doc/Y3204587747/BNCN?u=uclosangeles&sid=BNCN&xid=e886a2e1. Accessed 4 May 2021. While it falls slightly outside of the temporal scope of this chapter, another useful example of this conceptual carryover between slavery and forced labor can be seen in a 1904 article in the Morpeth Herald reporting on the passage of "The Transvaal Ordinance." The author writes that this ordinance, officially referred to as the Transvaal Imported Labour Ordinance of 1904, would "inflict a terrible wrong on 300,000 Chinamen by placing them in a large prison, to be called a 'compound,' and in the bonds of slavery to be described as 'indenture'." And thus, the Members of the House of Commons who passed this resolution, the author writes, are culpable for this "great crime against humanity." This instance is notable because this author suggests that this crime is all the more heinous because it is being committed by the leaders of such a "civilized European" state as Britain. "It was a deep and bitter humiliation to this great freedom-loving country," he writes, "that it should have been left to the Minister of 'barbarous' China to put forward the conditions that these Chinese immigrants should not be subject to corporal punishment at the hands of their masters, and that their labour should not be transferred from one master to another without their consent." "Indenturism." *Morpeth Herald*, February 27, 1904, 5. *British Library Newspapers* (accessed May 6, 2021). https://link.gale.com/apps/doc/GW3224178487/BNCN?u=uclosangeles&sid=BNCN&xid=eaedc44a .

3.2.2.1 *Jus ad Bellum*

In many of these, authors invoke supranational criminality in reference to what could be understood as a violation of the *jus ad bellum* – criticizing political or military leaders for waging "unjust," "unnecessary," or "unlawful" wars – or, put in the slightly more colorful language of the time, waging wars whose only purpose is to "gratify national pride and the selfish ambition of a despot by territorial aggrandizement."[71] While rarely described using any explicit reference to jurisprudential or political theories of just warfare, authors in these examples often invoked questions of justice and righteousness in their descriptions. In an 1838 article discussing a meeting of labor activists in London, a columnist quoted one of the attendees as having declared, "Remember, an unjust war is the greatest of crimes. The despots and the tyrants of the earth have too often repeated with impunity those crimes against humanity."[72] In late 1870, a columnist for the *Portland Daily Press* in Maine took a similar stance, criticizing the "unreasonable and overbearing" eagerness with which France had declared war on Prussia and the North German Confederation, accusing French leadership of having committed a "crime against civilization" by initiating a "war upon Europe … without just cause."[73] Seven years later, in an article reporting on an escalation of tensions between Russia and Turkey, a columnist in London's *Examiner* invoked the specter of French belligerence as a warning for Russian leaders. "We do not dream of drawing a parallel between Prussia and Turkey," they wrote, "but

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[71] *The Portland Daily Press*. July 18, 1870. *Chronicling America* (accessed July 31, 2023). https://chroniclingamerica.loc.gov/lccn/sn83016025/1870-07-18/ed-1.

[72] "Meeting at the Crown and Anchor Tavern." *Morning Post*, 5 Jan. 1838, pp. [1]+. British Library Newspapers, https://link.gale.com/apps/doc/R3209953739/DSLAB?xid=deb5207a. Accessed 20 Aug. 2023.

[73] *The Portland Daily Press*. July 18, 1870. *Chronicling America* (accessed July 31, 2023). https://chroniclingamerica.loc.gov/lccn/sn83016025/1870-07-18/ed-1.

we can very well compare Russia in 1877 to France in 1870. The one began an unrighteous war; the other is on the point of commencing another. And an unrighteous war in 1870 was, and in 1877 is, a crime against humanity."[74] A few months later, in October 1877, the editors of *The Standard* echoed this sentiment in an article reporting on the then-ongoing Russo-Turkish war. Lambasting Russian officials' comments asserting that the reason Russia had initiated the war was to force the Ottomans to reform and improve their standards of governance, the editors wrote that a war conducted in order to "force their own political ideas upon a neighbor" would not only be "wholly unjustifiable," but would also constitute a crime against humanity."[75]

Other authors raised the issue of necessity, criticizing national leaders for resorting to warfare over disputes that could be or could have been addressed otherwise. In an article in the *Manchester Courier and Lancashire General Advertiser*, for example, a columnist discussing the slump in international commodities trading caused by the war between Chili and Peru wrote that "the South American trade is evidently suffering from the desolation brought on Chili and Peru by the mutual slaughter in which they have been indulging." Pointing to rising sugar and cotton prices due to falling exports from both countries, the columnist ends by writing that "the moral of this is that two peoples on the other side of the globe cannot commit a crime against humanity

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[74] "Political and Social." *Examiner*, 21 Apr. 1877. *British Library Newspapers*, https://link.gale.com/apps/doc/BC3201026499/DSLAB. Accessed 18 May 2023.

[75] "The War in the East." *Manchester Courier and Lancashire General Advertiser*, 3 Oct. 1877, p. 8. British Library Newspapers, https://link.gale.com/apps/doc/IG3221247732/BNCN?u=uclosangeles&sid=BNCN&xid=18565226. Accessed 6 May 2021.

and then monopolise the misery they cause; it spreads far beyond themselves."[76]

Similarly, a number of sources resort to the rhetoric of international criminality to describe even the act of risking an unnecessary war. In a February 1863 article in London's *Daily News* reporting on rumors that Prussia had helped to suppress an uprising in Russian-controlled Poland,[77] for example, a columnist accused Prussia's King William I of committing not only a "breach of international faith"[78] but also a "crime against humanity."[79] By

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[76] "Trade & Commerce." *Manchester Courier and Lancashire General Advertiser*, September 19, 1883, 4. *British Library Newspapers* (accessed May 11, 2021). https://link.gale.com/apps/doc/IG3221358057/BNCN?u=uclosangeles&sid=BNCN&xid=9a94c6db.

[77] This revolutionary uprising is now generally referred to as the Polish Rebellion of 1863 or the "January Uprising." It originated within Russian Partition of Poland. The country of Poland had ceased to be a single, independent state in the late 18th century, having been divided into three partitions in 1772, each of which was controlled by a single neighboring state. These partitions were thus known as the Austrian Partition, Prussian Partition, and Russian Partition. The boundaries of these partitions were formally adjusted at least four times between 1772 and 1815, and indeed continued to be objects of contention through to the end of World War II. On the 1863 Rebellion and its roots in both the history of Poland's partition and in mid-19th century European politics, see generally Burant, Stephen R. "The January uprising of 1863 in Poland: Sources of disaffection and the arenas of revolt." *European History Quarterly* 15, no. 2 (1985): 131-156.

[78] The language that the author of this article uses to describe this breach of faith is striking. "The gratuitous and uncalled-for intervention of a foreign power in the affairs of a neighbouring state," they write, "is a direct attack on the primary rights of every other independent community" and is thus a violation of both the law of nations and "the public law of Europe."

[79] "London, Monday, Feb. 23." *Daily News*, February 23, 1863. *British Library Newspapers* (accessed May 11, 2021). https://link.gale.com/apps/doc/Y3202979376/BNCN?u=uclosangeles&sid=BNCN&xid=e3dee875. Elsewhere in this article, the author suggests another reason behind the decision to describe King William's actions here as a crime against humanity, namely that by aligning himself with the Russian anti-revolutionary forces, Prussia's William I became complicit in Russia's indiscriminate use of force against Prussian civilians and civilian infrastructure. "By his eager violation of a neutrality peculiarly sacred," the passage states, "the King of Prussia becomes a willing accomplice in which drove a noble-hearted and long-suffering people to despair" and "identifies himself with crimes which even their Muscovite perpetrators dare not avow." Ibid.

contributing to the attack against the neutral Kingdom of Poland, the Prussian monarch had "ma[de] the Polish question once more a European one" – increasing the risk of war in Europe by reopening old wounds and "inviting the action … of the other neutral Powers."[80] The criminality of William's actions in this instance, in other words, arises from the blood that would be spilled in any such intra-European war. This kind of rhetoric was also deployed counterfactually. In a June 1871 column in the *Liverpool Mercury*, for example, a columnist praised arbitrators charged with settling ongoing disputes between the U.S. and Britain,[81] lauding them for adopting as "one of the leading rules for the guidance of their deliberations was that a

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[80] "London, Monday, Feb. 23." *Daily News*, February 23, 1863. *British Library Newspapers* (accessed May 11, 2021). https://link.gale.com/apps/doc/Y3202979376/BNCN?u=uclosangeles&sid=BNCN&xid=e3dee875. This anticipated "military intervention" ultimately never came to pass – partly because of the wide press attention given to it. Prussia did, however, provide substantial assistance to Russian forces engaged in suppressing Polish revolutionary efforts. This assistance included: policing the Prussia-Poland border to cut off supply lines to the Polish revolutionary groups, granting Russian troops access and rights of passage through Prussian territory, and disarming any Polish revolutionaries found in Prussian territory. Many of these forms of military support were contemplated and formalized in the 1963 Alvensleben Convention, a secret treaty between the Russian Empire and the Kingdom of Prussia under which the two countries agreed to jointly suppress Polish revolutionaries. That said, the importance of the 1863 Convention itself was somewhat overblown. Prussia had provided informal support to Russia in suppressing Polish independence movements for decades before 1863. And, wary of encouraging Prussian territorial ambitions in his own back yard by giving it a pretext to intervene in Poland, Russian Emperor Alexander II backed away from the 1863 Convention soon after it came to light. On all these points, see generally Lord, Robert H. "Bismarck and Russia in 1863." *The American Historical Review* 29, no. 1 (1923): 24-48.

[81] The arbitrators in question were members of the Joint High Commission, a body created under the 1871 Treaty of Washington. The major disputes stemming from the U.S. Civil war were U.S. claims for damage to American military and civilian ships caused by Confederate warships that had been made in Britain (broadly known as the *Alabama* claims, named for a particularly successful Confederate warship) and British claims against the U.S. for U.K. subjects killed in the U.S. during the War Civil War. For a contemporary account of the ways in which the work of this commission was seen as vital in preventing an armed conflict between the U.S. and the U.K., see Caleb Cushing, *The Treaty of Washington: Its Negotiation, Execution, and the Discussions Relating Thereto* (Harper & Bros., 1873), 20 et seq.

war between Great Britain and the United States which could be reasonably and honourably avoided would be a crime against humanity and civilisation."[82]

Interestingly, one can also find instances in which a decision *not* to deploy military force was framed as a universal crime. For instance, in an August 1863 article in London's *John Bull* describing rumors of displacement and violent treatment of non-combatants living in Confederate territory by Union soldiers, a columnist condemned British leaders for maintaining an official policy of neutrality in regards to the U.S. Civil War, writing that "our so-called neutrality is a crime against humanity itself … when we see women and children of our own blood tortured and sent out from their homes to starve, by being forcibly driven across the lines of an army."[83] In June 1898, a Spanish diplomat used a similar framing in comments denouncing the failure of European states to come to Spain's aid during the Spanish-American war reported in multiple British newspapers, saying that "Europe and the whole world were committing the greatest and most horrible of crimes against humanity in allowing Spain to be vanquished, not by justice, but by the brutal force of numbers."[84]

Similarly, some writers used rhetoric of universal criminality to describe the act of unjustly *ending* a war. In July of 1861, for example, *the New York Times* printed an article criticizing calls to end the U.S. Civil War by accepting the secession of Southern states, and

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[82] "Summary." *Liverpool Mercury*, 5 June 1871. British Library Newspapers, link.gale.com/apps/doc/BB3204137411/BNCN?u=uclosangeles&sid=BNCN&xid=2574cc89. Accessed 6 May 2021.

[83] "The War of Extermination." *John Bull*, August 8, 1863, 504+. *Nineteenth Century UK Periodicals* (accessed August 20, 2023). https://link.gale.com/apps/doc/DX1900613753/DSLAB?xid=2b410c15.

[84] "The Situation in Spain." *Morning Post*, 24 June 1898, pp. 5+. *British Library Newspapers*, link.gale.com/apps/doc/GS3214982026/DSLAB?xid=12e2b7a3. Accessed 20 Aug. 2023.

thereby "demanding peace at the expense of the Union." In this article, the author argued that "to talk or think now of peace upon any terms short of the reestablishment of the Union in its integrity and all its proportions, – of the vindication and maintenance of the Constitution, with all its sanctions, – is to meditate a great crime against civilization – against the spirit of enlightened progress, and against humanity itself."[85] In an article reporting on the armistice ending the 1897 Greco-Turkish war, a columnist for the *Evening Telegraph* used similar language, describing the provisions of the September 1897 peace treaty as an "atrocious arrangement" and the international pressure being exerted upon Greece to give up its claims to the island of Crete as "an international crime."[86]

3.2.2.2 *Jus in Bello*

In other examples, authors invoke supranational criminality in reference to what could be understood as a violation of the *jus in bello* – violations of the laws and customs of war regarding the actions of combatants and belligerent nations in the course of armed hostilities.

Among the most common uses of the rhetoric of supranational or universal criminality in reference to violations of the "laws and customs of war" were in articles discussing military or political leaders' employing tactics that directly targeted civilians or civilian goods. A prime example of this can be seen in an October 13, 1870 article in the *Dundee Courier* reporting on

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[85] "Senator Bayard and his Demand for Peace." *NY Times*. July 24, 1861. Available at https://timesmachine.nytimes.com/timesmachine/1861/07/24/78662552.html.

[86] "Current Opinion." *Evening Telegraph* (Dundee, Scotland), Sept. 22, 1897. Pressure was being exerted on Greece to end their military efforts and thereby capitulate to the Turks by conservative forces wishing to preserve the balance of power in Europe. Under pressure from the European Powers, the Ottoman Empire eventually acceded to a treaty whose terms were more generous to Greece, returning much of the territory that the Ottomans had managed to capture from Greek forces.

the Prussian bombardment of Paris.[87] Referring to statements made by Prussian Chancellor Otto von Bismarck in which he affirmed that the shelling of Paris was not an unfortunate side-effect of Prussian war efforts but an intentional tactic to wear down French resistance,[88] the columnist for the *Courier* author denounced[89] "the cool indifference with which Bismarck writes about starving Paris into submission" and wrote that Prussia's attack on innocent civilians, and on the historic capital city itself, would be viewed "in the judgment of history" as "a crime against humanity."[90] Another contemporary source similarly censured the threatened bombardment,

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[87] Just over a month before this column's publication, the tide of war had turned against the French as Napoleon III had been captured and the remaining French troops had been pinned down after the disastrous Battle of Sedan. With the routes to Paris now entirely undefended, Prussian forces encircled the city of Paris, beginning a siege that would go on for the next 130 days. Kadushin, Charles. "Review of The Fall of Paris: The Siege and the Commune of 1870-71. by Alistair Horne." Political Science Quarterly 81, no. 4 (1966): 677-79. Accessed May 17, 2021. doi:10.2307/2146937.

[88] The first of these comments was made in a September 1870 interview with *The Standard*, Prussian Chancellor Otto von Bismarck succinctly described the reasoning behind the encirclement and siege of the French capital: "We shall enter [Paris] without attacking it. We shall starve it out." "Multiple News Items." Standard, September 20, 1870, 5. British Library Newspapers (accessed May 17, 2021). https://link.gale.com/apps/doc/R3213921346/BNCN. Bismarck echoed this prediction in a memorandum circulated among the European diplomatic corps, a transparent attempt to convince outside European powers to pressure France to return to stalled peace negotiations. If no negotiated peace could be reached, he warned, the Prussians would be forced to continue their siege or resort to outright bombardment (an approach that Bismarck had been widely reported to favor from the start). "M. Bismarck and M. Gambetta on Paris." *Lloyd's Illustrated Newspaper*, 16 Oct. 1870. *British Library Newspapers*, link.gale.com/apps/doc/BC3206235604/BNCN?u=uclosangeles&sid=BNCN&xid=77142e1d. Accessed 17 May 2021.

[89] This column is initially framed as a summary of sentiments expressed in that day's edition of *The Standard*, but the increasingly strident wording of the column suggests, in my reading, that these sentiments were very much also those held by the column's author.

[90] "Latest News." Dundee Courier, October 13, 1870. British Library Newspapers (accessed May 6, 2021). https://link.gale.com/apps/doc/R3214503576/BNCN?u=uclosangeles&sid=BNCN&xid=d1563c4c. After landing this point, this columnist continues the condemnation of Prussia's threats in language surely calculated to trigger

warning that Bismarck should be wary of the consequences of the "international crime" that was the "destruction [of] the homes of two millions of citizens" and the destruction of "the fairest city on the face of the earth."[91]

Similar language can be found in descriptions of attacks on civilian targets throughout the century. French commentators writing in October of 1814, and republished in translation in many of the major U.K. newspapers, condemned the burning of Washington DC by British troops as an act of "atrocious vengeance" and "a crime against all humanity."[92] In an 1849 article reporting on the massacre of thousands of "Sareban Dyaks" – one of the native groups of Borneo – at the hands of British and East India Company troops, the *Manchester Times* called on the

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British ethnic stereotypes, writing that the destruction of the French capital would also be remembered as a "great deed of Vandalism" more terrible than "the worst deeds of the barbarians who overran Europe," and one that would put the lie to Teutonic claims to be "the standard-bearers of civilisation and humanity." These not-so-subtle references to "barbarians" and "Vandalism" played on British suspicions of the Teutonic temperament, comparing (and thus connecting) the Prussians and the early Germanic tribes that toppled Roman control in Northern Europe. If the threatened destruction of Paris and its millions of non-combatants was a crime against humanity – and thus in some sense an inhuman act – then its commission would just confirm the inhumanity (and incivility) of these barely-reformed Visigoth hordes.

[91] "M. Bismarck and M. Gambetta on Paris." Lloyd's Illustrated Newspaper, 16 Oct. 1870. British Library Newspapers, https://link.gale.com/apps/doc/BC3206235604/BNCN?u=uclosangeles&sid=BNCN&xid=77142e1d. Accessed 17 May 2021.

[92] These comments were reprinted, in translation, in multiple British newspapers. See, e.g., "French Papers," The Morning Post (London, England), Tuesday, October 11, 1814; Issue 13642. Available in: British Library Newspapers, Part II: 1800-1900. ("How could a nation eminently civilized, conduct itself at Washington with as much barbarity as the whole banditti of Atilla and Genseric? Is not this act of atrocious vengeance a crime against all humanity?"). See also "Tuesday's Post," The Bury and Norwich Post: Or, Suffolk, Norfolk, Essex, Cambridge, and Ely Advertiser (Bury Saint Edmunds, England), Wednesday, October 12, 1814; Issue 1685. Available in: British Library Newspapers, Part II: 1800-1900. ("The French Journals continue to arraign the conduct of our Commanders in destroying the public buildings of Washington, and designate it an act of atrocious vengeance, and a crime against humanity.")

British public to "repudiate […] all who are responsible perpetrators in this crime against humanity."[93] In a description of Ottoman "irregulars" destroying dozens of Bulgarian villages and killing tens of thousands of Bulgarians as part of an effort to suppress a nationalist uprising, a columnist for London's *Examiner* described these killings as "crimes against humanity" and warned the British establishment against "lending our support to barbarity" by continuing to support Ottoman suppression of similar separatist efforts.[94] Just a year later, the *Freeman's Journal* similarly condemned the actions of Turkey's "irregular soldiers," calling their indiscriminate violence against Bulgarians "a crime against humanity."[95] In 1880, the *Sheffield Daily Telegraph* warned that Ottoman efforts to suppress a similar uprising in Albania might culminate in the Ottoman navy committing the "international crime" of "bombard[ing] the dwellings of a brave and independent people."[96] And similar language can be found in coverage

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[93] "The Massacre of the Dyaks." *Manchester Times*, December 1, 1849. *British Library Newspapers* (accessed August 30, 2023). https://link.gale.com/apps/doc/BC3206374611/BNCN?u=uclosangeles&sid=bookmark-BNCN&xid=2ba2c60a.

[94] "Political and Social." *Examiner*, 19 Aug. 1876. *British Library Newspapers*, https://link.gale.com/apps/doc/BC3201026005/DSLAB?xid=10808dfb. Accessed 20 Aug. 2023. See also "The Turkish Atrocities in Bulgaria." *Daily News*, 30 Sept. 1876. *British Library Newspapers*, https://link.gale.com/apps/doc/Y3203085512/BNCN. Accessed 6 May 2021. (Describing a town meeting in which the "Bulgarian atrocities" were denounced as "a crime against humanity and modern civilization" and a petition was delivered to Parliament demanding that the British government continue to pressure the Ottoman Porte to provide "reparation… for the wrongs already done, and to render impossible the recurrence of such atrocities in the future.")

[95] "The War." *Freeman's Journal*, August 28, 1877. *British Library Newspapers* (accessed May 6, 2021). https://link.gale.com/apps/doc/BA3204755757/BNCN?u=uclosangeles&sid=BNCN&xid=4fce2aad. (Also printed in the *Sheffield Independent*: "Multiple News Items." *Sheffield Independent*, 28 Aug. 1877, p. 6. *British Library Newspapers*, https://link.gale.com/apps/doc/R3214130626/BNCN. Accessed 6 May 2021.

[96] "Public Protest against the Armed Coercion of Turkey." *Sheffield Daily Telegraph*, 9 Oct. 1880, p. 2. *British Library Newspapers*, https://link.gale.com/apps/doc/EN3216459655/BNCN. Accessed 6 May 2021.

denouncing the massacre of over 100,000 Armenians at the hands of Ottoman troops, police, and irregulars as both an "international crime"[97] and "the most monstrous crimes against the laws of nations and the laws of Nature." [98]

Some authors extended this trope, describing the failure to protect civilian populations from forces known to have engaged in violence against similar populations in the past using the frame of universal criminality. In an 1863 pamphlet called *The Christians in Turkey*, for example, William Denton accused British leaders of complicity in the "destruction of far more than 50,000 persons, men, women, and children" who were part of the Christian minority in the Ottoman province of Syria. Britain had intervened after the Egyptian-Ottoman war, preventing the victorious Egyptian forces from annexing Syria and thereby preserving Ottoman rule over the territory. By intervening in this way, effectively "hand[ing] over the people of Syria to the rule of the Porte" without any "stipulation for their better treatment [or] precautions against their destruction," Denton suggests that British leaders bore partial responsibility for this "crime against humanity."[99]

While less common, one can also find instances of the rhetoric of supranational or universal criminality in reference to the destruction of civilian-owned goods at sea or the interruption of sea-borne trade by the imposition of a blockade. In a widely-publicized incident in 1862, for example, the New York Chamber of Commerce passed a resolution stating, in part,

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[97] "The Armenian Difficulty." *Bucks Herald (Aylesbury, England)* [British Library Newspapers], 22 Feb. 1896, p. 5. *British Library Newspapers*, https://link.gale.com/apps/doc/IG3220370474/DSLAB. Accessed 20 Aug. 2023.

[98] "Multiple News Items." *Daily Gazette for Middlesbrough*, August 1, 1896. British Library Newspapers (accessed May 18, 2021). https://link.gale.com/apps/doc/R3214799375/BNCN.

[99] Denton, W (William). *The Christians in Turkey*. Pamphlets. Bell and Daldy, 1863. https://jstor.org/stable/60100452.

that the "destruction of the [U.S.S.] Brilliant" by Confederate naval forces "can only be characterized as a crime against humanity."[100] Earlier that same year, British MP William Gregory leveled similar allegations at U.S. naval officials in a speech to the House of Commons criticizing Union efforts to blockade Confederate ports, describing this policy as not only a "crime against humanity" but also "an act of barbarity unparalleled in the history of civilization."[101] Notably, one of the foundational voices in the international laws of war, Francis Lieber, weighed in on a related debate over Union ships' firing on and sinking Confederate military and civilian vessels in the harbor of Charleston, South Carolina, remarking on coverage of the event in British newspapers and calls to "punish that crime against civilization."[102]

Another common context in which the rhetoric of supranational or universal criminality appeared in reference to conduct of belligerents during warfare was in reference to violence committed against enemy soldiers that had either been captured or surrendered. In an 1855 issue of the *Berrows Worcester Journal*, for example, a columnist wrote about the "barbarous and inhuman butchery perpetrated by the Russians on a peaceful boat's crew in Hango Bay," referring to an incident during the Crimean War in which Russian soldiers fired on a group of British soldiers who were waiving a flag of truce while they transported captured

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[100] See *Proceedings of the Chamber of Commerce, State of New York on the burning of the ship Brilliant by rebel pirate Alabama: Tuesday 21 October 1862* (New York, 1862), at p. 10. Available at https://www.google.com/books/edition/Proceedings_on_the_Burning_of_the_Ship_B/0Kiujbz3-nIC.

[101] "Address for Correspondence." HC Deb 07 March 1862 vol 165 cc1158-230, 1176-7. Available at: api.parliament.uk/historic-hansard/commons/1862/mar/07/address-for-correspondence#column_1176.

[102] Franz Lieber, "*The Usages of War: Continuation of the Lectures of Dr. Lieber, of Columbia College--Admissibility of Retaliation--Interesting View of the Stone Blockade.*" NYTimes. Jan. 19, 1862. Available at https://timesmachine.nytimes.com/timesmachine/1862/01/19/78676020.html?pageNumber=2.

Russian/Finnish prisoners to shore. This act, the columnist wrote, was "a crime against the laws of humanity and civilization which must be atoned for in a summary act of revenge."[103] Similarly, in 1860, a columnist for London's *Morning Post* wrote of two British soldiers who had been captured during a joint intervention in Ottoman Syria that "if they have been injured or tortured, or done to death by barbarous cruelty, all concerned in the **international crime** must pay the heavy penalty of his or their misdeeds."[104] Just a few years later, in the midst of a discussion of Ulysses S. Grant's prospects in the 1868 U.S. presidential election, a columnist for the Boston Daily Advertiser referenced mistreatment of Union solders at the hands of Confederate guards in the notorious Libby and Andersonville military prisons, describing the actions of "every cruel jailor who exposed, starved and robbed our prisoned soldiers" as "crimes against humanity and against civilization.[105]

3.2.2.3 War in general

Finally, the rhetoric of universal criminality can also be found in a number of sources arguing against the very concept of war and the use of force in general. Among the earliest of these is an 1826 article in London's *Morning Chronicle* in which the author echoes a Hobbesian understanding warfare, concluding a discussion of Spain's failing efforts to retain control over its

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[103] "Latest Intelligence." *Berrows Worcester Journal*, June 23, 1855. *British Library Newspapers*, link.gale.com/apps/doc/R3210952889. Accessed 5 May 2021.

[104] "London, Saturday, Dec. 15, 1860." *Morning Post*, 15 Dec. 1860, p. 4. *British Library Newspapers*, link.gale.com/apps/doc/R3210075272/BNCN?u=uclosangeles&sid=BNCN&xid=2f210543. Accessed 5 May 2021.

[105] "The War Democracy." *Boston Daily Advertiser*, October 23, 1868. *Nineteenth Century U.S. Newspapers* (accessed August 29, 2023). https://link.gale.com/apps/doc/GT3006449630/DSLAB?xid=fb7a5007.

Latin American colonies with the following generality "an appeal to force […] is never anything but a crime against civilization – a return to barbarism."[106] The philanthropist and reform advocate Hippolyte Peut[107] struck a similar chord in his speech to the 1851 International Peace Congress[108] – an event that had been planned to coincide with the 1851 Great Exhibition of the Works of Industry of All Nations – but suggests that war is not only "a crime against humanity" but also a crime "against reason, against justice, and against God."[109] Three decades later, a columnist for the Methodist London newspaper *The Watchman* adopted a similarly absolute stance, writing: "For what is war but murder on a mighty scale and of aggravated kind? In itself it is an inexcusable sin against God and crime against humanity. There cannot be war without

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[106] "French papers." *Morning Chronicle*, 20 December, 1826. *British Library Newspapers*, link.gale.com/apps/doc/BA3207139881/BNCN/. Accessed 4 May 2023.

[107] In addition to his involvement in the International Peace Congress, Mr. Peut appears to have had his hand in a variety of other reform efforts at the time. He was an active member of the Paris-based Societé d'Économie Politique and General Secretary of the imaginatively named International Association for Obtaining a Uniform Decimal System of Measures, Weights, and Coins. See Brown, Samuel. *An Account of the Plan, Objects, and Progress of the International Association for Obtaining a Uniform Decimal System of Measures, Weights, and Coins*. 1859. Accessed May 4, 2021. https://jstor.org/stable/10.2307/60100649. (Describing Peut as an "able political economist.). See also Yates, James. *Narrative of the origin and formation of the International Association for obtaining a uniform decimal system of measures, weights, and coins.* United Kingdom: Bell and Daldy, 1856. https://www.google.com/books/edition/Narrative_of_the_origin_and_formation_of/taI7AAAAcAAJ?hl=en&gbpv=0.

[108] This was one of seven annual "International Congresses of the Friends of Peace" held between 1843 and 1853. These international meetings were organized and attended by representatives of various peace societies that had sprung up across Europe and the Americas in the early 19th century.

[109] "THE PEACE CONGRESS." *Daily News*, 25 July 1851. *British Library Newspapers*, https://link.gale.com/apps/doc/BA3202862770/BNCN?u=uclosangeles&sid=BNCN&xid=496eece1. Accessed 4 May 2023.

vast wrong lying on one side or the other -- probably on both."[110] In the May 1900 edition of the Westminster Review, J Foster Palmer wrote that "In the abstract war is always indefensible and unjustifiable, a crime against humanity and civilisation, a remnant of barbarism, and absolutely inconclusive as to the merits of the dispute."[111]

3.2.3 Piracy

Perhaps unsurprisingly, given its long association with supranational or universal criminality,[112] the next most common context in which the authors deployed the rhetoric of supranational or universal criminality were discussions of piracy. Just over a tenth (87 of 800) of

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[110] "The Age of Blood and Iron." *The Watchman*, March 23, 1881. *Nineteenth Century Collections Online*, https://link.gale.com/apps/doc/MOCTWQ363492183/BNCN. Accessed 4 May 2023.

[111] J. F. Palmer. "THOUGHTS ON THE WAR." *Westminster Review, Jan.1852-Jan.1914* 153, no. 5 (05, 1900): 504-511. https://www.proquest.com/historical-periodicals/thoughts-on-war/docview/8214908/se-2.

[112] The notion of piracy as a supranational or universal crime can arguably be traced back to a passage in Cicero's *De Officiis*, written during height of the Roman Republic in 44 BCE, in which he describes pirates as "*communis hostis omnium*." *De Officiis* III.29. The term "*hostis*," in this context, has a double meaning: it can be read as "enemy," in both a personal and public sense (as in an enemy of the state), but can also be read as "foreigner." Thus, this passage from Cicero could be translated either as describing pirates as the "common enemy of all" or as "foreign to all nations in common." This concept of pirates being both universal enemies and foreign to all polities was incorporated by a number of jurists writing on the law of nations in early modern Europe, most notably Grotius. Writing during the early years of the state system in an attempt to reformulate natural law conceptions of international law to fit the new post-Westphalian political landscape, Grotius wrote that pirates are "no longer a national of any state, but rather as *hostis humani generis*, he is justiciable by any State anywhere." Hugo Grotius, *De Jure Belli Ac Pacis Libri*, trans. Francis W. Kelsey, ed. Arthur E. R. Boak (Birmingham, Ala.: Legal Classics Library, 1984), vol. 2, cap. 20, § 40. Although he uses terminology that did not in fact come from Cicero, Grotius clearly picks up on the dual meaning of "*hostis*" in suggesting that pirates – by virtue of their actions – had literally lost their nationality, becoming exiles or "out-laws." This passage in Grotius forms the basis for most modern readings of this phrase. For further discussion on this point, see, e.g., Joaquín Alcaide Fernández, *Hostes Humani Generis: Pirates, Slavers, and Other Criminals* (Oxford University Press, 2012), https://doi.org/10.1093/law/9780199599752.003.0006; Rubin, *The Law of Piracy*.

the texts coded for subject matter contained at least one reference to piracy as one or another form of supranational or universal crime.

Some of these examples appear in the course of descriptions of particular instances of piracy, such as in an 1898 column in *The Springfield Herald* describing the seizure of an Italian ship off the coast of Morocco by a "band of Riffs" – a reference to Rifians, a Berber ethnic group from northeastern Morocco[113] – warning readers that "piracy on the high seas is by no means a thing of the past" and predicting that "the maritime powers will have to devote some of their ships to the suppression of this crime against the laws of nations and the welfare of mankind."[114]

Others appear in the course of more abstract discussions of piracy's status as a supranational or universal crime as a matter of jurisprudence. Various editions of a professional manual for Scottish legal officials include a passage that describes piracy ("or robbing on the sea") as "a crime against the law of nations, and always capital."[115] And in a discussion of the "general principles of jurisdiction," an 1896 manual of regulations compiled for the use of

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[113] See David M. Hart, "Notes on the Rifian Community of Tangier," *Middle East Journal* 11, no. 2 (1957): 153–62, https://www.jstor.org/stable/4322893.

[114] *The Springfield Herald*. (Springfield, Baca County, Colo.), 28 Jan. 1898. *Chronicling America: Historic American Newspapers*. Lib. of Congress. https://chroniclingamerica.loc.gov/lccn/sn89052133/1898-01-28/ed-1/seq-1/. Accessed 4 May 2021.

[115] See, e.g., Tait, George. *A summary of the powers and duties of a justice of the peace in Scotland: with forms of proceedings, &c., comprising a short view of the criminal duty and of the greater part of the civil duty of sheriffs and magistrates of burghs*, 4th ed. Edinburgh: J. Anderson, 1828. *The Making of Modern Law: Legal Treatises, 1800–1926* (accessed August 30, 2023). https://link.gale.com/apps/doc/F0106192941/DSLAB?xid=759ac2d8&pg=1. Notably, multiple editions of a commentary on Scottish law by David Hume, nephew of philosopher by the same name, also include this passage. See, e.g., Hume, David. *Commentaries on the law of Scotland, respecting crimes*, 3rd ed. Vol. 1. Edinburgh: Printed for Bell & Bradfute, 1829. *The Making of Modern Law: Legal Treatises, 1800–1926* (accessed August 30, 2023). https://link.gale.com/apps/doc/F0103479920/DSLAB?xid=a8f5df7a&pg=1.

officials in U.S. refers to "piracy and other crimes against the law of nations."[116]

More often, though, references to piracy as a supranational or universal crime appeared in the course of discussions related to slavery or the slave trade. Such was the case in articles reporting on proposed and actual treaties and domestic legislation outlawing the slave trade by analogizing it to piracy. In articles on the progress of the Congress of Aix-la-Chapelle, various outlets reported on British Lord Castlereagh's proposal that the five European Powers (Britain, Prussia, Russia, Austria, and France) pressure the King of Portugal to enact legislation abolishing the slave trade in that country's domestic law by issuing a joint letter endorsing the proposition that "the trade in in slaves as a crime against the law of nations" and to support this assertion by "assimilate[ing] it to piracy."[117] Similarly, in an 1841 article reporting on the signing of the "Treaty for the Suppression of the African Slave Trade" by these same five European Powers, a writer for the *Anti-Slavery Monthly Reporter* – a periodical published by the British and Foreign Anti-Slavery Society – cheered that the slave trade had been "at length denounced by the entire moral and physical force of Europe, as a crime against the law of nations" whose commission merited the same "severe and summary treatment which the laws of civilised states agree to

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[116] United States Dept. of State. *Regulations Prescribed for the Use of the Consular Service of the United States*. Washington: Government Printing Office, 1896. *The Making of Modern Law: Foreign, Comparative and International Law, 1600–1926* (accessed August 29, 2023). https://link.gale.com/apps/doc/HT0100051034/DSLAB?xid=ffc526d7&pg=160.

[117] See, e.g., "Historical Epitome." *Leeds Intelligencer*, February 22, 1819, 4. *British Library Newspapers* (accessed August 30, 2023). https://link.gale.com/apps/doc/EN3216000098/DSLAB?xid=fe2de768. See also, "Relative to the Slave Trade." *The Philadelphia Register, and National Recorder*, April 17, 1819, 262+. *American Historical Periodicals from the American Antiquarian Society* (accessed August 30, 2023). https://link.gale.com/apps/doc/MDNPBT012306489/DSLAB?xid=b7e0e1b5.

inflict on pirates."[118]

Such was also the case in sources discussing the legal ramifications of various "slave revolts" that took place on slave ships at sea. In coverage of the case of the *Amistad* – an 1839 incident in which enslaved Africans being transported between two Cuban ports on *La Amistad*, a Spanish slaving vessel, rose up, killing the captain and two crew members, and despite ordering the remining crew to sail to Sierra Leone instead were taken to New York[119] – various outlets reported on language in a U.S. Circuit Court decision[120] holding that U.S. Federal courts did not have jurisdiction to prosecute the African captives for killing the captain because "murder … is not a crime against the laws of nations" and "were the crime piracy even, it would not be a crime against the laws of nations, connected as [this case is] with the slave trade."[121]

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[118] "EUROPEAN TREATY FOR THE SUPPRESSION OF THE SLAVE-TRADE." *Anti-Slavery Monthly Reporter; Under the Sanction of the British and Foreign Anti-Slavery Society*, December 29, 1841, [269]. *Nineteenth Century UK Periodicals* (accessed August 30, 2023). https://link.gale.com/apps/doc/CC1903209756/DSLAB?xid=0542a919.

[119] See Mark Curriden, "Amistad Case Opens in Supreme Court Precedents," *ABA Journal* 99, no. 2 (2013): 72–74, https://heinonline.org/HOL/P?h=hein.journals/abaj99&i=150.

[120] Cinque, and United States. Circuit Court. *Trial of the prisoners of the Amistad on the writ of habeas corpus before the Circuit Court of the United States for the district of Connecticut at Hartford, Judges Thompson and Judson, September term, 1839*. New York: Published and for sale at 143 Nassau Street, 1839. *Sabin Americana: History of the Americas, 1500-1926* (accessed August 30, 2023). https://link.gale.com/apps/doc/CY0108469483/DSLAB?xid=11644aa0&pg=1.

[121] *The African Captives. Trial of The Prisoners of The Amistad on The Writ of Habeas Corpus, Before the Circuit Court of The United States, for The District of Connecticut, at Hartford*. New York, 1839. *The Making of Modern Law: Trials, 1600–1926* (accessed August 30, 2023). https://link.gale.com/apps/doc/Q0101240629/DSLAB?xid=bc5dd448&pg=46. See also, e.g., "The African Prisoners." *Liberator*, September 27, 1839, 155. *Nineteenth Century U.S. Newspapers* (accessed August 30, 2023). https://link.gale.com/apps/doc/GT3005845023/DSLAB?xid=54d156cc; "United States Court." *Times*, October 16, 1839, 3. *The Times Digital Archive* (accessed August 30, 2023). https://link.gale.com/apps/doc/CS50621776/DSLAB?xid=fe4068be.

Just a few years later, reporting on arguments in the "The Creole Case" – a lawsuit arising out of a November 1841 incident in which enslaved Black Americans being transported from Virginia to New Orleans aboard the American-registered *Creole* seized the ship, killing a crew member and wounding others, and forced the remaining crew to sail to British-controlled waters in the Bahamas[122] – raised the same issue.[123]

3.2.4 Violence Against Political Leaders or Diplomatic Personnel

Another of the more common contexts in which the rhetoric of supranational or universal criminality appeared in the 19th century was in reference to violence against political leaders or diplomatic officials. Nearly a tenth of the sample of texts coded for subject matter (79 out of 800) contained at least one reference to assassination or attacks on political leaders, ambassadors, legation personnel, or some other category of foreign officials as one or another form of supranational or universal crime. As with the topic of piracy, this finding ought perhaps also not be all that surprising given that violence against political or diplomatic officials – whether those of one's own state or of another – given that the historical pedigree of both regicide and the "violation of the rights of ambassadors" as crimes warranting extraordinary

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[122] See Anita Rupprecht, "'All We Have Done, We Have Done for Freedom': The Creole Slave-Ship Revolt (1841) and the Revolutionary Atlantic," *International Review of Social History* 58, no. S21 (December 2013): 253–77, https://doi.org/10.1017/S0020859013000254.

[123] See, e.g. *The Madisonian. [volume]* (Washington City [i.e., Washington, D.C.]), 29 March 1842. *Chronicling America: Historic American Newspapers*. Lib. of Congress. <https://chroniclingamerica.loc.gov/lccn/sn82015015/1842-03-29/ed-1/seq-1/>. See also *The Madisonian. [volume]* (Washington City [i.e., Washington, D.C.]), 29 March 1842. *Chronicling America: Historic American Newspapers*. Lib. of Congress. <https://chroniclingamerica.loc.gov/lccn/sn82015015/1842-03-29/ed-1/seq-1/>

concern from the international community is at least as strong as that of piracy.[124]

The instance of political violence that loomed largest in the sample of sources analyzed for this chapter was the assassination of U.S. President Abraham Lincoln. Both U.S. and British sources regularly described the killing of Lincoln, and the attacks and assassination attempts on U.S. Vice President Andrew Johnson and Secretary of State William H. Seward, were regularly

[124] Grotius, for example, discussed the impermissibility of harming diplomatic officials, and arguably originate the conceptual basis of diplomatic immunity through his use of the legal fiction of their being treated as if outside the jurisdiction ("*fictione simile constituerentur quasi extra territorium*") in *De Jure Belli ac Pacis*, book II, ch. xviii, and the impermissibility of regicide under the law of nations (and exceptions to that impermissibility in the case of tyrannicide) in *De Jure Belli ac Pacis*, book I, ch. iv, sections vii and viii. Hugo Grotius, "Chapter 4 - Of a War Made by Subjects against Their Sovereigns," in *The Rights of War and Peace*, ed. Richard Tuck, In Three Volumes ed. edition (Indianapolis, Ind: Liberty Fund, 2005). On the historical development of these topics in both domestic and supranational legal contexts, see Franciszek Przetacznik, "The Perpetrators of Crimes Against Officials of Foreign States Are Extraditable," in *Protection of Officials of Foreign States According to International Law* (Brill Nijhoff, 1983), 135–47, https://doi.org/10.1163/9789004637283_015; Franciszek Przetacznik, "The History of the Jurisdictional Immunity of the Diplomatic Agents in English Law," *Anglo-American Law Review* 7, no. 4 (September 1, 1978): 348–95, https://doi.org/10.1177/147377957800700402; Franciszek Przetacznik, "The Protection of Foreign Officials under International Law," *Anglo-American Law Review* 9, no. 4 (October 1, 1980): 177–215, https://doi.org/10.1177/147377958000900401; Margaret Buckley, "Origins of Diplomatic Immunity in England," *University of Miami Law Review* 21, no. 2 (1966), https://repository.law.miami.edu/umlr/vol21/iss2/2; Jean d'Aspremont, "14. Le Tyrannicide En Droit International," in *The Right to Life* (Brill Nijhoff, 2010), 285–313, https://brill.com/display/book/edcoll/9789004189652/Bej.9789004183919.i-424_015.xml; Franklin L. Ford, *Political Murder: From Tyrannicide to Terrorism*, First Edition (Cambridge, Mass: Harvard University Press, 1985).

described using the rhetoric of international crime in speeches,[125] sermons,[126] and newspaper columns in the months following his death.[127] The *Boston Daily Advertiser* described the

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[125] See, e.g., Athenaeum Association. *Commemorative proceedings of the Athenaeum Club, on the death of Abraham Lincoln, President of the United States, April, 1865*. [New York]: [C.S. Westcott, Printers], [1865]. *Sabin Americana: History of the Americas, 1500-1926* (accessed September 10, 2023). https://link.gale.com/apps/doc/CY0102293959/DSLAB?xid=5d998647&pg=30; Morris, Benjamin Franklin. *Memorial record of the nation's tribute to Abraham Lincoln*. Washington, D.C: W.H. & O.H. Morrison, 1865. *Sabin Americana: History of the Americas, 1500-1926* (accessed September 10, 2023). https://link.gale.com/apps/doc/CY0102280325/DSLAB?xid=69cee941&pg=187; and Spencer, William V. *Lincolniana: in memoriam*. Boston; (Cambridge, Mass.): W.V. Spencer; Printed by J. Wilson and Sons, 1865. *Sabin Americana: History of the Americas, 1500-1926* (accessed September 10, 2023). https://link.gale.com/apps/doc/CY0102168484/DSLAB?xid=3b3f847f&pg=188.

[126] See, e.g., Goodspeed, Edgar Johnson. *Funeral discourse on the death of Abraham Lincoln, preached Sunday, April 23d, 1865, in the Second Baptist church, Chicago*. Chicago: The Trustees, 1865. *Sabin Americana: History of the Americas, 1500-1926* (accessed September 10, 2023). https://link.gale.com/apps/doc/CY0100049662/DSLAB?xid=f6eb64e8&pg=33; Blackburn, William Maxwell. *The crime against the Presidency: a sermon, delivered Sunday, April 16, 1865, in the Fourth Presbyterian church, Trenton, N.J.* Trenton, N.J.: Murphy & Bechtel, printers, 1865. *Sabin Americana: History of the Americas, 1500-1926* (accessed September 10, 2023). https://link.gale.com/apps/doc/CY0101227734/DSLAB?xid=7c17c44e&pg=5; Binns, William. *A sermon on the death of President Lincoln*. Birkenhead [Eng.]: J. Oliver, printer, 1865. *Sabin Americana: History of the Americas, 1500-1926* (accessed September 10, 2023). https://link.gale.com/apps/doc/CY0101327285/DSLAB?xid=2d0d15c5&pg=4; and Burrows, John Lansing. *Palliative and prejudiced judgments condemned: a discourse delivered in the First Baptist church, Richmond, Va., June 1, 1865, the day appointed by the President of the United States for humiliation and mourning on account of the assassination of President Lincoln, together with an extract from a sermon, preached on Sunday, April 23rd, 1865, upon the assassination of President Lincoln*. Richmond, Va.: Office Commercial bulletin, 1865. *Sabin Americana: History of the Americas, 1500-1926* (accessed September 10, 2023). https://link.gale.com/apps/doc/CY0101339004/DSLAB?xid=36f055dc&pg=5.

[127] See "The British Press on The Assassination of President Lincoln." *Caledonian Mercury*, April 28, 1865. *British Library Newspapers* (accessed September 10, 2023). https://link.gale.com/apps/doc/BB3205538530/DSLAB?xid=7511231b. (Referring to the assassination as a "crime against humanity.")

assassination plot as a "crime against humanity itself,"[128] the *Leeds Mercury* described it as a "crime against civilization,"[129] and in an open letter to President Lincoln's widow, Mary Todd Lincoln, published in the *Sheffield Independent*, a British community organization wrote that "when the head of the great American Federation, which represents these principles, is struck down, we regard it as a crime against humanity and the liberties of the human race."[130]

But Lincoln was far from the only political leader whose politically motivated killing was described as a crime against humanity. In an 1828 monograph, for example, influential Argentine author and political figure Manuel Moreno[131] described the assassination of Manuel Dorrego, then-Governor of the province of Buenos Aires, as a "gross and bloody violation of the laws" and an "enormous and glaring crime against humanity."[132] In a February 1858 address to

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[128] the London Times, April 27. "Assassination of Mr. Lincoln." *Boston Daily Advertiser*, May 10, 1865. *Nineteenth Century U.S. Newspapers* (accessed March 13, 2024). https://link.gale.com/apps/doc/GT3006411079/DSLAB?u=uclosangeles&sid=bookmark-DSLAB&xid=1264a2ce.

[129] "The Assassination of Mr. Lincoln." *Leeds Mercury*, April 29, 1865. *British Library Newspapers* (accessed March 13, 2024). https://link.gale.com/apps/doc/BB3201611790/DSLAB?u=uclosangeles&sid=bookmark-DSLAB&xid=0c6afb30.

[130] "Multiple News Items." *Sheffield Independent*, 31 May 1865, p. 3. *British Library Newspapers*, link.gale.com/apps/doc/R3212021785/BNCN?u=uclosangeles&sid=BNCN&xid=5fd8785c. Accessed 6 May 2021.

[131] Manuel Moreno was the younger brother of Mariano Moreno, a key political figure in the Primera Junta, the revolutionary government formed to wrest control of Argentina from colonial governance. The younger Moreno's use of the rhetoric of universal crime here is notable, in particular, because of his close association and work with his older brother. The elder Moreno was an influential shaper of both public ideals and public language in Argentina at the time, having founded the first newspaper in Buenos Aires, *La Gazeta de Buenos Ayres* and penned an influential 1810 translation of Rousseau's *Social Contract* into Spanish. See Eugene M. Wait, "Mariano Moreno: Promoter of Enlightenment," *Hispanic American Historical Review* 45, no. 3 (August 1, 1965): 359–83, https://doi.org/10.1215/00182168-45.3.359.

[132] Moreno, Manuel. *Late military revolution in Buenos Ayres, and assassination of Governor Dorrego: being the translation of an exposition, addressed to the United Province of the River Plate*. London: J. Richardson, 1829.

the House of Lords, for example, the Earl of Derby made a brief reference to the attempted assassination of Napoleon III by three Italian nationalists, saying that all three were undoubtably "guilty of a crime against humanity."[133] And this rhetorical trend only accelerated as the last decades of the century saw a growing wave of assassination attempts against European royals, including Russia's Tsars Alexander II, Alexander III, and Nicholas II, Germany's Kaisers Wilhelm I, Friedrich III, and Wilhelm, Britain's Queen Victoria, and Prince Albert, Italy's Kings Victor Emmanuel, Umberto I, and Victor Emmanuel III, and Emperor Franz Joseph of Austria, among others,[134] and elected political leaders. Such attacks and plots against heads of state were regularly framed as international crimes.[135] In 1891, for example, the *Western Times* described an attack on Britain's Prince Alexander as a "shocking international crime."[136] Similarly,

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Sabin Americana: History of the Americas, 1500-1926 (accessed September 10, 2023). https://link.gale.com/apps/doc/CY0100776174/DSLAB?xid=333006e3&pg=77.

[133] "Imperial Parliament." Manchester Times, 6 Feb. 1858. British Library Newspapers, https://link.gale.com/apps/doc/BC3206399625/BNCN?u=uclosangeles&sid=BNCN&xid=ba05beb9. Accessed 4 May 2021. The Earl made this reference in the context of a defense of the policy of offering asylum to political emigrees. Two of the three would-be assassins that took part in this assassination attempt, Giovanni Andrea Pieri and Carlo de Rudio, had been living in Britain as asylees during the planning of the attack. See "The Attempted Assassination of the Emperor of the French; Antecedents of the Conspirators. Complete History of the Plot and its Denouement." *New York Times*. 9 Feb. 1858, https://timesmachine.nytimes.com/timesmachine/1858/02/09/78528596.pdf.

[134] On this wave of assassination attempts, see Rachel G. Hoffman, "The Age of Assassination: Monarchy and Nation in Nineteenth-Century Europe," in *Rewriting German History: New Perspectives on Modern Germany*, ed. Jan Rüger and Nikolaus Wachsmann (London: Palgrave Macmillan UK, 2015), 121–41, https://doi.org/10.1057/9781137347794_7.

[135] See, e.g., "Political Assassinations." *Dundee Courier*, June 26, 1894. *British Library Newspapers* (accessed March 13, 2024). https://link.gale.com/apps/doc/R3214539117/DSLAB?u=uclosangeles&sid=bookmark-DSLAB&xid=7eb06dfe.

[136] "News." *Western Times*, December 31, 1891, 2. *British Library Newspapers* (accessed March 13, 2024). https://link.gale.com/apps/doc/IG3220062194/DSLAB?u=uclosangeles&sid=bookmark-DSLAB&xid=2c378fa7.

newspapers described the 1894 assassination of French President Sardi-Carnot as a "destabilizing crime against civilization"[137] and the 1897 assassination of Spanish Prime Minister Antonio Cánovas del Castillo as a "crime against humanity."[138]

In a similar vein, one can find quite a few examples in which writers and columnists use the rhetoric of supranational or universal crime to describe attacks on diplomatic officials, embassy or legation staff, or their families. The summer of 1900, for example, saw a flurry of stories using this framing to describe a sustained attack on the foreign legations of multiple European states in major cities in China, particularly in the capital city, then called Peking, during the 1900 Boxer Rebellion. In early 1900, the Boxers – a collective term used to refer to various anti-Christian, anti-foreign, and anti-imperialist groups that took shape in the late 1890s, primarily originating in the northeastern province of Shandong – initiated a series of attacks on foreign missionaries and Chinese Christians, moving from Shandong province into the farmland around Peking. Fearing that the violence would spread to Peking itself, American, British, French, German, Italian, and Russian leaders sent additional troops to Peking in May 1900 to ensure the safety of the legation staff and their families.[139] When in the ensuing weeks Boxer attacks did indeed spread to Peking, the Chinese government issued an instruction to all

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[137] "President Sadi-Carnot Murdered." *Daily Picayune*, June 25, 1894. *Nineteenth Century U.S. Newspapers* (accessed March 13, 2024). https://link.gale.com/apps/doc/GT3014452458/DSLAB?u=uclosangeles&sid=bookmark-DSLAB&xid=88b4f858.

[138] "The Spanish Assassination." *Bangor Daily Whig and Courier*, August 12, 1897. *Nineteenth Century U.S. Newspapers* (accessed March 13, 2024). https://link.gale.com/apps/doc/GT3007598665/DSLAB?u=uclosangeles&sid=bookmark-DSLAB&xid=3c039f93.

[139] Peter Harrington, *Peking 1900: The Boxer Rebellion* (Bloomsbury Publishing, 2013), 18–20.

foreigners to evacuate the capital. By then, however, flight was all but impossible as Boxer forces had destroyed the Tianjin to Peking railway, so the roughly 900 foreign diplomats, legation staff, their families, and security forces – along with roughly 2,800 Chinese Christians – were forced to take shelter in the diplomatic buildings in the Legation Quarter.[140] In late June, the German Minister was killed by Boxer forces as he attempted to meet with the Chinese foreign minister,[141] an act described by *The Standard* as "the most monstrous international crime ever committed."[142] This would mark the beginning of what would be a three month siege of the international legation buildings, with legation troops attempting to maintain defensive boundaries around the Legation Quarter and Boxer forces attacking those defenses with weapons looted from government and foreign storehouses. Describing one particularly heavy day of fighting, in which Boxers had fired cannons at the legation buildings, the *Standard* described the shelling of diplomatic buildings as a "massacre," saying that "there is no longer any shadow of doubt that an international crime of the first magnitude and deepest infamy has happened, horrifying Christendom and calling aloud for swift and sure retribution."[143] The *Northampton Mercury* adopted a similarly stark tone in its reporting that day, describing the "slaughter of the unfortunate foreign residents and officials who sought refuge in the British Legation" as not only a **"**crime against humanity generally" but also against "each nation in particular which was

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[140] Harrington, 18.

[141] Przetacznik, "The Protection of Foreign Officials under International Law," 183.

[142] "Current Topics." *Sheffield Daily Telegraph*, July 3, 1900, 6. *British Library Newspapers* (accessed May 11, 2021). https://link.gale.com/apps/doc/EN3217806065/BNCN?u=uclosangeles&sid=BNCN&xid=fecaafeb.

[143] "African and Asian Affairs." *Cheltenham Chronicle*, 21 July 1900, p. 2. *British Library Newspapers*, link.gale.com/apps/doc/ID3240330228/BNCN?u=uclosangeles&sid=BNCN&xid=2d5f51d4. Accessed 5 May 2021.

represented in the blood-stained capital."[144] Describing further rounds of shelling that continued into late July and early August, the *Leeds Mercury* wrote that the world had never seen "a more appalling crime against humanity and civilisation" than the Boxers' and that "history affords no parallel to such an atrocity."[145] And the *Western Gazette* described the ongoing attacks as "a crime against humanity" and "an unpardonable wrong to all the civilised nations."[146]

News media covering these events also used the rhetoric of international crime to frame potential Western responses to the Boxer attacks. The *Standard* wrote that Chinese leaders' apparent complicity with, or inability to protect against, the Boxers' anti-Western attacks justified "drastic measures" including "making an example of the Dowager-Empress" or even "the burning of Pekin" as methods of "illustrating the horror of the civilised world at the greatest public crime of our period."[147] The *Leeds Mercury* described the response among the British public as "a cry for retribution upon the malefactors responsible for such a fearful crime against humanity"[148] and warned that "there must be a great penalty to exact for so stupendous an

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[144] "Chinese Horror." *Northampton Mercury*, July 20, 1900, 3+. *British Library Newspapers* (accessed May 5, 2021). https://link.gale.com/apps/doc/GW3216752192/BNCN?u=uclosangeles&sid=BNCN&xid=1adb18ec.

[145] "THE WEEK." *Leeds Mercury*, 21 July 1900. *British Library Newspapers*, link.gale.com/apps/doc/BC3201947238/BNCN?u=uclosangeles&sid=BNCN&xid=b3086b2b. Accessed 6 May 2021.

[146] "Public Opinion." *Western Gazette*, 20 July 1900, p. 5. *British Library Newspapers*, link.gale.com/apps/doc/JF3233578205/BNCN?u=uclosangeles&sid=BNCN&xid=55c4d40e. Accessed 6 May 2021.
"Public Opinion." *Western Gazette*, 20 July 1900, p. 5. *British Library Newspapers*, link.gale.com/apps/doc/JF3233578205/BNCN?u=uclosangeles&sid=BNCN&xid=55c4d40e. Accessed 6 May 2021.

[147] "Current Topics." *Sheffield Daily Telegraph*, July 3, 1900, 6. *British Library Newspapers* (accessed May 11, 2021). https://link.gale.com/apps/doc/EN3217806065/BNCN?u=uclosangeles&sid=BNCN&xid=fecaafeb.

[148] "NEWS SUMMARY." *Leeds Mercury*, 6 July 1900. *British Library Newspapers*, link.gale.com/apps/doc/BC3201946603/BNCN?u=uclosangeles&sid=BNCN&xid=5d1e65fd. Accessed 6 May 2021.

atrocity."[149] And the *Sheffield Daily Telegraph* warned against calls to offer support to the embattled Chinese government against the Boxer forces, writing that "to support the present Chinese Government would be not only *a crime against humanity*, it would be a blow inflicted on our own interests."[150] Other outlets, on the other hand, used the same framing to warn Western leaders against giving in to the popular pressure to seek retribution. The *York Herald*, for example, lauded efforts to resolve the conflict through diplomatic pressure on leadership to surrender the "the primary and real instigators of the crimes committed against the law of nations at Pekin" – a strategy aimed at avoiding the need for an all-out attack by Western forces whose death toll would itself be "another crime against humanity."[151]

3.2.5 Violence Against an Ethnic or Cultural Minority Group

Another common context in which the rhetoric of supranational or universal crime was deployed was in descriptions of violence against an ethnic, racial, or cultural minority. This framing appeared in with 17 of the 800 sources coded for content. In a column published in January 1879, for example, the *Morning Post* addressed ongoing violence in Eastern Roumelia (an autonomous province within the Ottoman Empire that had been created in the 1878 Treaty of Berlin), describing Russian attacks against the Muslim population as "a prearranged plan for the

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[149] "THE WEEK." *Leeds Mercury*, 21 July 1900. *British Library Newspapers*, link.gale.com/apps/doc/BC3201947238/BNCN?u=uclosangeles&sid=BNCN&xid=b3086b2b. Accessed 6 May 2021.

[150] "News." *Sheffield Daily Telegraph*, 17 July 1900, p. 6. *British Library Newspapers*, link.gale.com/apps/doc/EN3217806640/BNCN?u=uclosangeles&sid=BNCN&xid=b44dec58. Accessed 6 May 2021.

[151] "Multiple News Items." *York Herald*, 20 Sept. 1900. *British Library Newspapers*, link.gale.com/apps/doc/R3215269865/BNCN?u=uclosangeles&sid=BNCN&xid=b6396593. Accessed 5 May 2021.

extermination of the Mohammedan inhabitants" and an "international crime of such a magnitude" that ought to be met with a unified "voice of indignant and horrified Europe."[152] In 1881, a Jewish group in Chicago used a similar framing in an open letter to Russia's Tsar Alexander II, calling on his government to take stronger measures to quash the wave of antisemitic violence sweeping Southern Russia and to "protect the Jewish inhabitants of his realm against their aggressors, who not only break the laws of Russia, but are guilty of the gravest crimes against the laws of humanity."[153] And in 1893, a columnist in *The Journal of Education* addressed centuries of violence against indigenous North Americans, enjoining readers: "Let us in humility confess the crime against humanity that has been committed while generations were fiendishly shot down."[154]

3.2.6 Torture

Interestingly, the rhetoric of supranational or universal crime also appeared in a number of descriptions of torture or inhumane treatment. Of the sample of 800 texts coded for subject matter, six contained columns in which torture or inhumane treatment was described as one or another form of supranational or universal crime. In an 1860 article describing punishments

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[152] *Morning Post*, January 18, 1879, 4. *British Library Newspapers* (accessed May 6, 2021). https://link.gale.com/apps/doc/R3213253123/BNCN?u=uclosangeles&sid=BNCN&xid=6418da99.

[153] "Fellow Israelites." *Daily Inter Ocean*, 27 May 1881, p. 8. *Nineteenth Century U.S. Newspapers*, link.gale.com/apps/doc/GT3001135077/DSLAB?xid=27b6af55. Accessed 29 Aug. 2023. This open letter was carried in a wide range of U.S. general interest newspapers and Jewish community newspapers on the same day. *See, e.g.*, Chicago Daily Tribune. May 27, 1881. *Chronicling America*, https://chroniclingamerica.loc.gov/lccn/sn84031492/1881-05-27/ed-1; *The Jewish Advance*. May 27, 1881. *Chronicling America*, https://chroniclingamerica.loc.gov/lccn/sn90053038/1881-05-27/ed-1.

[154] "The Indian School Exhibit." *The Journal of Education* 38, no. 13 (938) (1893): 225. http://www.jstor.org/stable/44038396.

inflicted on performed on inmates in American Prisons, a columnist writing for the *Sheffield Independent* described an instance in which a prisoner named Tom Kelly was subjected to a process of repeated near-drowning for hours each day for forty days, concluding that "whatever was Kelly's crime, his torture was a crime against humanity, against which civilized mankind ought to utter its indignant protest. Punishment is the duty of the state, but torture is beyond its province."[155] The *Morning Herald* used the same framing to describe punishments meted out in a Delaware prison, describing such torture as "crimes against humanity."[156] And an 1886 column describing conditions at a local "house of correction," the *Milwaukee Daily Sentinel* described practices of prisoners being beaten or chained in positions designed to cause injury as "brutalities" and "cries against humanity … more in the spirit of the most debased savages than a superficial observer of mankind could believe possible in this century."[157] Similar framing was also used to describe torture abroad, as in an 1856 report by the New York Journal of Commerce describing "practices of torture" employed by the British East India company, pointing to the dissonance between Britain's stance against "negro slavery in the United States" while failing to prevent the Company from engaging in similar "crimes against humanity" for the purposes of "extorting taxes and swelling the revenues of the conquered provinces."[158]

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[155] "New York and its Criminals." *Sheffield Independent*, November 3, 1860. *British Library Newspapers* (accessed May 11, 2021). https://link.gale.com/apps/doc/R3214715270/BNCN?u=uclosangeles&sid=BNCN&xid=342d3dea.

[156] "Lying Libels of the Sheriff's 'Gazette.'" *The Morning Herald*. August 09, 1876.

[157] "A Return to Barbarism." *Milwaukee Daily Sentinel*, January 14, 1886, 4. *Nineteenth Century U.S. Newspapers* (accessed March 15, 2024). https://link.gale.com/apps/doc/GT3002248158/DSLAB?u=uclosangeles&sid=bookmark-DSLAB&xid=9d4c4911.

[158] "Torture in India." *The South-Western*. June 4, 1856. *Chronicling America*. (Accessed March 15, 2024). https://chroniclingamerica.loc.gov/lccn/sn83016483/1856-06-04/ed-1.

3.2.7 Idiosyncratic Usages

Not all invocations of the rhetoric of supranational or universal criminality so cleanly map on to actions that today would be considered some form of international crime. These terms also sometimes appeared in discussions of problems of the day that were both smaller and closer to home. While examples in the other subject matter categories are by no means devoid of hyperbole or overstatement, the authors of the examples in this category seem much more clearly to be using terms related to supranational or universal criminality for rhetorical effect.

Many of these examples appear in the context of lurid descriptions of murder or other violent crime. In an 1849 pamphlet reporting on a murder trial that had occurred in Norfolk, Britain, a clergyman argued against efforts to commute the sentence of the convicted defendant, writing that "his crimes against humanity [were] so horrible that the human family will only libel itself by extending a sympathy towards him."[159] Another, writing for the *North Devon Journal*, writing about the murder of a young woman by a jealous male suitor, wrote that he hoped the local judge would sentence the man harshly and make him "answer for his crime against the laws of humanity and his country."[160] The most widely cited example of an author using the rhetoric of supranational or universal crime to describe murder was the following passage in Blackstone's Commentaries on the Laws of England: "Homicide is of three kinds: justifiable, excusable and felonious. The first has no share of guilt at all; the second very little; but the third is the *highest*

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[159] William M. Clark, *A Full Report of the Trial of J. B. Rush for the murder of Mr. Jermy and his son (I. J. Jermy) 1849*. 50th edition. With an Appendix. United Kingdom, n.p, 1849. At p. 98. Available at: https://www.google.com/books/edition/A_Full_Report_of_the_Trial_of_J_B_Rush_f/NbRjAAAAcAAJ.

[160] "Murder at Lynton, Committal of the Murderer." *North Devon Journal*, December 24, 1857. *British Library Newspapers* (accessed May 11, 2021). https://link.gale.com/apps/doc/EN3224305090/BNCN.

crime against the law of nature."[161] This passage was either quoted or paraphrased in 30 of the 800 sources coded for this chapter, appearing as early as 1805 and as late as 1890, in contexts ranging from pulp descriptions of murder trials[162] to professional manuals for legal officials like judges and justices of the peace.[163]

Others appear in the context of criticism leveled at proposed or existing laws or policies abridging what we would today understand to be basic civil or political rights. While this includes articles discussing freedom of speech, assembly, and voting, some of the more heated examples of the rhetoric of international crime being used frame policy critiques are in reference to laws or policies that did or would have discriminated on the basis of race, ethnicity, or nationality. In an 1868 article reporting on local resistance to reconstruction-era Federal legislation, a columnist for South Carolina's *Charleston Daily News* reported that a local group of conservative Democrats had passed resolutions denouncing provisions requiring former

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[161] William Blackstone, *Commentaries on the Laws of England: In Four Books*, vol. 4 (A. Strahan and W. Woodfall, 1795), 177.

[162] See, e.g., *Trial of Isaac Spencer, Before the Supreme Judicial Court of Maine, For the Murder of Reuben McPhetres, of Orono*. Bangor: Nourse & Smith, 1835. *The Making of Modern Law: Trials, 1600–1926* (accessed August 29, 2023). https://link.gale.com/apps/doc/Q0101010496/DSLAB?xid=4bb57393&pg=18. See also *The Cold Spring Tragedy: Trial and Conviction of Mrs. Nancy E. Clem for the Murder of Jacob Young and Wife*. Indianapolis, Indiana: Published by A. C. Roach, Journal Building, 1869. *Crime, Punishment, and Popular Culture, 1790-1920* (accessed August 29, 2023). https://link.gale.com/apps/doc/ATKAHQ962050786/DSLAB?xid=cd3e4e08&pg=1.

[163] See, e.g., Potter, Henry. *The office and duty of a justice of the peace … according to the laws of North-Carolina*. Raleigh: J. Gales, 1816. *The Making of Modern Law: Legal Treatises, 1800–1926* (accessed August 29, 2023). https://link.gale.com/apps/doc/F0106191103/DSLAB?xid=e8150785&pg=147. Also see Wright, Robert Emmet. *The Pennsylvania justice : a practical digest of the statute and common law of Pennsylvania*, Philadelphia: R.H. Small, 1839. *The Making of Modern Law: Legal Treatises, 1800–1926* (accessed August 29, 2023). https://link.gale.com/apps/doc/F0105529238/DSLAB?xid=7779ba17&pg=1.

Confederate states to give Black Americans the right to vote as "vindictive and partisan" acts and "a crime against civilization and humanity."[164] In an 1879 address to the Ohio State House regarding a bill passed by the U.S. House and Senate restricting immigration from China, Ohio State Representative James Dalzell argued that legislation not only would "unjustly discriminate" against the Chinese but would violate existing treaty obligations between the U.S. and China, and as such described the proposed legislation as "unchristian," "un-American," and "a crime against civilization and sacred treaty obligations."[165] In an 1898 article for *Political Science Quarterly* discussing regulations requiring prospective U.S. voters to satisfy "educational qualifications" or "literacy tests" – regulations that were regularly used to disenfranchise minority groups and in particular Black Americans – George H. Haynes writes that the imposition of "literary qualifications for the exercise of any right, is a crime against humanity."[166]

Finally, a number of these examples appear in what might be understood as "moral outrage" articles; those describing of acts that were either nonviolent offenses or not prohibited

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[164] *The Charleston Daily News. [volume]* (Charleston, S.C.), 30 March 1868. *Chronicling America: Historic American Newspapers*. Lib. of Congress. <https://chroniclingamerica.loc.gov/lccn/sn84026994/1868-03-30/ed-1/seq-1/>

[165] *The Wellington enterprise. [volume]* (Wellington, Ohio), 27 Feb. 1879. *Chronicling America: Historic American Newspapers*. Lib. of Congress. <https://chroniclingamerica.loc.gov/lccn/sn84028271/1879-02-27/ed-1/seq-1/>. This 1879 bill would in fact be vetoed by Republican President Rutherford B. Hayes for largely these reasons. Just three years later, though, Congress passed and Hayes' successor, Republican President Chester A. Arthur signed into law the 1882 Chinese Exclusion Act, legislation that largely preserved the terms of the bill vetoed in 1879. "Milestones: 1866–1898 - Office of the Historian," accessed August 30, 2023, https://history.state.gov/milestones/1866-1898/chinese-immigration#.

[166] Haynes, George H. "Educational qualifications for the suffrage in the United States." *Political Science Quarterly* 13, no. 3 (1898): 495-513, at 495.

by law but either violated a social taboo or, in the author's account, signaled a degradation in public morality. One British columnist, for example, bemoaned the high rates of "imprudent and premature marriage" among the working poor, referring to this trend (in language that, to modern eyes, reads with almost comical levels of snobbery) as not only a societal problem but "a high crime against humanity and virtue."[167] A columnist writing in the Madison, Wisconsin *Evening Star,* reported the story of a married man who married his niece without having divorced his wife, thereby committing both incest and bigamy, as having committed a "great crime against the laws of humanity and State."[168] Another columnist, in a particularly florid account of a woman who had posed as a widow to receive money from a local parish, described this act of fraud as not only a crime but a "crime… against all humanity."[169] Another, writing for Wilmington, Delaware's *Daily Republican*, warned readers about the dangers of Mormonism, writing that "polygamy is its chief cornerstone" and describing that practice as "a crime against civilization" whose aim was to "re-establish the barbarism of the past centuries by destroying the institutions upon which the stability of the Nation depends."[170]

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[167] "Premature Marriages", *Gateshead Observer,* reprinted as part of a "Miscellaneous" column in the *Bradford Observer*. "Miscellaneous." *Bradford Observer*, Dec. 13, 1849. Note here that "premature marriage" here is not referring to marriages involving an underage person, but rather marriages undertaken between individuals who are poor, or at least insufficiently affluent. "Working men," the author writes, "should learn the true lesson, that marriage is honourable only when a man can provide for a household."

[168] "Elopement in High Life." *Daily Evening Bulletin*, November 15, 1872. *Nineteenth Century U.S. Newspapers* (accessed August 29, 2023). https://link.gale.com/apps/doc/GT3000253976/DSLAB?xid=d48f4a91.

[169] "Middlesex Sessions, June 12." *Morning Post*, 13 June 1821. British Library Newspapers, link.gale.com/apps/doc/R3209733774/BNCN?u=uclosangeles&sid=BNCN&xid=633d666c. Accessed 13 Apr. 2021.

[170] *Daily Republican*, 1 February 1882. *Chronicling America.* https://chroniclingamerica.loc.gov/lccn/sn84038114/1882-02-01/ed-1. Accessed 30 May 2023.

4 Analysis

What insights can we draw from this eclectic archive of texts? I'd suggest that there are at least two notable takeaways that we can draw from the archival evidence presented here.

4.1 Prevalence

The first thing one notices about the myriad examples of 19th century popular usage of phrases like "crime[s] against humanity" or "international crime[s]" catalogued above is just how many there are. This finding alone is enough to challenge the common wisdom among international legal historians and international criminal law scholars that phrases like these – and indeed the concept of a supranational or international crime – are artifacts of the 20th century. Indeed, the prevalence with which these phrases appear in quotidian texts of the 19th century suggests that the concept of a supranational or universal crime was not nearly so alien to audiences of this era as has been previously assumed.

There are a number of reasons why this finding should not be all that surprising, despite the common academic wisdom on this point. The 19th century saw a number of technological, social, and political developments that not only fostered a growing concern with international events among the reading publics of both the U.S. and Britain, but also an increasing tendency to view transgressions through the lens of crime and punishment.

4.1.1 The Growth of "International Concern"

A number of significant technological and social shifts in the 19th century allowed the average person in the U.S. or Britain to be much more aware of events taking place around the globe than in previous generations. The first of these shifts was a rapid increase in the amount of written material available to the average literate person in both the U.S. and Britain. Although

mass printed journals, pamphlets, and other forms of print media had been a familiar part of public life for centuries, the invention of the steam-driven printing press in 1810 led to dramatic increase in the amount of written material available to literate consumers. The introduction of steam-powered printing presses increased the rate at which pages could be printed, increasing the potential reach of any given publication, and lowered the per-unit cost of production. And, as steam press technology became more ubiquitous, start-up and maintenance costs fell, which lowered the bar to entry and fostered the creation of a flurry of new newspapers, periodicals, print shops and other venues.[171] In the UK, for example, many cities and towns saw the publication of multiple local newspapers, and larger metropolitan papers saw significant increases in their circulation and reach.[172]

The second of these shifts was a rapid increase in the amount and timeliness of information about foreign events that resulted from a number of similarly revolutionary advancements in communication technology. Technologies like the telegraph and the first trans-oceanic steamships, both introduced in the 1830s and rolled out through 1840s and 1850s, allowed ideas and correspondence to circulate much faster, even over large distances.[173] The proliferation of photography starting in the 1840s allowed readers for the first time to see images of events in

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[171] Lansdall-Welfare et al., "Content Analysis of 150 Years of British Periodicals," 462.

[172] See, e.g. Nelson, "A History of Newspaper: Gutenberg's Press Started a Revolution," *The Washington Post*, February 11, 1998, https://www.washingtonpost.com/archive/1998/02/11/a-history-of-newspaper-gutenbergs-press-started-a-revolution/2e95875c-313e-4b5c-9807-8bcb031257ad/. (Describing how, after the *Times of London* installed its first steam-powered press in 1814, allowing it to print up to 1,100 sheets per hour, the "newspaper industry was transformed virtually overnight as production increased tenfold.")

[173] See Yrjö Kaukiainen, "Shrinking the World: Improvements in the Speed of Information Transmission, c. 1820–1870," *European Review of Economic History* 5, no. 1 (April 2001): 1–28, https://doi.org/10.1017/S1361491601000016.

far-flung corners of the globe.[174] Together, these technologies brought accounts of violence and depredations being committed abroad home to reading publics in Europe and the West. The immediacy of these accounts, and the increasing ability for members of the public to communicate and organize amongst themselves, led to some of the first examples of a sort of "CNN effect" *avant la lettre*.[175] First-hand accounts of battles in the Greek civil war, transmitted by various Western news outlets, contributed to the formation of a trans-national movement of advocates for Greek independence (and British intervention to guarantee it).[176] Similarly, slave narratives recorded and circulated in abolitionist pamphlets and major Western newspapers reinforced public pressure on leaders across Europe and the New World – particularly in Britain and the U.S. – to outlaw the slave trade at home and commit resources to suppressing it abroad.[177]

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[174] See, e.g., Simone Natale, "A Mirror with Wings: Photography and the New Era of Communications," in *Photography and Other Media in the Nineteenth Century*, by Nicoletta Leonardi and Simone Natale (Penn State Press, 2018).

[175] This term, widely attributed to Warren Strobel, refers to the phenomenon of media coverage of atrocities leading to increased public awareness and pressure. See Warren Strobel, "The CNN Effect," *American Journalism Review*, May 1996, https://go.gale.com/ps/i.do?id=GALE%7CA18328925&sid=googleScholar&v=2.1&it=r&linkaccess=abs&issn=10678654&p=AONE&sw=w. See also Piers Robinson, "The CNN Effect: Can the News Media Drive Foreign Policy?," *Review of International Studies* 25, no. 2 (1999): 301–9, https://www.jstor.org/stable/20097596.

[176] This movement, generally referred to "philhellenism," counted among its members notable figures like Lord Byron, Jeremy Bentham and David Ricardo. See Gary Jonathan Bass, *Freedom's Battle: The Origins of Humanitarian Intervention* (New York: Alfred A. Knopf, 2008), 47–48, http://www.vlebooks.com/vleweb/product/openreader?id=none&isbn=9780307269294.

[177] Admittedly, the same technological changes that allowed for the amplification and proliferation of information about crimes that – because of their scale, their viciousness, or their transnational consequences – were properly of international concern also allowed for the rise in coverage of crimes that became objects of international concern but perhaps should not have been. See Knepper, 2010, p. 13. ("Amplification in mass circulation newspapers made it

The third shift was a similarly rapid increase in the number of people in both countries that had the educational attainment to be able to take advantage of the growing availability of written information about events abroad. For various reasons, the reading public in both the U.S. and Britain expanded significantly, growing in size, and expanding to include middle- and working-class sectors of society that previously included far fewer "day-to-day readers."[178] As to size, both countries saw significant increases in literacy during this period. Between 1800 and 1870, the percentage of Britain's population that could read and write jumped from around 50% to 76%, and by 1900 had risen to nearly 98%.[179] In the United States,[180] estimates of literacy

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difficult to assess the reality of the new threat. Local and national crime stories became international crime stories in the late nineteenth century.")

[178] Richard D. Altick, *The English Common Reader: A Social History of the Mass Reading Public, 1800-1900*, 2nd ed (Columbus: Ohio State University Press, 1998), 7, https://archive.org/details/englishcommonrea0000alti_f9a5/page/82/mode/2up.

[179] See Amy J. Lloyd, "Education, Literacy and the Reading Public" (Gale Primary Sources, 2007), https://www.gale.com/binaries/content/assets/gale-us-en/primary-sources/intl-gps/intl-gps-essays/full-ghn-contextual-essays/ghn_essay_bln_lloyd3_website.pdf. See also David Franklin Mitch, *The Rise of Popular Literacy in Victorian England: The Influence of Private Choice and Public Policy* (Philadelphia: University of Pennsylvania Press, 1992).

[180] It should be noted here that although all estimates of population-level attributes like literacy necessarily elide some degree of variation by geography, social class, or other variable characteristics, estimates of overall U.S. literacy during this period have a particularly high degree of variance – notably across the north vs. south geographical divide and racial classification and enslaved status. Throughout the century, literacy rates among all non-enslaved U.S. nationals were consistently higher in the more industrialized northern states than in the more agrarian southern states. In 1850, for example, roughly 93% of adults in northern states could read and write, whereas in southern slave states only 80% of the free population and only 57% of the overall population (including free and enslaved populations) could do so. See Beth Barton Schweiger, "The Literate South: Reading before Emancipation," *Journal of the Civil War Era* 3, no. 3 (2013): 333, https://www.jstor.org/stable/26062071. Gaps in estimated literacy between Black or African-American populations and native-born white populations were even more striking. Census records suggest, for example, that in 1870 overall literacy among native-born white American nationals was roughly 97% but just 19% among African Americans. See William Collins and Robert Margo,

among native-born free Americans rose from roughly 75% in 1800 to 89% in 1850, and reached nearly 94% by 1900.[181] These increases in literacy rates, combined with the exponential growth in overall population in both countries over the course of the century,[182] to rapidly expand the potential audience for written material in both countries. And, due to the confluence of various economic and social factors – e.g., increasing industrialization leading to a need for more educated workers capable of reading and following written instructions, and improvements in access to elementary education through a proliferation of both public and private schools – the reading publics in both countries now grew beyond the affluent and well-connected to include large portions of the working class, professional class, and the "ever-expanding" bourgeoisie.[183]

"Historical Perspectives on Racial Differences in Schooling in the United States" (Cambridge, MA: National Bureau of Economic Research, June 2003), 113–14, https://doi.org/10.3386/w9770. While this data is itself not entirely reliable given the cursory nature of census questions on literacy and evidence of bias in their application to non-white populations, it serves as a rough illustration of this significant variation.

[181] See "Literacy from 1870 to 1979: Excerpts Are Taken from Chapter 1 of 120 Years of American Education: A Statistical Portrait" (National Center for Education Statistics, 1993), https://nces.ed.gov/naal/lit_history.asp.

[182] During the first half of the 19th century alone, the population of Britain doubled, going from 8.9 million to 17.9 million, and in the second half it nearly doubled once again, rising to 32.5 million in 1901. See Altick, *The English Common Reader*, 81. Population growth in the United States was even more rapid than in Britain, growing nearly five-fold in the first half of the century, growing from just over 5 million in 1800 to just over 23 million in 1850. Then between 1850 and 1900, the population tripled, going from approximately 23 to 76 million people. See Rachel S. Franklin and Matthias Ruth, "Growing Up and Cleaning Up: The Environmental Kuznets Curve Redux," *Applied Geography (Sevenoaks, England)* 32, no. 1 (January 2012): 29–39, https://doi.org/10.1016/j.apgeog.2010.10.014.

[183] Altick, *The English Common Reader*, 7. Indeed, according to Altick, this expansion in literacy and literary consumption was particularly notable among two particular class segments: lower–middle class workers (e.g., shopkeepers, skilled workers, clerks, and "the better grade of domestic servants") and the professional or white-collar workers that constituted "the middle class proper" (e.g., physicians, civil servants, and teachers). With reading skills sharpened by the demands of their position or the cultural traditions in their profession, and the disposable income necessary to buy cheap books and periodicals, these workers formed and reshaped the "new mass audience for printed matter." Altick, 83.

With the rise of this newly-expanded reading public in both the U.S. and Britain came an increase in the proportion of the populace of both countries that were aware of events and policies that did not have immediate tangible effects on their lives and an increase in the weight of public opinion and public scrutiny on policymakers' actions both at home and abroad.

4.1.2 The Growth of Concern with "International Crime" and International "Crime"

Alongside the expansion of the reading public in both Britain and the U.S., and the growing availability of written accounts of world events international, the 19th century also witnessed a significant rise in the use of "crime" as a rhetorical frame, shaping public discourse and social anxieties. This trend of "criminal legal language" steadily spilling over and proliferating into the "images, debates, and controversies" at the center of public opinion began in the last years of the 18th century, but it accelerated over the course of the following one.[184] The same technological innovations and social shifts that fostered the proliferation of the popular press and the growth of the reading public in both Britain and the U.S. – industrialization, long-distance communication and transportation infrastructure, industrialization, and urbanization – brought with them an increasing concern about malicious uses of these "world shrinking" technologies. Government officials, academics, and social critics alike pointed to the potential of these technologies to make it more difficult for authorities to respond to existing forms of criminal behavior and to enable new kinds of "transnational crimes."[185] Newly professionalized

[184] Wilf, *Law's Imagined Republic*, 7.

[185] Paul Knepper, *The Invention of International Crime* (London: Palgrave Macmillan UK, 2010), 4–5, https://doi.org/10.1057/9780230251120.

classes of police officials, prison authorities, and criminologists[186] joined lawyers and elected officials, warning of a "generation of criminals empowered by the very latest advances in science."[187] And amplification of these warnings in widely-circulated newspapers – particularly during a period in which fierce competition among print media sources only heightened the temptation to employ scandal and sensationalism to attract readers[188] – made it difficult for readers to assess the reality of the new threat as easy access to reports of about crimes occurring outside of one's local community blurred the lines between local, national, and international crimes.[189]

This perpetual salience of crime discourse at home, the proliferation of professional discourses framing crime as a "serious social problem" and emphasizing the importance of

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[186] The latter half of the century saw the formation or reformation of a number of fields of expertise related to crime and social order, not least of which being the professionalization of policing, widespread efforts at prison reform, and the creation of criminology, a new field of academic study that promised an "exact and scientific method for the study of crime." David, Garland. "The Criminal and His Science: A Critical Account of the Formation of Criminology at the End of the Nineteenth Century." The British Journal of Criminology 25, no. 2 (April 1985): 109–37. See also, Pasquale Pasquino, "Criminology: The Birth of a Special Knowledge," in *The Foucault Effect: Studies in Governmentality*, ed. Graham Burchell, Colin Gordon, and Peter Miller (University of Chicago Press, 1991), 35; Richard F. Wetzell, *Inventing the Criminal: A History of German Criminology, 1880-1945*, Studies in Legal History (Chapel Hill: University of North Carolina Press, 2000), 369.

[187] Paul Knepper, *The Invention of International Crime* (London: Palgrave Macmillan UK, 2010), 18, https://doi.org/10.1057/9780230251120.

[188] On this point, *see, e.g.*, Gretchen Soderlund, *Sex Trafficking, Scandal, and the Transformation of Journalism, 1885-1917* (Chicago ; London: The University of Chicago Press, 2013), 16–18; Michael C. Emery, Edwin Emery, and Nancy L. Roberts, *The Press and America: An Interpretive History of the Mass Media* (Allyn and Bacon, 1996), 97.

[189] Knepper, *The Invention of International Crime*, 13.

remediation and "improving the character of offenders,"[190] and increased access to information about violence occurring abroad all combined to foster a tendency to view global events through the lens of crime and punishment and to see the infliction of violence and suffering abroad as an issue of legitimate international concern.

4.2 Similarity in Usage and Subject Matter to Present Discourse

Another striking pattern that one can observe in the examples of 19th century uses of terms supranational or universal crimes of the examples of 19th century authors using phrases we today would associate with international criminal justice is that these authors generally used these phrases in ways not all that dissimilar to how they are used in political and public discourse today. While it is true, of course, that the use of phrases describing supranational or universal crimes in 19th century discourse was much broader and less standardized even than their uses in popular speech today, many of the examples discussed in the previous section seem to fulfill both elements of the contemporary conceptualization of "international crime" laid out by Nessam McMillan that were discussed in the first chapter. To wit, they imply, even if merely rhetorically, the existence of a "distinctly 'international' [or supranational or universal] form of crime and justice" and the existence and the assumed existence of an "international constituency united – in part – through its opposition to extreme suffering."[191]

In the various references to slavery, war, violence against civilians, torture, and other forms of violence – and even in the odd or idiosyncratic references to other forms of

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[190] Garland, "The Criminal and His Science: A Critical Account of the Formation of Criminology at the End of the Nineteenth Century," 109–37.

[191] McMillan, "Imagining the International," April 2016, 164.

transgression like murder, economic policies, or bigamy – as "crime[s] against humanity" or "against civilization," we can see the invocation of a category of crimes that is, if not distinctly international, at the very least not solely national. Put another way, through framing them not only as crimes but as crimes not against a state but against a larger and more diffuse subjectivity like "humanity," these 19th century writers and speakers "code" the acts to which these usages refer (e.g., slavery, mass killings, etc.) as "crimes" that transcend national boundaries.

At the same time, most all of these examples also imply the existence of a constituency that is decidedly international – or at least trans- or supranational – united in part through its opposition to these instances of extreme suffering. The specific bounds and definitional characteristics vary, of course, from example to example. Indeed, the use of the phrases examined here, and particularly their compound variations (e.g., "a crime against humanity and civilization"[192]), illustrate a variety of overlapping collective subjectivities (e.g., humanity, civilization) that were taking shape, or taking new shape, over the course of the century. The grounds for inclusion in that transnational constituency – humanity, civilization, etc. – being defined in part through opposition to extreme suffering. Interestingly, across the uses of "crime[s] against humanity" and "crime[s] against civilization" included in this corpus, one can see that the use of both of these phrases during this period already exhibited the double inherent meaning that David Luban pointed to in his analysis of the contemporary use of the phrase "crimes against humanity" – signifying not only offenses that are so serious as to aggrieve all members of a collectivity (humanity, civilization, etc.), but also to violate the shared qualities

[192] "Events." *The Comet*. July 09, 1881. https://chroniclingamerica.loc.gov/lccn/sn85038603/1881-07-09/ed-1/.

upon which that collectivity rests.[193] We can see the same ambiguity between humanity as noun and as adjective, for example, in an 1815 description of Napoleon's ill-fated charge to once again assume power printed in the *Morning Chronicle*, for example, when it describes him as being "in a state of revolt against Humanity itself."[194] Or in the phrasing adopted by Reverend T.S Hughes in an 1822 address to the House of Commons in which he argues for British intervention in the Greek civil war, describing the struggle between Greek separatists and Ottoman forces as a "struggle [] between oppression, tyranny, and injustice, arranged against humanity, civilization, and Christianity."[195] In coverage of the 1860 Druze/Maronite Syrian civil war, the failure of the Ottomans to prevent the outbreak of sectarian violence was met with assertions that "outraged humanity calls for vengeance on the man by whose means and at whose instigation such barbarities have been committed"[196] and the joint intervention by European Powers was framed as both a "service to Syria and to the cause of humanity."[197] Thereby this humanity, or civilization, is often characterized, whether explicitly or implicitly, precisely through its opposition to the acts of violence or subjugation being described as a supranational or universal crime.

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[193] David Luban, "A Theory of Crimes against Humanity," *Yale J Int'l L,* 2004, 86, http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/yjil29&section=7. This double meaning is also emphasized by Norman Geras in his work on crimes against humanity in the field of normative political philosophy, though Geras goes on to give a detailed typology of further possible interpretations and nuances under each of the two readings in Luban's dualism. See Geras, *Crimes Against Humanity: Birth of a Concept*, 39–50.

[194] "The Morning Chronicle." *Morning Chronicle*, March 18, 1815. British Library Newspapers (accessed April 13, 2021). https://link.gale.com/apps/doc/BA3207125351/BNCN?u=uclosangeles&sid=BNCN&xid=db6c1071.

[195] "Multiple News Items." Bury and Norwich Post, July 17, 1822. British Library Newspapers (accessed April 13, 2021). https://link.gale.com/apps/doc/R3212614052/BNCN?u=uclosangeles&sid=BNCN&xid=31cb8d1f.

[196] "The Fearful Massacre of the Christians", Morning Post, 7 September 1860.

[197] "The Syrian Intervention", Saturday Review, 11 August 1860.

5 Conclusion

The conceptual category of "universal" or supranational crimes – crimes that are both of universal concern and, arguably, give rise to a universal right or duty to punish – continues to play an outsized role in the contemporary popular imagination. Journalists, pundits, national leaders, and activists alike commonly use the rhetoric of international crime to describe atrocities or grave violations of human rights committed abroad, and often analyze potential policy responses with an eye to the prosecution and punishment of those deemed to be personally culpable.[198] One can find examples of this rhetorical frame deployed in reporting, opinion columns, official announcements, blog entries, and even social media posts describing any number of recent world events.[199]

In and among these examples, we can see evidence that the codified legal definitions of

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[198] *See, e.g.* Human Rights Watch, "'The Boot on My Neck': Iranian Authorities' Crime of Persecution Against Baha'is in Iran," *Human Rights Watch*, April 1, 2024, https://www.hrw.org/report/2024/04/01/boot-my-neck/iranian-authorities-crime-persecution-against-bahais-iran (Describing the Iranian government's "spectrum of abuses" towards its largest non-Muslim minority as a "crime against humanity"); J. Lester Feder, "Opinion | 'Wear It or We Will Beat You to Death,'" *The New York Times*, March 15, 2024, sec. Opinion, https://www.nytimes.com/2024/03/15/opinion/ukraine-russia-putin-crimes.html.

[199] Interestingly, one can even find recent usage of some of the more archaic of the phrases discussed in these examined in the course of this chapter. In a 2015 article, for example, a writer for the *New York Post* described the destruction of a complex of ancient tombs in the Syrian city of Palmira as a "crime against civilization." Associated Press, "ISIS Destroys Ancient Tombs in Latest Crime against Civilization," September 4, 2015, https://nypost.com/2015/09/04/isis-destroys-ancient-tombs-in-latest-crime-against-civilization/. And the writer of a 2017 story for the *Daily Mail* described the conviction of a Syrian man in Sweden for "crimes against the law of nations." Kelly Mclaughlin, "Syrian Asylum Seeker Is Jailed for Life in Sweden," Mail Online, February 16, 2017, http://www.dailymail.co.uk/~/article-4230578/index.html.

many of these phrases have percolated out into popular discourse.[200] But one can also find evidence that phrases like "crimes against humanity" and "international crimes" continue to be the subject of a good deal of popular law talk popular, political, and non-legal professional/academic discourse. This includes, of course, any number of facetious or hyperbolic uses of these terms– such as in complaints about a given show being removed from popular streaming services[201] or aesthetic critiques of new clothing items.[202] But it also includes the much larger category of non-expert writers using these phrases to refer to the same sorts of atrocities and large-scale violence that were being referenced by contemporary writers' 19th century counterparts in the various examples discussed in this chapter. And one can also find a number of instances in which legal actors use these terms in ways intended to stretch their bounds enough to encompass acts that would otherwise not fall within their commonly accepted technical definitions.[203]

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[200] See, e.g. "Syrian President's Uncle to Stand Trial in Switzerland for Crimes against Humanity," France 24, March 12, 2024, https://www.france24.com/en/live-news/20240312-syrian-president-s-uncle-to-face-swiss-trial-for-war-crimes; Marija Tausan, "Serb Ex-Fighters Plead Not Guilty to Attack on Bosniak Villagers," *Balkan Insight* (blog), February 1, 2024, https://balkaninsight.com/2024/02/01/serb-ex-fighters-plead-not-guilty-to-attack-on-bosniak-villagers/.

[201] "(1) Cameron Burns on X: 'It Is a Crime against Humanity That The Burbs Doesn't Appear to Be Streaming Anywhere Right Now and Can't Even Be Bought on iTunes or Amazon. Https://T.Co/Vqdkvsr0YC' / X," X (formerly Twitter), May 16, 2024, https://x.com/cammo101/status/1791194340791816234.

[202] Afouda Bamidele, "New Crocs Cowboy Boots Called A 'Crime Against Humanity,'" Yahoo Entertainment, October 6, 2023, https://www.yahoo.com/entertainment/crocs-cowboy-boots-called-crime-170732087.html.

[203] *See, e.g.*, Balakrishnan Rajagopal, "Opinion | Domicide: The Mass Destruction of Homes Should Be a Crime Against Humanity," *The New York Times*, January 29, 2024, sec. Opinion, https://www.nytimes.com/interactive/2024/01/29/opinion/destruction-of-homes-crime-domicide.html; AFP-Agence France Presse, "Serbia Calls Kosovo Policy On Its Currency 'Crime Against Humanity,'" February 8, 2024, https://www.barrons.com/news/serbia-calls-kosovo-policy-on-its-currency-crime-against-humanity-923cc7e7;

Examining the ways in which terms that invoke one or another form of supranational or universal crime have taken shape and continue evolve in the realm of popular law talk is important both because of their potential to prefigure or presage future developments in international criminal law, but also because popular understandings of these terms implicitly shape the limits of what acts of violence were understood as within the bounds of legitimate international concern. Popular law talk, in fact, may be of unique importance in helping to shape the political and legal field of possibility in this area of the law. These crimes are by definition committed against not only their direct victims but also the collective subjectivities implied and presupposed in the various phrases used to identify them – humanity, civilization, or the world community. It is perhaps fitting that these same constituencies are referenced in the definition and redefinition of the category of which harms qualify as legitimate objects of our collective concern.

Reuters, "Pope Francis Says War Is in Itself a Crime against Humanity," *Reuters*, January 14, 2024, sec. Europe, https://www.reuters.com/world/europe/pope-francis-says-war-is-itself-crime-against-humanity-2024-01-14/.

CHAPTER 3: CREATING INTERNATIONAL CRIMES – PIRATES, SLAVERS, AND THE EMERGENCE OF THE SUPPRESSION TREATY

Abstract

Before and during the 19th century, legal actors experimented with international criminalization – the processes and practices by which international policymakers, advocates, and other interested parties create new crimes of international concern. In this chapter, I discuss the emergence and proliferation of suppression treaties, a key legal tool with which international actors experimented in creating and codifying new international crimes through bilateral or multilateral agreements. I begin by presenting new evidence showing that examples of this kind of international agreement can be found from as early as the mid-17th century – more than a century before the earliest example discussed in the existing literature. I then discuss the explosive growth in the number of suppression treaties starting in the early 19th century, as British advocates and policymakers adopted and adapted this previously obscure legal tool as a means to amend the international legal order in ways that would permit and foster that country's efforts to suppress the African and Arab slave trades.

1 Chapter Introduction

How are crimes of international concern[1] created? How can states – both the subjects

[1] As mentioned in the introductory chapter of this dissertation, for the purposes of this project I define this category broadly to encompass the full range of crimes, or acts of violence or cruelty, that are for whatever reason severe or widespread enough to merit the attention of the international community.

and authors of the Law of Nations – exercise the legislative jurisdiction necessary to establish new "crimes of international concern" (supranational/universal crimes)? Both of these questions address the issue of international criminalization[2] – a particular form of international lawmaking in which legal actors adopt the lens of criminality in framing acts of international concern; translating from the domestic context the impulse towards "the use of criminal law to address a social problem."[3] In this chapter, I look at the ways in which 19th century politicians, diplomats, and lawyers engaged with these questions as they sought to define and expand the category of acts that could form the basis for international concern. In particular, I trace the emergence and spread of one particular means of international criminalization – the suppression treaty.

In contemporary international law, a "suppression treaty"[4] (referred to as such because its objective is to suppress a given activity)[5] is an agreement between two or more countries that

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[2] Criminalization here should be understood to refer, per Aaronson and Shaffer, to the "set of processes through which actors construct legal norms that label certain activities as crimes." Ely Aaronson and Gregory Shaffer, "Defining Crimes in a Global Age: Criminalization as a Transnational Legal Process," *Law & Social Inquiry* 46, no. 2 (May 2021): 457, https://doi.org/10.1017/lsi.2020.42.

[3] Aaronson and Shaffer, 462.

[4] A terminological note: there is a good deal of slippage in the terms used in the academic and legal literature to refer to this genre of international agreements, with sources referring to them as "suppression treaties," "suppression conventions," "prohibition treaties," and "prohibition conventions," among other terms. When discussed in concert with the legal and institutional structures that grow up around their enforcement and interpretation, are commonly referred to as "suppression regimes," they are also commonly called "suppression regimes." For the purposes of this project, I treat these terms as largely interchangeable but will generally use the term suppression treaties.

[5] Roger S. Clark, "International Criminal Law," in *A Companion to European Union Law and International Law*, ed. Dennis Patterson and Anna Södersten, 1st ed. (Wiley, 2016), 535, https://doi.org/10.1002/9781119037712.ch35. It should be noted, despite this naming convention, that the goal of suppressing a given activity need not be the sole or even the primary focus of a given treaty for it to be considered a suppression treaty. While many of the more commonly cited examples of suppression conventions – such as the 1929 Convention for Suppression of Counterfeiting Currency or the 1970 Convention on the Suppression of Unlawful Seizure of Aircraft – are single-

contains one or more provisions that obligate signatory states to enact and enforce domestic legislation or regulations that criminalize a given form of conduct.[6] These treaties also often contain provisions obligating signatories to provide mutual assistance in the enforcement of these criminal prohibitions. Suppression treaties may be used to create new international law obligations for the criminalization and/or enforcement of domestic criminal laws against a given activity or, in cases where there are already customary or positive international law obligations on the subject, to define and clarify signatory states' duties under existing customary international law obligations.[7] Similarly, suppression provisions may be used to compel signatory parties to criminalize actions not previously prohibited by their domestic laws or, if all signatory parties have already enacted domestic prohibitions on the activity at issue, to reinforce and encourage the enforcement of signatories' existing domestic laws on the subject.[8] Such

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issue treaties focused solely on suppression of the activity referenced in their titles, suppression clauses are commonly included in treaties with a broader scope or focus on other topics. *See* International Convention for the Suppression of Counterfeiting Currency and Protocol. Signed at Geneva, April 20, 1929 [1931] LNTSer 45; 112 LNTS 371. Available at http://www.worldlii.org/int/other/LNTSer/1931/45.html. Convention for the Suppression of Unlawful Seizure of Aircraft. Signed at the Hague on 16 December 1970. 800 UNTS 105. Available at https://treaties.un.org/doc/db/terrorism/conv2-english.pdf. For example, although it is generally dedicated to issues of property and international trade, the 1994 Agreement on Trade-Related Aspects of International Property Rights (TRIPS) can be classified as a suppression agreement as it includes a provision obligating signatory states to "provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyrights piracy on a commercial scale." See TRIPS agreement Article 61, available at https://www.wto.org/english/docs_e/legal_e/27-trips_05_e.htm#5.

[6] Boister, "'Transnational Criminal Law'?," 962. "The suppression conventions impose obligations on state parties to enact and enforce certain municipal offences.")

[7] Roger S. Clark, "Treaty Crimes," in *The Cambridge Companion to International Criminal Law*, ed. William A. Schabas (Cambridge University Press, 2016), 216.

[8] Clark, 217.

treaties are also useful for harmonizing domestic criminal law provisions, promoting consistency in the definition of crimes across different national jurisdictions and facilitating cooperation among states in investigating, prosecuting, and extraditing alleged offenders.

Here I document the earliest uses of this legal tool, showing that suppression treaties were at the heart of the first successful instances of international criminalization. By analyzing the origins of this genre of international agreement and its spread, first from treaties of peace and commerce to treaties of commerce and slavery suppression, then to treaties and treaty provisions aiming to legislate individual criminal responsibility for various other acts "of international concern," I uncover the early evolution of what became one of the core tools of international criminal law.

The analysis in this chapter proceeds as follows. First, I present new evidence suggesting that examples of this kind of international agreement can be found from as early as the mid-17th century, more than a century before the earliest example discussed in the existing academic literature. Then I discuss the explosive growth in the number of extant suppression treaties starting in the early 19th century, as British advocates and policymakers adopted and adapted this previously obscure legal tool as a means to establish a foundation in the international legal order in pursuit of their goal to suppress the African and Arab slave trades.

1.1 A Theoretical Note

As a matter of international criminal law jurisprudence and theory, criminal offenses that have been enacted or defined according to suppression provisions in a bilateral or multilateral

treaty are commonly referred to as "treaty crimes."[9] The status of such "treaty crimes" in the field of international criminal law is widely debated. Most contemporary scholars have embraced, if sometimes hesitantly, a distinction between treaty crimes (commonly treated as roughly synonymous with "transnational crimes"[10] or "crimes of international concern"[11]) and "true international crimes"[12] (also referred to as the "core international crimes"[13] or international crimes "*stricto sensu*"[14]). Under this framework, crimes in the latter category – genocide, war

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[9] Clark, 214. It is unclear whether it is limited to instances in which suppression treaties have been concluded in order to promote the suppression of an activity that was *not already the subject of* an existing obligation under customary international law, or whether it also extends to crimes that defined by suppression treaties enacted to reinforce an existing customary international law obligation. International criminal law expert Kai Ambos, a proponent of the differentiation of these "crimes of international concern" and international crimes *stricto sensu*, for example, explicitly endorses the former more restricted view in the definition of treaty crimes he provides in his treatise on the subject, defining treaty crimes as "a series of other crimes whose suppression is also of interest to the international community and which are the objects of multilateral treaties ('treaty-based') but for which no supranational criminal jurisdiction exists." Kai Ambos, *Treatise on International Criminal Law. Vol. 2: The Crimes and Sentencing*, 1. ed (Oxford: Oxford Univ. Press, 2014), 222. Other scholars treat crimes like genocide or war crimes, which have been codified in multilateral international agreements but are also widely understood to prohibited under customary international law or general principles of international law, as *both* treaty crimes *and* international crimes *stricto sensu*. See, e.g. Schwöbel-Patel, "The Core Crimes of International Criminal Law." It is largely due to this ambiguity that the term "treaty crimes" has begun to fall out of favor among some international criminal law scholars.

[10] See, e.g. Neil Boister, *An Introduction to Transnational Criminal Law*, 1st ed (Oxford, U.K: Oxford University Press, 2012); Neil Boister, *Routledge Handbook of Transnational Criminal Law*, 1st ed. (Routledge, 2014), https://doi.org/10.4324/9780203380277; Boister, "'Transnational Criminal Law'?"

[11] Cryer, "The Doctrinal Foundations of International Criminalization," 109.

[12] Kai Ambos, "Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?," *Leiden Journal of International Law* 24, no. 3 (September 2011): 667, https://doi.org/10.1017/S0922156511000215.

[13] Cryer, "The Doctrinal Foundations of International Criminalization," 108.

[14] Claus Kreß, "International Criminal Law," in *Max Planck Encyclopedias of International Law*, March 2009, https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1423?prd=EPIL; Claus

crimes, crimes against humanity, and the crime of aggression[15] – are privileged as the proper focus of "*pure* international criminal law"[16] whereas those in the former are treated as belonging to the periphery of the discipline, a "residuum"[17] of lesser offenses "with little in common" beyond the fact that some number of states have agreed that "some form of international legal action ought to be taken to mutually suppress such behaviour."[18] While the specific criteria invoked to support this distinction vary from author to author, they commonly include some combination of the following: core crimes are those that are the "most heinous"[19] or "most serious"[20] of the international crimes, they are those crimes that are directly criminalized under international law (rather than indirectly through an international law obligation on states to criminalize under domestic law),[21] and they are those crimes that are prosecutable (or have been

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Kreß, "The Peacemaking Process After the Great War and the Origins of International Criminal Law Stricto Sensu," *German Yearbook of International Law* 62, no. 1 (January 1, 2019): 163–88, https://doi.org/10.3790/gyil.62.1.163.

[15] Schwöbel-Patel, "The Core Crimes of International Criminal Law," 769.

[16] Luban, "Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law," 572.David J. Luban, "Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law," in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (Oxford University Press, 2010), 572.

[17] Guilfoyle, "Transnational Crimes," 791.

[18] Cryer, "The Doctrinal Foundations of International Criminalization," 109.

[19] Antonio Cassese, *International Criminal Law*, 2nd edition (Oxford ; New York: Oxford University Press, 2008), 148.

[20] The use of this formulation, in sources published after 1998, is commonly presented as a reference to Article 5 of the Rome Statute of the International Criminal Court, describing the crimes over which the court was granted jurisdiction as "the most serious crimes of concern to the international community as a whole." Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 3 (as am by the Review Conference 2010, Res RC/Res.6, depository notification C.N.651.2010.TREATIES-8), art 5. See, e.g. Christopher Soler, *The Global Prosecution of Core Crimes under International Law* (The Hague: T.M.C. Asser Press, 2019), 119, https://doi.org/10.1007/978-94-6265-335-1; Schwöbel-Patel, "The Core Crimes of International Criminal Law," 769.

[21] Antonio Cassese, *Cassese's International Criminal Law* (OUP Oxford, 2013), 3.

prosecuted) by international criminal tribunals.[22] By extension, transnational or treaty crimes are those crimes that lack one or more of these characteristics – being less grave, indirectly criminalized, or not having been included in the subject matter jurisdiction of international criminal tribunals. Neil Boister and others have attempted to create a cohesive code by proposing that these less clearly "international" crimes be split off from international criminal law entirely and treated as a separate doctrinal and jurisprudential field of study: transnational criminal law.[23] Boister defines this field, in fact, explicitly by its relationship to suppression conventions, defining transnational criminal law as "limited to those offences where states use a convention designed to suppress a particular form of conduct – a 'suppression convention' – to provide for a mutual obligation to criminalize that conduct."[24]

Despite its widespread adoption, however, this division – and the narrowing of focus in international criminal law scholarship it has engendered – has been criticized by other international legal scholars as theoretically inconsistent, strategically unhelpful, and historically

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[22] Guilfoyle, "Transnational Crimes," 791; Cryer, "The Doctrinal Foundations of International Criminalization," 108; Paola Gaeta, "International Criminalization of Prohibited Conduct," in *The Oxford Companion to International Criminal Justice*, ed. Antonio Cassese (Oxford University Press, 2009), 70; Ciara Damgaard, *Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues* (Springer Science & Business Media, 2008); Clark, "Treaty Crimes," 215.

[23] Boister, "'Transnational Criminal Law'?"; Boister, *Routledge Handbook of Transnational Criminal Law*.

[24] Boister, *An Introduction to Transnational Criminal Law*, 14. Other leading works on the subject don't define the field quite so narrowly. Luban, O'Sullivan, and Steward, for example, endorse a definition posited in a foundational mid-century work of Phillip Jessup on "transnational law," defining transnational criminal law as "the part of any nation's domestic criminal law that 'regulates actions or events that transcend national frontiers.'" David Luban et al., *International and Transnational Criminal Law* (Aspen Publishing, 2023), 3 (citing Philip Caryl Jessup, Transnational Law [Yale University Press, 1956], 2.).

inaccurate.[25] Many of these scholars, such as Frederick Mégret, adopt a more inclusive account of both international crimes and international criminal law, responding to the fragmentation of both the ontology and field of international criminal law with the proposition that it may be "more useful, productive, and interesting to describe international criminal law as the totality of manifestations of criminal justice that transcend the state."[26] While this is currently a minority position in international criminal law scholarship, it has begun to gain momentum among scholars and treatise writers[27] seeking to draw on a strain of "oecumenical" optimism that has

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[25] Many have pointed to the fact that treaty crimes were included in most of the iterations of the International Law Commission's Draft Codes of Crimes against the Peace and Security of Mankind. Indeed, treaty crimes were prominently featured in the ILC's 1984 Draft Code and formed the majority of the 26 offenses described in the 1991 Draft Code. See ILC, 'Report of the International Law Commission on the work of its forty-third session' (29 April–19 July 1991) Supplement No 10 UN Doc A/46/10 (1991), http://legal.un.org/ilc/documentation/english/reports/a_46_10.pdf. These treaty offenses were ultimately only removed in the 1996 Draft Code which embraced a pared down list of just five offenses: the crime of aggression, genocide, crimes against humanity, crimes against the UN and its staff and war crimes. This marked a significant departure from the more expansive approach adopted in prior drafts. See, e.g. Balint et al., *Keeping Hold of Justice*, 73–83. (Discussing, in particular, the inclusion of a crime of "Colonial domination and other forms of alien domination" in the 1984 Draft Code under the heading of offenses "recognized by the international community since 1954.") Other scholars have pushed back against arguments in favor of distinguishing "core" crimes from other international offenses that point to the limited scope of the substantive jurisdiction of the International Criminal Court by pointing out that treaty crimes were very much at the center of the original proposal, put forward by Trinidad and Tobago to the UNGA in 1989 that led to the creation of the ICC. See U.N. GAOR, 44th Sess., 38th mtg., U.N. Doc. A/C.6/44/SR.38 (Nov. 17, 1989). Indeed, a number of countries continued to push for the inclusion of at least some treaty crimes (notably "Serious Drug Trafficking") in the substantive jurisdiction of the International Criminal court well into the course of the negotiations at the Rome Conference.

[26] Mégret, "The Unity of International Criminal Law: A Socio--Legal View," 813.

[27] See, for example, the defiant tone of this passage from the introductory international criminal law textbook by Ilias Bantekas and Susan Nash, in which they argue in favor of the international nature of treaty crimes: "The fact that a treaty defines certain conduct simply as an offence, or imposes a duty on States to take action at the domestic criminal level, without, however, describing the conduct as an international crime, in no way detracts from the

arguably been part of the international criminal law project since its inception.[28]

All this said, this doctrinal and theoretical debate is somewhat orthogonal to the main thrust of this chapter. Regardless of whether one understands treaty crimes as properly within the ambit of contemporary international criminal law jurisprudence or in its periphery, treaty crimes – and the treaties by which they were constituted and codified – have been central to the historical development of international criminal law as a doctrinal, jurisprudential, institutional, and political project.

2 The Emergence of the Form

2.1 Existing Accounts of Origin: The 1794 Jay Treaty

While some authorities have suggested that the suppression treaty as a genre of international agreement first emerged as recently as the mid-20th century,[29] most locate its

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international nature of the offence prescribed by the treaty." Ilias Bantekas and Susan Nash, *International Criminal Law* (London; New York: Routledge-Cavendish, 2007), 5, http://public.ebookcentral.proquest.com/choice/publicfullrecord.aspx?p=432766.

[28] See, e.g. Guilfoyle, "Transnational Crimes," 791. ("International criminal law was, historically, a broadly conceived term, encompassing all crimes de ned under general international law or found in treaties"). On this point, Mégret points in particular to the work of M. Cherif Bassiouni. As compared to other similarly prolific and influential international criminal law scholars such as Antonio Cassesse, Bassiouni adopted a particularly broad understanding of the scope of international criminal law and the category of international crimes. While Mégret acknowledges that Bassiouni's approach did have its theoretical flaws, he suggests that Bassiouni's ambitous efforts to examine the relevance of international criminal law to "countless areas of international life" – beyond the narrow confines of international criminal adjudication – was both intellectually generative and "empowering to international criminal lawyers, validat- ing their particular skill set, and putting them seemingly in command of the protection of vast swaths of the international order."Mégret, "The Unity of International Criminal Law: A Socio--Legal View," 834.

[29] See, e.g., Gaeta, "International Criminalization of Prohibited Conduct," 63 (Asserting that "treaties for the repression of crimes such as counterfeiting, slavery, and trafficking of women and children" first "began to

origins in the early 19th century slave trade suppression treaties.[30] While these treaties are indeed an important part of this story, and one that I address in the next section, recent scholarship on the topic points to an earlier origin for this genre of international agreement. In a series of publications on the topic of suppression treaties, Roger S. Clark, has instead pointed to the 1794 Treaty of Amity, Commerce and Navigation between Britain and the United States[31] as the earliest known example of a suppression convention.[32]

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emerge...during the first decades of the last century"); Donald Feaver, "The International Regulation of Transnational Criminal Law," in *Counter Terrorism and Social Cohesion*, ed. Alperhan Babacan and Hussein Tahiri (Cambridge Scholars Publishing, 2011), 19 (Citing the 1963 Convention on Offenses and Certain Other Acts Committed on Board Aircraft as the first suppression treaty); William S. Dodge, Brief of International Law Scholars as Amici Curiae in Support of Respondents, Nestlé USA, Inc. v. John Doe I, et al. Cargill, Inc. v. John Doe I, et al., No. 19-416, 19-453 (U.S. Supreme Court October 21, 2020) ("The first modern suppression convention was the Genocide Convention").

[30] See, e.g. Gloria J. Browne-Marshall, "Treaties and International Law," in *International and Transnational Crime and Justice*, ed. Mangai Natarajan (Cambridge University Press, 2019), 404; Matthew Zagor, "Elementary Considerations of Humanity," in *The ICJ and the Evolution of International Law* (Routledge, 2011), 271.

[31] Treatby of Amity, Commerce, and Navigation, Between His Britannic Majesty and the United States of America, Nov. 19, 1794 (entered into force Oct. 28, 1795), U.S.-Gr. Brit., art. 27, 8 Stat. 116, T.S. No. 105 [hereinafter "Jay Treaty"].

[32] Clark has made this point in a number of places, and to his credit in each of them he caveats it by describing this 1794 treaty as the earliest that he has yet found. See Clark, "Treaty Crimes," 216; Roger S. Clark, "Some Aspects of the Concept of International Criminal Law: Suppression Conventions, Jurisdiction, Submarine Cables and the Lotus," *Criminal Law Forum* 22, no. 4 (December 2011): 523, https://doi.org/10.1007/s10609-011-9163-z; Clark, "International Criminal Law," 535–36. Most scholars on the subject have followed Clarke's lead on this point. See Neil Boister, "The Growth of the Multilateral Suppression Conventions in the First Half of the 20th Century," in *Histories of Transnational Criminal Law*, by Neil Boister (Oxford University Press, 2021), 40, https://doi.org/10.1093/oso/9780192845702.003.0004 (writing that examples of suppression treaties "can be found as far back" as the 1794 Jay Treaty, citing Clark, "Some Aspects of the Concept of International Criminal Law."). Other scholars have posited that the origins of the suppression treaty as a genre of international agreement are much more recent, in the early to mid-20th century.

Concluded in November of 1794 – commonly referred to as the "Jay Treaty"[33] in reference John Jay, the chief American diplomat sent to negotiate the agreement – this agreement was the result of a last-ditch effort by leaders in Britain and the United States to defuse growing trade tensions and residual disagreements arising from the American War of Independence.[34] This omnibus treaty is today generally remembered either for its inclusion of provisions aimed at settling a number of hotly-contested issues between Britain and its newly-independent American

[33] Jay, then serving as the Chief Justice of the United States, was sent to London to lead negotiations. His counterpart was Lord Grenville (William Wyndham, Baron Grenville) the then-Foreign Secretary of Britain. See Bradford Perkins, "Lord Hawkesbury and the Jay-Grenville Negotiations," *The Mississippi Valley Historical Review* 40, no. 2 (1953): 291–304, https://doi.org/10.2307/1888929.

[34] Although ultimately the two countries would go to war some eighteen years later, in part over issues contemplated in the 1794 treaty, historians have suggested that the arrangements under the Jay Treaty were critical in postponing those hostilities. See, e.g., John Holland Rose, *William Pitt and the Great War* (G. Bell and Sons, Limited, 1911), 291.

colonies – including border disputes,[35] trade relations,[36] extradition obligations,[37] and the arbitration of private and public debts (via two of the first international commissions of arbitration)[38] – or for the fierce political opposition that these provisions fomented in the halls of power and courts of public opinion in both countries.[39]

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[35] Jay Treaty, Article 2 (guaranteeing the removal of British troops from forts in the Northwest Territory, many of which Britain was already obligated to vacate under the terms of the 1783 Treaty of Paris but were still held by British troops). See Matthew H Williamson, "The Networks of John Jay, 1745-1801: A Historical Network Analysis Experiment." (Doctoral Dissertation, Northeastern University, 2017), 144.

[36] Jay Treaty, Articles 14 and 15 (codifying rights of free navigation and obligating both parties to lower trade barriers for goods exported from the other). The first of these clauses was included in response to Britain's repeated interference with American merchant shipping, particularly its seizure of a series of American merchant vessels, justified by the British as a legitimate effort to cut supply lines supporting French colonies in furtherance of its war with France, and decried by Americans as a flagrant violation of its neutrality in the Napoleonic Wars. The second was meant to assuage the concerns of manufacturers and merchants in both countries about both countries' resistance to open their markets to goods manufactured in the other. On the impetus for and impacts of these provisions, see Joseph M. Fewster, "The Jay Treaty and British Ship Seizures: The Martinique Cases," *The William and Mary Quarterly* 45, no. 3 (1988): 426–52, https://doi.org/10.2307/1923643; N. A. MacKenzie, "The Jay Treaty of 1794," *Canadian Bar Review* 7, no. 7 (1929): 431–37; H. Nicholas Muller III, "Jay's Treaty: The Transformation of Lake Champlain Commerce" 80, no. 1 (Winter/Spring 2012): 33–56, https://doi.org/10.1163/2468-1733_shafr_SIM030170062.

[37] Jay Treaty, Article 27. This was notably the United States' first formally codified extradition obligation. See Gary Botting, *Extradition between Canada and the United States* (BRILL, 2021), 33–35.

[38] Jay Treaty, Articles 6 and 7. On the historical importance of the resulting international commission, see A. M. Stuyt, *Survey of International Arbitrations 1794–1938* (Springer, 2013); Georg Schwarzenberger, "Present-Day Relevance of the Jay Treaty Arbitrations," *Notre Dame Lawyer* 53, no. 4 (1978 1977): 715–33, https://heinonline.org/HOL/P?h=hein.journals/tndl53&i=712; Richard B. Lillich, "The Jay Treaty Commissions," *St. John's Law Review* 37, no. 2 (1963 1962): 260–84, https://heinonline.org/HOL/P?h=hein.journals/stjohn37&i=272.

[39] See, e.g. Todd Estes, "Shaping the Politics of Public Opinion: Federalists and the Jay Treaty Debate," *Journal of the Early Republic* 20, no. 3 (2000): 393–422, https://doi.org/10.2307/3125063; Todd Estes, *The Jay Treaty Debate, Public Opinion, and the Evolution of Early American Political Culture* (Amherst: University of Massachusetts Press, 2006), https://muse.jhu.edu/pub/190/monograph/book/4318. Indeed, some of these provisions, along with those relating to freedom of movement, continued to be disputed and indeed litigated well into the 20th century. See,

In calling our attention to 1794 agreement, however, Clarke points to a less well-known provision[40] nestled among these more high-profile clauses. This provision, spelled out in Article 20, reads as follows:

> It is further agreed that both the said Contracting Parties, shall not only refuse to receive any Pirates into any of their Ports, Havens, or Towns, or permit any of their Inhabitants to receive, protect, harbour, conceal, or assist them in any manner, but will bring to condign punishment all such Inhabitants as shall be guilty of such Acts or offences.
>
> And all their Ships with the Goods or Merchandizes taken by them and brought into the port of either of the said Parties, shall be seized, as far as they can be discovered and shall be restored to the owners or their Factors or Agents duly deputed and authorized in writing by them (proper Evidence being first given in the Court of Admiralty for proving the property) even in case such effects should have passed into other hands by Sale, if it be proved that the Buyers knew or had good reason to believe, or suspect that they had been piratically taken.[41]

Despite its prominent use of the word "pirates," the provisions in this Article are not primarily concerned with the signatory parties' obligations regarding the treatment of individuals

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for example, Akins v. United States, 64 C.C.P.A. 68, 551 F.2d 1222, 1229-30 (C.C.P.A. 1977), a case in the United States Court of Customs and Patent Appeals that turned on the question of the continued relevance of Article III of the Jay Treaty.

[40] The provisions regarding the suppression of piracy and the disbursement of their ill-gotten wares contained in this article seem to have gone largely unremarked in contemporary diplomatic correspondence and were ultimately never tested in the courts of either signatory party. Rubin, *The Law of Piracy*, 134.

[41] "Treaty of Amity, Commerce, and Navigation, Between His Britannic Majesty and the United States of America," November 19, 1794, art. 20, https://avalon.law.yale.edu/18th_century/jay.asp.

found to have *committed* acts of piracy. Instead, these paragraphs address the question of how Britain and the U.S. ought to deal with individuals found to have *assisted or abetted* acts of piracy. Specifically, they address the question of how the two states should treat individuals who perform a range of ancillary activities – providing ships, financing, and supplies used to conduct voyages on which piracy was committed, providing lodging or concealment to individuals who participated in acts of piracy, and receiving and fencing goods stolen in the course of such actions – without which any act of piracy would not be possible.

On Clark's account, the historical significance of this treaty turns on the inclusion of the unassuming phrase "will bring to condign punishment" in the first of these two paragraphs. This phrase, he writes, establishes "three analytically distinct" obligations on the two signatory states: "[1] an obligation to make these activities criminal (by legislative action) [2] an obligation to enforce that legislation (by executive action) and [3] an obligation to make the courts available for adjudication."[42] On this reading, although the treaty text itself is less explicit than most modern suppression provisions regarding the means by which the signatory states are to legislatively justify the "condign punishment" of individuals found to have committed any of these forms of "land-based assistance to pirates"[43] or administratively provide for their apprehension and adjudication, this short passage satisfies the definitional criteria of a suppression convention.[44]

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[42] Clark, "Some Aspects of the Concept of International Criminal Law," 523.

[43] Clark, "International Criminal Law," 536.

[44] It is worth noting here, as Clarke and others have, that both the U.S. and Britain already had domestic criminal laws against each of the activities described in the first paragraph of this Article, and their procedures for dealing with ships and goods seized in connection with such activities were largely in line with the procedures outlined in the second paragraph. Clark, 216–17; Rubin, *The Law of Piracy*, 133. Similarly, both countries already had

While I generally agree with Clark's interpretation of this passage, I question the historical significance he places on the Jay Treaty more broadly. Specifically, if it is the case that the use of the phrase "condign punishment" in this provision qualifies the Jay Treaty as a suppression convention, it is this same language that makes it so that it cannot be the first. In the course of my research, I have found a line of treaties going back to at least the early 17th century that contain provisions similarly obligating signatories to impose "condign punishment" on pirates, brigands, or some other class of individuals.

2.2 An Alternate Account: 17th Century Appearances of Suppression Clauses

The earliest of these was a "Treaty of Truce" signed in 1643 between two of the three factions in the Irish Confederate War (1641-1653), the Irish Royalists and the Catholic Parliamentarians.[45] This agreement, signed in the midst of a brief "cessation of arms" between

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domestic statutes enabling the prosecution of accused pirates in their domestic courts. The prevailing British criminal statute on this point at the time was established under Chapter 30 of the 1744 Piracy Act. 18 Geo 2 (1744), full text available at https://www.legislation.gov.uk/apgb/Geo2/18/30/1991-02-01. In the U.S., criminal provisions allowing for the prosecution of individuals accused of piracy, mutiny, or other felony on the high seas had been enacted under Chapters 8 and 9 of the Crimes Act of 1790. 1 Stat 112 (1790), full text available at http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=235. As such, the inclusion of this Article in the treaty thus seems to have been less for the purposes of legal gap filling and more for the purposes of reaffirming those laws and encouraging both parties to enforce them.

[45] Samuel Whatley, ed., "Treaty of Truce between the Irish Royalists, and the Parliamentarians, in December, 1643," in *A General Collection of Treatys of Peace and Commerce, Renunciations, Manifestos, and Other Publick Papers, from the Year 1642 to the End of the Reign of Queen Anne.*, 2nd ed., vol. 3, 4 vols., 1732, 6–7, https://heinonline.org/HOL/P?h=hein.unl/gcolt0003&i=46. On the circumstances surrounding this agreement and the "cessation of arms" between these two factions in the Irish conflict, see Charles Patrick Meehan, *The Confederation of Kilkenny* (J. Duffy, 1882), 111–17, http://archive.org/details/confederationki01meehgoog; Robert Armstrong, *Royalism and the Three Stuart Kingdoms: Ideas in Action in the Wars of the 1640s* (Springer Nature,

Catholic supporters of Irish independence and Royalist forces stationed in Ireland,[46] contains the following provision addressing the possibility of a soldier from either side violating the peace:

> If there be any Infringer of the present Treaty in any one of the said Provinces, no Assistance shall be given him from either side, but on the contrary, *he shall be punished*, and whenever this happens, it shall not be taken for a Breach of the said suspension of Arms in the other Provinces of the Kingdom, which shall conform to the said Treaty, and no occasion shall be taken from thence to commit Acts of Hostility and the Party that shall keep within the Bounds prescribed by the present Treaty, *may depend on it that the Lieutenant Generals of that Party to which the Infringer belongs will bring him to condign Punishment.*[47]

The language here is no less sparse than that in Article 20 of the Jay Treaty, and while there is less in the way of supporting documentation to aid in its interpretation, it is not unreasonable to read into this clause a similar set of obligations to those that Clark reads into his example. This clause obligates both signatory parties to treat individual infringement of the

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2023), 2; Fiona Pogson, "Strafford's 'Spirit' at the Royalist Court: Sir George Radcliffe and Irish Affairs, 1643–5," *Irish Historical Studies* 43, no. 164 (November 2019): 181–83, https://doi.org/10.1017/ihs.2019.49.

[46] This "cessation" was largely orchestrated by Charles I in an effort to entice Irish Catholic factions to align with him against Protestant English and Irish factions in the English Civil War (1642-1651), or at least to free up Royalist troops currently stationed in Ireland for redeployment closer to his stronghold in Oxford. See Richard Bagwell, *Ireland under the Stuarts and during the Interregnum* (London, New York [etc.] Longmans, Green and co, 1909), 46–52, http://archive.org/details/irelandunderstua02bagw. See also generally Joyce Lee Malcolm, "All the King's Men: The Impact of the Crown's Irish Soldiers on the English Civil War," *Irish Historical Studies* 22, no. 83 (1979): 239–64, https://www.jstor.org/stable/30008283; John Lowe, "Charles I and the Confederation of Kilkenny, 1643-9," *Irish Historical Studies* 14, no. 53 (1964): 1–19, https://www.jstor.org/stable/30006355.

[47] Whatley, "Treaty of Truce between the Irish Royalists, and the Parliamentarians, in December, 1643." (Emphasis added.)

terms of this peace treaty as criminal (by either legislative or at least quasi-legislative action), and indeed names the parties obligated to both enforce this legislative (or at least quasi-legislative) change and to adjudicate the guilt and appropriate punishment of those accused of infringing the peace.

Admittedly, because its signatories were not states but competing intra-state factions, this 1643 agreement is not, strictly speaking, the first instance of a "condign punishment" suppression clause appearing in an international treaty. The earliest example of suppression provisions appearing in a formal treaty between two countries seems to be the 1654 "Treaty of Peace and Alliance" concluded between England, under Lord Protector Oliver Cromwell, and the United Provinces of the Netherlands.[48] Articles 5 and 6 of this treaty obligate both signatories to "defend...against all persons who shall attempt to disturb the Peace of either State by Land or Sea," to declare all such persons as "enemies of public liberty," and to "expressly and effectually contradict, oppose and really hinder" any persons who attempt to attack the other.[49] Article 7 goes farther, obligating both signatories, and their inhabitants, to not only refrain from "favour[ing] or assist[ing] the Enemys or Rebels of either Republick with any manner of Subsidy, Counssel or good Will," but furthermore to "expressly contradict, and effectually hinder" any persons attempting to provide such assistance to such individuals, and to condemn both these "Enemys or Rebels" and those found to have "knowingly and wilfully" provided them

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[48] Samuel Whatley, ed., "Treaty of Peace and Union between Oliver Cromwell, as Protector of England, and the United Provinces of the Netherlands. At Westminster, April 5, 1654 Note," in *A General Collection of Treatys of Peace and Commerce, Renunciations, Manifestos, and Other Publick Papers, from the Year 1642 to the End of the Reign of Queen Anne.*, 2nd ed., vol. 3, 4 vols., 1732, 67–86, https://heinonline.org/HOL/P?h=hein.unl/gcolt0003&i=112.

[49] Whatley, 68.

assistance to suffer "the Pains of High Treason" as "Enemys to both Republics."[50] This treaty also includes a provision providing for mutual assistance in implementing these policing and enforcement obligations (Article 8)[51] and a provision obligating both sides to prosecute or expel accused "Enemys or Rebels" (Article 10).[52] This latter is notable because it is arguably an example of another mainstay of modern international criminal law treaties, the obligation to extradite or prosecute (*aut dedere aut judicare*), which predates the earliest examples commonly discussed in the literature on this subject by almost 300 years.[53]

Similar suppression obligations appear in two peace treaties concluded between England and Sweden and England and Denmark in 1654.[54] The former contains two detailed clauses obligating both signatory states to police and punish individuals committing acts of violence

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[50] Whatley, 68–69.

[51] Whatley, 69 ("both Republicks shall sincerely and faithfully, as the need may require, mutually assist one another against the Enemies and Rebels of either...").

[52] Whatley, 69 (holding that "if either of the said Republicks shall signify and declare to the other...that any Enemy or Enemys, rebel or Rebels, Fugitive or Fugitives of either State...has been receiv'd or admitted into the [territory] of the other State...then that Republick...shall be oblig'd within the space of twenty eight days...to injoin the said [enemies/rebels/or fugitives] to depart their Dominions" and if those persons ignore that expulsion order "he shall be punish'd with Death and the Loss of Goods and Chattels.").

[53] See, e.g. M. Cherif Bassiouni and Edward Martin Wise, *Aut Dedere Aut Judicare: The Duty to Extradite Or Prosecute in International Law* (Martinus Nijhoff Publishers, 1995), 12 (pointing to the 1929 Convention for the Suppression of Counterfeiting as the first example of a treaty including such a clause). See also Andrea Caligiuri, "Governing International Cooperation in Criminal Matters: The Role of the Aut Dedere Aut Judicare Principle," *International Criminal Law Review* 18, no. 2 (2018): 253, https://heinonline.org/HOL/P?h=hein.journals/intcrimlrb18&i=262. More notably, it is an example of a treaty formulation of this principle, sometimes referred to by the earlier formulation *aut dedere aut punire* (the obligation to extradite or punish), appearing just a few years after the publication of the 1625 text in which Grotius first discussed it. See Hugo Grotius, *On the Law of War and Peace* (Batoche, 2001), chap. 21, para 4.

[54] J. R. Jones, *The Anglo-Dutch Wars of the Seventeenth Century* (Routledge, 2013), 34.

contrary to the terms of the peace treaty,[55] but it is the latter that is the most relevant to this argument:

> For the greater Security of Commerce, and the Liberty of Navigation, 'tis agreed and concluded, that neither Party shall, if it be in their power, permit common Pirates, or other Robbers of this sort to harbour in any Parts of the other's Kingdom or Country, nor shall suffer any of the Inhabitants or People of the other, to receive or assist them in reality, or by countenance, but on the contrary, shall do their Endeavour that the said Pirates or Robbers, and their piratical Partners and Accomplices, be apprehended and brought to condign Punishment; and that the Ships and the Merchandize, as much of it as can be found, be restored to their lawful Owners, or their Attorneys, provided their Right appear from due Proofs according to Law in the proper Courts.[56]

This provision in the 1654 Anglo-Danish peace treaty[57] mirrors the content and structure

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[55] Samuel Whatley, ed., "Treaty of Peace between Oliver Cromwell, Protector of the Commonwealth of England, and Christina, Queen of Sweden; Concluded at Upsal, the 11th of April, 1654 Note," in *A General Collection of Treatys of Peace and Commerce, Renunciations, Manifestos, and Other Publick Papers, from the Year 1642 to the End of the Reign of Queen Anne.*, 2nd ed., vol. 3, 1732, art. 13, https://heinonline.org/HOL/P?h=hein.unl/gcolt0003&i=135 (providing that any persons "who shall violate this Treaty...shall be punish'd," and whenever those "Delinquents or those who are guilty of the Violence committed ... come into the power of [either] State, shall moreover suffer due Punishment, according to the Nature of the Offense"). Whatley, art. 12 (obligating both signatories to refrain from impeding the free navigation of ships belonging to the "subjects and inhabitants" of the other and ending with the following obligation: "And if any thing be committed by either Party contrary to the genuine meaning of this Article, both of the Confederates hall inflict a severe punishment on their Subjects").

[56] "Treaty of Peace and Alliance, between Frederick III King of Denmark, and Oliver Cromwell, Protector of the Republick of England. Done at Westminster, Sept. 15, 1654," *General Collection of Treatys*, 1732, art. 12, https://heinonline.org/HOL/P?h=hein.unl/gcolt0003&i=176.

[57] For an account of the significance of this agreement – particularly in relation to free trade between England, Denmark, and Holland – and the continuing issues that led to war breaking out again in the second Anglo-Dutch

of Article 20 of the 1794 Jay Treaty remarkably closely, showing little variation even in its wording despite the interceding century and a half of linguistic development. It includes the same broad injunction against either the government or residents of each signatory party providing support, comfort, or concealment to pirates, and the same instruction that the disposal of whatever possessions – stolen or otherwise – found to belong to any apprehended pirates should be adjudicated by appeal to the relevant court system.

While the peace and alliances agreed upon in these two 1654 agreements were to be short-lived, with war breaking out again just a year later, this formulation of a suppression clause was to live on. Similar wording was included in a 1661 treaty between Britain and Sweden, and a nearly identical provision was included in a treaty between Britain and Denmark concluded that same year (both of which were largely designed to recapitulate the terms of the 1654 agreements between the same parties but were made necessary by the fall of the English Republic and the return of the Stuart monarchy)[58] and the 1667 Treaty of Breddah, a peace treaty

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War in 1665, see Paul Douglas Lockhart, "War and Absolutism, 1648–1660," in *Denmark, 1513–1660: The Rise and Decline of a Renaissance Monarchy*, ed. Paul Douglas Lockhart (Oxford University Press, 2007), 234, https://doi.org/10.1093/acprof:oso/9780199271214.003.0012.

[58] See Samuel Whatley, ed., "Treaty of Alliance Concluded between Charles II His Royal Majesty of Great Britain, and Charles XI His Royal Majesty of Sweden, for the Confirmation of Their Friendship, and for the Mutual Security of Their Dominions and Trade. Done at Whitehall, October 21, 1661 Note," in *A General Collection of Treatys of Peace and Commerce, Renunciations, Manifestos, and Other Publick Papers, from the Year 1642 to the End of the Reign of Queen Anne.*, 2nd ed., vol. 3, 1732, art. 14, https://heinonline.org/HOL/P?h=hein.unl/gcolt0003&i=283 (Obligating both signatory states to "renounce as enemies of both States" any of either of their nationals that commit an act of violence contrary to the terms of the treaty, make reparations to the injured party within "twelve months after the demand of such restitution," and impose "condign punishment" on the perpetrators "according to the nature of the crime"). See also Samuel Whatley, ed., "Treaty of Alliance between Charles II King of England, and Frederick III King of Denmark. It Has Not Date, but Is Plac'd in the Year 1661 by Aitzema, in the 10th Tome of His Collection Intitled Affaires d'Etat &(and) de Guerre; Where He Says That the Danish Secretary Left This Treaty

between England and the Netherlands that marked the end of the Second Anglo-Dutch war.[59]

Interestingly, the next place treaty language like this can be found is in a series of treaties rather far afield from Britain, having been concluded in 1699 between the Ottoman Empire and

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behind Him without Either Date or Subscription, as He Travell's Thro' Holland Note," in *A General Collection of Treatys of Peace and Commerce, Renunciations, Manifestos, and Other Publick Papers, from the Year 1642 to the End of the Reign of Queen Anne.*, 2nd ed., vol. 3, 1732, art. 19, https://heinonline.org/HOL/P?h=hein.unl/gcolt0003&i=301 (Providing that "neither Party shall…suffer open pirates or other robbers of that kind to make their retreats in the ports of either's Kingdom or Country, or shall permit any of the inhabitants or people of either to harbour or relieve them, or any way assist them," and that both "shall use means that the foresaid pirates and robbers, and their partners and abettors, may be apprehended, and suffer condign punishment" and any "ships or goods" stolen by such criminals "be restored to their lawful owners or their attornies, so as their right be made to appear by due and legal proof in the Court of Admiralty for maritime Causes").

[59] "Treaty of Bredah, 1667," *Complete Collection of All the Marine Treaties Subsisting between Great-Britain and France, Spain, Portugal, Austria, Denmark, Sweden, Savoy, Holland, Morocco, Algiers, Tripoli, Tunis, Etc.*, 1779, art. 20, https://heinonline.org/HOL/P?h=hein.weaties/ccmarte0001&i=188 ("Great-Britain and the said States General shall not receive into their Ports, Cities and Towns, nor suffer that any of the Subjects of either Party to receive any Pirates or Sea Rovers, or afford them any Entertainment, Assistance, or Provisions, but shall endeavour that all such Pirates and Sea Rovers, and their Partners, Sharers and Abettors, be found out and apprehended, and that they suffer condign Punishment for a Terror to others : And all the Ships, Goods and Commodities, piratically taken by them, and brought into, the Ports of either Party, which can be found, even although they be fold, shall be restored to the right Owners, or Satisfaction shall be given either to their Owners, or to those who by Virtue of Letters of Attorney shall demand the fame; provided their Right and Property therein be made to appear in the Court of Admiralty by due Proofs according to Law.").

Poland,[60] Venice,[61] and the Holy Roman Empire[62] ending the Great Turkish War of 1683–1697. While Britain was not party to any of these treaties, there is reason to think that the framing and

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[60] "Treaty of Peace Between Poland and Turkey 26th January 1699," *World Treaty Library*, 1699, art. 10, https://heinonline.org/HOL/P?h=hein.weaties/contreout0220019&i=14 (Obligating both parties to refrain from admitting any fugitive nationals of other signatory state, to give up any such persons already in their territory upon request of the other party, and to ensure that "all Persons whatsoever that shall go about to disturb the Peace and Friendship now concluded on both sides, shall receive condign punishment.").

[61] "Treaty of Peace Between Venice and Turkey 26th January 1699," *World Treaty Library*, no. Issue (1699): art. 12, https://heinonline.org/HOL/P?h=hein.weaties/contreout0220020&i=17 ("Therefore no Shelter or Protection shall be given on either side to such Fugitives, of what Quality soever they are; but, on the contrary, they shall be pursued, apprehended and imprison'd, that they may have condign Punishment for a warning to others: and for the future, the giving Support or Protection to People of this sort shall be prohibited.").

[62] "Treaty of Peace Between the Emperor and Turkey 26th January 1699," *World Treaty Library*, no. Issue (1699): art. 8, https://heinonline.org/HOL/P?h=hein.weaties/contreout0220018&i=20 ("All hostile Incursions, Usurpations and Invasions made clandeslinely, or by surprize, and all Devastations and Depopulations of the Territorys of either Dominions, shall be deemed unlawful, and shall be prohibited by the severest Mandates. And the Transgressors of this Article, wherever they are apprehended, shall immediately be committed to Prison, and receive condign Punishment without Mercy from the Jurisdiction of the Place where they shall be committed: and whatever they have taken shall be most diligently inquir'd after, and when found, faithfully restor'd to the Owners. Also the Captains, Commanders and Governours of both Partys shall be obliged to administer Justice diligently and uprightly, on pain, not only of the Loss of Office, but of Life and Honour."). "Treaty of Peace Between the Emperor and Turkey 26th January 1699," art. 9 ("It shall also be unlawful to give any Sanctuary or Support to wicked Men, Rebels, or Malecontents, but both Partys shall be oblig'd to bring such sort of Men, and all Thieves, Robbers, &c. whom they shall apprehend in their Dominions, to condign Punishiment, altho they happen to be the Subjects of the other Party; and if they cannot be apprehended, they shall be describ'd to their Captains or Governours; and if they happen to lurk in their Jurisdictions, they shall be impower'd to apprehend and punish them: and if these don't discharge their Duty by punishing such Criminals, they shall incur the Indignation of their Emperor, and be turn'd out of Office, or punish'd in the place of the Delinquents. And to guard also against the Insolence of Men yet more wicked, it shall be lawful for neither of the Partys to entertain and maintain Man-stealers, call'd Pribeck, and such fort of wicked People who are in the Pay of neither Prince, but live by Robbery; and both they and those who support them shall be duly punish'd: and whatever Pretences such wicked Men make of Amendment of their former Lives, they shall not be trusted nor tolerated near the Frontiers, but transported to other Places at a greater distance.").

language of the suppression clauses in these three Ottoman treaties may have drawn upon Britain's earlier treaty experience, as the content of all three of these treaties was heavily influenced by Britain's King William III, the chief mediator at the peace negotiations in which they were drafted.[63] In this context, too, these suppression provisions proved durable, appearing in largely similar form in the 1718 Treaties of Passarowitz,[64] signed at the conclusion of the next war between the Ottomans and neighboring Austria[65] and Venice.[66]

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[63] Randall Lesaffer, "The Peace of Karlowitz (1699)," Oxford Public International Law, 2023, https://opil.ouplaw.com/page/945.

[64] On the negotiation of these treaties, and possible evidence of continuity in the framing and wording of suppression provisions with the 1699 treaties discussed above, see generally Charles Ingrao and Jovan Pešalj, *The Peace of Passarowitz, 1718* (Purdue University Press, 2011).

[65] "Treaty of Peace between Charles VI Most August Emperor of the Romans, and King of Spain, Hungary and Bohemia, and Achmet Han Sultan of the Turks. Done in the Congress at Passarowitz in Servia, the 21st Day of July 1718," *General Collection of Treatys* 4 (1732): art. 14, https://heinonline.org/HOL/P?h=hein.unl/gcolt0004&i=417 ("It shall also be unlawful hereafter to give shelter or support to Rebels or Malecontents; and both Partys shall be obliged to give condign Punishment to such wicked Men, and all Robbers and Freebooters, whom they shall apprehend in their Dominion, of which soever Party they are, and if they cannot be apprehended, they shall be describ'd to the Captains or Governours of the Places, where they are known to sculk, which Captains or Governours shall have it in Command to punish them; and if these fail in their Duty of punishing such Miscreants, they shall incur the Displeasure of their respective Emperor, or be turn'd out of their Offices, or be punish'd themselves for the guilty Persons. And for the better providing against the Mischief of such Villains, neither of the Partys shall be allow'd to entertain Freebooters and Kidnappers, and such wicked kind of People as are not in the pay of either Prince, but live by Rapine; and both they and those who maintain them, shall have condign Punishment, and such wicked Wretches, altho they pretend amendment of their Lives shall not be credited nor tolerated near the Confines, but remov'd to other remoter Places.").

[66] "Instrument of the Peace Made and Sign'd at Passarowitz in Servia, the 21st of July 1718, between the Republick of Venice, and the Ottoman Porte, The Note," *General Collection of Treatys* 4 (1732): art. 6, https://heinonline.org/HOL/P?h=hein.unl/gcolt0004&i=425 ("By how much the more neceflary it is to procure a folid Friendflhip and Tranquillity between the Subje&s of both Empires, in fo much the greater Abhorrence ought thofe to be held, who being of .a reprobate Nature and. Difpofition, diflutb the Quiet of the Frontiers; even in time of Peace, by Robberys and hoile Machinations: for which Reafon neither Party 1hall afford Shelter or Prote&ion to

2.3 Connecting the Dots: Sources for the 1794 Jay Treaty

While the 1794 Jay Treaty was not in fact the earliest identifiable suppression treaty, scholars like Clark are not entirely wrong for highlighting its importance to the historical development of this form. The similarity between the suppression provisions it contains to the wording and structure of similar provisions in the earlier treaties discussed here provides at least *prima facie* evidence to count the Jay Treaty as a continuation of this much older line of treaties. And this classification is further reinforced by extant historical evidence that members of both the American and British diplomatic delegations, and their colleagues whose instructions they were carrying out, had access to reference works containing the text of these earlier agreements and reason to consult them for precedent.[67]

Most recent scholarship on the subject states that the provisions of the treaty related to piracy were personally drafted by John Jay.[68] That said, available archival materials relevant to the treaty's drafting provide little information on the question of where exactly the "condign punishment" suppression provision came from. The draft treaty text tabled by Grenville does not contain any equivalent text. And although Jay candidly mentions in a letter written on the same day that the treaty was finally signed that the text of Articles 19 and 21 were "taken from the Treaty of Commerce between Great Britain and France" (1786) and that other material regarding

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fuch Outlaws, but they fhall be inquir'd after, purfued and apprehended, that they may receive condign Punifhment for an Example to' others. Moreover, for the future, the giving Support or Proteelion to fuch People fhall be prohibited.").

[67] Perkins, "Lord Hawkesbury and the Jay-Grenville Negotiations"; Williamson, "The Networks of John Jay, 1745-1801: A Historical Network Analysis Experiment."; Jerald A. Combs, *The Jay Treaty: Political Battleground of the Founding Fathers* (Univ of California Press, 2023).

[68] See, e.g., Rubin, *The Law of Piracy*, 133.

treating "Privateers as Pirates" was "partly taken from ours with Holland" (referring to the 1782 Dutch-American "Treaty of Amity and Commerce")[69], he makes no mention of whether this particular provision was similarly borrowed or, if not, who authored it. From this silence, and its first appearance in drafts composed after Grenville's initial draft, scholars have assumed that Jay wrote this provision.[70]

Given its obvious similarity to the suppression clauses contained in the line of earlier treaties discussed above, however, I suggest that it is more likely that the text of Article 20 of the final 1794 treaty was based on that used in those earlier treaties. As that the agreement the Jay and Grenville were negotiating was to be a "Treaty of Peace and Commerce," it seems unsurprising that they, or their respective superiors in the State Department and the Foreign Ministry, would draw inspiration from the text of similar such treaties signed by Britain – especially those whose purpose had been to restore calm to trade relations with other rising competitors in the "Atlantic economy of trade and finance."[71] And, importantly, although some of the treaties discussed above were concluded over a hundred years before, they would have been ready to hand for the men involved in drafting the 1794 treaty.

The full text of these and other treaties of peace and commerce could be found in a number of volumes available to Jay, Hamilton, and others involved in the drafting of the 1794

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[69] "Final Text of the Dutch-American Treaty of Amity and Commerce: A Translation, 6 September 1782," Founders Online (National Archives, September 6, 1782), http://founders.archives.gov/documents/Adams/06-13-02-0162-0011-0002.

[70] John Jay, "Founders Online: From John Jay to Edmund Randolph, 19 November 1794," Founders Online (National Archives, November 19, 1794), https://founders.archives.gov/documents/Jay/01-06-02-0085.

[71] Daniel J Hulsebosch, "Being Seen Like a State: How Americans (and Britons) Built the Constitutional Infrastructure of a Developing Nation" 59 (n.d.): 1244.

treaty in these same library reference collections. These included Samuel Whatley's *General Collection of Treatys*[72] and William Harris' *Complete Collection of Marine Treaties*.[73] Similarly, Jay, as a lawyer and practicing judge (indeed, the sitting Chief Justice of the U.S. courts at the time), would have had access to, and likely have had to consult, a number of treatises on British law such as Blackstone or Matthew Bacon's *New Abridgement of the Law*,[74] copies of which are known to have been in the library of reference texts gathered by the new U.S. Congress[75] and both of which include passages from English laws regarding piracy.[76]

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[72] Samuel Whatley, *A General Collection of Treatys, Declarations of War, Manifestos, and Other Publick Papers, Relating to Peace and War*, 2nd ed., 1732, https://openlibrary.org/books/OL24355578M/A_general_collection_of_treatys_declarations_of_war_manifestos_and_other_publick_papers_relating_to_.

[73] William Harris, *A Complete Collection of All the Marine Treaties Subsisting Between Great-Britain and France, Spain, Portugal, Austria, Russia, ... &c. Commencing in the Year 1546, and Including the Definitive Treaty of 1763*, 1779, http://archive.org/details/bim_eighteenth-century_a-complete-collection-of_great-britain_1779_0.

[74] Matthew Bacon, *A New Abridgment of the Law* (E. and R. Nutt, and R. Gosling (assigns of E. Sayer, Esq.), 1736).

[75] "A New Abridgment of the Law - Wythepedia: The George Wythe Encyclopedia," accessed January 10, 2024, https://lawlibrary.wm.edu/wythepedia/index.php/New_Abridgment_of_the_Law.

[76] "Piracy," in *A New Abridgment of the Law*, by Matthew Bacon (E. and R. Nutt, and R. Gosling (assigns of E. Sayer, Esq.), 1736), 779–824, https://heinonline.org/HOL/P?h=hein.beal/nbridofla0003&i=844. (such as § Geo. 1. cap. 34. for the more effectual "Suppressing of Piracy", an act containing the following passage that itself uses similar terminology to the suppression provisions in the Jay Treaty to address the liability of those adjudged to have been accessories to piracy: "Whereas there are some Deseas in Laws for bringing Persons who are Accessories to Piracy and Robbery upon the Seas to *condign Punilshment*, if the Principal who committed such Piracy and Robbery is not or cannot be apprehended and brought to Justice; be it therefore enacted, that all and every Person and Perfons whatsoever, who […] are declared to be Accessory or Accessories to any Piracy or Robbery therein mentioned, are hereby declared and shall be deemed and taken to be principal Pirates, Felons and Robbers, and shall and may be inquired of, heard, determined and adjudged in the same Manner, as Persons guilty of Piracy and Robbery may and ought to be inquired of, tried, heard, determined and adjudged by the said Statute ii & 12 W. 3. and being thereupon attainted and convicted (hall suffer such Pains of Death, Loss of Lands, Goods C and Chattels, and in like Manner, as Pirates and Robbers ought by the said statute to suffer.")

But there is another, and perhaps even more likely, avenue by which the text of at least one of these treaties may have inspired the content and form of Article 20 of the Jay Treaty. The 1667 Anglo-Dutch treaty, is reprinted and discussed in some detail in the pages of Malachy Postlethwayt's *Universal Dictionary of Trade and Commerce*, a widely popular reference work that was revised in four editions between 1753 and 1774.[77] The *Universal Dictionary* was a "learned almanac of politics, economics, and geography" containing commentary, selections, and sometimes outright copies of writing by influential scholars and statesmen.[78] Among the more vocal admirers of Postlethwayt during this period was Alexander Hamilton, who praising Postlethwayt as among "the ablest masters of political arithmetic"[79] and frequently relying on his copy of the Universal Dictionary as an "all-purpose crib" and reference book throughout his political career.[80] Indeed, Hamilton is said to have carried both folio-sized volumes in his satchel throughout his time at the front lines of the American War of Independence.[81] Not only that, but Postlethwayt's text – considered a "key text of English commercial knowledge from the mid-eighteenth century"[82] – was readily available among the reference works available in collections

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[77] Malachy Postlethwayt, "Mar," in *Universal Dictionary of Trade and Commerce: With Large Additions and Improvements, Adapting the Same to the Present State of British Affairs in America, since the Last Treaty of Peace Made in the Year 1763*, vol. 2, 1774, [135-142], https://heinonline.org/HOL/Page?handle=hein.lbr/unidict0002&id=180&div=5&collection=selden.

[78] Ron Chernow, *Alexander Hamilton* (New York: Penguin Press, 2005), 110. (110)

[79] The Continentalist No. VI, 4 July 1782, reprinted in Alexander Hamilton, *The Political Writings of Alexander Hamilton: Volume 1, 1769–1789* (Cambridge University Press, 2017), 178.

[80] Chernow, *Alexander Hamilton*, 156.

[81] Chernow, 110.

[82] Deryck W. Holdsworth, "The Counting-House Library: Creating Mercantile Knowledge in the Age of Sail," in *Geographies of the Book* (Routledge, 2010), 142.

of the College of William and Mary and the Library Company of Philadelphia,[83] and was one of ten of Postlethwayt's works to be included in the library of reference works compiled in large part by James Madison for use of the Continental Congress between 1782 and 1784.[84]

Hamilton's fondness for Postlethwayt's rather eclectic collection of historical legal and commercial documents is relevant to our discussion here because, although Jay was sufficiently senior that his being appointed to represent the United States in these negotiations was a mark of respect, Jay's positions and strategy during the negotiations were largely directed by then-Secretary of the Treasury Hamilton.[85] Indeed, Hamilton's influence over the terms of the 1794 treaty was so great that, as Samuel Flagg Bemis wrote in his landmark work on this treaty, "it must be remembered that [Jay's] was not the guiding hand in 1794. The terms of his treaty were the result of the powerful influence of Alexander Hamilton, to whom, in the last analysis any praise or blame for the instrument must be given. ... More aptly the treaty might be called Hamilton's Treaty."[86]

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[83] These two library collections were commonly frequented by early American political figures, including Hamilton, Franklin, Madison, and Jay, among others. Early catalogs of these and other late-18th century library collections, many containing Postlethwayt's works, can be found in H. Trevor Colbourn, *The Lamp of Experience: Whig History and the Intellectual Origins of the American Revolution* (Institute of Early American History and Culture at Williamsburg, Virginia, 1965), https://oll.libertyfund.org/title/colbourn-the-lamp-of-experience.

[84] James Madison, "Founders Online: Report on Books for Congress, [23 January] 1783" (University of Virginia Press), accessed November 29, 2023, http://founders.archives.gov/documents/Madison/01-06-02-0031.

[85] Indeed, a copy of Hamilton's notes to be included in Washington's instructions to John Jay can be found here: https://www.loc.gov/resource/mss24612.022_0092_0096/?st=gallery. Though he attributes the authorship of Article 20 of the 1794 treaty to Jay, even Rubin agrees on this point. See Rubin, *The Law of Piracy*, 133.(**"**The distinctions between privateers exceeding their commissions, nationals accepting foreign commissions, and "pirates" reflected instructions drawn up by Edmund Randolph as Secretary of State pursuing an outline prepared by Alexander Hamilton.")

[86] Samuel Flagg Bemis, *Jay's Treaty: A Study in Commerce and Diplomacy* (Macmillan, 1923), 271.

Admittedly, Hamilton's instructions to Jay contained no mention of including a provision addressing the legality of aiding or harboring pirates. As others have pointed out, the directions that Jay received from Hamilton were focused on the more high-stakes issues to be negotiated, such as free travel and the administration of pre-war debts. The only marginally relevant passage was one in which Hamilton wrote, as the twelfth item in a list of nineteen issues that Jay might raise if Britain were to be open to negotiating a treaty, "Proper shelter, defence, and succour [*sic*] against pirates, shipwreck &c."[87] Indeed, these instructions do not contain any substantial reference to the content of what would become the last ten articles of the treaty. It seems to be this omission that gave rise to widespread assumption among historians that "those articles were not of his [Hamilton's] invention" and thus suggested that they were instead drafted by Jay.[88]

I argue, however, that while Hamilton may not have given Jay specific direction on the content of these provisions – including Article 20's suppression obligations – Hamilton expected Jay to model them on similar provisions in the various other treaties of amity and commerce that were reprinted in Postlethwayt and other similar sources. We can see evidence of this in Hamilton's later remarks on the content of the final text of the treaty, composed at the request of President Washington in July 1795, in which he describes Articles 19 and 20 of the treaty as "usual and every way unexceptionable provisions" that "require no comment."[89] By contrast,

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[87] Alexander Hamilton, "Enclosure: Points to Be Considered in the Instructions to Mr. Jay, Envoy Extraordinary to G B, [23 April 1794]" (University of Virginia Press, 1794), http://founders.archives.gov/documents/Hamilton/01-16-02-0252-0002.

[88] Botting, *Extradition between Canada and the United States*, 34.

[89] Alexander Hamilton, "Remarks on the Treaty of Amity Commerce and Navigation Lately Made between the United States and Great Britain, [9–11 July 1795]," Founders Online (National Archives, July 9, 1795), https://founders.archives.gov/documents/Hamilton/01-18-02-0281.

Hamilton had devoted multiple pages to analyzing other Articles addressing issues of trade and free navigation in depth. The text of Articles 19 and 20 were, in other words, not only unremarkable but familiar enough to be considered the "usual" way of handling such matters.

2.4 The End of the Beginning

This would, however, not be the "usual" way of handling such matters for long. The line of treaties that led up to the 1794 Jay Treaty came to an end within just a few decades of the ratification of that agreement. The last appearance of a "condign punishment" suppression clause in a treaty to which the United States was a party was the 1800 Treaty of Peace, Commerce and Navigation Between France and the United States.[90] Britain similarly moved

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[90] "Treaty of Peace, Commerce and Navigation Between France and the United States," *World Treaty Library*, 1800, 1–26, https://heinonline.org/HOL/P?h=hein.weaties/contreout0550043&i=1. Of note, "condign punishment" suppression clauses were included in two further U.S. treaties, the 1806 Monroe-Pinkney Treaty, and the 1823 draft Convention for Regulating the Principles of Commercial and Maritime Neutrality, but neither of these treaties ever entered into force. The former, an agreement between the United States and Great Britain, was designed as a restatement and renewal of most of the provisions of the Jay Treaty. This treaty – whose terms were negotiated by U.S. diplomats James Monroe and William Pinkney and British representatives Lords Holland and Auckland – was signed by both countries' delegations on 31 December 1806, but it never entered into force as President Jefferson refused to submit it to Congress for ratification. See Donald R. Hickey, "The Monroe-Pinkney Treaty of 1806: A Reappraisal," *The William and Mary Quarterly* 44, no. 1 (January 1987): 65, https://doi.org/10.2307/1939719. The provision in question can be found in Article 14 of the final treaty text. See James Madison, "Letter to James Monroe and William Pinkney - May 20th 1807," in *The Writings of James Madison*, vol. 7 (1803-1807) (G. P. Putnam's Sons, 1908), https://oll.libertyfund.org/title/madison-the-writings-vol-7-1803-1807#lf1356-07_head_019. The 1824 draft Convention for Convention for Regulating the Principles of Commercial and Maritime Neutrality didn't even make it as far as the 1806 Monroe-Pinkney treaty. Written by John Quincy Adams, the 1824 draft Convention was an ambitious effort to codify and improve the law of the sea, barring not only privateering but also impressment and the seizure of private property by warring nations. *See* John Quincy Adams, "Project of a Convention for Regulating the Principles of Commercial and Maritime Neutrality," in Bemis, *Foundations*, app. 3, 579–85. Although Adams had intended it to be a multilateral agreement, to be presented to "all the maritime powers of Europe," it was only ever formally presented to one, Britain, and when the British balked at its sweeping

away from the use "condign punishment" suppression clauses, with the last appearance of such wording in a treaty to which it was a party in its 1810 Treaty of Commerce and Navigation with Portugal.[91] The end of this particular line of suppression treaties, however, did not mark the end of the use of suppression treaties more generally. Indeed, even as the ink was drying on the last of these "condign punishment" suppression clauses, British officials were about to find a new use for this old legal tool.

3 The Proliferation of the Form – From Pirates to Slave Traders

In the mid- to late-18th century, British traders held a dominant role in the trans-Atlantic slave trade.[92] As the century drew to a close, however, a series of forces began to converge that would rapidly upend this state of affairs. The particular causes of this abrupt policy shift continue to be the subject of heated debate among historians. Some have emphasized the importance of the economic impacts of the country's rapid industrialization and loss of the

provisions relating to the right of search, political support for the effort dried up. See *The Nineteenth Century* (Henry S. King & Company, 1882), 286–89.

[91] "Treaty of Commerce and Navigation between Great Britain and Portugal. Signed at Rio de Janeiro, the 19th February, 1810 Treaty," *Nouveaux Supplemens Au Recueil de Traites et d'Autres Actes Remarquables Servant a La Connaissance Des Relations Etrangeres Des Puissances et Etats Dans Leur Rapport Mutuel, Depuis 1761 Jusqu'a Present* 2 (1829 1763): 142–87, https://heinonline.org/HOL/P?h=hein.weaties/recgtraig0026&i=184.

[92] While the British role in the slave trade was initially overshadowed by that of other European Powers, the British share of the slave trade increased markedly after the 1713 Peace of Utrecht. Under that treaty, Britain was granted an exclusive right (*asiento*) to supply Spanish colonies with slaves – a right that it continued to hold, and to delegate to the British-based South Sea Company, until 1750. On this point, see, e.g., Michael Craton, *Sinews of Empire: A Short History of British Slavery*, The Michigan Historical Reprint Series (Ann Arbor, Michigan: The Scholarly Publishing Office, The University of Michigan, University Library, 2011).

American colonies,[93] and others have emphasized the impacts of the concerted efforts by religious and secular moral reform groups to foster moral and political opposition to slavery among a British populace that had long been ambivalent about the practice.[94] Whatever the exact causes, however, the effects of this shift were profound. In the span of just a few decades – starting roughly with the landmark 1772 case of *Somerset v. Stewart,*[95] which effectively abolished slavery on English soil, continuing with the 1807 Act for the Abolition of the Slave Trade[96] that prohibited "all British subjects throughout the United Kingdom and her colonies"

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[93] See, e.g., Eric Eustace Williams, *Capitalism & Slavery* (Chapel Hill: University of North Carolina Press, 1994); Seymour Drescher, *Capitalism and Antislavery: British Mobilization in Comparative Perspective* (Springer, 1987); Joseph E. Inikori, *Africans and the Industrial Revolution in England: A Study in International Trade and Economic Development* (Cambridge: Cambridge University Press, 2002), https://doi.org/10.1017/CBO9780511583940; Selwyn H. H. Carrington and Colin A. Palmer, *The Sugar Industry and the Abolition of the Slave Trade, 1775 - 1810* (Gainesville, Fla.: Univ. Press of Florida, 2002).

[94] On the importance of these Quaker, Evangelical, Rational Dissenter, and other moral reform groups, see, e.g. Seymour Drescher, "5 From Consensus to Consensus: Slavery in International Law," in *The Legal Understanding of Slavery: From the Historical to the Contemporary*, ed. Jean Allain (Oxford University Press, 2012), 580, https://doi.org/10.1093/acprof:oso/9780199660469.003.0006; Christopher Leslie Brown, *Moral Capital: Foundations of British Abolitionism* (UNC Press Books, 2012), 71–80; Miles Taylor, *The Victorian Empire and Britain's Maritime World, 1837-1901: The Sea and Global History* (Basingstoke: Palgrave Macmillan, 2013), 46–47; Anthony Page, "Rational Dissent, Enlightenment, and Abolition of the British Slave Trade," *The Historical Journal* 54, no. 3 (September 2011): 741–72, https://doi.org/10.1017/S0018246X11000227.

[95] The ruling in this case, issued by the Lord Chief Justice of the King's Bench, was in fact written rather narrowly and held only that slavery had no basis in English common law. This ruling was, however, widely understood at the time to have effectively outlawed slavery across England and Wales. William R. Cotter, "The Somerset Case and the Abolition of Slavery in England," *History* 79, no. 255 (February 1994): 31–39, https://doi.org/10.1111/j.1468-229X.1994.tb01588.x; Drescher, *Capitalism and Antislavery*, 39–45.

[96] The Abolition of Slavery Act 180747 George III, Session 1, Cap. XXXVI, full text available at: http://www.esp.org/foundations/freedom/holdings/slave-trade-act-1807.pdf. On the effects and provisions of this legislation, see David Richardson, "The Ending of the British Slave Trade in 1807: The Economic Context," *Parliamentary History* 26, no. 4S (2007): 127–40, https://doi.org/10.1353/pah.2007.0041. Interestingly, a number

from "buying, selling, transporting, or otherwise transferring ownership of slaves,"[97] and culminating with the 1833 Abolition of Slavery Act, which abolished the practice of slavery itself and led to the emancipation of all enslaved persons in most British colonies[98] – Britain went from one of the leading participants in and beneficiaries of African slavery and the trans-Atlantic slave trade to a leading proponent of its abolition.

While it was undoubtedly in service of a moral goal, Britain had effectively cut the British economy off from two legs of the infamous "triangle trade"[99] – the trade in enslaved persons and the trade in manufactured goods commonly exchanged for slaves in West Africa

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of scholars have suggested that the passage of this legislation was aided not only agitation by abolitionist groups in London – notably those headed by evangelicals like Granville Sharpe – but also by the outbreak of war with Napoleon's France. While pressure had been building for such a ban for some time, Tara Helfman points out, for example, that one of the factors leading to its success in 1807 was the need to bolster British naval resources. Instituting a ban on slavery would free up many of the ships operating out of Bristol and Liverpool that had previously been engaged in the slave trade, making it easier to commandeer them for the national effort to confront Napoleon's fleet. Tara Helfman, "The Court of Vice Admiralty at Sierra Leone and the Abolition of the West African Slave Trade," *The Yale Law Journal* 115, no. 5 (2006): 1131, https://doi.org/10.2307/20455647.

[97] Helfman, "The Court of Vice Admiralty at Sierra Leone and the Abolition of the West African Slave Trade," 1131.

[98] The Slavery Abolition Act 1833 (citation 3 & 4 Will. IV c. 73). Notably, the provisions of this act – also referred to commonly as the "Emancipation Act" of 1833 – included a number of limits and delays because of which it not quite accurate to say that Britain abolished slavery or that all British slaves were emancipated in 1833. One such limitation was geographical, with those provisions banning the owning of human beings being explicitly applied to all British territorial holdings except three: "the Territories in the Possession of the East India Company," the "Island of Ceylon," and "the Island of Saint Helena." Slavery Abolition Act 1833, Section LXIV. Enslaved persons in these territories would have to wait until 1843, 1839, and 1844 respectively. The other notable limitation in this legislation was procedural. This legislation required the manumission of all enslaved persons across Britain and her colonies, but they would not be released from bondage outright but first have to serve as "apprentice labourers" for up to seven years. Slavery Abolition Act 1833, Sections I-V. Full text available here: https://www.pdavis.nl/Legis_07.htm.

[99] *See* Kenneth Morgan, *Slavery and the British Empire: From Africa to America* (OUP Oxford, 2007), 54.

– and given its rivals an advantage in accessing the third – the market for raw materials and input goods such as cotton and sugar commonly grown in the West Indies and the Americas. As the first mover in banning slavery in its colonial territories, input goods grown or produced in British colonies cost more to produce than similar products produced in the slave economies of territories or colonies held by France, Spain, or America. By extension, then, British merchants and traders that used or sold these British goods were squeezed by having to pay higher prices for raw materials and input goods and downward price pressure from their counterparts in the metropoles of these same competitor empires.[100] This left British consumers paying higher prices for goods imported from or reliant on the empire.[101] Above and beyond the costs to British manufacturing and consumers in the form of lost revenue and higher prices, concessions in the 1833 Abolition Act that the compensated former slaveholders put additional strain on British government coffers.[102] Thus, while it may be a matter of historical debate whether Britain had an economic incentive to abolish slavery and the slave trade in its own territories prior to the passage of the 1807 or 1833 Abolition Acts, it clearly had an economic incentive to pressure other imperial powers to abolish slavery and the slave trade afterward.

Under pressure from British capital and consumers alike to protect against this threat to

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[100] Chaim D. Kaufmann and Robert A. Pape, "Explaining Costly International Moral Action: Britain's Sixty-Year Campaign against the Atlantic Slave Trade," *International Organization* 53, no. 4 (1999): 635, https://www.jstor.org/stable/2601305.

[101] *See* Kaufmann and Pape, 636; David Eltis and Stanley L. Engerman, "The Importance of Slavery and the Slave Trade to Industrializing Britain," *The Journal of Economic History* 60, no. 1 (March 2000): 125, https://doi.org/10.1017/S0022050700024670.

[102] Ultimately, the British government would pay out over £20 million to former slave owners under this provision, an amount that was roughly equivalent to 5% of the country's GDP at the time. *See* Kaufmann and Pape, "Explaining Costly International Moral Action," 636.

the country's economy, and from increasingly influential abolitionist groups and moral reformers to be seen championing the cause of emancipation abroad,[103] British leaders began to work towards categorizing slavery and the slave trade as an international crime.[104]

To this end, Britain initially adopted a strategy of unilateral "abolition through interception,"[105] using British naval superiority to "enforce her ban on the slave trade against the nationals of other states."[106] To this end, British officials created a new West Africa Squadron, also referred to as the "Preventive Squadron," that would be charged with patrolling the West African coast and interdicting suspected slaving ships,[107] and issued new Naval directives under which slave trading was declared to be on par with piracy, providing a colorable "legal justification for the self-proclaimed right of Britain to intercept and search foreign vessels on the high seas."[108] To bolster the Navy's official efforts, the Abolition Act also created an incentive for privateers to join the fray in the form of bounties to be paid to privateers that captured and

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[103] Public support for abolitionist action abroad grew steadily over the first decades of the 19th century. In 1833, Parliament received a petition in favor of abolition at home and abroad signed by over 20% of all British men over the age of 15. See Seymour Drescher, "Public Opinion and the Destruction of British Colonial Slavery (1982)," in *From Slavery to Freedom: Comparative Studies in the Rise and Fall of Atlantic Slavery*, ed. Seymour Drescher (London: Palgrave Macmillan UK, 1999), 57–86, https://doi.org/10.1007/978-1-349-14876-9_3.

[104] Taylor, *The Victorian Empire and Britain's Maritime World, 1837-1901*, 46.

[105] Helfman, "The Court of Vice Admiralty at Sierra Leone and the Abolition of the West African Slave Trade," 1152.

[106] Laurence R Helfer, "Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes," August 2009, 1151.

[107] Lloyd, *The Navy and the Slave Trade*; Raymond C. Howell, *The Royal Navy and the Slave Trade* (Taylor & Francis, 2022).

[108] Stefan Eklöf Amirell, *Pirates of Empire: Colonisation and Maritime Violence in Southeast Asia*, 1st ed. (Cambridge University Press, 2019), 102, https://doi.org/10.1017/9781108594516. Amirell 102.

delivered ships carrying slaves to British authorities.[109] And to provide a judicial seal of approval to the seizure of ships under this unilateral suppression regime, Britain established a new Court of Vice Admiralty in Sierra Leone in 1807 that would be dedicated to, and have its jurisdiction explicitly limited to, "the prosecution and that only of captured [slaves] seized or taken on or near the Coast of Africa together with the Ships Vessels or Boats in which they shall be so seized and taken and all the Goods Wares Merchandize and Effects found on board the same."[110]

Initially, this strategy worked rather well. Between 1808 and 1815, the rag-tag West Africa Squadron[111] intercepted and seized dozens of French, Dutch, Spanish, Danish, and Portuguese slave ships. And initially British officials were happy to cheer on the Navy's efforts

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[109] These bounties were paid not as prize money for the ship itself but allocated according to the number of slaves the captured ship was carrying at time of capture. See 1807 Abolition Act, §VIII. The value of these bounties were set in 1808 by an order of the Crown and ranged from £10 to £40 per captured slave, varying according to their age and gender. Richard Anderson, "Abolition's Adolescence: Apprenticeship as 'Liberation' in Sierra Leone, 1808–1848*," *The English Historical Review* 137, no. 586 (June 1, 2022): 770, https://doi.org/10.1093/ehr/ceac117. This policy seems to have been extraordinarily successful as, according to one historian's estimates, the Treasury paid out more than £191,000 in slave bounties over just seven years (mid-1807 to mid-1815), a total that corresponded to between 9,000 and 10,000 freed slaves. Christopher Fyfe, *History of Sierra Leone*, First Edition (Oxford University Press, 1962), 136.

[110] Helfman, "The Court of Vice Admiralty at Sierra Leone and the Abolition of the West African Slave Trade," 1132. (citing Letters Patent Establishing a Court of Vice Admiralty at Sierra Leone (May 2,1807) (on file with PRO, Admiralty 5/51). This court was established in May of 1807, three months before the territory was formally annexed as a Crown Colony.

[111] As Leslie Gardiner has pointed out, for all the historic interest and moral imprimatur granted to it, the West Africa Squadron was, for most of its existence, a rather haphazard and not particularly well-equipped force. *See* Leslie Gardiner, *The British Admiralty* (Blackwood, 1968), 218. (Describing the Africa Squadron as "a task force of out-of-date sloops and frigates, far from the limelight, from Their Lordships' notice and from the modest comforts of Channel or Mediterranean warships.")

to give "vigorous effect" to the policy of suppressing the slave trade while turning something of a blind eye to the legal ambiguities they raised.[112] In these early years, the ongoing war with Napoleon and France's allies provided convenient diplomatic and legal cover for these operations. Seizures of ships flying the French, Dutch, and – prior to 1809 – Spanish flags could be justified as Britain exercising its rights as a belligerent under the Law of Nations to visit and search enemy vessels.[113] Napoleon's reintroduction of slavery in 1802 allowed Britain to frame its abolition efforts to audiences at home and abroad as a "demonstration of British moral superiority," and later in the war, with the launch of the Peninsular Campaigns, Portugal and Spain, whose slave ships were frequently the target of British patrols, were too reliant on British protection to risk any serious protest of British interference with the trade.[114]

By the 1815, however, as the Napoleonic Wars came to a close, this strategy began to face mounting opposition, both abroad and at home. Spain and Portugal – now no longer dependent on Britain for their defense against Napoleon's forces – began to lodge increasingly strident complaints against the repeated seizure and detention of slave ships owned and operated by their nationals.[115] The end of the war also brought increasing scrutiny from British courts. A

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[112] Helfman, "The Court of Vice Admiralty at Sierra Leone and the Abolition of the West African Slave Trade," 1137.

[113] Holger Lutz Kern, "Strategies of Legal Change: Great Britain, International Law, and the Abolition of the Transatlantic Slave Trade," *Journal of the History of International Law / Revue d'histoire Du Droit International* 6, no. 2 (September 1, 2004): 235, https://doi.org/10.1163/1571805042782073. Later, Britain would assert an even more expansive interpretation of this wartime right to search, asserting the right to intercept ships suspected of trading with enemy territories, even if they were flying the flag of a neutral country, on the logic that such trade could not help but to support the enemy cause and prolong the war.

[114] Kaufmann and Pape, "Explaining Costly International Moral Action," 654.

[115] In addition to the political capital expended in the resolution of this diplomatic crisis, Britain would ultimately have to expend a good deal of financial capital to put this issue to rest. Under the 1815 Anglo-Portuguese and 1817

series of legal decisions by Britain's own High Court of Admiralty,[116] culminating with the 1817 case of the *Le Louis*,[117] ruled that in the absence of any plausible threat to the safety of British crews, the capture or forcible inspection of foreign ships was contrary to the Law of Nations. The diplomatic crisis with Spain and Portugal and the legal finality of the *Le Louis* decision effectively marked the end of Britain's experiment with unilateral suppression. In the absence of the legal and political cover that wartime had provided for its naval efforts to suppress the slave trade, and with little support for the notion that the passage of domestic legislation (in Britain and the United States, among other states)[118] equating slavery with piracy was sufficient to make

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Anglo-Spanish Treaties on the Gradual Abolition of the Slave Trade – both of which are discussed in more detail below – in return for Spanish and Portuguese commitments to enact laws prohibiting the slave trade, England agreed to pay £400,000 to Spain and £300,000 to Portugal as "compensation for injuries committed against her nationals by the West Africa Squadron and British privateers." Helfman, "The Court of Vice Admiralty at Sierra Leone and the Abolition of the West African Slave Trade," 1149.

[116] See discussions of the cases of the the *Amedie* (1810), the *Africa* (1810), the *Anne* (1810), the *Fortuna* (1811), and the *Diana* (1812) in in Hugo Fischer, "The Suppression of Slavery in International Law," *International Law Quarterly* 3, no. 1 (January 1950): 35, https://heinonline.org/HOL/P?h=hein.journals/intlq3&i=40. The *Le Louis* decision was presaged, not only by prior cases appealed from the Vice Admiralty Court in Sierra Leone, but also by a letter written by another judge in the High Court of Admiralty – Christopher Robinson – and sent to the Foreign Secretary that contained the following: "There has never been any Principle avowed by any Court of Justice in England by which Cruizers can have been envisaged to venture on the Seizure and detention of Vessels, being bona fide Spanish property, engaged in the Slave Trade." Helfman, "The Court of Vice Admiralty at Sierra Leone and the Abolition of the West African Slave Trade," 1149. (citing Letter from Christopher Robinson, Admiralty Judge, to Viscount Casdereagh, Sec'y of State for Foreign Affairs (Oct. 31,1815) (on file with PRO, Foreign Office 38/2364/313).

[117] Le Louis, (1817) 165 Eng. Rep. 1464,1480 (High Ct. of Adm.). (Holding that "no nation can exercise a right of visitation and search on the common and unappropriated parts of the sea, save only on the belligerent claim.")

[118] The U.S. was the first state to adopt legislation to this effect, doing so in 1820. *See* Jean Allain, "The Nineteenth Century Law of the Sea and the British Abolition of the Slave Trade," *British Yearbook of International Law* 78, no. 1 (2007): 363, https://doi.org/10.1093/bybil/78.1.342.

a similar analogy at the international level,[119] Britain was left without a clear justification for ongoing suppression efforts under the Law of Nations. At an impasse, then, British leaders were forced to shift their political and diplomatic energy to a different strategy.[120]

If the Law of Nations in its contemporary form could not provide Britain with a justification for continuing its efforts to abolish the slave trade on the high seas, then perhaps it could carve out such a justification in a different way. During the recent war with Napoleon, British officials had some success modifying the "inter-imperial law of neutrality" – the shared understanding between European Powers as to the rights of belligerents in regard to neutral shipping – through the use of treaties. From the end of the 18th century through the first decade of the 19th, Britain had concluded a series of bilateral treaties "carving out exceptions" to the general rules of neutrality that allowed it greater leeway to visit, search, and potentially condemn as contraband, goods being shipped under the flags of those neutral countries with which Britain

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[119] On this point, Henry Wheaton writes in his 1866 textbook, "[t]he African slave-trade, though prohibited by the municipal laws of most nations, and *declared* to be piracy by the statutes of Great Britain and the United States, and [by treaty] Austria, Prussia and Russia, is not such by the general international law." As part of his evidence for this position, he points to an 1825 U.S. Supreme Court case, *The Antelope*, in which the Court, according to Wheaton, "decided that the [slave] trade was not piracy jure gentium." Henry Wheaton, *Elements of International Law* (Little, Brown, 1866), 197–98. See also David Eltis, *Economic Growth and the Ending of the Transatlantic Slave Trade* (New York: Oxford University Press, 1987), 85 ("Unlike robbery and murder, the traffic in slaves was not and never became classed as piracy. Britain, the U.S. and some other countries declared the trade to be piratical, but this was not enough to make the activity a breach of international law and therefore punishable by the laws of any country within whose power a pirate was brought.").

[120] Benton, "Abolition and Imperial Law, 1790–1820," 360 (describing "the turn towards treaty making as a way of regulating the slave trade" as in large part "a response to rulings in prominent cases involving the trade"); Boister, "The Growth of the Multilateral Suppression Conventions in the First Half of the 20th Century," 41 ("Attempts to suppress the slave trade had to rely on treaties because, as Wheaton noted in 1866, attempts to analogize slavery to the customary law of piracy had failed.").

had signed the treaties.[121] Over the course of the war, as more states began to embrace the exceptions to neutrality that had been spelled out in these British treaties, and more prize court rulings based upon them were issued, international jurists slowly embraced them as well.[122]

Drawing on this experience with shifting the balance of the Law of Nations through the accretion of bilateral treaties, British officials began to experiment with adopting the same strategy in the context of slave trade treaties, but this time borrowing from another area of British treaty practice: the use of suppression clauses.

3.1 A New Use for an Old Tool

The first evidence of British officials transplanting the legal tool of suppression treaties from the context of piracy suppression to the context of the suppression of the slave trade can be found in two bilateral agreements concluded in 1817 – first an "Additional Convention" that built on Britain's existing slave trade "prevention" treaties with its old ally Portugal and a new "abolition treaty" with Spain.[123] These two agreements, negotiated as part of the effort to quell diplomatic tensions with the two Iberian powers, are the first examples of what Roger Clark

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[121] *See* Benton, "Abolition and Imperial Law, 1790–1820," 360; Adriane Sanctis De Brito, *Seeking Capture, Resisting Seizure: An International Legal History of the Anglo-Brazilian Treaty for the Suppression of the Slave Trade (1826–1845)* (Max Planck Institute for Legal History and Legal Theory, 2024), 14, https://muse.jhu.edu/pub/329/oa_monograph/book/123564.

[122] *See* Benton, "Abolition and Imperial Law, 1790–1820," 360; De Brito, *Seeking Capture, Resisting Seizure*, 14.

[123] Additional Convention between Great Britain and Portugal for the Prevention of the Slave Trade, 28 July 1817, 67 CTS 373; Treaty between Great Britain and Spain for the Abolition of the Slave Trade, 23 September 1817, 68 CTS 45.

refers to as the "slave trade suppression genre."[124] The former contained the following provision, clearly laying out an obligation on the part of King John IV:

> "His Most Faithful Majesty engages, within the space of two months of the ratifications of the present Convention, to promulgate in His Capital, and in other parts of His Dominions, as soon as possible, a Law, which shall prescribe the punishment of any of His Subjects who may in the future participate in the illicit traffic of Slaves ... and engages to assimilate, as much as possible, the Legislation of Portugal in this respect, to that of Great Britain."[125]

The 1817 treaty with Spain did not contain as clear a suppression obligation, but did contain the obligation to outlaw participation in the slave trade by any Spanish subject (coming into force six months after the treaty entered into effect) and binding the Spanish King, Ferdinand VII, to "adopt, in conformity to the spirit of this treaty, the measures which are best calculated to give full and complete effect to the laudable objects which the high contracting parties have in view."[126]

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[124] Roger S Clark, "British Anti-Slave-Trade Treaties with African and Arab Leaders as Precursors of Modern Suppression Conventions," in *Histories of Transnational Criminal Law*, by Roger S Clark (Oxford University Press, 2021), 129, https://doi.org/10.1093/oso/9780192845702.003.0010.

[125] Additional Convention between Great Britain and Portugal for the Prevention of the Slave Trade, Article 3, 28 July 1817, 67 CTS 373. Clark, "Some Aspects of the Concept of International Criminal Law," 524.

[126] Treaty between Great Britain and Spain for the Abolition of the Slave Trade, Articles 1, 2, and 6, 23 September 1817, 68 CTS 45. British officials would later seek to strengthen this obligation under a subsequent 1835 treaty with Spain. That treaty, negotiated and signed after the death of Ferdinand VII and during the minority of his daughter Isabella II, contained a much more specific provision obligating the Queen to "promulgate throughout [her] Dominions… a penal law, inflicting a severe punishment on all those Her Catholic Majesty's subjects, who shall, under any pretext whatsoever, take any part whatever in the traffic in slaves" and to do so within just two months of the treaty's ratification. Treaty between His Majesty and the Queen Regent of Spain, during the Minority of her

This experimentation with using suppression clauses to leverage European allies into enacting and enforcing domestic legislation against their subjects would continue and accelerate over the next decades. In an 1818 treaty with the Netherlands, signed just a year after those with Portugal and Spain, Britain successfully pushed[127] for the inclusion of a slave trade suppression clause that required the Dutch Prince of Orange to issue decrees criminalizing participation in the slave trade for any Dutch subject, and equating participating in the slave trade to piracy.[128] In an 1824 treaty, King Oscar I of Sweden and Norway agreed to largely the same obligation, agreeing to issue penal laws ("with the concurrence of the States General of the Kingdom of Sweden and of the Storthing of the Kingdom of Norway") "which shall visit with a punishment proportionate to the magnitude of the crime, any participation whatsoever, by Swedish or Norwegian subjects,

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Daughter, Donna Isabella the Second, Queen of Spain, for the Abolition of the Slave Trade, 28 June 1835, [1835] UKTS 9999, in Lewis Hertslet, *Hertslet's Commercial Treaties: A Collection of Treaties and Conventions, Between Great Britain and Foreign Powers, and of the Laws, Decrees, Orders in Council, &c., Concerning the Same, So Far as They Relate to Commerce and Navigation, Slavery, Extradition, Nationality, Copyright, Postal Matters, &c., and to the Privileges and Interests of the Subjects of the High Contracting Parties. Compiled from Authentic Documents ...*, 1835, 441.

[127] There is some indication that the Dutch willingness to go along with Britain's wishes on this point was in large part a "gesture of gratitude" from the Prince of Orange for Britain's having helped restore him to the Dutch throne, and a ploy to convince Britain to return Dutch overseas possessions that had fallen under Britain's control after Napoleon's defeat. *See* Kern, "Strategies of Legal Change," 241.

[128] Treaty between His Britannic Majesty and His Majesty the King of the Netherlands, for preventing their Subjects from engaging in any Traffic in Slaves, 4 May 1818, in Lewis Hertslet, *Hertslet's Commercial Treaties: A Collection of Treaties and Conventions, Between Great Britain and Foreign Powers, and of the Laws, Decrees, Orders in Council, &c., Concerning the Same, So Far as They Relate to Commerce and Navigation, Slavery, Extradition, Nationality, Copyright, Postal Matters, &c., and to the Privileges and Interests of the Subjects of the High Contracting Parties* (H.M. Stationery Office, 1827), 277.

in the Slave Trade."[129] The inclusion of this clause is notable because Sweden had already abolished the slave trade in 1813, under pressure from Britain, indicating that it was included for the purpose of inducing further criminalization of the practice in the two Nordic countries.

At the same time that British officials were negotiating these slave trade suppression treaties with other European states, they were also experimenting with extending this strategy to the various Arab and African kingdoms and polities from which those persons were most commonly trafficked. The first evidence of this can be seen in an 1817 treaty with Madagascar, one of the major slave trading hubs in Eastern Africa, in which King Radama agreed to suppression terms, enacting them with a declaration under which any person found "guilty of selling any slave" in Madagascar would be "reduced to slavery himself, and his property shall be forfeited to me."[130] Similar terms would be included in treaties signed in 1822 with two of the other eastern slave trading hubs, Zanzibar and Muscat.[131] From there, this strategy expanded to negotiations with the many slave-exporting polities up and down the West African coast, starting with an 1826 treaty with the Chiefs of the Soombia Soosoos "in the hinterland of Sierra Leone"[132] and an 1841 agreement with the Timmanees in 1841.[133] The rate at which new

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[129] Treaty between His Britannic Majesty and His Majesty the King of Sweden and Norway for Preventing Their Subjects from Engaging in any Traffic in Slaves, 6 November 1824, in Hertslet, 399–400.

[130] Treaty between Great Britain and Madagascar, 23 October 1817, 68 CTS 115, in Hertslet, 241.

[131] *See* Treaty With The Imaum Of Muscat For Abolishing The Slave Trade Traffic With Foreign Powers Through His Highness's Dominions And Dependencies, 10 September 1822, UKTS 14950, in Hertslet, 265.

[132] Treaty with the Chiefs of the Soombia Soosoos', in the hinterland of Sierra Leone, 18 April 1826, in Hertslet, 4. Clark, "British Anti-Slave-Trade Treaties with African and Arab Leaders as Precursors of Modern Suppression Conventions," 132.

[133] Treaty with the Chiefs of the Timmanees (in the hinterland of Sierra Leone), 13 February 1841, 92 CTS 316 in Lewis Hertslet, ed., *A Complete Collection of the Treaties and Conventions, and Reciprocal Regulations at Present*

suppression treaties with West African leaders were signed accelerated sharply in the mid-1840s with the creation of a "model treaty" – a standardized draft treaty, which contained not only agreements to abolish the slave trade but also specific suppression clauses under which signatories would be obligated to "promise to inflict a severe punishment on any person who shall break this law" – that was first used during the 1847 Buxton expedition. The expedition produced treaties with at least 30 kingdoms up and down the Niger river and was later distributed "among all the colonial governors of the West African settlements and the naval officers of the Africa station."[134] By 1860, Britain had concluded a network of 45 slave trade treaties with polities on the West Coast of Africa, covering nearly all the "provenance zones" (common sources of, or departure points for, slave ships) in the trans-Atlantic trade.[135] By the end of the century, this web of treaties would expand to more than 100 such agreements with African rulers whose territories covered all areas of the coast from which slaves were exported.[136]

Although contemporary scholarship tends to discount the importance and effectiveness of some of these treaties, particularly those with smaller African and Arab polities,[137] it seems at

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Subsisting Between Great Britain and Foreign Powers [...] So Far as They Relate to Commerce and Navigation, the Slave Trade, Post-Office Communications, Copyright, Etc. (London: H.M. Stationery Office, 1856), 56, https://books.google.com/books?id=jfs3AAAAYAAJ. Clark, "British Anti-Slave-Trade Treaties with African and Arab Leaders as Precursors of Modern Suppression Conventions," 133.

[134] Inge Van Hulle, *Britain and International Law in West Africa: The Practice of Empire*, First edition, The History and Theory of International Law (Oxford, United Kingdom: Oxford University Press, 2020), 80.

[135] Eltis, *Economic Growth and the Ending of the Transatlantic Slave Trade*, 89.

[136] Jean Allain, *The Law and Slavery: Prohibiting Human Exploitation* (Leiden, The Netherlands ; Boston: Brill Nijhoff, 2015), 87.

[137] See, for example James B. Webster, Albert Adu Boahen, and Michael Tidy, *The Revolutionary Years, West Africa Since 1800 (Growth of African Civilization)*, New ed, The Growth of African Civilisation (London:

least that British leadership at the time believed them to be important.[138] In a report delivered to Parliament in 1853, a group of MPs appointed to inquire into the status and cost of Britain's network of slave trade suppression treaties (the "Select Committee on Slave Trade Treaties") reinforced this point, writing that the efforts to conclude these treaties, undertaken "in the cause of humanity" and "continued through so many years," were not only "honourable to the nation" but also effective enough to "afford a strong inducement to persevere until this iniquitous trade shall be entirely abolished."[139]

4 Conclusion

International criminalization is one of the chief ways that international actors – whether national leaders, diplomats, lawyers, or issue advocates – have sought to *use* the idea of international crime. The act of establishing certain acts as crimes of international concern is to some degree an organizational or logistical one. As one scholar writes, international criminalization is "instrumental in allowing states to better organize the joint repression of certain criminal offences"[140] and "to achieve stronger cooperation in judicial matters to oppose transnational criminality."[141] It is also, and I would suggest more fundamentally, a tool of

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Longman, 1980), 57–58. (Describing the British treaties with various small West African polities – including Dahomey, Bonny, Lagos, and others – as "not very effective, because most kings ignored them.")

[138] Clark, "British Anti-Slave-Trade Treaties with African and Arab Leaders as Precursors of Modern Suppression Conventions." ("But there is no doubt that the British took them seriously. … Considerable resources were devoted to negotiation and implementation … the British would hardly have persisted with such a dramatic programme of treaty negotiation unless they thought it was having some effect.")

[139] British House of Commons, *Report from the Select Committee on Slave Trade Treaties: Together with the Proceedings of the Committee, Minutes of Evidence, Appendix and Index* (British House of Commons, 1853), iii.

[140] Gaeta, "International Criminalization of Prohibited Conduct," 63.

[141] Gaeta, 63.

legitimization. Once a given act is recognized as a crime of international concern then evidence of that act being committed – particularly if it is framed as a broader pattern of "transnational criminality" – can be cited to provide political and legal cover for policies or actions actually or nominally aimed at enforcement, policing, or intervention that would otherwise be unjustifiable under international law. The effort to frame certain acts as crimes of international concern is thus always and fundamentally a political one.[142] And, as shown in this chapter, suppression treaties were among the earliest tools by which legal actors could pursue and accomplish this goal.

While the account presented here leaves off in the middle years of the 19th century, the trends described here would only accelerate in the subsequent decades. Britain went on to amass well over 150 treaties related to the abolition of the slave trade by the end of the century, many of which included suppression clauses containing obligations for signatories to adopt and enforce domestic laws criminalizing the participation in the slave trade. Even more notable for the purposes of this dissertation's focus on the emergence and spread of legal ideas, however, the latter years of the century would also see a second wave of legal borrowing in which international legal actors facing new and emerging issues of international concern – including the protection of undersea telegraph cables and the spectre of international anarchist terrorism – once again turned to the idea of using positive treaty agreements containing suppression clauses to create new crimes of international concern.[143] And this tool continued to proliferate throughout

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[142] Aaronson and Shaffer, "Defining Crimes in a Global Age," 459.

[143] On the efforts to negotiate international agreements defining terrorist or anarchist violence as an international crime, either through direct criminalization or through suppression clauses obligating states to adopt domestic criminal prohibitions on specified conduct, *see, e.g.*, Richard Bach Jensen, "The International Campaign Against

the following century and up to today.

Suppression treaties remain one of the primary diplomatic and legal tools that states and other international actors have sought to address serious issues of international concern. Indeed, the use of multilateral treaties to formalize (and foster the creation of) "transnational prohibition norms" has been accelerating over the past few four decades.[144] Between the fall of the Berlin Wall and today, states have concluded at least a dozen broadly-ratified multilateral suppression

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Anarchist Terrorism, 1880–1930s," *Terrorism and Political Violence* 21, no. 1 (January 5, 2009): 89–109, https://doi.org/10.1080/09546550802544862; Richard Bach Jensen, "The International Anti-Anarchist Conference of 1898 and the Origins of Interpol," *Journal of Contemporary History* 16, no. 2 (April 1981): 323–47, https://doi.org/10.1177/002200948101600205; Richard Bach Jensen, ed., "The First International Conference on Terrorism: Rome 1898," in *The Battle against Anarchist Terrorism: An International History, 1878–1934* (Cambridge: Cambridge University Press, 2013), 131–84, https://doi.org/10.1017/CBO9781139524124.008; Richard Bach Jensen, *The Battle against Anarchist Terrorism: An International History, 1878-1934* (Cambridge ; New York: Cambridge University Press, 2014); Knepper, *The Invention of International Crime*.
On the successful effort to negotiate a multilateral international agreement (the 1884 Convention for the Protection of Submarine Telegraph Cables) containing provisions obligating states to criminalize the act of damaging transnational undersea telegraph cables, *see, e.g.* Clark, "Some Aspects of the Concept of International Criminal Law"; Douglas R Burnett, "Submarine Cable Security and International Law" 97 (2021); Louis Renault, "De La Protection Internationale Des Cables Telegraphiques Sous-Marins," *Revue de Droit International et de Legislation Comparee* 12 (1880): 251–75, https://heinonline.org/HOL/P?h=hein.journals/intllegcomp12&i=251; Douglas Howland, "The Limits of International Agreement: Belligerent Rights vs. Submarine Cable Security in the 19th Century," *Jus Gentium: Journal of International Legal History* 2, no. 1 (January 2017): 67–92. Notably, Travers Twiss was an early champion of this latter effort towards international criminalization. Twiss presented a paper on the topic that prefigured, in large part, the ultimate text of the 1884 Convention at the 1878 Annual Conference of the Association for the Reform and Codification of the Law of Nations. *See* Association for the Reform and Codification of the Law of Nations, "Report of the Sixth Annual Conference Held at Frankfort-on-the-Main, August 1878" (Frankfort-on-the-Main: Association for the Reform and Codification of the Law of Nations., 1878), 46.
[144] Aaronson and Shaffer, "Defining Crimes in a Global Age," 466.

treaties.[145] In addition to these "universal" suppression treaties – called such not because of their universal ratification but because any country may sign on to them – there have been myriad suppression treaties enacted under regional or closed-membership international organizations such as the European Union, the African Union, the Organization of American States, and the Organization for Economic Co-operation and Development (OECD).[146] And suppression treaties remain the most commonly used tool of "international criminalization" (the process by which state actors can create or re-codify new international crimes) today. And the world may soon see another example added to this list as the activists behind the growing movement to establish a crime of "ecocide" have put forward draft language for a suppression treaty codifying that new crime.[147]

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[145] These include, among others, the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), Convention for Suppression of Terrorist Bombing (1997), Rome Statute of the International Criminal Court (1998), The International Convention for the Suppression of the Financing of Terrorism (1999), The UN Convention against Transnational Organized Crime (2000), Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (2000), Protocol against the Smuggling of Migrants by Land, Sea and Air (2000), Protocol against the Illicit Manufacturing of and Trafficking in Firearms (2000), The UN Convention against Corruption (2003), Convention for Suppression of Acts of Nuclear Terrorism (2005).

[146] These include, among others, the Arab Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Arab Convention against Transnational Organized Crime, Arab Convention against Corruption, AU Convention on Corruption, OECD Convention on Bribery, Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, EU Criminal Law Convention on Corruption, Inter-American Convention against Corruption Inter-American Convention against Arms Trafficking, Inter-American Convention on International Traffic in Minors, the EU Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, the EU Convention on Cybercrime (Budapest Convention), Arab Convention on Combating Information Technology Offences, and the Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa.

[147] See, e.g. Kate Mackintosh Oldring Lisa, "Watch This Space: Momentum Toward an International Crime of Ecocide," Just Security, December 5, 2022, https://www.justsecurity.org/84367/watch-this-space-momentum-

The historical study of emergence and spread of suppression treaties as a tool of international criminalization, and of the broader idea of international criminalization itself, offers valuable insights for contemporary debates on international criminal law. The international community continues to face new and emerging challenges as ever-increasing connectivity and accelerating climate change increase the range of actions that could, and perhaps should, be understood as crimes of international concern.

toward-an-international-crime-of-ecocide/; Darryl Robinson, "The Ecocide Wave Is Already Here: National Momentum and the Value of a Model Law," Just Security, February 23, 2023, https://www.justsecurity.org/85244/the-ecocide-wave-is-already-here-national-momentum-and-the-value-of-a-model-law/; "'A Powerful Solution': Activists Push to Make Ecocide an International Crime | Environment | The Guardian," accessed December 15, 2023, https://www.theguardian.com/environment/2022/sep/26/activists-push-make-ecocide-international-crime; Katelyn Weisbrod, "The UN Wants the World Court to Address Nations' Climate Obligations. Here's What Could Happen Next," *Inside Climate News* (blog), March 29, 2023, https://insideclimatenews.org/news/29032023/climate-change-international-court-rulings/.

CHAPTER 4: APPLYING INTERNATIONAL CRIMES – MIXED COURTS, INTERNATIONAL COMMISSIONS, AND OTHER 19TH CENTURY EXPERIMENTS IN INTERNATIONALIZED CRIMINAL ADJUDICATION

Abstract

In this chapter, I examine the ways in which legal actors experimented with internationalized criminal adjudication – the practices and processes by which national leaders, military officials, diplomats, and other interested parties can use internationalized courts to address instances in which individuals are accused of committing crimes of international concern – during the latter parts of the 19th century and dawn of the 20th. This chapter presents four case studies in which political, military, and legal actors responded to alleged crimes of international concern by creating *ad hoc* internationalized courts and commissions of inquiry charged with adjudicating the criminal responsibility of alleged perpetrators: a Special Court established to hear an 1874 trial for piracy in the Malay kingdom of Kuala Langat; a French-Siamese Mixed Court convened in 1894 in Siam; the 1900 International Military Commission in Paoting-Fu China; and the 1905 International Commission of Inquiry for the North Sea (Dogger Bank) Incident. It then considers the historical significance and contemporary relevance of these and other early experiments in international criminal adjudication.

1 Introduction

How should state leaders, diplomats, military officials, and other legal actors respond to instances in which crimes of international concern are alleged to have occurred? What kinds of institutions are sufficient, or even suitable, for the adjudication of such cases? In this chapter, I

examine the ways in which 19th century politicians, diplomats, and lawyers engaged with these questions as they sought to define and expand the category of acts that could form the basis for a legitimate international concern. In particular, I explore four case studies in which legal actors experimented with internationalized[148] criminal adjudication by forming *ad hoc* hybrid or mixed international tribunals.

In contemporary international law, hybrid or mixed international tribunals defined as a class of adjudicatory bodies that have all or most of the following institutional characteristics: they are staffed by personnel (judges, counsel, prosecutors, administrators, staff, etc.) from two or more countries; they apply a mixture of domestic, foreign, and/or international criminal law and procedures; and they have the institutional capacity and mandate to adjudicate instances of "international crimes" or "crimes of international concern."[149] These internationalized courts may be geographically situated in a target state or sit within the territory of a neutral state. They may be established as stand-alone international bodies or as special courts or chambers within a country's existing domestic court system.[150] Finally, these internationalized tribunals are

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[148] For purposes of this discussion, I define "internationalized criminal adjudication" as the practice of adjudicating alleged crimes through the use of a criminal court that has one or more "international" elements.

[149] *See, e.g.*, Michail Vagias, "Other 'Hybrid' Tribunals," in *International Conflict and Security Law: A Research Handbook*, ed. Sergey Sayapin et al. (The Hague: T.M.C. Asser Press, 2022), 634, https://doi.org/10.1007/978-94-6265-515-7_30; Beth Van Schaack, "The Building Blocks of Hybrid Justice," *Denver Journal of International Law and Policy* 44 (2015): 173, https://doi.org/10.2139/ssrn.2705110; Neha Jain, "Conceptualising Internationalisation in Hybrid Criminal Courts," 2009, 16.

[150] For discussions of more contemporary examples of internationalized, mixed, or hybrid courts that employ similarly ecumenical conceptions of this category of adjudicatory bodies, see, e.g. Robert Muharremi, "The Concept of Hybrid Courts Revisited: The Case of the Kosovo Specialist Chambers," *International Criminal Law Review* 18, no. 4 (November 10, 2018): 623–54, https://doi.org/10.1163/15718123-01804008; Laura A. Dickinson, "The Promise of Hybrid Courts," *American Journal of International Law* 97, no. 2 (April 2003): 295–310,

established through agreements between two or more states (or, in the case of recent examples of the form, between a state and an intergovernmental organization,[151] such as the United Nations or the African Union). These agreements are generally presented as the result of a concern – by one or more foreign states or international organizations – that the target state will be either "unwilling or unable" to try those accused of crimes of international concern.[152]

The analysis in this chapter proceeds as follows. First, I present four case studies in which legal actors experimented with internationalized criminal adjudication: a special mixed court established 1873 in the Malay Sultanate of Selangor to adjudicate an alleged act of piracy against residents of the British Straits Settlements, two mixed courts established in 1894 in the Kingdom of Siam to adjudicate allegations that arose from the killing of a French soldier the previous year, an International Commission established in Paoting-Fu (Baoding) China to punish those responsible for the murders of fifteen American and British missionaries in the midst of the Boxer uprising of 1900, and an International Commission established in 1905 to prosecute

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https://doi.org/10.2307/3100105; L A Dickinson, "Relationship between Hybrid Courts and International Courts: The Case of Kosovo, The," *New Eng L Rev*, 2002, http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/newlr37&section=60; Harry Hobbs, "Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy," *Hybrid Tribunals*, 2016, 42.

[151] "Internationalized Criminal Tribunals," *International Justice Resource Center* (blog), February 27, 2010, https://ijrcenter.org/international-criminal-law/internationalized-criminal-tribunals/.

[152] The phrasing quoted here is drawn from Article 17(1)(a), "Rome Statute of the International Criminal Court," UN Doc. A/CONF.183/9 § (1998), https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf. For a discussion of the role of this concern about the ability and willingness of domestic courts and authorities to prosecute nationals accused of crimes of international concern in international criminal justice, see Timothy McCormack, "Their Atrocities and Our Misdemeanours: The Reticence of States to Try Their 'Own Nationals' for International Crimes," in *Justice for Crimes Against Humanity*, ed. Mark Lattimer and Philippe Sands (United Kingdom: Bloomsbury Publishing, 2003), 107–42.

individuals responsible for an incident in which Russian navy vessels opened fire on a group of British fishing boats. Then I consider some notable themes present across the four case studies and the significance of each of these four experiments with internationalized criminal adjudication to later developments in the history of international criminal law and international criminal justice.

2 Experimenting with Internationalized Criminal Adjudication: Case Studies of *Ad Hoc* Internationalized Criminal Trials

In discussions of hybrid or mixed international criminal tribunals, it is common for authors to describe these institutions as a relatively new addition to the institutional toolkit of international criminal justice.[153] Indeed, a number of authors have claimed that the broader idea of internationalized criminal adjudication is more or less a project of the 20th century.[154] Continuing the theme of this project, here I show that the idea of internationalized criminal

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[153] *See, e.g.* Dickinson, "The Promise of Hybrid Courts," 295 (Writing that "comparatively little attention has been paid, however, to a fifth, newly emerging, form of accountability and reconciliation: hybrid domestic-international courts.").

Dickinson (2003):

[154] Bassiouni argues that the first modern attempt to create a permanent international court with the power to adjudicate individual criminal responsibility came in 1919 with provisions in the Treaty of Versailles. M C Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court," *Harv Hum Rts J*, 1997, 14–19, http://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/hhrj10&section=6. Blakesly argues that this idea originates in the 1899 Hague Convention for Pacific Settlement of Disputes. Christopher L. Blakesley, "Obstacles to the Creation of a Permanent War Crimes Tribunal," *The Fletcher Forum of World Affairs* 18, no. 2 (1994): 82, https://www.jstor.org/stable/45288899 ("The 'modern' idea of establishing an international criminal court could be said to have been launched in 1899 with the Hague Convention for the Pacific Settlement of International Disputes.").

adjudication was very much present during the 19th century and that the practice of convening this kind of *ad hoc* internationalized bodies to adjudicate alleged crimes of international concern is, in fact, rather older than has been widely recognized.

Over the course of the 19th century and first years of the 20th century, one can find any number of examples of "mixed courts" and "international commissions of inquiry" that were empowered, to one degree or another, to exercise criminal jurisdiction. In addition to the four tribunals featured in the case studies presented later in this section, I have found at least three more examples of internationalized *ad hoc* criminal tribunals: an 1860 International Commission of Inquiry established to investigate and punish individuals responsible for atrocities committed during an outbreak of inter-communal violence in Ottoman Syria between Maronite Christians and Muslim Druze communities;[155] an International Commission of Inquiry established in 1895

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[155] For a remarkably thorough account of the formation and work of this Commission, see Benjamin E Brockman-Hawe, "Constructing Humanity's Justice: Accountability for 'Crimes Against Humanity' in the Wake of the Syria Crisis of 1860," in *Historical Origins of International Criminal Law: Volume 3*, ed. Morten Bergsmo et al. (Torkel Opsahl Academic EPublisher, 2015), 181–248. This Commission, composed of representatives from Britain, France, Prussia, Austria and Russia, in addition to a contingent of Ottoman representatives, ultimately performed the tasks of investigating the underlying causes of the violence, assessing the responsibility of local officials and those alleged to have been directly involved in the attacks, issuing rulings as to appropriate individual punishments, and proposing structural reforms to the governance of the Mount Lebanon region that would reduce the likelihood of future outbreaks of similar internecine violence. Although this International Commission was initially granted relatively limited powers by their respective governments, the Commission's mandate expanded over the course of their investigations until, by November 1860, they began to take an active role in adjudicating the individual criminal liability of accused instigators. Ultimately the Commission heard the cases of fifteen Ottoman officials, finding each guilty of "various degrees of criminality" in their failures to take adequate steps to prevent the outbreak of violence against the Druze. For more information this tribunal, *see, e.g.* British House of Commons, *State Papers Relating to Syria*, Parliamentary Papers: 1850-1908. Accounts and Papers of the House of Commons., Volume 36 (Session 5 February, 1861 to 6 August, 1861) (United Kingdom: H.M. Stationery Office, 1861), https://www.google.com/books/edition/Accounts_and_Papers_of_the_House_of_Comm/oSNcAAAAQAAJ?hl=en

to investigate and punish those responsible for the killings of nine British and American missionaries in Kutien (Kucheng) China;[156] and two 1898 International Military Commissions

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&gbpv=0; Ozan Ozavci, "An Untimely Return of the Eastern Question?," in *Dangerous Gifts*, by Ozan Ozavci, 1st ed. (Oxford University PressOxford, 2021), 302–17, https://doi.org/10.1093/oso/9780198852964.003.0013; Ozan Ozavci, "Returning the Sense of Security: The International Commission on Syria," in *Dangerous Gifts*, by Ozan Ozavci, 1st ed. (Oxford University PressOxford, 2021), 318–52, https://doi.org/10.1093/oso/9780198852964.003.0014; Caesar E. Farah, *The Politics of Interventionism in Ottoman Lebanon, 1830-1861* (Oxford: Centre for Lebanese Studies [u.a.], 2000), 564; Davide Rodogno, *Against Massacre: Humanitarian Interventions in the Ottoman Empire, 1815-1914*, 2015, 109, https://doi.org/10.1515/9781400840014; Ussama Makdisi, "After 1860: Debating Religion, Reform, and Nationalism in the Ottoman Empire," *International Journal of Middle East Studies* 34, no. 4 (November 2002): 603, https://doi.org/10.1017/S0020743802004014; "Intervention in Lebanon and Syria, 1860–61," in *Humanitarian Intervention in the Long Nineteenth Century*, by Alexis Heraclides and Ada Dialla (134-147: Manchester University Press, 2017), https://doi.org/10.7765/9781526125125.

[156] This Commission, whose initial composition included American, British, and Chinese representatives but later only British and Chinese officials, ultimately heard the cases of more than 200 alleged participants in the anti-missionary violence at Kutien and issued over a dozen capital sentences. The details of this incident parallel and presage those that gave rise to the 1900 International Commission at Paoting-Fu. This flurry of killings of missionaries occurred during (and was very much a part of) the cycles of escalating anti-foreign and anti-Christian violence that would, just a handful of years later, explode in what came to be known as the Boxer Rebellion. These killings were committed by members of a group referred to as the "Vegetarians" – members of "a secret society whose aim was the overthrow of the Manchu dynasty." George E Paulsen, "The Szechwan Riots of 1895 and American 'Missionary Diplomacy,'" *The Journal of Asian Studies* 28, no. 2 (1969): 291, https://www.jstor.org/stable/2943003. Official records of this tribunal can be found in ixson Report, Consulate of the United States. Foochow, August 24, 1895. Telegram. Consul Hixson to Minister Denby, Peking. For an account of the killings in Kutien and the subsequent American and British response, *see* Ian Welch, "British and Anglican Women in 19th Century China," Working/Technical Paper, ANU Research Publications (Australian National University, 2015), 5, https://openresearch-repository.anu.edu.au/handle/1885/16197. *See also* Ian Welch, "Missionaries, Murder and Diplomacy in Late 19th Century China: A Case Study," in *Pacific Missionaries: At Home and Abroad* (ANU Missionary History Conference Asia, Australian National University, 2006); Ian Welch, "The Flower Mountain Murders: A 'Missionary Case' (Chiao-an) Data-Base.," 2011, 24, https://openresearch-repository.anu.edu.au/handle/1885/7273.

established to investigate and punish individuals responsible for atrocities committed during an 1898 war of secession (the Cretan Revolt) in Ottoman-controlled Crete.[157] Beyond these effectuated experiments with internationalized criminal adjudication in *ad hoc* mixed or hybrid courts, I found a number of instances in which national leaders, military officials, or other prominent legal actors proposed the creation of similar internationalized tribunals that were not realized: an 1870 proposal by Otto von Bismarck to convene an international court empowered to investigate and punish individuals found to have instigated the Franco-Prussian war;[158] an 1877 proposal aired among the Great Powers during the 1876–77 Constantinople Conference for "internationalized penal proceedings" in response to reports of "massacres and other excesses" committed in Bulgaria in the course of a Bulgarian uprising against Ottoman rule in 1876 and the subsequent Russo-Turkish War of 1877-1878.[159]

Beyond these *ad hoc* internationalized criminal tribunals, I found at least three high-profile proposals aired during the 19th century for the formation of standing international courts

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[157] For detailed discussions of the circumstances surrounding the formation of these International Military Commissions, their operation, and outcomes, *see* Rodogno, *Against Massacre*; Gregory S Gordon, "International Criminal Law's 'Oriental Pre-Birth': The 1894–1900 Trials of the Siamese, Ottomans and Chinese," in *Historical Origins of International Criminal Law: Volume 3*, 2015, 1–62; R. John Pritchard, "International Humanitarian Intervention And Establishment Of An International Jurisdiction Over Crimes Against Humanity: The National And International Military Trials On Crete In 1898," in *International Humanitarian Law: Origins*, ed. John Carey, William Dunlap, and R. John Pritchard (Brill, 2003), 1–87, 10.1163/ej.9781571052674.i-1142.8.

[158] *See* Benjamin E Brockman-Hawe, "Punishing Warmongers for Their 'Mad and Criminal Projects': Bismarck's Proposal for an International Criminal Court to Assign Responsibility for the Franco-Prussian War," *Tulsa Law Review* 52, no. 2 (2016): 241–62.

[159] Brockman-Hawe, 258. This proposal would have established an international commission with the mandate to "find out the culprits" of the "Bulgarian horrors," oversee local investigations, and assess the criminal liability of the perpetrators.

with the capacity to adjudicate alleged commissions of international crimes. In 1818, Russia introduced a proposal during the Congress of Aix la Chappelle for the formation of a multilateral institution dedicated to "ending the traffic in slaves" that was envisioned with both an administrative arm dedicated to coordinating member states' anti-slaving efforts in the waters off the African coast and an adjudicative arm consisting of a standing international court with the capacity to "judge all crimes relating to the trade."[160] In January 1872, Gustave Moynier presented a proposal for a similarly multilateral and institutionalized criminal court to a meeting of the International Committee of the Red Cross.[161] Motivated by doubts over the ability of national governments to effectively and fairly adjudicate alleged violations of the laws of war, in particular those protected under the terms of the 1864 Geneva Convention, Moynier proposed the

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[160] *See* "Suppression of the Slave Trade -- Conference of Foreign Governments on the Subject: Communicated to the House of Representatives February 9, 1821.," in *American State Papers: Documents, Legislative and Executive, of the Congress of the United States.* (United States: Gales and Seaton,., 1820), 119, https://www.google.com/books/edition/American_State_Papers/l-JIVMTcOJYC?hl=en&gbpv=1&dq=Mr.+Hemphill,+%22from+the+Committee+to+which+is+referred+so+much+of+the+President%27s+message%22&pg=PA90. Russia's proposal called for the formation of a "special association" between all states represented at the conference that would have had the goal of "end[ing] the traffic in slaves." To this end, the proposal called for the formation of a multilateral institution, the seat of which was to be "a central point on the coast of Africa." This institution's administrative officers would be granted oversight over and the capacity to direct combined maritime forces contributed by member states, and its adjudicatory arm would try alleged crimes relating to the slave trade by forming mixed multilateral tribunals for each case.

[161] Moynier's proposal was published and distributed in the *Bulletin International des Sociétés de Secours aux Militaries Blessés* (the predecessor of the International Review of the Red Cross) under the title "Note sur la Création d'une Instituition Judiciaire Internationale Propre à Prevenir et à Reprimer les violations à la Convention de Geneve." The full text of Moynier's proposal can be found under the heading "Draft Convention for the Establishment of an International Judicial Body Suitable for the Prevention and Punishment of Violations of the Geneva Convention" in Christopher Keith Hall, "The First Proposal for a Permanent International Criminal Court," *International Review of the Red Cross (1961 - 1997)* 38, no. 322 (March 1998): 57–74, https://doi.org/10.1017/S0020860400090768.

creation of a standing international body entrusted with the capacity to adjudicate both state liability for violations of the laws of war and individual criminal liability for soldiers and others involved in such violations.[162] Moynier went on to deliver an updated and amended version of this proposal at the annual meeting of the Institute of International Law at Paris in 1894.[163] And this is not even to mention the most common category of internationalized criminal trials that

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[162] Despite his status as the International Committee's founding president, Moynier's proposal did not meet with the support of any of the national delegations present at the meeting. *See* Harry M Rhea, "The Evolution of International Criminal Tribunals," *International Journal of Criminology and Sociology* 6 (April 11, 2017): 53, https://doi.org/10.6000/1929-4409.2017.06.06. For more on the content, context and reception of Moynier's 1872 proposal, *see, e.g.*,
Daniel Marc Segesser, "'Unlawful Warfare Is Uncivilised': The International Debate on the Punishment of War Crimes, 1872–1918 1," *European Review of History—Revue Européenne d \ldots*, 2007, 216, https://doi.org/10.1080/13507480701433885; Daniel Marc Segesser, "Forgotten, but Nevertheless Relevant! Gustave Moynier's Attempts to Punish Violations of the Laws of War 1870-1916," 2016, http://boris.unibe.ch/89310/; Lewis, *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919–1950*, 16–17; Harry M Rhea, "The United States and International Criminal Tribunals" (Galway, Ireland, National University of Ireland, Galway, 2012), 20, https://aran.library.nuigalway.ie/bitstream/handle/10379/3044/Harry%20Rhea,%20PhD%20Thesis,%20NUIG.pdf?sequence=1.

[163] While Moynier's 1894 proposal, and earlier drafts based on his proposal from 1872, gained at least theoretical support from a number of founding members of the *Institut* – including Conrad von Holtzendorff, Gustave Rolin-Jaequemyns, and Achille Morin – the membership declined to actively advocate for the adoption of Moynier's proposal on the grounds that it would be unlikely to be accepted by the states concerned. Ultimately, Moynier would abandon his proposed tribunal, agreeing with his colleagues that concluding that much "additional legal groundwork had to be laid before an international tribunal would be feasible." Segesser, Daniel Marc. "On the Road to Total Retribution? The International Debate on the Punishment of War Crimes, 1872–1945." *A World at Total War*, 1937. http://historische-bibliographie.degruyter.com/hbo.php?F=titel&T=HB&ID=20509500&target=_self. at 355-6. There is some suggestion that Moynier's proposals may have been influential on discussions over a similar proposal for a similar standing international criminal adjudicatory body raised during the negotiations to draft of the 1899 Hague Convention for Pacific Settlement of Disputes. *See* Blakesley, "Obstacles to the Creation of a Permanent War Crimes Tribunal," 82.

were conducted during this period: the various "consular courts" – such as the Ottoman Mixed Commercial Courts,[164] Mixed Courts in Egypt,[165] and the Supreme Court for China and Japan,[166] among others – which were established as part of a growing trade relationship between one or more European powers and a semi-peripheral/semi-civilized state seen as too established to warrant outright colonization but not "civilized" enough to be trusted to provide adequate standards of justice to foreign (Western) nationals.

In emphasizing the existence of these various examples, I do not mean to present them as indicators of a robust system of internationalized criminal law and adjudication. They were very much not. They were, however, a series of experiments a relatively novel legal institutional form that, taken together, show that the idea of internationalized criminal adjudication was very much at play in the deliberations and actions of legal actors in the latter half of the 19th century, and that the institutional form of a "mixed" or "hybrid" international tribunal was a relatively common site of legal experimentation during that period.

This proposition will be further substantiated by the four case studies that follow. In each, we can see various legal actors facing the question of how to respond to the alleged

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[164] *See, e.g., Turan Kayaoglu, Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China (Cambridge University Press, 2010).*

[165] *See* Jasper Y. Brinton, "The Mixed Courts of Egypt," *The American Journal of International Law* 20, no. 4 (1926): 670–88.

[166] *See* Par Kristoffer Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan* (Oxford University Press, 2012), http://books.google.com/books?id=edxeB4xsydwC&pg=PT2&dq=intitle:Grounds+of+Judgment+inauthor:cassel&hl=&cd=1&source=gbs_api; Scott Gilfillan, "Institutional Imperialism Extraterritoriality and the British Consular Court System in Japan," *Journal on European History of Law* 1 (2015): 13, https://www.ceeol.com/search/article-detail?id=290182.

commission of crimes of international concern and deciding, for a range of reasons, that the appropriate response was not mere retaliation or gunboat diplomacy (though those were certainly at play in a number of these cases) but the adjudication of these alleged crimes in an internationalized court of some form. While they ultimately operated under various names – e.g., Mixed Courts, International Commissions of Inquiry, Mixed Tribunals, or Joint Military Commissions – all the adjudicatory bodies discussed here were *ad hoc* adjudicatory bodies that exercised criminal jurisdiction over either (a) common domestic crimes (e.g., murder or assault) with an internationalizing hook (mixed nationality of parties) or (b) one or more supranational or universal crimes. In their deliberations and their existence, these internationalized criminal tribunals raised and explored questions of what sorts of crimes can legitimately give rise to "international concern" and how it is that such crimes should be adjudged.

2.1 First Case Study: Piracy Trial at Kuala Langat (1874)

2.1.1 Events

On the evening of November 16, 1873, a small Malay trading boat came under attack near the mouth of the Jugra river[167] in the Malay kingdom of Selangor.[168] The boat – a small,

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[167] While some sources refer to the location of these events as the Langat River, it was in fact the Jugra River, a tidal creek which joined the Langat River upstream near the residence of the Sultan of Selangor. See Frank A. Swettenham, "Some Account of the Independent Native States of the Malay Peninsula: Especially of the Circumstances Which Led to the More Intimate Relations Recently Adopted towards Some of Them by the British Government," *Journal of the Straits Branch of the Royal Asiatic Society* 6 (1880): 184, https://www.google.com/books/edition/Journal_of_the_Straits_Branch_of_the_Roy/5tJDAQAAMAAJ.

[168] Isabella L. Bird Bishop, "A Chapter on Selangor - Letter XVII," in *The Golden Chersonese And The Way Thither* (New York: G. P. Putnam's Sons, n.d.), http://digital.library.upenn.edu/women/bird/chersonese/chersonese-3.html.

smooth-hulled sailboat[169] – was registered simply as "Number 71" to captain Haji Abdul Rahman, a native of British Malacca.[170] On the evening of the attack on his trading boat, Rahman and his crew – five fellow residents of British Malacca[171] – had just completed a trading run to nearby Jugra and were returning to their home port in Malacca carrying three passengers, Chinese merchants, and a cargo of rattan cloth and gold specie. As dusk approached, Captain Rahman had ordered his crew to drop anchor while they waited for favorable winds to carry them farther south.

While they waited, Rahman, his crew, and their passengers began to prepare their evening meal. As they did, they noticed two boats approaching from the nearby stockade – a military installation under the command of Raja Yakob, a son of the Sultan of Selangor – carrying twenty men. As their boat had passed through the stockade hours earlier without incident, Rahman and his crew took little notice.[172] They hailed the other boat and exchanged greetings with the newcomers. Suddenly, the situation shifted. The leader of the men from the stockade, a man named Musa, ordered his men to "run amok" and they obliged, shooting and

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Also see Swettenham, "Some Account of the Independent Native States of the Malay Peninsula," 186. ("The immediate cause of this Government's recent and more intimate relations in Selangor arose from an atrocious piracy being committed in November, 1873, just off the Jugra river, some few miles from the Sultan of Selangor's residence.")

[169] John Gullick, "The Kuala Langat Piracy Trial," *Journal of the Malaysian Branch of the Royal Asiatic Society* 69, no. 2 (1996): 103. While referred to in some sources as a sloop, it was of a kind referred to locally as a "perahu nadir."

[170] Scott C Abel, "A Covert War at Sea: Piracy and Political Economy in Malaya 1824-1874" (PhD Dissertation, De Kalb, Illinois, Northern Illinois University, 2016), 235, https://www.proquest.com/docview/1861733661/fulltextPDF/8F9519FE112A479CPQ/1?accountid=14512.

[171] These included the the boatswain (juragan) and four hired crewmen.

[172] Gullick, "The Kuala Langat Piracy Trial," 103.

stabbing wildly.[173] In a matter of minutes, the men from the stockade had killed all those aboard the "Number 71" except for one crew member, Mat Syed, who escaped by diving overboard and hiding in the water under the stern of the boat.[174] The attackers, their work apparently done, sailed the boat and its cargo back to shore, where they were overheard planning to deliver both to Raja Yakob.[175] As the attackers sailed back to the stockade, Syed swam to shore. Shaken by the brutality of the attack and his near brush with death, he hid for some time before calling to the crew of another trading boat that had happened to land nearby. With their help, he continued his journey back to Malacca. Over the next month, news of Syed's ordeal spread through the merchants of Malacca and on December 29, 1873 Syed made a formal report of the attack to British Malaccan magistrate and justice of the peace A.R. Ord.[176] As luck would have it, Syed encountered a number of his alleged attackers in British Malacca within a week of making his report to Ord and, after reporting their presence to British colonial police, they were taken into custody.

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[173] John Frederick Adolphus McNair, *Perak and the Malays: "Sārong" and "Krīs."* (London: Tinsley Brothers, 1878), 283–87. The details of this account are taken from the testimony of Mat Syed at the later trial regarding this incident, which was republished in McNair's text cited here. (Of note here, Musa's use of the phrase "run amok" here was not colloquial, but actually in the original sense of the term. The term "amok" is a Malayo-Indonesian word widely used in South and Southeast Asia to refer to a pattern of "sudden, unanticipated, indiscriminate homocidal action by one wielding a knife or spear." *See* Karl G. Heider, "Running Amok: An Historical Inquiry. By John C. Spires. Monographs in International Studies. Ohio University, 1988.," *The Journal of Asian Studies* 48, no. 2 (May 1989): 443, https://doi.org/10.2307/2057464.

[174] Swettenham, "Some Account of the Independent Native States of the Malay Peninsula," 183.

[175] Some sources report that they were to give the boat and cargo to Tunku Allang, but this was just a nickname for Raja Yakob.

[176] "Deposition of Mat Syed," 29 December 1873, National Archives, United Kingdom, Admiralty Records, Piracy in the Straits of Malacca, 1873-1874, ADM 125/148, 128.

2.1.2 Context

British Malacca was one of three colonies on or around the Malay Peninsula that were merged into a single political unit, the Straits Settlements, in 1826.[177] At the time of the events discussed here, there were three settlements included in this unit: Penang, Melacca, and Singapore.[178] These colonial settlements were neither contiguous nor even particularly close together, being separated by land ruled over by a series of Sultanates spanning the Malay Peninsula.

The governance structures of the various Malay Sultanates – including the Sultanate of Perak, the Sultanate of Selangor, the Sultanate of Johor, and others – were similar to that of the nearby Bruneian Empire on the island of Borneo, with each headed by a singular Sultan as monarch and administered by various "rajas" (royal governors) appointed to govern specific regions. The Straits Settlements were directly administered by the British Colonial Office, whereas a number of the surrounding Malay states were, at various times, considered "dependent protectorates […] whose native rulers are guided in their internal government by British officers."[179] The residents of these states were therefore considered British subjects, if not citizens.

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[177] See Khoo Kay Kim, "The Origin of British Administration in Malaya," *Journal of the Malaysian Branch of the Royal Asiatic Society* 39, no. 1 (209) (1966): 52–91, https://www.jstor.org/stable/41491875.

[178] Half a century later, in 1907, the settlement of Labuan would be added as a fourth component of the Straits Settlements.

[179] H. Morse Stephens, "The Administrative History of the British Dependencies in the Further East," *The American Historical Review* 4, no. 2 (1899): 246, https://doi.org/10.2307/1833555.

2.1.3 Domestic and International Responses

News of the attack quickly spread throughout the Straits Settlements, the colonial press, and leading metropolitan newspapers. A London Times correspondent, writing on February 25th, 1874, wrote "Surely this wholesale butchery of British subjects [...] can be no longer tolerated; for is not the whole of the coasting trade from our settlement to Malacca thereby paralyzed?"[180] A correspondent from the Morning Post in London described the attack on the trading vessel as a "case of atrocious piracy and murder" in which "outrages of a revoltingly cruel nature were perpetrated most audaciously by the Sultan's subjects upon traders belonging to the Straits Settlements."[181]

Colonial authorities in the Straits Settlements adopted a similarly outraged tone. In an official report to his Colonial Office superiors, Attorney-General of the Straits Settlements, Thomas Braddell wrote that "the Salangore pirates are distinguished in the Malayan seas as the most daring and bloodthirsty of all," casting the November 1873 attack as part of long pattern of "piratical practices" in Salangore that were "continuous, well organized, and more daringly carried out," and arguing that British intervention was justified because this pattern of maritime raiding was "not, as in other places, caused by temporary difficulties in the country, and ceasing

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[180] Though the correspondent submitted this piece in February 1874, it wasn't printed until late May of that year. "Malay Pirates. The Slaughter of a Ship's Crew – Quick Retribution." *London Times*, 25 May, 1874. This piece was subsequently reprinted in the New York Times a month later. See "Malay Pirates. The Slaughter of a Ship's Crew – Quick Retribution." *New York Times*, June 7, 1874. *NYTimes Archive*. https://timesmachine.nytimes.com/timesmachine/1874/06/14/issue.html.

[181] "The Straits Settlements." *Morning Post*, 20 Nov. 1874, p. 3. *British Library Newspapers*, link.gale.com/apps/doc/R3210523764/DSLAB?u=uclosangeles&sid=bookmark-DSLAB&xid=ddd55f6f. Accessed 8 June 2023.

with those difficulties, but were the result of long-continued lawlessness in the people, and protected, if not caused, by persons of rank in the country."[182] In a telegram to a nearby Royal Navy official, Sir Andrew Clarke, Governor of the British Straits settlements wrote that "these attacks have at last reached a point when they are threatening the peaceful navigation of the Straits, the great highway between Europe and China."[183]

While brutal, it is not clear whether this incident was unusual in either its violence or its scale. Contemporary sources and recent commentary suggest that acts of maritime raiding and banditry like this had long been a common practice in the waters around the Malay archipelago.[184] But there is evidence to suggest that, at least as of the late 1860s, maritime raiding off the coast of Selangor was quite rare, and that statements like those made by Clarke and Braddell (depicting Selangor as a "formidable pirate lair")[185] were largely pretextual efforts designed to justify extending British influence into territory currently controlled by Malay Sultinates.[186]

There are, however, several aspects of this incident that might have justified colonial officials' unusual attention to it. First, the attack was diplomatically complicated. Although all

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[182] Braddell, "Continuation of Report on the Proceedings of Government relating to the Native States in the Malay Peninsula," 18 February 1874, cited in Stefan Eklöf Amirell, "Civilizing Pirates: Nineteenth Century British Ideas about Piracy, Race and Civilization in the Malay Archipelago," *HumaNetten*, no. 41 (December 19, 2018): 149, https://doi.org/10.15626/hn.20184102.

[183] Clarke to Shadwell, 1 February 1874, cited in Eklöf Amirell, 149.

[184] Indeed, in a 2016 dissertation, Scott C. Abel presents a detailed account of the ways in which this practice was intricately intertwined with local systems of political rule and economic activity. Maritime raiding, he suggests, was more or less an accepted form of rent seeking by local nobles through at least the mid-19th century under the *Kerajaan* system. See generally, Abel, "A Covert War at Sea: Piracy and Political Economy in Malaya 1824-1874."

[185] Eklöf Amirell, "Civilizing Pirates," 37.

[186] Amirell, *Pirates of Empire*, 152.

of the slain crewmen were British colonial subjects and the boat that had been attacked had been registered under the British flag, three of the men killed in the pirate attack were Chinese nationals.[187] Second, this attack was carried out close to the Sultan of Selangore's residence and had allegedly done so on the orders of his son, Raja Yakob, which blurred the line between state-sponsored naval violence and non-state naval violence.[188] Indeed, the Raja Yakob was among the individuals in the case charged with the commission of murder and piracy. While this wasn't the first time that a Straits Settlement government leveled formal charges against such a high-ranking member of a neighboring state, it was still highly unusual.[189]

Given these complicating factors, as well as the fact that most of those accused were in custody in British Malacca, it might at first seem odd that Governor Clarke sought for the accused to be tried by a court not in Malacca, but in Selangor. Clarke, however, had three good reasons for doing so. First, he feared that a British court might dismiss the case on the grounds that the crime had taken place outside British jurisdiction (arguably either in waters controlled by Selangor or on the high seas).[190] Second, he wanted to ensure that the prosecution would have a

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[187] Abel, "A Covert War at Sea: Piracy and Political Economy in Malaya 1824-1874," 235.

[188] R. O. Winstedt, "A History of Selangor," *Journal of the Malayan Branch of the Royal Asiatic Society* 12, no. 3 (October 1934): 31, https://www.jstor.org/stable/41559525.

[189] Abel, "A Covert War at Sea: Piracy and Political Economy in Malaya 1824-1874," 234–35.

[190] Clarke had reason to worry that the courts in the Straits Settlements might be hostile to his efforts to prosecute the alleged perpetrators of this attack. Sir Peter Benson Maxwell, the recently-retired but still quite influential former Chief Justice of the Straits Settlements, was an outspoken critic of the aggressive stance that Clarke – and his predecessor, Governor Ansen – had taken towards the local Malay states. When Clarke had ordered British colonial police to enter the territory of Selangor to capture alleged pirates in 1871, Maxwell had decried this decision as "an unjustifiable act of war, ordered by an acting governor who had no authority to wage war on a sovereign state." The British colonial forces, he wrote, were no more justified in seeking to arrest Malay subjects on Malay territory than the French gendarmes would be in seeking to arrest a Communist on the streets of London. Although Maxwell was

deterrent effect on future maritime raids by Selangor elites and their followers, and he believed that a trial and sentencing in a colonial court on British territory would have no such effect.[191] The only way to achieve such an outcome, he believed, was to "set an example by prosecuting and punishing the pirates in their own homeland."[192]

Clarke wasn't the only local authority pushing for the accused in this case to be tried by an internationalized mixed court seated in Selangor. Tunku Kudin, the Sultan's son-in-law and Viceroy of Selangor,[193] sent a request to British Straits Settlements authorities asking that they permit Selangor to host the piracy trial and advised the Sultan to allow the British to appoint members of the *ad hoc* tribunal.[194]

Although he was the son-in-law of Sultan Abdul Samad, Kudin's position in Selangor was a precarious one. Born a prince in the ruling family of Kedah, another independent Malay kingdom, located just north of the kingdom of Perak, Kudin had risen to prominence in Selangor after his 1868 marriage to Sultan Samad's daughter by assisting the Sultan in his efforts to assert control over a neighboring port city in 1870.[195] Just a year later, though, with the backing of British colonial officials (including then-governor Ansen, the Colonial Secretary of the Straits

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no longer on the bench, Clarke knew that much of the Straits Settlements judiciary agreed with Maxwell's position. Amirell, *Pirates of Empire*, 132.

[191] Winstedt, "A History of Selangor," 31.

[192] Amirell, *Pirates of Empire*, 151.

[193] As Viceroy, Kudin was the executive head of Selangor's government but was ultimately answerable to the Sultan. In this, his position was something akin to a prime minister in a constitutional monarchy. Gullick, "The Kuala Langat Piracy Trial," 105–6.

[194] Abel, "A Covert War at Sea: Piracy and Political Economy in Malaya 1824-1874," 234.

[195] John M Gullick, "Tunku Kudin in Selangor (1868 - 1878)," *Journal of the Malaysian Branch of the Royal Asiatic Society* 59, no. 2 (1986): 17, https://www.jstor.org/stable/41493048.

Settlements J.W.W. Birch, and the Auditor General of the Straits Settlements C.J. Irving), Kudin led a moderately successful uprising against Sultan Samad in 1871.[196] Having led a small band of supporters from Kedah, joined by a much larger force of British-funded and French-armed mercenaries, to victory over the Sultan's forces, Kudin arrived at the Sultan's palace in 1872 (accompanied by the Colonial Secretary Birch and a Royal Navy gunboat) and demanded the Sultan transfer power over Selangor to him. Finding himself literally at gunpoint, the Sultan did so, appointing Kudin to the position of Viceroy – the executive head of government – over Selangor. Soon afterward, though, pressures from Parliament curtailed the more interventionist voices in the corners of the Colonial Office and the Admiralty concerned with British policy in the Malay peninsula, leaving Kudin – a man who had adopted both "European clothes and European manners" and was viewed as an "interloper" by much of the Selangor Malay aristocracy[197] – without the powerful foreign backing that he needed in order to assert the authority granted by this title.[198] Indeed, while he remained the nominal executive head of Selangor's government, he had spent the two years prior to his service on the 1874 trial court living in semi-exile in his ancestral home kingdom of Kedah.[199]

Luckily for both Clarke and Kudin, early February 1874 saw the arrival of a contingent of gunboats and men-of-war from the China Squadron of the Royal Navy in the Strait of Malacca. Clarke, sensing an opportunity to ply the same sort of gunboat diplomacy leverage that he had used against the Sultan three years earlier, convinced Shadwell to send a contingent of Royal

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[196] Amirell, *Pirates of Empire*, 130.

[197] Gullick, "The Kuala Langat Piracy Trial," 104.

[198] Amirell, *Pirates of Empire*, 136.

[199] Gullick, "The Kuala Langat Piracy Trial," 106.

Navy ships from the China Fleet to accompany Clarke and his advisors, riding on the Governor's yacht, the HMS Pluto,[200] upriver to Kuala Langat.

Thus it was that Clarke, his advisors, and a contingent of Royal Navy gunboats sailed up the Jugra river towards the Sultan's palace in February 1874. Once there, he induced the Sultan to grant him an audience and issued the contradictory demand that the Sultan "give satisfaction" for the alleged case of piracy,[201] but also that he do so by appointing a court to try the alleged perpetrators fairly and according to some degree of due process.[202]

Upon receiving the British colonial convoy at his palace, the Sultan put up little resistance to the combined efforts of Clarke and Kudin.[203] Although he continued to describe the actions of his son and his son's compatriots as nothing more than "boys' play,"[204] the Sultan ordered the creation of a special *ad hoc* mixed court to inquire into and prosecute those responsible for the attack in November 1873.[205]

2.1.4 The Court

This special court was to consist of six members: three local commissioners appointed by

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[200] A photograph of the H.M.S. Pluto can be found at https://i.pinimg.com/originals/69/7d/40/697d40cfe8c6c44ada450d726f111eb7.jpg.

[201] Swettenham, "Some Account of the Independent Native States of the Malay Peninsula," 183.

[202] Bird Bishop, "A Chapter on Selangor - Letter XVII."

[203] While he may not have put up much resistance to the prospect of assembling a court and holding a trial, this may have been more a capitulation to a forceful opponent rather than an uncoerced endorsement of the idea. Even the most sympathetic contemporary sources to British interests described Clarke as having "induced" the Sultan to go along with the demands for a trial. *See, e.g.* Bird Bishop. ("On this Sir A. Clarke, the Governor of the Straits Settlements, with a portion of H.B.M.'s China fleet, went to Langat and *induced* the Sultan to appoint a court to try the pirates.")

[204] Swettenham, "Some Account of the Independent Native States of the Malay Peninsula," 183.

[205] Swettenham, 183.

the Sultan, two British commissioners appointed by the Governor of the British Straits Settlements, and a president to be selected by joint agreement. For his part, the Sultan appointed two local officials – the Datuk Aru and the Penhulu Dagang of Kuala Langat – and See Ah Keng, a prominent Chinese merchant living in Selangor.[206] Governor Clarke appointed two of the British nationals that had accompanied Clarke and Vice-Admiral Shadwell to Selangor: James Guthrie (J.G.) Davidson and J.F.A. McNair.

Both Davidson and McNair were fluent Malay speakers, and each had over a decade of first-hand experience of the Malay states.[207] That said, the two were not equally qualified to participate in legal proceedings. Davidson was a British lawyer and colonial official who had practiced law in the neighboring British colony of Singapore for the preceding decade.[208] By contrast, McNair had no legal training or experience whatsoever. He was a Colonial Engineer who, after being transferred from the Indian Army in 1856 to serve as the private secretary and aide-de-camp to the Governor of the Straits Settlements in Singapore, was serving at the time of the trial as the Director of the Public Works Department of the Straits Settlements.[209] Whereas Davidson was chosen in large part due to his understanding of Malay and British Colonial jurisprudence and trial court experience,[210] McNair seems to have been selected by Clarke

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[206] Winstedt, "A History of Selangor," 31.

[207] Amirell, *Pirates of Empire*, 150–51.

[208] "Obituary - James Guthrie Davidson," *Straits Times Weekly Issue*, February 11, 1891, https://eresources.nlb.gov.sg/newspapers/Digitised/Article/stweekly18910211-1.2.49.

[209] Gullick, "The Kuala Langat Piracy Trial," 106.

[210] There is reason to believe, however, that it was not just his experience in legal practice that recommended Davidson for this role. Davidson had been an unofficial advisor to the President of the Court, Viceroy Tunku Kudin, for more than three years. Winstedt, "A History of Selangor," 32. Davidson himself may also have pushed to be involved in the proceedings as he had a personal interest in expanding British control and influence over the

largely for reasons of convenience. The final member of the court was Tunku Kudin.[211] Soon after appointing McNair and Davidson, Governor Clarke left on his yacht to return to Singapore. In addition to the two British commissioners, he left behind the three Royal Navy gunboats he'd borrowed from Admiral Shadwell in the harbor out front of the palace.[212] This was the background against which the trial unfolded.

2.1.5 The Trial

The trial began on February 13th, 1874[213] and lasted three days.[214] The accused consisted of eight Selangor men, including one named Tunku Allang (also referred to as Raja Yakob), one of the sons of the Sultan of Selangor.[215] By all accounts the trial seems to have been a good faith effort to adjudicate the responsibility of those accused of the November 1873 attack. Interestingly, the British commissioners played a much more significant role in the proceedings

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area. In addition to his personal and professional ties to the area Davidson also had a significant stake in the tin mining industry in Selangor, having purchased "a large tin concession" in Selangor and had written to Britain's then-Secretary of State for the Colonies, Lord Kimberley, expressing his interest in creating a company to manage tin mining in Selangor and requesting either that the British Navy commit to protecting the company's mining operations or the company be permitted to keep an armed force on site. Winstedt, 31.

[211] Abel, "A Covert War at Sea: Piracy and Political Economy in Malaya 1824-1874," 234. It is perhaps worth noting the imbalance in the makeup of the court. It may seem unusual that the British would find a court with four local commissioners and just two British ones to be acceptable. That said, the inclusion of Kudin may have been seen as evening the scales in favor of British colonial interests as Kudin was seen, despite his ties by marriage to the Sultan of Selangor and by blood to neighboring Kedah, as likely to ally with British interests.

[212] Bird Bishop, "A Chapter on Selangor - Letter XVII."

[213] Gullick, "The Kuala Langat Piracy Trial," 105–6.

[214] Amirell, *Pirates of Empire*, 151.

[215] Abel, "A Covert War at Sea: Piracy and Political Economy in Malaya 1824-1874," 234.https://commons.lib.niu.edu/bitstream/handle/10843/20773/Abel_niu_0162D_12694.pdf?sequence=1&isAllowed=y at 234

of the trial than had initially been envisioned. Although they were under orders from Governor Clarke to "avoid taking an active part of the trial itself," McNair and Davidson had also been ordered to "give such aid to the court as you may deem advisable for the purpose of securing a full and fair enquiry."[216] And, at the request of the court's other commissioners, both British commissioners disregarded the former order in the interest of carrying out the latter. As such, this was far from an instance of foreign observers being dropped into an already existing domestic judicial proceeding. This was, it seems, a truly internationalized proceeding. McNair heard testimony and participated in court deliberations, while Davidson's involvement went significantly farther. In addition to acting as a legal adviser to the court, Davidson conducted almost all the examination of witnesses – "performing the functions of both prosecuting and defence counsel" – and acting as the court's secretary by "keep[ing] the record of its proceedings."[217] Indeed, although there are other contemporaneous sources reporting on the trial, Davidson's verbatim notes of the proceedings and evidence is by far the most complete at almost 9,000 words.[218]

2.1.6 Ruling and Aftermath

After three days of testimony and questioning, the court reached its verdict. All eight of the men accused of murder and piracy were convicted on both charges.[219] One defendant, a

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[216] Gullick, "The Kuala Langat Piracy Trial," 105–6.

[217] Gullick, 105–6.

[218] Gullick, 105–6.

[219] Swettenham, Frank Athelstane. *British Malaya: An Account of the Origin and Progress of British Influence in Malaya*. United Kingdom: J. Lane, 1920. At p. 183. Available at: https://www.google.com/books/edition/British_Malaya/kBQ-AQAAMAAJ.

teenager, was pardoned, but the other seven defendants were sentenced to death.[220] The Sultan, apparently to signal his acquiescence to British demands for not only justice but satisfaction, provided a *kris* (a ceremonial dagger or knife) by which the sentences could be carried out.[221]

Subsequent historical analysis suggests that the trial was broadly successful in protecting British maritime interests and signaling Britain's intent to prosecute and punish violence against its subjects.[222] Ruling Malay elites seem to have rapidly abandoned the practice of permitting, or actively participating in, piracy as a means of rent seeking and increased British political pressure – along with the promise that the protection of peaceful commerce would result in economic gains that would in large part accrue to leaders aligned British policing efforts against "piratical activity" – led to a "sharp decline of piracy off the Selangor coast."[223]

2.2 Second Case Study: Franco-Siamese Mixed Court (1894)

2.2.1 Events

In the early summer of 1893, the French authorities sent a small group of colonial soldiers into the interior of the Indochinese Peninsula to seize a series of Siamese outposts.[224]

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[220] Swettenham, "Some Account of the Independent Native States of the Malay Peninsula," 186.

[221] Swettenham, Frank Athelstane. *British Malaya: An Account of the Origin and Progress of British Influence in Malaya*. United Kingdom: J. Lane, 1920. At p. 183. Available at: https://www.google.com/books/edition/British_Malaya/kBQ-AQAAMAAJ.

[222] *See* Abel, "A Covert War at Sea: Piracy and Political Economy in Malaya 1824-1874," 239 (Writing that "the year 1874 marked a turning point in Malaya's history of piracy because states ceased support for piratical operations and no longer ignored acts of piracy in their territory.").

[223] Abel, 239.

[224] Keat Gin Ooi, ed., *Southeast Asia: A Historical Encyclopedia, from Angkor Wat to East Timor* (Santa Barbara, Calif: ABC-CLIO, 2004), 1015.

This force, composed primarily of French colonial officers and militia conscripts drawn from French-controlled Annam (a territory that roughly corresponds to the northern portion of Vietnam), was divided into three columns, each of which was ordered to evict Siamese officials from outposts that Siam had established along the river in central and southern Laos.[225] The northern column, composed of a few hundred men commanded by French Résident Louis Paul Luce, were ordered to take control over the district of Kham Muon.[226]

Over the course of the preceding half-century, France had progressively taken control over more and more of the Indochinese Delta to the south and east of Siam. In 1862, after a four-year-long military campaign launched in response to the reported persecution of French Catholic missionaries in the area,[227] France forced the Kingdom of Vietnam to cede control over its three southernmost provinces.[228] In 1872 France then consolidated these provinces, along with three more seized in 1967, formally annexing them and creating French Cochinchina, an overseas colony governed through direct French rule.[229] In 1863, the French gained influence over much of southern Indochina including the whole of the Mekong Delta when, in a bid to avoid outright annexation by either Siam or Vietnam, King Norodom of Cambodia requested that

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[225] Arthur J. Dommen, *The Indochinese Experience of the French and the Americans: Nationalism and Communism in Cambodia, Laos, and Vietnam* (Bloomington: Indiana University Press, 2001), 18.

[226] Historical sources provide a number of alternative spellings for this district and region, most notably Khammouan. *See, e.g.,* Dommen, 19.

[227] R. Stanley Thomson, "The Diplomacy of Imperialism: France and Spain in Cochin China, 1858-63," *The Journal of Modern History* 12, no. 3 (September 1940): 334–56, https://doi.org/10.1086/236488.

[228] R. Stanley Thomson, "France in Cochinchina: The Question of Retrocession 1862–65," *The Journal of Asian Studies* 6, no. 4 (August 1947): 366, https://doi.org/10.2307/2049432.

[229] Martin Stuart-Fox, "The French in Laos, 1887–1945," *Modern Asian Studies* 29, no. 1 (February 1995): 113, https://doi.org/10.1017/S0026749X00012646.

Cambodia become a French protectorate.[230] It then gained control, also by nominally indirect means, over the territories of Annam and Tonkin (territories roughly corresponding to central and northern Vietnam) after the brief Sino-French War of 1884-85, declaring both French protectorates. Having secured control over the entire southern and eastern coast of the peninsula, France turned its attention to Laos and the portions of its territory that straddled the Mekong River Valley.

Expansionist interests in Paris championed the prospect of France annexing Laos on various grounds. Expanding French control inland to at least the eastern bank of the Mekong river would make its position on the peninsula more defensible, not least because the Mekong itself would provide a second naval route by which to deliver personnel and supplies to French encampments farther inland.[231] Gaining access to the upper stretches of the Mekong River Valley would also allow French commercial interests to "open up the interior" of the Indochinese peninsula, "penetrating" markets all along the river's 2,700 mile length.[232] It would, in effect, link France's existing colonies to "a vast commercial circuit" running from the seaports of Cochinchina in the south through the markets of Tonkin and on to foreign markets stretching as

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[230] R. Stanley Thomson, "The Establishment of the French Protectorate Over Cambodia," *The Far Eastern Quarterly* 4, no. 4 (1945): 330, https://doi.org/10.2307/2049693.

[231] See Stuart-Fox, "The French in Laos, 1887–1945," 115. (Describing the advocacy in pro-imperial circles in Paris to expand French control into Laos in order to "to expand the narrow coastal band of French territory, especially in central Vietnam to a more defensible depth.")

[232] Dommen, *The Indochinese Experience of the French and the Americans*, 30. (Describing French colonial and commercial interest in the Mekong as a means by which to "open up the interior" of the Indochinese Peninsula, allowing the "systematic and large-scale … penetration of the interior of Indochina.")

far north as the Mekong's headwaters in Tibet.[233] More importantly from an ideological and political perspective, it would also link France's colonies together. Gaining control over Laos, with its long and narrow territory running up the backbone of the peninsula, would allow France to consolidate the piecemeal holdings it had so far accumulated – "bring[ing] together in a compact whole the diverse parts of her Indochina possessions."[234] As if in an effort to manifest this enticing outcome, by the early 1890s French politicians (both in and out of the then-ascendent *parti colonial*) had taken to referring to the Mekong as "our river."[235]

The French, however, faced competition in their ambitions for the Mekong River Valley. Siam, the independent kingdom that controlled much of the western portion of the Indochinese peninsula, had its sights on the same goal. Alongside Vietnam, Siam was among the regional powers on the peninsula that had risen to prominence after the decline of the Khmer Kingdom in the 18th century.[236] During the 19th century, the two regional powers repeatedly wrestled for control over Laos and Cambodia, with the struggle twice rising to the level of all-out armed conflict in the First (1831-1834) and Second Siamese-Vietnamese Wars (1841-1845).[237] As neither was able to fully expel the other from the interior of their shared peninsula, Siam and Vietnam instead sought to control Laos and Cambodia indirectly through successive, and at

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[233] Guillot, M.E. "La France au Laos et la question du Siam." In *Grandes Conférences de Lille* (Lille: L. Daniel, 1894), 82, 71.

[234] Guillot, "La France au Laos et la question du Siam," 71.

[235] Milton Osborne, "The Strategic Significance of the Mekong," *Contemporary Southeast Asia* 22, no. 3 (2000): 432, https://www.jstor.org/stable/25798506.

[236] Kenneth R. Hall, "The Coming of the West: European Cambodian Marketplace Connectivity, 1500–1800," in *Cambodia and the West, 1500-2000*, ed. T. O. Smith (London: Palgrave Macmillan UK, 2018), 19, https://doi.org/10.1057/978-1-137-55532-8_2.

[237] Spencer Tucker, ed., *Vietnam*, Repr, Warfare and History (London: Routledge, 2004), 25–26.

times overlapping, claims of suzerainty. (Indeed, prior to France establishing its protectorate over Cambodia, it was in the uncomfortable position of having accepted vassal status under the suzerain control of both Vietnam and Siam.)[238] By the 1880s and 1890s, though, the contest to control the interior of the content had swung decisively in Siam's favor, as Vietnam became increasingly distracted and weakened by its war of survival with France. No longer checked by their historical rival in the region, Siam signaled its intent to exert greater control over Laos, and especially those of its provinces that bordered the increasingly French-controlled Annam, by sending troops and resources to fortify strategic outposts along the east side of the Mekong River Valley. Regional governors, appointed by Siam, were assigned to oversee the governance of these contested territories, and were given troops and resources to establish and fortify these outposts, one of which was the outpost at Kham Muon.

On the 18th of May, Luce's troops arrived at the official residence of the Siamese Commissioner of the district of Kham Muon, Major Phra Yot Muang Kwang, and issued an official demand that he hand over control of the surrounding territory and vacate the area.[239] Initially, Phra Yot resisted the French demands, insisting that he did not have the authority to transfer control over Siamese-controlled territory without first seeking approval from his superiors, but after four days French Résident Luce grew impatient and ordered his men to occupy the Siamese post.[240] After this, Phra Yot was forced to capitulate. In an official letter to

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[238] Thomson, "The Establishment of the French Protectorate Over Cambodia," 315.

[239] *The Case of Kieng Chek Kham Muon Before the Franco-Siamese Mixed Court—Constitution of the Mixed Court and Rules of Procedure—The Trial, Judgment and Condemnation of Phra Yot*, 1894, 7, http://www.archive.org/details/caseofkiengchekk00franrich.

[240] Phra Yōṭmūangkhwāng, *Full Report, with Documentary Appendices, of the Phra Yot Trial before the Special Court at Bangkok* (Bangkok: Bangkok Times, 1894), 11, https://archive.org/details/cu31924067565170/.

Luce dated May 23, Phra Yot handed over the post buildings and the territories of Kamkurt and Kham Muon to Résident Luce.[241] With Kham Muon now under French control, Résident Luce ordered one of his officers, a French Inspector of Militias named Grosgurin,[242] to escort Phra Yot and a small group of Siamese officers roughly fifty miles southeast to the Laotian city of Outhene.[243] To accomplish this task, Grosgurin was allocated a contingent of twenty militiamen and a Cambodian interpreter.

Grosgurin's small company decamped on May 26th and started towards Outhene. After a week of traversing the difficult terrain, they arrived at the Siamese customs post of Kieng Chek in the town of Ban Pha Muang, about 60km from Outhene, where they stopped to wait for locals to gather a sufficient number of boats for the entire party to cross Nam Hin Boon River and keep on towards Outhene – a process that took several days. Grosgurin and his men set up camp in a cluster of houses inside the town, allowing Phra Yot and his men to stay in a shelter about a mile away.[244] After receiving reports that Phra Yot's deputy, a man named Luang Anurak, had been fomenting anti-French sentiment among the residents of Kieng Chek, Grosgurin ordered that the deputy be captured and brought to the houses where Grosgurin and his militiamen were

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[241] Notably, though, even as he handed over control to the French, Phra Yot still stopped short of relinquishing the Siamese claim to them, writing: "I hereby commit to your care the territory of Kamkurt and Kham Muon with the interests therein contained, while making formal declaration of our continued absolute lights over it." *Phra Yot Before the Franco-Siamese Mixed Court*, 10.

[242] Of note, despite having surveyed dozens of historical and contemporary sources on this trial, I was unable to locate a single source that includes Inspector Grosgurin's full name.

[243] M. L. Manich, *History of Laos*, Enlarged 2nd edition (Chalermnit, 1967), 286–87, https://www.yumpu.com/en/document/read/9344677/manich-history-of-laos.

[244] Yōṭmūangkhwāng, *Full Report, with Documentary Appendices, of the Phra Yot Trial before the Special Court at Bangkok*, 37.

camped.[245]

Unbeknownst to the French, Phra Yot had sent a message to the Siamese governor of Outhene reporting his capture by French forces and requesting that he send reinforcements.[246] The governor of Outhene acceded to this request so, after demanding that Grosgurin release his deputy, Phra Yot then ventured further down the Nai Boon River towards Outhene and met the reinforcements. Now backed by a group of Siamese soldiers large enough to outmatch Grosgurin's small contingent of militiamen,[247] Phra Yot returned to Kieng Chek on June 3rd and surrounded the French encampment.

Reports differ as to the circumstances of the ensuing confrontation. French-leaning sources describe Phra Yot and his reinforcements as having surrounded the small French force and, after demanding the release of Luang Anurak, opening fire on the cluster of houses, killing many of the militiamen "in cold blood"[248] and "assassinating [Grosgurin] with a revolver" as he lay sick in bed.[249] Descriptions of the event from Siamese sources, including Phra Yot himself,

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[245] Yǭtmūangkhwāng, 28.

[246] *Phra Yot Before the Franco-Siamese Mixed Court*, 11.

[247] In trial transcripts, testimony on the size of this force was contested, with Phra Yot estimating there were no more than 50 men, one of Grosgurin's Annamite militiamen estimating there were more than 100, and Grosgurin's Cambodian translator estimating that there were more than 200 men. Yǭtmūangkhwāng, *Full Report, with Documentary Appendices, of the Phra Yot Trial before the Special Court at Bangkok*, 28.

[248] B.A. Smith, "The King of Siam," *The Contemporary Review, 1866-1900* 71 (June 1897): 890, https://www.proquest.com/docview/6663586. ("The French maintained, in spite of overwhelming evidence to the contrary, that Grosgurin was shot at deliberately in cold blood by Pra Yaut without any provocation.")

[249] "Extract from the 'Courrier d'Haiphong' of 18th June 1893" describing the contents of a telegram sent by Résident Luce, reprinted in Yǭtmūangkhwāng, *Full Report, with Documentary Appendices, of the Phra Yot Trial before the Special Court at Bangkok*, 90. See also "France and Siam." The Hong Kong Telegraph. July 7, 1893. Available at: https://archive.org/details/NPTG18930707/page/5/mode/2up?q=%22phra+yot%22.

agree that the encounter began with a demand for Grosgurin to release Luang Anurak, but maintain that Grosgurin had been the one to escalate the situation, shooting from inside the house towards Phra Yot and killing one of the Siamese men standing beside him.[250] On these accounts, Grosgurin had not been assassinated but rather had been killed in the crossfire when "a bullet […] struck through the open verandah of the Annamite house round which the skirmish took place."[251] In the end, Grosgurin and a dozen of his militiamen were dead. His Cambodian interpreter and the surviving members of Grosgurin's entourage were arrested but soon allowed to return to French-controlled Annam.[252]

2.2.2 Domestic and International Responses

At the same time that Luce had set out leading the northern column to Kham Muon, France's Vice-Résident in Cambodia, a man named Bastard, had led the southern column towards Khong.[253] Bastard's troops similarly experienced slight initial resistance from the Siamese forces, reporting that they had successfully occupied Stung Treng and Khong "without firing a shot,"[254] but were later surprised by a delayed and stronger than expected Siamese response. Siamese forces attacked the French encampment on Khong, killing one French soldier and

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[250] Manich, *History of Laos*, 287.

[251] Smith, "The King of Siam," 890.

[252] Manich, *History of Laos*, 287.

[253] Ian G. Baird, "Different Views of History: Shades of Irredentism along the Laos—Cambodia Border," *Journal of Southeast Asian Studies* 41, no. 2 (2010): 191, https://www.jstor.org/stable/20778873; Dommen, *The Indochinese Experience of the French and the Americans*, 18.

[254] Dommen, *The Indochinese Experience of the French and the Americans*, 18.

capturing another.[255]

Almost as soon as reports of the incident at Kieng Chek reached Paris, pro-imperial voices in the Parti in Paris seized on these two incidents, using them to whip up anti-Siamese sentiment and to press for action against the Siamese.[256] French Foreign Minister Jules Develle made it clear, both in diplomatic communications and in comments made to the Chamber of Deputies and the press, that if Siam did not immediately accede to French demands for reparations and satisfaction (bringing any Siamese individuals involved in either incident to justice), that France would initiate a Blockade of the Mekong River.[257] Siamese authorities immediately capitulated, offering to "grant an indemnity and complete satisfaction for the murder of Inspector Grosgurin and his escort."[258]

In early July 1893, French Admiral Edgar Humann ordered a contingent of two gunboats – the *Comete* and the *Inconstant* – from the French fleet anchored near the Annamese capital of Huế to sail to the mouth of the Chao Phraya river, a strategic location guarded by a Siamese fort

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[255] Baird, "Different Views of History," 191; Ian G. Baird, "Millenarian Movements in Southern Laos and North Eastern Siam (Thailand) at the Turn of the Twentieth Century: Reconsidering the Involvement of the Champassak Royal House," *South East Asia Research* 21, no. 2 (2013): 260, https://www.jstor.org/stable/23752551; Stuart-Fox, "The French in Laos, 1887–1945," 25.

[256] Stuart-Fox, "The French in Laos, 1887–1945," 25.

[257] For coverage of the French Foreign Minister's remarks, see, e.g., "Siam Must Make Reparation," Chicago Daily Tribune, July 19, 1893. Available at: https://archive.org/details/per_chicago-daily-tribune_the-chicago-daily-tribun_1893-07-19_52_200/page/n3/mode/2up?q=grosgurin.

[258] Trewman's Exeter Flying Post, June 24, 1893. *British Library Newspapers* (accessed September 1, 2023). https://link.gale.com/apps/doc/Y3200754758/DSLAB?u=uclosangeles&sid=bookmark-DSLAB&xid=f6bf51ca. See also John Cassell, *Cassell's History of England: From the British Occupation of Egypt to the Opening of Parliament, 1895*, Special Edition, vol. 8, Cassell's History of England (London: Cassell and Company, Limited, 1906), 543, https://archive.org/details/centuryeditionof0003unse/.

at Paknam.[259] The two craft reached their destination on July 12 and, although they had been ordered to anchor at the river mouth, made an attempt to force their way past the fort. While the precise order of events is disputed, it seems the commander of the Siamese fort, acting under orders to prevent the French ships from passing, ordered his men to fire warning shots – shots that according to Siamese accounts were blanks, but other sources describe as live rounds, that damaged the *Comete* – across the bows of the French vessels.[260] The French ships responded by firing live rounds at the fort, successfully forcing their way past the fort and sailing up-river to anchor at Bangkok with their guns trained on the royal palace.[261]

In an act of quite literal gunboat diplomacy, Auguste Pavie, the French Charge d'Affaires in Bangkok, delivered an ultimatum from Paris to the Siamese foreign minister, Prince

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[259] Dommen, *The Indochinese Experience of the French and the Americans*, 18; Peter Simms and Sanda Simms, *The Kingdoms of Laos: Six Hundred Years of History* (Psychology Press, 2001), 208; Norman Dwight Harris, *Europe and the East* (Houghton Mifflin, 1926), 363.

[260] "Mr. Boyd to Mr. Gresham, Legation of the United States, Bangkok, July 17, 1893 (Received September 2)," in *Papers Relating to the Foreign Relations of the United States, 1893* (Washington: Government Printing Office, 1894), Document 537, https://history.state.gov/historicaldocuments/frus1893/d537. See also Henry Norman, "The True Story of France and Siam," in *The Peoples and Politics of the Far East: Travels and Studies in the British, French, Spanish and Portuguese Colonies, Siberia, China, Japan, Korea, Siam and Malaya* (London : T. F. Unwin, 1895), 483, http://archive.org/details/peoplespoliticso00normiala.

[261] Simms and Simms, *The Kingdoms of Laos*, 209; Dommen, *The Indochinese Experience of the French and the Americans*, 18; Martin Stuart-Fox, *A History of Laos* (Cambridge University Press, 1997), 18. This action was apparently rather unexpected and Britain, concerned France would initiate hostilities quickly enough that British subjects would need to be rapidly evacuated from the country, sent three navy ships to the mouth of the Chao Phraya river. Stuart-Fox, "The French in Laos, 1887–1945," 25. British traders in Siam seem to have shared this concern judging by the comments of one British national describing the following year how the French "disagreements with the Siamese" had left British traders in Bangkok "cramped and harassed by the uncertainty as to the possible course of events." Charles Stuart Leckie. "The Commerce of Siam in Relation to the Trade of the British Empire." Journal of the Society of Arts. June 8, 1894.

Devawongse, on July 20. Under threat of war, France issued a series of demands: that Siam forfeit all claims to and cede control to France over all its territories on the left (east) bank of the Mekong river; that Siam pay three million francs indemnity for the attack on French-Annamese troops at Kham Muon and on the French ships at the Paknam fort; and that all individuals responsible for these and other acts of violence against French forces be tried and punished.[262] Although the Siamese readily acceded to the latter two demands, they refused to accede to the first, as it would have entailed giving up not only territory that had been previously disputed, but also 90,000 square miles of territory that had until then been undisputedly under Siamese control. With negotiations at an impasse, the French minister and the two gunboats were ordered to leave Bangkok on July 26. Seeking to reinforce its ultimatum, France then ordered a blockade of the Chao Phraya River on July 29, cutting Bangkok and the royal palace off from maritime supply routes.[263] At this, King Chulalongkorn and foreign minister Prince Devawongse gave in, conceding all three demands made in France's July 20 ultimatum. The French, however, capitalizing on their advantage, pushed for a range of additional stipulations – demanding that Siam allow French troops to be stationed along the east bank, remove Siamese troops from the west bank of the river, and withdraw all military support from a series of strategic settlements

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[262] Dommen, *The Indochinese Experience of the French and the Americans*, 18; Simms and Simms, *The Kingdoms of Laos*, 209. The text of this ultimatum can be found in "Mr. Boyd to Mr. Gresham (Extract), Legation of the United States, Bangkok, July 26, 1893 (Received September 7)," in *Papers Relating to the Foreign Relations of the United States, 1893* (Washington: Government Printing Office, 1894), Document 538, https://history.state.gov/historicaldocuments/frus1893/d538.

[263] Simms and Simms, *The Kingdoms of Laos*, 209; "Mr. Boyd to Mr. Gresham (Extract), Legation of the United States, Bangkok, July 27, 1893 (Received September 7)," in *Papers Relating to the Foreign Relations of the United States, 1893* (Washington: Government Printing Office, 1894), Document 539, https://history.state.gov/historicaldocuments/frus1893/d539.

along the Siamese border with its tributary state Cambodia – all of which were justified as measures "to ensure the agreement was kept."[264]

Under pressure from France, and having been unable to enlist the backing of Britain, Siam was forced to acquiesce to all French demands in a Treaty and implementing Convention, both signed October 3, 1893. The provisions of the Treaty included not only the demands that France had laid out in the ultimatum that the French Foreign Minister had issued in June but the additional demands France had made during its blockade.[265] In addition to provisions under which Siam was obliged to give up all claims to all territory on the left bank of the Mekong River and formally recognize France's right to administer Laos as a protectorate (Treaty Article 1), permit French and French-aligned merchants free access to Siamese ports (Treaty Article 5), free all French and Ammanite prisoners (Convention Article 4), and even supply the wood and coal that France would require (Treaty Article 6), the French insisted on inserting the following provision (Convention Article 3):

> The persons guilty of the offences of Tong-Xieng-Kham and Kammoun [alt. Kham Muon] shall be tried by the Siamese authorities, a Representative of France to be present at the trial, and will see that the penalties inflicted are

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[264] Stuart-Fox, "The French in Laos, 1887–1945," 119; Simms and Simms, *The Kingdoms of Laos*, 209.

[265] Minton F. Goldman, "Franco-British Rivalry over Siam, 1896-1904," *Journal of Southeast Asian Studies* 3, no. 2 (1972): 211, https://www.jstor.org/stable/20069986; Charles Stuart Leckie, "The Commerce of Siam in Relation to the Trade of the British Empire," ed. A. C. Mountain and George Birdwood, *The Journal of the Society of Arts* 42, no. 2168 (1894): 659, https://www.jstor.org/stable/41334099. The full text of the October 3, 1893 Franco-Siamese treaty can be found as an attachment to "Mr. Boyd to Mr. Gresham (Extract), Legation of the United States, Bangkok, October 23, 1893 (Received December 9)," in *Papers Relating to the Foreign Relations of the United States, 1893* (Washington: Government Printing Office, 1894), Document 543, https://history.state.gov/historicaldocuments/frus1893/d543.

> carried out. The French Government reserves the right of deciding whether the sentences are sufficient and, if they are, of claiming a new trial before a Mixed Tribunal, of which it shall determine the composition.[266]

Not only did this provision grant France the unilateral right to determine whether any Siamese nationals alleged to have been culpable in these two "offences" that were prosecuted in Siamese courts should subsequently also be the subject of a Mixed Tribunal, but also that the grounds on which France would make this determination would not be any procedural quality of those Siamese trial but rather the "sufficiency" of the punishment meted out. It is not surprising, then, that the Siamese representative to the negotiation of these treaties, Prince Dawongse, challenged the prospect of allowing Siamese subjects to be tried by a "Mixed Tribunal" on the grounds that it would "withdraw Siamese subjects from their natural Judges." The French representative, Le Myre De Vilers, however, waived away this concern, noting that "Siam is a country in which there is Consular jurisdiction, and that it is no innovation, as there are already Mixed Tribunals there."[267] Apparently mollified, or at least unwilling to further press the issue, Dawongse lodged

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[266] Treaty of Peace signed by the French and Siamese Plenipotentiaries, October 3, 1893 and Convention regarding the execution of Terms of Treaty of Peace signed by the French and Siamese Plenipotentiaries. Inclosures 1 and 2 in No. 375. British Foreign Office, *Siam. 1894, No. 1: Correspondence Respecting the Affairs of Siam* (Harrison and Sons, 1894), 197–201, https://upload.wikimedia.org/wikipedia/commons/c/c6/Correspondence_respecting_the_affairs_of_Siam_%28IA_cu31924023182052%29.pdf. Also see Stuart-Fox, "The French in Laos, 1887–1945," 25; Carl Cavanagh Hodge, ed., *Encyclopedia of the Age of Imperialism, 1800-1914* (Westport, Conn: Greenwood Press, 2008), 506; Dommen, *The Indochinese Experience of the French and the Americans*, 18; Simms and Simms, *The Kingdoms of Laos*, 210.

[267] *Proces-verbal* appended to Convention signed ly the French and Siamese Plenipotentiaries, October 3, 1893. Inclosure 3 in No. 375. British Foreign Office, *Siam. 1894, No. 1*, 201–3. This reference to Mixed Tribunals was likely a reference to French Consular Court System, established under the Law of June 28, 1778. See Julien Pillaut, *Manuel de Droit Consulaire*, (2 Vols., Paris: Berger-Levrault, Éditeurs, 1912), Vol. II, pp. 180-309; Jules de Clercq,

no further complaint and thus the French gained not only the right to see those Siamese nationals involved in the violence at Kieng Chek in June 1893, but also to unilaterally overrule any ruling handed down by that court if it proved unsatisfactory in the eyes of French authorities.[268]

2.2.3 First Trial: The Special and Temporary Court

Guide Pratique des Consulats, (2 Vols., Paris: A. Pédone, Éditeur, 1898), Vol. I, pp. 509-606. It may also have been in reference to existing British consular or "international" courts, established in Siam under the terms of the 1855 Bowring treaty. Among other concessions made in this treaty, Siam had agreed to allow Britain to expand its existing consular jurisdiction over British nationals and individuals of mixed nationality, effectively allowing for exclusive extraterritorial jurisdiction in most cases. See Akiko Iijima, "The 'International Court' System in the Colonial History of Siam," *Taiwan Journal of Southeast Asian Studies* 5, no. 1 (2008): 31–64; Francis Bowes Sayre, "The Passing of Extraterritoriality in Siam," *American Journal of International Law* 22, no. 1 (November 1928): 70–88, https://doi.org/10.2307/2188970; Nigel Brailey, "The Scramble for Concessions in 1880s Siam," *Modern Asian Studies* 33, no. 3 (1999): 513–49, https://www.jstor.org/stable/313075. On the structure and extent of U.S., British, French, and other consular court systems operated in Siam during this period, see Owart Suthiwartnarueput, *From Extraterritoriality to Equality: Thailand's Foreign Relations 1855-1939* (Bangkok: International Studies Center, Ministry of Foreign Affairs, 2021), 91–178, https://image.mfa.go.th/mfa/0/4OJCTby7gE/From_Extraterritoraility_to_Equality_Owart_Suthiwartnarueput.pdf.

[268] While many of the French demands must have stung the pride of Siam's King Chulalongkorn and his advisors, this one seems to have come as a particular insult. In response, to some degree, to Western powers' patronizing distrust of the Siamese legal system on the grounds that it was "obsolete, unsystematic and uncertain," King Chulalongkorn had initiated a comprehensive overhaul of the administrative arrangement of the Siamese justice system in 1892, just a year before the events at issue in this case. Rungsaeng Kittayapong, "The Origins of Thailand's Modern Ministry of Justice and Its Early Development" (University of Bristol, 1990), 70, https://research-information.bris.ac.uk/ws/portalfiles/portal/34491119/303923.pdf. As part of these reforms, he had ordered the creation of a Ministry of Justice that housed departments of the prosecutor, of corrections, and of legislative advising on penal issues that was largely based on administrative arrangements then common among European powers. Indeed, these reforms had been overseen by Gustave Rolin-Jaequemyns, the illustrious Belgian jurist and founding member of the *Institut du Droit International*, in his capacity as resident advisor to the King. Eugénie Mérieau, *Constitutional Bricolage: Thailand's Sacred Monarchy vs. the Rule of Law*, Constitutionalism in Asia (Oxford London New York New Delhi Sydney: Hart, 2022), 88.

Although Siamese authorities were reluctant to give in to French demands to prosecute a Siamese subject for taking up arms against French forces, they were even more reluctant to undergo the humiliation of allowing France to do so. And while the language of Article III was patently uneven, it at least offered Siam a chance – though one that seemed doomed from the start – to avoid the greater of those two evils. To this end, Siam's King Chulalongkorn ordered the creation of an ad-hoc "Special and Temporary Court" to adjudicate the affair of Kham Muon. This court – the Special Court for the Affairs of Tong-Xieng-Kham and Keng-Chek (Kham-Muon) – was designed as a "special and temporary court," constituted by Royal Decree.[269] Contemporary sources generally describe this "rapsang" or "special" court as a *sui generis* one-off body,[270] and in some ways it was. It was not, however, without precedent.

Like the Ottomans, the Qing Chinese, and so many other peripheral polities that had been leveraged or coerced into uneven trading relationships with European powers in the mid-19th century, Siam's leadership had faced both internal and external pressures to reform, modernize, and westernize its domestic legal and political arrangements for years. In response to these pressures, King Chulalongkorn had initiated a number of changes to the administration of justice in his kingdom over the preceding decades. As part of one such set of reforms, undertaken in 1874 in an effort both to address widespread corruption in local Siamese courts and to consolidate political power over regional officials, the King had issued a decree granting himself the power to establish "rapsang" courts – special temporary courts – to address "special cases"

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[269] Royal Decree Instituting a Special and Temporary Court for the Trial of the Affairs of Tong-Xieng-Kham and Keng-Chek (Kham-Muon), in Yṓtmūangkhwāng, *Full Report, with Documentary Appendices, of the Phra Yot Trial before the Special Court at Bangkok*.

[270] Yṓtmūangkhwāng.

that presented "special circumstances which the normal courts could not cope with."[271] That same year, he created four of these courts in four ministries (Mahatthai, Kalahom, Khlangm and Nakhonbarn) in order to "overcome … delays and corruption" in each. These rapsang courts, as well as the one established in 1894 to hear the charges against Phra Yot, operated within the Siamese court system but allowed for a greater degree of flexibility in their administrative structure and choice of laws than ordinary Siamese courts.[272]

Siam's decision to convene such a "Special and Temporary" rapsang court to adjudicate this matter, rather than trying Phra Yot through a more standard military court, was itself an expression not only of Siamese officials' awareness of the heightened stakes of this case, but also a means by which to allow the judges appointed to the court to adapt the proceedings to the international context at hand. To wit, in trying Phra Yot, the court was to apply Siamese criminal law but would not adopt the adversarial model – largely cast after those of the English legal system, adopted as one of the myriad changes brought during the previous half-century of legal reforms – of adjudicative procedure characteristic of trials in most Siamese courts at the time.[273] Nor would this be a jury trial.[274] Instead the court would employ an adjudicatory model much closer to French civil trials, in which the court's panel of seven judges would act as

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[271] *See* Kittayapong, "The Origins of Thailand's Modern Ministry of Justice and Its Early Development," 65.

[272] *See* Kittayapong, 65.

[273] David M. Engel, *Code and Custom in a Thai Provincial Court: The Interaction of Formal and Informal Systems in Justice*, Monographs and Papers / Association for Asian Studies 34 (Tucson, Ariz: University of Arizona Press, 1978), 133; Ted L McDorman, "The Teaching of the Law of Thailand," *Dalhousie Law Journal* 11, no. 3 (October 1, 1988): 923.

[274] See "News in Brief." *Times*, February 12, 1894, 5. *The Times Digital Archive* (accessed March 1, 2024). https://link.gale.com/apps/doc/CS85776972/DSLAB?u=uclosangeles&sid=bookmark-DSLAB&xid=66097462.

principle triers of fact, being empowered to call witnesses, compel testimony (at least from Siamese witnesses), and adduce evidence.[275]

The personnel appointed to the court also evidenced the seriousness with which the King and his advisors took the matter. The court was headed by Prince Krom Luang Bijitprijakorj,[276] a long-time legal advisor to the King who had already served on a number of the King's rapsang courts[277] as Chief Justice.[278] Alongside the Prince were six more Siamese Justices, Phya Siharaj Dejojai, Phya Abhaironaridhi, Phya Devesr Wongse Vivadh, Phya Dhammasaranitti, Phya Dhamraasaranetti, and Phya Ridhirong Ronached, all experienced jurists and well aware of the context of the case.[279] Arguing for the prosecution (acting as "advocates for the Crown," despite the Crown's stated interest against conviction in the case) were Luang Sunthorn Ivosa and Nai Hasbamror, two Siamese administrative officials, and for the defense were William Alfred Tilleke,[280] a young Singhalese solicitor, Vernon Page, a British lawyer, and Nai Mee and Nai

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[275] See Part III, 9-23 of the Royal Decree instituting the court. Yo̱tmu̱angkhwāng, *Full Report, with Documentary Appendices, of the Phra Yot Trial before the Special Court at Bangkok*, 1–5.

[276] Also transliterated by contemporary and modern sources as either Phichit Preechakorn or as simply "Prince Bidjit." See, e.g., "News in Brief." *Times*, February 26, 1894, 5. *The Times Digital Archive* (accessed March 1, 2024). https://link.gale.com/apps/doc/CS84204122/DSLAB?u=uclosangeles&sid=bookmark-DSLAB&xid=d6d7b9cd. See also Mérieau, *Constitutional Bricolage*, 270.

[277] Kittayapong, "The Origins of Thailand's Modern Ministry of Justice and Its Early Development," 80.

[278] Yo̱tmu̱angkhwāng, *Full Report, with Documentary Appendices, of the Phra Yot Trial before the Special Court at Bangkok*.

[279] Yo̱tmu̱angkhwāng.

[280] Although relatively young and untested at the time of the trial, Tilleke's role in the successful defense of Phra Yot in front of the Special and Temporary Court cemented his reputation as a talented solicitor and defense attorney. So much so that the law firm he would go on to found – the 130-year-old Tilleke and Gibbins – still touts this accomplishment in its public-facing communications. See Tilleke & Gibbins, "History," Tilleke & Gibbins, 2024, https://www.tilleke.com/history/.

Kaat, two Siamese advocates.[281] Finally, while they were not to take any official role in the proceedings, Charles Hardouin, France's Consul to Siam, and Alexandre Ducos, then Chief Justice of the Court of Appeals in French Indo-China and soon to be Lieutenant Governor of Annam, were appointed to observe "with great interest" the proceedings on behalf of the French.[282] The adjudication of Phra Yot's guilt or innocence was to be fully in the hands of the seven Siamese judges, as the Royal Decree establishing the court included no provision for a jury, but its proceedings would be largely open to the public.[283]

The court ultimately heard five charges against Phra Yot: the murder (premeditated and willful homicide) of the French Inspector Grosgurin, the murder of 16 to 24 of the French Annamite soldiers (with the total depending on evidence presented at trial), the assault of Boon Chan (Grosgurin's Cambodian interpreter), the theft of arms and ammunition that had been taken

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[281] Yṓtmūangkhwāng, *Full Report, with Documentary Appendices, of the Phra Yot Trial before the Special Court at Bangkok*, 1. It is unclear whether Mee and Kaat were members of the defense team or merely translators appointed due to Page and Tilleke being unable to understand or speak Siamese. This latter possibility is supported by various outlets' reporting of the time that French authorities refused to allow Phra Yot to be defended by "his own countrymen." This might explain why Yot would have retained two foreign Angolophone attorneys to defend him in a trial that was largely conducted in Siamese. See, e.g., "A Trial in Siam." *Bristol Mercury*, April 11, 1894. *British Library Newspapers* (accessed March 1, 2024). https://link.gale.com/apps/doc/BB3206890265/DSLAB?u=uclosangeles&sid=bookmark-DSLAB&xid=55b3de51.

[282] Yṓtmūangkhwāng, 1.

[283] See "News in Brief." *Times*, February 12, 1894, 5. *The Times Digital Archive* (accessed March 1, 2024). https://link.gale.com/apps/doc/CS85776972/DSLAB?u=uclosangeles&sid=bookmark-DSLAB&xid=66097462. This arrangement was to prove popular as a number of local and international notables were reported to have attended many of the court's sessions, including then-legal advisor to the King Gustave Rolin-Jaequemyns, British diplomat James G. Scott, F. Flügger, the German Consul to Siam, and Andreas du Plessis de Richelieu, a Dutch naval officer who had also been commissioned in the Siamese Navy and had been in command of the forces at the Paknam fort during the crisis of July 1893. See Yṓtmūangkhwāng, 1.

from the French camp, and arson (for the burning of several structures in the French camp).[284] Under the Siamese criminal code, which the court had been instructed to apply, convictions of murder or arson could carry the penalty of death, robbery a penalty of flogging[285] If convicted of either of the murder charges or arson, Phra Yot could face execution, and if convicted of any of the lesser charges he could face "imprisonment – followed by condemnation to cut grass for the royal elephants – and triple, double, or single fines."[286]

While negotiations over these and other details of the "method of procedure" of the court involved a good deal of diplomatic wrangling back and forth, the trial itself seems to have been rather straightforward. In late December 1893, Siamese police began the process of transporting

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[284] Interestingly, while the "Full Report" of the trial in the Special and Temporary Court later published by the Bangkok times includes a thorough record of the proceedings and documentary record of the trial, it does not contain any comprehensive list of the charges that were leveled against Grosgurin. These five charges were, however, broadly reported. See, e.g., "A Trial in Siam." *Lancaster Gazetter*, April 14, 1894. *British Library Newspapers* (accessed March 1, 2024). https://link.gale.com/apps/doc/R3208752517/DSLAB?u=uclosangeles&sid=bookmark-DSLAB&xid=89e7be8a. They were also recorded in memoirs by individuals, such as Dr. John MacGregor, who were present for the trial. See John MacGregor, *Through the Buffer State: A Record of Recent Travels Through Borneo, Siam, and Cambodia* (F.V.White & Company, 1896), 99, https://www.google.com/books/edition/Through_the_Buffer_State/xYNCAAAAIAAJ.

[285] Some reports on this point suggest that the punishment for robbery not only included flogging of not less than 50 strokes but also a court-ordered tattooing of an image of the property having been stolen on the chest of one convicted of that crime. See, e.g. "A Trial in Siam." *Lancaster Gazetter*, April 14, 1894. *British Library Newspapers* (accessed March 1, 2024). https://link.gale.com/apps/doc/R3208752517/DSLAB?u=uclosangeles&sid=bookmark-DSLAB&xid=89e7be8a.

[286] "Siam Notes." *Hong Kong Telegraph*. March 5, 1894. Available at: https://archive.org/details/NPTG18940305/page/n1/mode/2up. MacGregor, *Through the Buffer State: A Record of Recent Travels Through Borneo, Siam, and Cambodia*, 100.

Phra Yot to the capital for trial, arriving in early January, 1894.[287] On February 19, 1894, Phra Yot was formally served notice that he would stand trial in front of the Special Court and placed under detention.[288] Despite a request from defense counsel to postpone the trial in order to allow more time to gather evidence – a request that was denied by the court under intense pressure from French Minister Pavie – Phra Yot's trial in the Siamese Special Court began on February 24, 1894.[289] After 22 days of testimony, in which even French-aligned sources agreed the prosecution was unable to produce much in the way of compelling evidence for the case against Phra Yot, the trial concluded on March 16, 1894.[290] On March 17, 1894, the Siamese Special Court found Phra Yot not guilty on all five of the charges of which he had been accused.[291]

2.2.4 Second Trial: The Mixed Franco-Siamese Court

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[287] See *Hong Kong Daily Press*. January 12, 1894. Available at: https://archive.org/details/NPDP18940112/page/6/mode/2up?q=%22phra+yot%22.

[288] "Siam Notes." *Hong Kong Telegraph*. March 5, 1894. Available at: https://archive.org/details/NPTG18940305/page/n1/mode/2up.

[289] See "Siam Notes." *Hong Kong Telegraph*. March 5, 1894. Available at: https://archive.org/details/NPTG18940305/page/n1/mode/2up. See also "Trouble Brewing at Bangkok." *New York Herald* [European Edition], February 25, 1894, [1]. *International Herald Tribune Historical Archive, 1887-2013* (accessed March 1, 2024). https://link.gale.com/apps/doc/UIRGOG880896761/DSLAB?u=uclosangeles&sid=bookmark-DSLAB&xid=abedcacc. On the dates of the trial itself, see *Hong Kong Daily Press*. March 8, 1894. Available at: https://archive.org/details/NPDP18940308/page/n1/mode/2up?q=%22phra+yot%22.

[290] Leckie, "The Commerce of Siam in Relation to the Trade of the British Empire."

[291] Yṓtmūangkhwāng, *Full Report, with Documentary Appendices, of the Phra Yot Trial before the Special Court at Bangkok*, 62. Mr. Scott to the Earl of Kimberley, Bangkok, March 11, 1894 (Received March 18) British Foreign Office, *Siam. 1894, No. 1*, 224, Document 410. See also "Siam." *Times*, March 19, 1894, 5. *The Times Digital Archive* (accessed March 1, 2024). https://link.gale.com/apps/doc/CS84335219/DSLAB?u=uclosangeles&sid=bookmark-DSLAB&xid=0e2689fd.

French authorities and the more imperialist factions within France's public opinion were, predictably, infuriated by news of the Siamese court's acquittal of Phra Yot. French authorities immediately demanded the Siamese officer be tried again, justifying their right to do under Article III of the 1893 Franco-Siamese convention.[292] While this announcement was met with support by many Francophone and French-aligned outlets, it was elsewhere derided as an obvious and politically motivated interference to obtain the French's preferred outcome. Indeed, the fact that this was Phra Yot's second trial for the same murder did not escape the notice of many Anglophone sources.[293]

It was perhaps unsurprising, then, that when French Minister Pavie issued an announcement on April 2, 1894 that the Mixed Tribunal convened to re-try Phra Yot for his alleged crimes against French and Annamite troops in June 1893 would consist of three French

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[292] See "Mr. Scott to the Earl of Kimberley." Bangkok, March 11, 1894. No. 410. British Foreign Office, *Siam. 1894, No. 1*, 224. This development was widely reported. See, e.g., "France." *Morning Post*, March 24, 1894, 4. *British Library Newspapers* (accessed March 1, 2024). https://link.gale.com/apps/doc/R3213288890/DSLAB?u=uclosangeles&sid=bookmark-DSLAB&xid=5eef40dc. Most contemporary accounts of this development, particularly those in Anglophone outlets, attribute this move on the part of French officials more to a dissatisfaction with the outcome than any perceived shortcomings of the Special and Temporary Court's procedural process. See, e.g., Leckie, "The Commerce of Siam in Relation to the Trade of the British Empire," 659. See also, "Notes." *The Literary Digest*. June 23, 1894. Volume 1, Issue 8. Available at: https://archive.org/details/sim_literary-digest_1894-06-23_9_8/page/236/mode/2up?q=%22phra+yot%22; "Siam." *Times*, March 19, 1894, 5. *The Times Digital Archive* (accessed March 1, 2024). https://link.gale.com/apps/doc/CS84335219/DSLAB?u=uclosangeles&sid=bookmark-DSLAB&xid=0e2689fd (noting that although the trial in the Special Court had been a "full and impartial inquiry" the "French...will probably insist on a new trial.")

[293] *See, e.g.*, "Twice Tried for Murder." *Portsmouth Evening News*, April 28, 1894, 2. *British Library Newspapers* (accessed March 1, 2024). https://link.gale.com/apps/doc/GR3218594877/DSLAB?u=uclosangeles&sid=bookmark-DSLAB&xid=0346bf33.

judges and two Siamese judges, the imbalance was immediately remarked upon by Prince Devawongse.[294] Moreover, the Tribunal would be seated not in the Bangkok Central Court building but within the walls of the French Consulate.[295]

To lead this Mixed Court, Pavie appointed Judge Mondot, then-President of the Court of Appeal at Hanoi, as the President of the Mixed Court and Judges Cammate and Fuynel, Councillor to the Court of Appeal at Saigon and then-Procureur in French-held Mỹ Tho (Mytho) respectively, to hold the two French positions on the bench. For their part, Siamese authorities appointed Phya Maha Amati Thibodi and Phya Kassem Sukari to serve as the two Siamese judges.[296] Arguing on behalf of the defense were William Alfred Tilleke, one of the members of the defense team in Phra Yot's first trial, and another barrister named Duval whose practice had previously been limited to Saigon.[297]

The Constitution of the Mixed Court defined the subject matter jurisdiction of the court, limiting the crimes it could consider to murder (defined as "homicide committed voluntarily"), assassination (defined as murder committed either with premeditation or through ambush), theft, and arson or "incendiarism" (defined as voluntarily setting fire to any "edifices, vessels, boats,

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[294] Prince Devawowgse to Prince Vadhana, May 29, 1894. British Foreign Office, *Siam. 1894, No. 1*, 189.

[295] Manich, *History of Laos*, 297.

[296] *Phra Yot Before the Franco-Siamese Mixed Court*, 10. Although the names of the French and Siamese judges appointed to the Mixed Court, and of the appointed advocates on each side, were widely reported upon, neither the official record of the court nor any contemporary source I was able to locate includes much in the way of biographical details on them or even, indeed, their full names. See, e.g. "The Re-Trial of Phra Yot." *The Singapore Free Press and Mercantile Advertiser* (Weekly), 29 May 1894, Page 326. Available at: https://eresources.nlb.gov.sg/newspapers/digitised/article/singfreepresswk18940529-1.2.59.

[297] "France And Siam." *Times*, May 19, 1894, 9. *The Times Digital Archive* (accessed March 1, 2024). https://link.gale.com/apps/doc/CS151968435/DSLAB?u=uclosangeles&sid=bookmark-DSLAB&xid=74582057.

stores, [or] woodyards").[298] Alongside this substantive list of potential crimes, the Constitution also contained various provisions addressing accomplice liability, requiring only that an individual be found to have knowingly supported, abetted, or even benefitted from any of the listed crimes to be found culpable for and be sentenced to the "same punishment" of the primary authors of that crime.

The charges against Phra Yot in his trial by the Mixed Court were not substantively different than those he faced in his initial trial in the Siamese Special Court. The prosecutor charged him with the assassination (willful and premeditated murder) of Inspector Grosgurin, being an accomplice to the assassination of "divers [e.g., an unknown number of] Annamite militiamen," being an accomplice to the attempted assassination of one Boon Chan, a Cambodian interpreter who had been accompanying Inspector Grosgurin, and being an accomplice to various acts of attempted assassination, theft, and arson committed during the attack at Kieng Chek – an incident at which he had not been present but to which he was charged as being an accomplice to after the fact.[299]

The three French-appointed judges arrived in Bangkok on May 19, 1894, and after two

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[298] *Phra Yot Before the Franco-Siamese Mixed Court*, 4–5 (Articles 1-3, 8-11). Interestingly, Article 8 of the Constitution also makes reference to the crimes of parricide and infanticide despite neither party having put forth any indication that any of the alleged French victims had any familial relation to Phra Yot or any of his Siamese subordinates or allies, as well as to poisoning despite the absence of any suggestion that any French national had been harmed in that manner during the "offenses" at Kham Muon or Tong-Xieng-Kham.

[299] *Phra Yot Before the Franco-Siamese Mixed Court*, 9. In what seems to have been a maximalist prosecution strategy, playing perhaps to the assumed friendliness of the French-majority bench, the prosecutor attached all the charges of theft to the more serious charges of assassination and attempted assassination against Grosgurin and Boon Chan. *Phra Yot Before the Franco-Siamese Mixed Court*, 9. ("With this circumstance, that the said theft's have accompanied and followed the two crimes of homicide above specified.")

weeks of preliminary matters, the trial of Phra Yot before the Mixed Franco-Siamese tribunal began on June 4, 1894.[300] This trial was to be far less open than the last, held behind closed doors of the French Consulate building and attended only by permission of the French legation, and much shorter in duration. Indeed, the proceedings were adjourned on June 7, 1894 after just four days – during which the court heard testimony from a handful of witnesses, largely in line with the testimony those witnesses had given in front of the Special Court.[301]

2.2.5 Ruling and Aftermath

On 11 June 1894, the President of the Court issued its decision – a decision that was signed only by the three French judges, the two Siamese judges having refused to endorse the Court's judgment.[302] Phra Yot was found guilty of "culpable homicide and incendiarism" – this was reduced from the charge of murder that French officials had sought – and sentenced to 20 years of hard labor.[303] Despite being present in the courtroom during the course of the trial, Phra

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[300] "France And Siam." *Times*, May 19, 1894, 9. *The Times Digital Archive* (accessed March 1, 2024). https://link.gale.com/apps/doc/CS151968435/DSLAB?u=uclosangeles&sid=bookmark-DSLAB&xid=74582057.

[301] *Phra Yot Before the Franco-Siamese Mixed Court*, 6–33. "Latest Telegrams." *Edinburgh Evening News*, June 9, 1894, 3. *British Library Newspapers* (accessed March 1, 2024). https://link.gale.com/apps/doc/ID3240752143/DSLAB?u=uclosangeles&sid=bookmark-DSLAB&xid=5d1ccc74.

[302] Manich, *History of Laos*, 298.Also see *The Japan Weekly Mail*. July 7, 1894. P. 15. https://books.google.com/books?id=pR9CAQAAMAAJ&pg=PA15.

[303] *Phra Yot Before the Franco-Siamese Mixed Court*, 39. The ruling of the Mixed Court and its sentencing of Phra Yot to such a long period of hard labor was widely covered in global newspapers at the time. See, e.g. [Special Despatch to the Herald]. "Phra Yot Sentenced." *New York Herald* [European Edition], June 14, 1894, [1]. *International Herald Tribune Historical Archive, 1887-2013* (accessed March 1, 2024). https://link.gale.com/apps/doc/MUJFUS786234129/DSLAB?u=uclosangeles&sid=bookmark-DSLAB&xid=365719a7; "Local and General." *Hong Kong Telegraph*. June 28, 1894. https://archive.org/details/NPTG18940628/page/17/mode/2up?q=%22phra+yot%22.

Yot wasn't in court to hear its ruling.[304] Contemporary reports suggest that Phra Yot's absence from the courtroom that day was due to a fear that the French, in violation of the terms of the same Treaty article that provided the basis for the Mixed Commission itself, would seize the Siamese defendant immediately after the Commission handed down their ruling and convey him to a nearby French gunboat.[305] These fears were not unfounded, as the French Charge d'Affaires, Joseph Piliuski, had suggested, both to the court and to local reporters, that Phra Yot ought to be "provisionally transported" to a French gunboat stationed in Menam for detention until the French and Siamese delegations could agree on the details of his sentence.[306] After a brief period of saber rattling between Siamese and French authorities,[307] and some conciliatory intervention by British officials, French officials relented and agreed to let Phra Yot serve his sentence in a Siamese prison, on the condition that the French Minister at Bangkok be allowed to verify his incarceration "in order that there should be no evasion of the sentence."[308] At this, the

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[304] See "France and Siam." *Morning Post*, June 12, 1894, 5. *British Library Newspapers* (accessed March 1, 2024). https://link.gale.com/apps/doc/R3214437604/DSLAB?u=uclosangeles&sid=bookmark-DSLAB&xid=4239a295.

[305] See Reuters. "The French in Siam." Daily Telegraph, 11 June 1894, p. 7. The Telegraph Historical Archive, link.gale.com/apps/doc/IO0707660061/DSLAB?u=uclosangeles&sid=bookmark-DSLAB&xid=02c5deb9. Accessed 1 Mar. 2024.

[306] The Japan Weekly Mail. July 7, 1894. P. 15. https://www.google.com/books/edition/Japan_Weekly_Mail/pR9CAQAAMAAJ?hl=en&gbpv=1&dq=%22phra+yot&pg=PA15&printsec=frontcover.

[307] Contemporary sources reported that, in the midst of the deadlock over which party should be allowed to hold Phra Yot in custody, French ships anchored at Saigon received orders to mobilize towards Bangkok to provide further leverage to the French demands. See, e.g., "France and Siam." *Morning Post*, June 11, 1894, 5. *British Library Newspapers* (accessed March 1, 2024). https://link.gale.com/apps/doc/R3214437497/DSLAB?u=uclosangeles&sid=bookmark-DSLAB&xid=f4631a14.

[308] See *Public Opinion: A Weekly Review of Current Thought and Activity* (G. Cole (etc.), 1894), 756; Prabhakar Singh, "Of International Law, Semi-Colonial Thailand, and Imperial Ghosts," *Asian Journal of International Law* 9,

Siamese produced Phra Yot and the Commissioners briefly reconvened to read out his sentence.[309]

2.3 Third Case Study: The International Military Commission at Paoting-Fu (1900)

2.3.1 Events

On June 30 and July 1, 1900, fifteen American and British missionaries living near the city of Paoting-Fu (today Baoding), China were attacked and killed by group of local villagers and peasant farmers. Most of the attackers were reportedly aligned with a growing anti-foreign and anti-imperial movement led by group known in Chinese as the *Yìhéquán* – variously translatable as the "Fists of Righteous Harmony," the "Great Sword Society," or "Militia United

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no. 1 (January 2019): 73, https://doi.org/10.1017/S204425131800005X. Also see "Occasional Notes." Pall Mall Gazette, June 14, 1894. British Library Newspapers (accessed March 18, 2023). https://link.gale.com/apps/doc/Y3200452868/BNCN?u=uclosangeles&sid=bookmark-BNCN&xid=4b873ce8, and "Abroad." The Speaker. June 16, 1894. Available here: https://archive.org/details/sim_speaker-the-liberal-review_1894-06-16_9/page/652/mode/2up?q=phra+yot, and Mei Nam Kong, "The Siamese Blue-Book and the Present Condition of Siam Affairs," in *The Imperial And Asiatic Quarterly Review And Oriental And Colonial Record, Vol.8*, 1894, 308, http://archive.org/details/in.ernet.dli.2015.21998.

[309] See "Siam." Manchester Courier and Lancashire General Advertiser, June 14, 1894, 5. British Library Newspapers (accessed March 1, 2024). https://link.gale.com/apps/doc/GR3221667149/DSLAB?u=uclosangeles&sid=bookmark-DSLAB&xid=07fb9369. See also *The Japan Weekly Mail*. July 7, 1894. P. 15. https://books.google.com/books?id=pR9CAQAAMAAJ&pg=PA15&dq=%22phra+yot%22+%22siam%22+trial&hl=en&newbks=1&newbks_redir=0&sa=X&ved=2ahUKEwjMsb6Yo4eBAxWpjIkEHZXDAfIQ6AF6BAgSEAI#v=onepage&q=%22phra%20yot%22%20%22siam%22%20trial&f=false.

in Righteousness."[310] In English, though, they were most commonly known as the "Boxers."[311]

In the late afternoon of June 30th, a throng of Boxers and angry villagers attacked a cluster of houses and a chapel operated by missionaries from the American Presbyterian Mission. Although the buildings in the American Mission compound had housed well over a dozen missionaries and family members in the spring of that year, only eight were present in the houses

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[310] See Harrington, *Peking 1900*, 12; Joseph Esherick, *The Origins of the Boxer Uprising* (Berkeley: University of California Press, 1987); Henry Keown-Boyd, *The Fists of Righteous Harmony: A History of the Boxer Uprising in China in the Year 1900* (London: Leo Cooper, 1991); Paul A. Cohen, *History in Three Keys: The Boxers as Event, Experience, and Myth* (Columbia University Press, 1997), 16.

[311] See, e.g., Llewellyn James Davies, "The Chinese 'Boxers,'" in *The National Geographic Magazine*, vol. XI (Washington : National Geographic Society, 1900), 282, http://archive.org/details/nationalgeograph111900na. While it is unclear who coined this term, letters and records of Western missionary groups in China indicate that it was in common usage in that community at least as early as 1899. Given this, a number of scholars have suggested that the term may have originated with either Henry Dwight Porter or Arthur Henderson Smith, two influential missionaries who lived in the Shandong region at the time of the Boxer uprising. See, e.g. Larry Clinton Thompson, *William Scott Ament and the Boxer Rebellion: Heroism, Hubris and the "Ideal Missionary"* (Jefferson, NC: McFarland & Co, 2009), 223. Both Porter and Smith went on to publish books on their experience and the experience of the missionary community at the time, both of which contain passages on the origins of the term. Porter writes that the "first known use of the now well-known name 'Boxers' was in a telegram from P'ang Chuang on the 18th of September [1899] to Mr. Aiken at Tientsin: 'Secure immediate protection from the attacks of the Boxer fanatics.'" Henry Dwight Porter, *William Scott Ament, Missionary of the American Board to China* (London and Edinburgh: Fleming H. Revell Company, 1911), 167, https://www.google.com.ua/books/edition/William_Scott_Ament_Missionary_of_the_Am/_IhjAAAAMAAJ. Smith was less precise in his efforts to pinpoint the source of the term, writing only that the "designation [was] first used by one or two missionary correspondents of foreign journals in China." That said, he provided useful insight into the understanding among Chinese-speaking missionaries of the possible translations of the Chinese characters that composed the group's name, ultimately concluding that its inclusion of "Ch'üan (fists) and "I" (public or righteous) was close a then-common Chinese phrase "fists and feet" that was used to signify "boxing and wrestling," finally concluding that because of this similarity "there appeared to be no more suitable term for adherents of this sect than 'Boxers.'" Arthur Henderson Smith, *China in Convulsion*, vol. 1 (New York: Fleming H. Revell Company, 1901), 154, https://www.google.com/books/edition/China_in_Convulsion/W9ZAAAAAYAAJ.

at the time of the attack: [312] the Reverend Frank E. Simcox, his wife May Gibson Simcox, the three Simcox children, two medical doctors, Dr. George Y. Taylor and Dr. Cortland Van R. Hodge, and Hodge's wife Elsie Sinclair Hodge.[313] As the crowd surrounded and began attacking the mission buildings, all eight of the foreign missionaries and family members took refuge in a second story room in one of the houses. Reverend Simcox and Dr. Taylor reportedly attempted to reason with the crowd and, when that failed, fired on the Boxers with rifles, killing one and wounding ten others. The Boxers then set fire to all of the houses in the compound, including the one in which the American missionaries had taken refuge. All five adults in the house and one of the children died in the fire. Two of the Simcox children escaped the house only to be killed by the mob who then threw their bodies into the cistern. In addition to the eight

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[312] As of the spring of 1900, there were just 32 Protestant missionaries living in Paoting-Fu, most were away on mission business in June 1900, some travelling elsewhere in the country and some back in the U.S. Among those that remained in Paoting-Fu, there were four British nationals and eleven American nationals. The British nationals were all affiliated with the China Inland Mission, a British missionary organization founded in 1865, and the American nationals were affiliated with the American Presbyterian Mission founded in 1837 and the American Board of Commissioners for Foreign Missions (ABCFM) founded in 1810. Robert Coventry Forsyth, *The China Martyrs of 1900: A Complete Roll of the Christian Heroes Martyred in China in 1900, with Narratives of Survivors* (Religious Tract Society, 1904), 20. ("On June 1, 1900 many of the Protestant missionaries were absent from their station some being in the United States and others elsewhere in China. There were in all fifteen left at Paoting Fu; one being Mr William Cooper of the China Inland Mission Shanghai who was there on a visit. The remainder consisted of five men five women and four children belonging to the American Presbyterian Mission were Dr GY Taylor Rev FES Simcox Mrs Simcox and three children and Dr CVR and Mrs Hodge of the American Board were Rev HT Pitkin Miss MS Morrill and Miss AA Gould Of the China Inland Mission were Mr and Mrs B Bagnall and one child and Mr W Cooper")

[313] G. Thompson Brown, *Through Fire and Sword: Presbyterians and the Boxer Year in North China*, vol. 78 (Presbyterian Historical Society, 2000), 198, https://www.jstor.org/stable/23335478; United States Adjutant-General's Office Military Information Division, *Reports on Military Operations in South Africa and China: July, 1901* (U.S. Government Printing Office, 1901), 468.

Americans, between five and twenty Chinese Christians who had worked with the American Mission as household staff, chapel staff, or medical assistants were also killed, either in the burning houses or cut down by the attacking mob.[314]

Early the next morning, July 1, 1900, the throng of villagers and Boxers turned its attention to two other missionary compounds, one maintained by the American Board of Commissioners for Foreign Missions and the other operated by the China Inland Mission, a British missionary organization, both of which were located just south of the city wall. Many of the residents of these two missionary compounds were also away traveling, leaving only three American missionaries present in the American Board buildings – Reverend Horace T. Pitkin, Mary S. Morrell, and Annie A. Gould – and four British missionaries present at the China Inland Mission buildings – William Cooper, Benjamin and Emily Bagnall and their daughter Gladys Bagnall.[315] As in the attack the previous day, the four American missionaries barricaded themselves in a single building, this time in the small chapel nearby.[316] Although Pitkin briefly kept the crowd at bay with a revolver, the three were quickly overwhelmed. Pitkin was killed in the scuffle and the two women, Morrell and Gould, were bound and walked through the city to

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[314] Brown, *Through Fire and Sword*, 78:199; Kenneth Latourette, *A History of Christian Missions in China* (Gorgias Pr Llc, 2009), 514, http://gen.lib.rus.ec/book/index.php?md5=5B20D2C603B0AE5774614CED4D1DBEAC.

[315] Division, *Reports on Military Operations in South Africa and China*, 514. The full names of the three American missionaries were found here: "Slain in China." Indianapolis Journal, Volume 50, Number 208, Indianapolis, Marion County, 27 July 1900. https://newspapers.library.in.gov/cgi-bin/indiana?a=d&d=IJ19000727.1.1. The names of the British missionaries were found here: "Benjamin Bagnall (1844-1900) - Find a Grave," accessed April 5, 2024, https://www.findagrave.com/memorial/217726758/benjamin-bagnall. Also see: Asia Harvest, "1900 - Benjamin, Emily, & Gladys Bagnall," 2024, https://www.asiaharvest.org/china-resources/hebei/1900-benjamin-emily-gladys-bagnall.

[316] Division, *Reports on Military Operations in South Africa and China*, 69–70.

the Chi-Sheng-An Temple, a building located in the southeast corner of the city that had been set up as a temporary headquarters for local Boxers.[317] Cooper and the Bagnall family, seeing the destruction of the nearby American Board mission, reportedly fled and sought protection at a nearby outpost of the Imperial Chinese Army, but they were instead handed over to the throng of Boxers and angry villagers, at which point the three British missionaries and the Bagnalls' daughter were also bound and led to the Chi-Sheng-An Temple.[318]

The two surviving American missionaries and four surviving British missionaries now in custody were brought by the Boxers before the provincial judge, a man named Ting Yung, for an impromptu trial. While the specifics of that morning's proceedings were not recorded in any English sources, one American source mentions that, in the course of the attacks, the Boxers captured and tortured a Chinese Christian in order to "secure evidence against the missionaries, corroborative of their alleged practices of cutting out eyes, hearts, etc., and of kidnapping children."[319] It seems plausible to assume that the claims on which Ting Yung was asked to rule were largely similar in content. In the late afternoon, the ersatz trial proceedings completed, all six of the missionaries were bound, led out of the south gate of the city, and beheaded. Their bodies were buried, along with the remains of the foreign missionaries killed earlier that day, in a shallow pit. The Boxers and villagers then continued their attacks, killing between 100 and 150

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[317] James L. Hevia, "Leaving a Brand on China: Missionary Discourse in the Wake of the Boxer Movement," *Modern China* 18, no. 3 (1992): 309, https://www.jstor.org/stable/189335; Division, *Reports on Military Operations in South Africa and China*, 470.

[318] Arthur Judson Brown, *Report of a Visitation of the China Missions* (Board of Foreign Missions of the Presbyterian Church in the U.S.A., 1902), 6; Division, *Reports on Military Operations in South Africa and China*, 470–71.

[319] Division, *Reports on Military Operations in South Africa and China*, 514.

more people, including Chinese Christians and the remaining servants that had worked for any of the foreign missionaries. In total, the attacks resulted in the deaths of 15 foreign nationals and between 150 and 200 Chinese nationals.[320]

2.3.2 Context

The events in Paoting-Fu on June 30th and July 1, 1900 were one relatively small part of a much larger conflagration that had begun to engulf the Chinese countryside in the early summer of 1900, today referred to as the Boxer Rebellion or the Boxer Uprising. The Boxers coalesced and began to grow rapidly, more as a movement than a cohesive group, starting in the mid 1890s. During this period, food shortages and rising levels of banditry gripped many of the poorer rural areas of the country, both of which were due in part to the inability of the Qing authorities to maintain order or foster economic prosperity in outlying territories.[321] While managing lands far from Peking had long been difficult, the governance capacity of the Qing imperial government had been stretched particularly thin through the latter decades of the 19th century, as it hemorrhaged revenues and resources through a series of major military and economic defeats to foreign powers beginning in the late 1830s.[322]

Through a series of treaties, signed after successive military defeats to European Powers, notably to Britain in the First Opium War (1839–1842) and to the combined forces of Britain, France, and later Russia in the Second Opium War (1856–1860), the Qing government had been

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[320] Brown, *Through Fire and Sword*, 78:199; Brown, *Report of a Visitation of the China Missions*, 7; Division, *Reports on Military Operations in South Africa and China*, 471.

[321] Esherick, *The Origins of the Boxer Uprising*, 281.

[322] Keown-Boyd, *The Fists of Righteous Harmony*, 72.

forced to roll back its protectionist efforts to limit trade with the West. Under the terms of these "unequal treaties" – including the Treaty of Nanjing (1842), the Supplementary Treaty of the Bogue (1843), the Treaty of Tianjin (1858), and the Beijing Conventions of 1860 – the Qing regime had been forced to open over a dozen of China's ports to European trade, grant first Britain then France an early form of "most favored nation" status, allow foreign legations to reside in Peking, grant adjudicatory extraterritoriality to foreign trade partners (here defined as something like a negative grant of adjudicatory sovereignty barring Chinese courts from hearing cases against British nationals and nationals of other European states), permit Christian missionaries to enter the country and proselytize, and legalize the import of opium.[323] In addition to these already onerous provisions, the Beijing Conventions of 1860 included provisions forcing China to hand over a number of strategically and economically important pieces of territory. Most notable of these were the provisions granting control over Kowloon Peninsula, located across the Victoria Strait from the Island of Hong Kong (already under direct British Rule as a Crown Colony since 1841), to Great Britain, and those ceding control over a great deal of territory in what is now called Outer Manchuria to Russia. This latter concession is

[323] See Emily Whewell, "British Extraterritoriality in China: The Legal System, Functions of Criminal Jurisdiction, and Its Challenges, 1833-1943." (University of Leicester, 2015), https://leicester.figshare.com/articles/thesis/British_extraterritoriality_in_China_the_legal_system_functions_of_criminal_jurisdiction_and_its_challenges_1833-1943_/10167116/1; Aleš Skřivan Sr and Aleš Skřivan Jr, "The Firm Fried. Krupp in the Chinese Market Prior to the First Sino-Japanese War of 1894/95," *German History* 40, no. 3 (September 1, 2022): 361–83, https://doi.org/10.1093/gerhis/ghac029; Nicholas Zeller, "Semi-Colonialism in China," in *The Palgrave Encyclopedia of Imperialism and Anti-Imperialism*, ed. Immanuel Ness and Zak Cope (Cham: Springer International Publishing, 2019), https://doi.org/10.1007/978-3-319-91206-6_112-1; Teemu Ruskola, *Legal Orientalism: China, the United States, and Modern Law* (Cambridge, Mass: Harvard University Press, 2013); Chi-Hua Tang, "29: China–Europe," in *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012), 1–27, https://doi.org/10.1093/law/9780199599752.003.0030.

of particular importance because it directly led to the conflict that forms the basis for the fourth and last case study discussed in this chapter – the Russo-Japanese War, and the 1905 Dogger Bank Tribunal. It was this swath of territory in Manchuria through which Russia had built the railway network that would ultimately supply its military installation Port Arthur, the southern-most point of Russian Manchuria. Russia had already sent troops into the territory, which would ultimately be ceded as Russian Manchuria, as early as 1856, in a largely pretextual effort to defend against invasion by British and French troops during their offensive from Tianjin to Peking.[324]

Peking's already tenuous control over outlying and rural areas of the empire, further weakened by these defeats and foreign distractions, left a power vacuum in these areas. This fostered the emergence, or re-emergence, of various local secret "boxing" societies in the provinces of Chihli, Szechuan, and Shantung, whose members stepped in to provide an alternative source of protection for the lives and property of residents.[325]

Frustration and distrust of outside influence and control were always a central element of these groups. A series of waves of internal migration over the preceding century, encouraged by land reclamation policies instituted by the Manchu-led imperial Qing government, had resulted in growing numbers of land disputes and increased competition for resources between those

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[324] This effort was largely pretextual because the territory that Russia was "defending" against British and French troops was far to the North of the rather direct West-East route that those troops had taken from the coastal city of Tianjin to Peking. See Hodge, *Encyclopedia of the Age of Imperialism, 1800-1914*, 147; Malcolm W. Davis, "Railway Strategy in Manchuria," *Foreign Affairs* 4, no. 3 (1926): 499–502, https://doi.org/10.2307/20028472; Theodore J. Grayson, "The War in the Orient in the Light of International Law. Part II," *The American Law Register (1898-1907)* 53, no. 12 (December 1905): 738, https://doi.org/10.2307/3307024.

[325] Keown-Boyd, *The Fists of Righteous Harmony*, 66; Cohen, *History in Three Keys*, 17–18.

already living in these provinces and incoming migrants.[326] These tensions and conflicts fostered a simmering anti-"foreign" sentiment (here understood as opposition to outsiders on a more local scale, "tensions between Chinese insiders and Chinese outsiders") in these outlying areas, and only added to local anger at the central authorities in Peking.[327]

The initial target of this reactionary fervor was the Manchu-led imperial Qing government, but soon there would be another ready foreign target: Western Christian missionaries and Chinese Christian converts. Long excluded from Chinese territory, Western Christian missionaries had been granted the right to enter and establish missions in the interior of the country under the terms of the 1858 Treaty of Tianjin.[328] While the efforts of Christian missionaries were generally lauded by Western officials as "bringing civilization to a backward land,"[329] as the number of missionaries and missionary groups active in China grew, and as their work took them farther and farther into China's interior, their presence became a source of diplomatic tension and logistical difficulty for both Chinese and Western officials. The second half of the century saw a series of recurring incidents in which Western missionaries encountered resistance, sometimes violent, from local populations.[330] These Western missionaries – coded

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[326] Judith Wyman, "Foreigners or Outsiders?: Westerners and Chinese Christians in Chongqing, 1870s-1900," in *New Frontiers*, ed. Robert Bickers and Christian Henriot (Manchester University Press, 2017), 76–79, https://doi.org/10.7765/9781526119742.00013.

[327] Wyman, 78.

[328] Hodge, *Encyclopedia of the Age of Imperialism, 1800-1914*, 373. The practice of Christianity had been outlawed, and European missionaries expelled from the country, by a royal edict in 1724. See Robert E. Entenmann, "Christian Virgins in Eighteenth-Century China," in *Christianity in China: From the Eighteenth Century to the Present* (Stanford University Press, 1996), 182.

[329] Paulsen, "The Szechwan Riots of 1895 and American 'Missionary Diplomacy,'" 286.

[330] Paulsen, 285.

ethnically, culturally, and religiously as outsiders *par excellence* – were ready targets for simmering anti-foreign sentiment.[331] This wasn't helped by the cultural insensitivity and assumptions of Western superiority with which some missionary groups approached interactions with local officials and populations.[332]

This simmering tension would reach a rolling boil in the summer of 1900. In the span of just a few months, the countryside was rocked by a series of escalating attacks by Boxers and villagers sympathetic to their anti-foreign credo against missionaries and other foreigners living in the country, Chinese groups believed to be associated with foreigners (including Chinese Christians, as well as servants retained by missionaries and foreign diplomats), and foreign-built infrastructure projects like railways and telegraph wires. These attacks were fueled by rumors that circulated among rural populations, spread via posters, pamphlets, and word of mouth, about missionaries engaging in all manner of immoral or pernicious hostile behaviors, from poisoning

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[331] This explanation comports with a point made by Paul Cohen, a scholar who wrote extensively on this period. He argued that in bore the brunt of resentment and fear towards outsiders not necessarily because of any antipathy by local populations against Western incursion. Indeed, given the difficulty of communication and low education levels in many of these areas, local populations were unlikely to fully understand the international machinations between Peking and Western nations. Instead, if we take into account the background levels of suspicion of outsiders in these areas at the time, resistance to Western missionaries is unsurprising given that in many of the more remote corners of Qing China, these missionaries were the only Westerners that local populations had ever seen. Paul A. Cohen, *China and Christianity: The Missionary Movement and the Growth of Chinese Antiforeignism; 1860 - 1870*, 3. print, Harvard East Asian Series 11 (Cambridge, Mass.: Harvard Univ. Press, 1977), 59.

[332] See, e.g., Paul Clements' description of the way in which Catholic missions, with the political backing of the French state, "demanded" that the Qing confer varying levels of "mandarin status" for ranking bishops stationed in the country. Paul Henry Clements, *The Boxer Rebellion: A Political and Diplomatic Review* (Columbia University, 1915), 72.

local wells to causing droughts with magic rites to kidnapping and killing local children.[333] Railroads and telegraph lines, under construction with the assistance of foreign engineers and supervisors, were reportedly the target of similar rumors. According to contemporary accounts, some locals feared that the heavy rumbling of the cargo trains would disturb ancestral graves and the presence of telegraph lines would disrupt the wind and anger local deities.[334]

Regardless of the underlying causes, reports of violence against Western missionaries demanded a response from their home countries, most commonly one of the Great Powers. At first, these responses were generally limited to reiterating demands that Peking exact reparations for any damage to property or lives lost, punish any local officials that had proven "unable or unwilling" to prevent attacks on foreign nationals, and that the central government provide for the protection of missionaries and Western nationals living and traveling in China. These demands were buttressed by threats of gunboat diplomacy – threats that were all too credible, given how recently multiple Powers had proved the superiority of their naval forces, and the frequency with which Russian, French, British, and other Powers' naval vessels visited the now bustling port cities along China's coast that their nations controlled. By the 1890s, as "outrages" against foreign nationals in China became more common, it became increasingly clear to Western leaders that seeking to improve the safety of foreigners living in China by pressuring Peking was not working.[335]

In the summer of 1900, the simmering anti-foreign and anti-Christian sentiment had

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[333] Diana Preston, *The Boxer Rebellion: The Dramatic Story of China's War on Foreigners That Shook the World in the Summer of 1900*, 2nd Printing edition (New York: Berkley Books, 2001), 31–32.

[334] Preston, 31–32.

[335] Paulsen, "The Szechwan Riots of 1895 and American 'Missionary Diplomacy,'" 285.

boiled over. Between May and June of 1900, violence began to escalate and spread from the countryside towards the capital. On May 17th, Boxer groups destroyed three villages outside of Paoting-Fu, 90 miles from Peking, killing dozens of Chinese villagers who had converted to Catholicism[336] and leaving thousands without shelter, clothing, or food.[337] On May 28th, the rail lines between Paoting-Fu and Tientsin and that between Tientsin and Peking were both attacked. Using explosives and hand tools, Boxers destroyed multiple bridges and stations, one of which was located just 10 miles from Peking, stopping all rail traffic between the capital and outlying areas. Many of the foreign workers who had been stationed along the line were forced to flee on foot towards the ports of Tientsin.[338] On May 31, a group of French and Belgian railway engineers and their families attempting to reach Tientsin by boat were attacked when they came ashore for supplies, resulting in the death of four of the party.[339] On June 2, a group of 30 Belgian railway workers and engineers that had been stationed on the Tientsin to Paoting-Fu line were also attacked as they made their way downriver just 20 miles from Tientsin. In the fray,

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[336] No 62 Sir C MacDonald to the Marquess of Salisbury Received May 17, Telegraphic Peking May 17 1900 in British House of Commons, *Parliamentary Papers*, Parliamentary Papers: 1850-1908. Accounts and Papers of the House of Commons., Volume 91 (Session 23 January, 1901 to 17 August, 1901) (United Kingdom: H.M. Stationery Office, 1901), 283 (37), https://books.google.com/books?id=EeM5AQAAIAAJ&pg=RA2-PA16.

[337] Arthur H. Smith, *China in Convulsion: By Arthur H. Smith Twenty-Nine Years a Missionary of the American Board in China Author of "Chinese Characteristics" and "Village Life in China" with Illustarions and Maps in Two Volumes*, vol. 2 (Edinburgh; London: Oliphant, Anderson & Ferrier, 1901), 206, https://link.gale.com/apps/doc/CYIFGU568749724/DSLAB?u=uclosangeles&sid=bookmark-DSLAB&xid=9c60fd8d&pg=285.

[338] Clements, *The Boxer Rebellion*, 97.

[339] Victor Purcell, *The Boxer Uprising: A Background Study* (Hamden, Conn.: Archon Books, 1974), 247.

nine of the fleeing engineers died and dozens of Boxers were killed.[340]

From there, Boxers began advancing on the cities. Just weeks before the attacks on the missionary compounds at Paoting-Fu, on June 13th Boxers advanced on Peking, taking control of much of the city.[341] As the Boxers advanced through the city, setting fires that would ultimately destroy thousands of homes and businesses, most of the foreigners still present in the capital fled for the relative safety of the Legation Quarter, the area of the city that housed the diplomatic headquarters of the British, Japanese, Russian, French, German, Austro-Hungarian, Italian, and American legations to China.[342] As Boxer forces attempted to advance on the Legation Quarter, however, they were met by stiff resistance from soldiers stationed in and around the diplomatic enclave.[343] On June 19th, local Imperial officials issued a decree that all foreigners were required to evacuate via the port of Tientsin within 24 hours, after which point even the safety of those with diplomatic protections could not be guaranteed.[344] On June 20th, after days of skirmishes, the German Minister, Baron von Ketteler, and an interpreter ventured out in order to seek an audience with local authorities, but they were stopped by Imperial forces and the German Minister was killed by a rifle shot from an Imperial soldier.[345] Later that day, Chinese Imperial

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[340] No 62 Sir C MacDonald to the Marquess of Salisbury Received May 17, Telegraphic Peking May 17 1900 in British House of Commons, *Further Correspondence Respecting the Disturbances in China.*, 283 (37). See also Smith, *China in Convulsion: By Arthur H. Smith Twenty-Nine Years a Missionary of the American Board in China Author of "Chinese Characteristics" and "Village Life in China" with Illustarions and Maps in Two Volumes*, 2:212.

[341] Preston, *The Boxer Rebellion*, 74.

[342] Preston, 71–80.

[343] Preston, 78–79.

[344] Lynn Bodin, *The Boxer Rebellion* (London: Osprey Publishing, 1979), 6.

[345] Bodin, 6.

forces joined the Boxer attack, opening fire on the Legation Quarter.

June 20th marked the beginning of a 55-day-long siege, referred to in contemporary coverage and subsequent historical scholarship as the Siege of the Legations, during which the roughly 350 foreign nationals and 2,700 Chinese Christians faced sustained shelling and other attacks with little ability to contact the outside world and no way of replenishing limited stores of food and water.[346]

2.3.3 Domestic and International Responses

Throughout June and early July, communication about the events happening in China with the outside world remained sporadic. Because the Boxers' attacks had targeted not only the residences of foreign nationals like those missionaries killed at Paoting-Fu but also foreign-backed infrastructure projects like the railways and telegraph wires, international reactions to the violence at Paoting-Fu and other sites of anti-foreign violence across the Chinese countryside was delayed. With telegraph lines down, the only means by which news of these attacks could reach the outside world was via written letters – a mode of communication that was painfully slow even during more peaceful times, with letters sent by British missionaries, for example, commonly taking around two months to reach London.[347]

Reports of the uprising taking place across China steadily mounted, however, as letters slipped out and those who had fled the country recounted their experiences. These accounts,

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[346] Clements, *The Boxer Rebellion*, 99.

[347] Ariane Knuesel, "British Diplomacy and the Telegraph in Nineteenth-Century China," *Diplomacy & Statecraft* 18, no. 3 (September 13, 2007): 528, https://doi.org/10.1080/09592290701540249.

carried in diplomatic communications and reporting by Western newspapers, fueled international outrage and calls for intervention. By late-July, all eight of the "Great Powers" – the six European Powers of Austria, France, Germany, Great Britain, Italy, Russia as well as the United States and Japan[348] – had formed the Eight-Nation Alliance, and each had sent forces to relieve the embattled soldiers, diplomats, and thousands of Chinese Christians in their embassies in Peking.[349]

The allied governments appointed – partly through the manipulations of the Kaiser and partly through a sentiment that the at the start of the siege of the legations gave Germany – German Field Marshal Alfred von Waldersee as the supreme commander of the combined European forces in China. Field Marshal von Waldersee was a decorated military commander, and though the appointment made a certain amount of sense both militarily and politically,[350] it was an unconventional one from the point of operational logistics. Not only did the German army lack experience mounting overseas expeditions, von Waldersee himself was in Germany at the time of his appointment on August 18th (four days after European troops took control of Peking) and he could not arrive in mainland China to take personal command of the allied forces

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[348] See Captain H. R. Stevens, U.S. Navy, "Evolution Of Great Powers," *U.S. Naval Institute Proceedings* 78, no. 1 (1952), https://www.usni.org/magazines/proceedings/1952/january/evolution-great-powers.

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[350] The German army was widely seen as among the most effective European military forces, especially in overland combat, due in no small part to its victory over France in the Franco-Prussian war of 1870-1. On the basis of this perception, see, e.g., David Stone, *First Reich: The German Army in the Franco-Prussian War 1870-71* (London: Brasseys, 2003). Further, political sentiments among European leaders – stoked to no small degree by the Kaiser's deft political navigations – held that the death of German Ambassador von Ketteler at the start of the siege of the Legation Quarter gave Germany "a certain priority" in the "crusade against Chinese barbarism." Peter Fleming, *The Siege at Peking*, Second Edition (Harper, 1959), 178, https://archive.org/details/siegeatpeking0000flem_y9i8/.

until nearly six weeks later.[351]

In the interim, temporary command over the allied forces on the ground in China was given to the Commander in Chief of the British forces, Lieutenant General Sir Alfred Gaselee. Gaselee was appointed temporary commander, tasked with maintaining order among the multinational European troops and implementing orders telegraphed from von Waldersee. On August 14th, 1900, allied soldiers entered Peking.[352] Seeing the fall of the capital city's defenses, the Empress Dowager and her court fled the next morning, traveling to the southwest, and ultimately establishing a court in exile in the provincial city of Xi'an. Waldersee's ship arrived in Tianjin on 25 September 1900, over a month after the allied forces' successful occupation of Peking.[353]

With Western interests in Peking successfully secured, von Waldersee and Gaselee turned their attention to countering anti-foreign forces farther inland. To accomplish this, von Waldersee and the allied leadership enacted a number of "punitive expeditions" – troop movements intended to "liberate" cities that had become Boxer strongholds and "punish" those responsible for violence against foreign missionaries, Chinese Christians, and others.[354] Among the most prominent of these was the punitive expedition to Paoting-Fu, the capital of Chih-li

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[351] Fleming, *The Siege at Peking*, 179–80; Roger R. Thompson, "Military Dimensions of the 'Boxer Uprising' in Shanxi, 1898-1901," in *Warfare in Chinese History*, ed. Hans Van De Ven (BRILL, 2000), 311, https://doi.org/10.1163/9789004482944_010.

[352] Purcell, *The Boxer Uprising*, 257.

[353] Thompson, "Military Dimensions of the 'Boxer Uprising' in Shanxi, 1898-1901," 311.

[354] Clements, *The Boxer Rebellion*, 155.

province.[355] This excursion, consisting of between 4,000 and 6,000 soldiers under the command of General Gaselee, left Peking on October 12th,[356] traveling overland the approximately 100 miles to the small provincial city.[357] At the same time, a second column of soldiers, under the command of the French General Maurice Bailloud and British Major General Lorne Campbell left Tientsin with orders to meet up Gaselee's troops in Paoting-Fu. Both columns rendezvoused in Paoting-Fu on October 21st,[358] and by the following day the four Allied contingents had taken formal possession of the city, dividing it into districts "under the superintendence of the various

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[355] Although it was the capital city of what was then the province of Chih-li (also referred to as "Chili" or "Zhili" province), Paoting-Fu was a rather provincial town. Paoting-Fu's status as the capital of Chih-li province was somewhat counterintuitive, given that it also contained Peking and Tientsin, two cities that held greater political and economic significance in China at the time. Peking, the capital of the Empire and the city in which the Emperor's primary residence was located, sat within its own "metropolitan district" and was administered by a separate governing system. Tientsin, located closer to the coast and home to many foreign merchants, was the province's economic center. Interestingly, at the time of the Boxer Uprising, the residence of the Viceroy of the Chih-Li province (the chief administrator charged with governance of the area) was not located in the province's official capital of Pao-Ting-Fu but rather in Tientsin.Forsyth, *The China Martyrs of 1900*, 19.

[356] "Marching on Pao-Ting-Foo: Expedition of 10,000 Men Starts by Orders of Field Marshall von Waldersee." *New York Times*. October 12, 1900. https://timesmachine.nytimes.com/timesmachine/1900/10/12/102617840.html?pageNumber=7 .

[357] Clements, *The Boxer Rebellion*, 155.

[358] *See* "Marching on Pao-Ting-Foo: Expedition of 10,000 Men Starts by Orders of Field Marshall von Waldersee." *New York Times*. October 12, 1900. https://timesmachine.nytimes.com/timesmachine/1900/10/12/102617840.html?pageNumber=7 . "Officials Punished -- Sentenced to be Hanged for the Paoting-Fu Atrocities." *The San Francisco Call. [volume]* (San Francisco [Calif.]), 12 Dec. 1900. *Chronicling America: Historic American Newspapers*. Lib. of Congress. <https://chroniclingamerica.loc.gov/lccn/sn85066387/1900-12-12/ed-1/seq-1/>. James Louis Hevia, *English Lessons: The Pedagogy of Imperialism in Nineteenth-Century China* (Durham, NC: Duke University Press, 2003), 225.

nationalities represented in the occupying force"[359] – following the same practice employed by the forces charged with administering the occupation of Peking.

2.3.4 The Court

Although Gaselee had been tasked with leading the expedition to Paoting-Fu, his orders from von Waldersee contained very little guidance as to what to do when he got there. Gaselee's own understanding of his mandate, described in an October 12 telegram to the India office, was simply to "exact […] reparation" for the "murder [of] missionaries [and] converts."[360] After it came to light that a preponderance of the foreign nationals who had been killed in the Boxer attacks on Paoting-Fu were American, Gaselee sought the opinion of Captain Grote Hutcheson, one of two American army officers who had been sent to accompany the Paoting-Fu expedition.[361] Although Hutcheson had not been invested with any particular authority by his superiors, having been sent not as a formal part of the punitive expedition but merely as an attaché to Gaselee himself, Hutcheson reportedly recommended that an International Commission be "instituted to make an impartial examination into the conduct of the officials and any other accused persons, and whose report and recommendation might serve as a basis for action."[362] On October 21st, Gaselee adopted Hutcheson's recommendation, constituting an International Commission to "inquir[e] into the murder of the missionaries and railway officials

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[359] Division, *Reports on Military Operations in South Africa and China*, 466.*See also* "Arrests at Pao-Ting-Foo." *New York Times*. October 31, 1900. https://timesmachine.nytimes.com/timesmachine/1900/10/31/102637261.html.

[360] See Gaselee to India Office, Telegraphic, October 12 , 1900, in British House of Commons, *Further Correspondence Respecting the Disturbances in China.*

[361] The other was First Lieutenant Soulard Turner.

[362] Division, *Reports on Military Operations in South Africa and China*, 467.

with a view of fixing responsibility"[363] – specifically instructing the Commission to "inquire into the guilt of certain local officials."[364]

Gaselee selected high ranking officials from each of the four Allied contingents to serve as Commissioners: Maurice Bailloud,[365] a French General and the commander of the French contingent; A. Ramsey, a Lieutenant Colonel in the British Army previously stationed in India; Tommaso Salsa, a Lieutenant Colonel in the Italian army; and Hans von Brixen, a Major in the German army. In addition to these four military officers, the Commission would include one civilian Commissioner, a Mr. J.W. Jamison,[366] British Consul at Shanghai.[367] As the senior ranking officer, the French General Bailloud was appointed to serve as the Commission's president.[368]

2.3.5 The Trial

The Commission would not have long to undertake its inquiries, as most of the Allied troops occupying Paoting-Fu had been ordered by Field Marshall Count von Waldersee to return to

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[363] Gaselee included this description of the scope of the International Commission's mandate in a telegram to Britain's then-Secretary of State, Lord George Hamilton, that was widely reproduced in contemporary news stories. *See, e.g.*, "Inquiry at Pao-Ting-Foo." *New York Times*. October 30, 1900. https://timesmachine.nytimes.com/timesmachine/1900/10/30/102636991.html?pageNumber=7.

[364] Inclosure 1 in No. 40. Memorandum of Mr. Jamieson's Visit to Paoting, in British House of Commons, *Further Correspondence Respecting the Disturbances in China.*, 439 (16).

[365] This individual's name is alternately spelled Baillond and Balliond in contemporary sources.

[366] This individual's name is alternately spelled Jamieson and Jameson in contemporary sources.

[367] Division, *Reports on Military Operations in South Africa and China*, 467.

[368] "Paoting-Fu." *Sheffield Independent*, October 31, 1900, 5. *British Library Newspapers* (accessed March 12, 2023). https://link.gale.com/apps/doc/R3214340582/BNCN?u=uclosangeles&sid=bookmark-BNCN&xid=0c1fcbfc.

Peking and Tientsin by November 6th, 1900.[369]

The Commission ultimately held seven sessions between October 23 and October 27th, 1900, each of which were reportedly closed to the public, open only to Commission staff and those witnesses called to testify.[370] During these sessions, contemporary sources suggest that the Commissioners all took an active role in directing the investigation, hearing evidence, and questioning witnesses. While the Commission heard testimony from Western missionaries, including two families associated with the China Inland Mission, these missionaries had survived largely because they had been away from Paoting-Fu on the days of the attacks and thus were only able to provide information regarding the actions of the accused in the weeks leading up to the attacks.[371] As such, the Commissioners reportedly relied heavily on the testimony of Chinese witnesses – provided via translation by T.J.N. Gatrell, a British interpreter sent to accompany Gaselee's punitive expedition.[372]

On October 24th, after just one day of initial hearings, the International Commission ordered the arrest of five Chinese officials,[373] charging them with having participated in or enabled the massacre: Ting Yung, the acting Governor and *fantai* (provincial treasurer) who had

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[369] "Inquiry at Pao-Ting-Foo." *New York Times*. October 30, 1900. https://timesmachine.nytimes.com/timesmachine/1900/10/30/102636991.html?pageNumber=7.

[370] See, e.g., Thomas F. Millard, "A Campaign of Revenge" *The Public*, Issue 152. Saturday, March 2, 1901. Reprinted in Chicago. *The Public* (Louis F. Post, 1900), 751, https://www.google.com/books/edition/The_Public/aFHZAAAAMAAJ. See also "Paoting-Fu." *Sheffield Independent*, October 31, 1900, 5. *British Library Newspapers* (accessed March 12, 2023). https://link.gale.com/apps/doc/R3214340582/BNCN?u=uclosangeles&sid=bookmark-BNCN&xid=0c1fcbfc.

[371] Hevia, *English Lessons*, 225.

[372] Hevia, 225.

[373] "Arrests at Pao-Ting-Foo." *New York Times*. October 31, 1900. https://timesmachine.nytimes.com/timesmachine/1900/10/31/102637261.html.

been a provincial judge at the time of the attacks; Quai Heng, a high-ranking Imperial official tasked with maintaining a garrison of Imperial troops assigned to the city;[374] Wang Chan Kuei, a Lieutenant Colonel in the Chinese Army and the commander of a camp of army soldiers that had refused to protect the Bagnell family after they had arrived at the camp asking for help during the attack; and Shen Chia Pen, the *niehtai* (provincial judge) who had been the city's Prefect at the time of the attacks; and T'an Wen Huan, the *taotai* (a high-ranking provincial officer in charge of the civil and military affairs of a given area) of the region.[375]

2.3.6 Ruling and Aftermath

Just four days after it met for the first time, the Commissioners issued their decisions, recommending sentencing Ting Yung, Quei Heng, and Wang Chan Kuei to death by "the Chinese method in vogue for criminals – beheading."[376] Shen Chia Pen was spared a capital sentence, with the Commission instead recommending that he be "degraded and deposed from

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[374] Quai Heng is commonly referred to as the "chief Tartar official of the city." While the term "Tartar" had long been used by Europeans to refer to various peoples living across north and central Asia – including Mongolians and Tibetans – by the 18th century it was generally used to refer to Manchurians, the ethnic group to which the ruling Qing dynasty linked itself. On this terminological note, see, generally, Peter J. Kitson, "Tartars, Monguls, Manchus, and Chinese," in *Romantic Literature, Race, and Colonial Encounter*, ed. Peter J. Kitson (New York: Palgrave Macmillan US, 2007), 175–213, https://doi.org/10.1007/978-1-137-10920-0_7; Edward J. M. Rhoads, *Manchus and Han: Ethnic Relations and Political Power in Late Qing and Early Republican China, 1861–1928* (University of Washington Press, 2000). Under the Qing dynasty, the garrisons of Manchu troops were stationed in a number of provinces whose resources or geographical locations were essential to continued imperial control. These troops were referred to as "Tartar" soldiers, and their officers, up to and including the singular general overseeing their movements and readiness, were referred to as "Tartar" officials. *See* Harold Scott Quigley, "The Political System of Imperial China," *The American Political Science Review* 17, no. 4 (1923): 559, https://doi.org/10.2307/1943756.

[375] Division, *Reports on Military Operations in South Africa and China*, 472.

[376] Hevia, *English Lessons*, 225.

office" from office and held in custody until his successor could be appointed.[377] The Commissioners declined to issue a decision on the guilt or recommended punishment of T'an Wen Huan, instead recommending that he be sent to Tientsin for trial, as that was where he had been stationed when he was alleged to have sent money and supplies to the Boxers in Paoting-Fu.[378]

In addition to these individual sentences, the Commission issued a number of recommendations regarding punishments that the Allied forces should level against the city and its remaining officials for "the atrocities committed in its midst."[379] The Commission recommended that the "city fathers" be required to pay 100,000 taels of silver,[380] to be paid to the Allied forces within a month.[381] Stopping short of agreeing with calls to burn the city to the ground, the Commission ultimately recommended that a number of structures around the city be

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[377] Division, *Reports on Military Operations in South Africa and China*, 490. Inclosure 1 in No. 40. Memorandum of Mr. Jamieson's Visit to Paoting, in British House of Commons, *Further Correspondence Respecting the Disturbances in China.*, 439 (16). *See also* Letter from Mr. E.H. Conger to Secretary of State John Hay. Pekin, China, November 16, 1900. Available at: https://1991.history.state.gov/historicaldocuments/frus1900/d219. ("The present provincial judge, Shen Chia-pen, was recommended to be degraded and to be kept under military restraint until the appointment and arrival of his successor.")

[378] Division, *Reports on Military Operations in South Africa and China*, 72. These recommendations were widely reported in contemporary news sources of the time. *See, e.g.,* "Pao-Ting Officials to Die." *New York Times*. November 3, 1900. https://timesmachine.nytimes.com/timesmachine/1900/11/03/102637901.html?pageNumber=1

[379] Division, 490.

[380] A "tael" was a Chinese measure of weight, roughly equivalent to 1.3 ounces, commonly used to denote a standard currency unit of silver.

[381] Inclosure 3 in No. 40. General Sir A. Gaslee to Sir E. Satow and the Secretary of State for India. November 10, 1900 in British House of Commons, *Further Correspondence Respecting the Disturbances in China. See also* Clements, *The Boxer Rebellion*, 156.

destroyed, including the Chenghuang[382] Temple (described in contemporary sources as "the temple of the city's Tutelary God"[383] and "the most venerated temple in the city"[384]), the Jisheng'an[385] Temple (a building that Boxer groups had used for meetings prior to the attacks and that had been the ersatz holding cell for the captured missionaries during the attacks), all pagodas built along the city wall, and the southeast corner of the wall (the site of many of the missionaries' executions).[386]

After receiving confirmation and endorsement of the Commission's recommendations as to the punishment of the five officials and the collective punishment on the city from Field Marshal von Waldersee, Gaselee's allied troops carried out the punishments. In a series of explosions, both the city temples were demolished along with the adjoining portions of the city walls. Two hours later, the capital sentences against Ting Yung, Quei Heng, and Wan Chan Kuei were carried out. After being marched past the destruction of the city's fortifications, all three were beheaded by a Chinese executioner. The last remaining defendant, Shen Chia Pen, was made to watch the execution of his co-defendants before being ceremonially stripped of his rank.[387]

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[382] Also referred to in some sources as the Cheng-Huang-Miao Temple.

[383] Division, *Reports on Military Operations in South Africa and China*, 490.

[384] "Pao-Ting Officials to Die." *New York Times*. November 3, 1900. https://timesmachine.nytimes.com/timesmachine/1900/11/03/102637901.html?pageNumber=1

[385] Also referred to in some sources as the Chi-Sheng-An Temple.

[386] Thomas F. Millard, "A Campaign of Revenge" *The Public*, Issue 152. Saturday, March 2, 1901. Reprinted in Chicago. *The Public*, 751.

[387] Thompson, "Military Dimensions of the 'Boxer Uprising' in Shanxi, 1898-1901," 312.

2.4 Fourth Case Study: The International Commission of Inquiry for the North Sea (Dogger Bank) Incident (1905)

2.4.1 Events

On the night of October 21, 1904, a squadron of Russian warships opened fire on a small fleet of about 50 British trawlers fishing for cod in the waters of the Dogger Bank, a shallow area of the North Sea located just over 100 miles off the coast of Britain. Believing them, incredibly, to either be Japanese torpedo boats or to be clustered around Japanese torpedo boats, the Russian ships fired hundreds of rounds at the British fishing vessels, sustaining the barrage for between ten and fifteen minutes before the order to cease fire was issued. When the smoke cleared, two British nationals were dead, six were severely wounded, and others had had to abandon ship as one of the British boats had been sunk during the gunfire.[388] A number of Russian ships had also sustained damage – a fact that served, at least initially, to reinforce the Russian sailors' beliefs that they were correct in their belief that the cluster of ships they'd just attacked had contained enemy vessels. (It would later be revealed that all damage to Russian ships was almost certainly the result of some of the smaller Russian ships having mistakenly opened fire on their own cruisers.) Apparently seeking to avoid any further attacks, the Russian fleet then steamed away from Dogger Bank towards the next port on their journey, the Spanish port of Vigo, without stopping to provide assistance to the British fishing vessels or sending word of the incident to

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[388] North Sea Incident Commission, "The Dogger Bank Case (Great Britain v. Russia)," *American Journal of International Law*, (I.C.I. Report of 26 Feb. 1905), 2 (1908): 931–36, https://web.archive.org/web/20160401213236/http:/www.worldcourts.com/ici/eng/decisions/1905.02.26_doggerbank.htm. See also Lassa Oppenheim, *International Law: War and Neutrality.* (Switzerland: Longmans, Green, 1906), 7–8.

Moscow. The fishing fleet, collectively referred to as the Gamecock fleet, limped home to Hull.

2.4.2 Context

At the time of this incident, Russia was months into what was rapidly becoming a losing land and sea war with Japan. Tensions between the two powers had been rising for decades, as Russia's efforts to expand and cement its control over Southern Manchuria in the latter years of the 19th century brought it into competition with Japan's efforts to expand its sphere of influence over the Korean Peninsula and beyond. In early 1904, this tension reached a fever pitch as Russian negotiators rejected Japanese proposals to adopt a power sharing agreement in the region.[389] On February 8, 1904, Japanese and Russian delegates broke off negotiations. That same day, Japanese forces launched a surprise attack on the Russian Pacific Fleet stationed in the waters of the Liaodong Gulf, a full 24 hours before Japan issued a formal declaration of war. Over the next month, the Japanese navy continued to chip away at the Russian Pacific Squadron using long-range naval bombardment.[390] At the same time, Japanese army forces routed their under-prepared and under-equipped Russian counterparts, forcing them to retreat down the

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[389] This effort had been, in fact, aided by Russia's participation in the multilateral European intervention into China in response to the Boxer Uprising less than a decade earlier. At the end of that joint effort, Russia had ordered much of its expeditionary forces to remain in Southern Manchuria, nominally in order to protect the Southern Manchurian Railway, but likely also in order to enable a potential Russian invasion of the Korean Peninsula. See Davis, "Railway Strategy in Manchuria." See also Bruce A. Elleman and Stephen Kotkin, eds., *Manchurian Railways and the Opening of China: An International History* (Routledge, 2010), https://books.google.com/books?hl=en&lr=&id=9mlsBgAAQBAJ&oi=fnd&pg=PP1&dq=russia+manchuria,+southern+manchurian+railway,+pretext&ots=f23KfZTIvJ&sig=DVGGNWfujhis_p2BxUAqa8m3Psw#v=onepage&q=russia%20manchuria%2C%20southern%20manchurian%20railway%2C%20pretext&f=false.

[390] "What the Loss of the Port Arthur Fleet Would Mean to Russia," *Scientific American* 91, no. 5 (1904): 79–79, https://www.jstor.org/stable/24993132.

Liaodong Peninsula to Port Arthur, a military base located at the tip of the Liadong Peninsula. Japanese forces then continued to press their advantage, conducting a protracted siege against the well-fortified walls of the compound sheltering what was left of Russia's Pacific forces.[391]

Relieving the besieged soldiers at Port Arthur quickly became Russia's top objective. But as their entire Eastern force was in tatters, Tsar Nicholas II and his advisors were forced to look elsewhere for reinforcements. They made the desperate decision to mobilize part of Russia's Baltic fleet, ordering them to sail halfway around the globe to join the fight. To do so, the motley collection of warships,[392] under the command of Admiral Zinovy Petrovich Rozhdestvensky, would have to sail out of the Baltic Sea, through the North Sea and English

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[391] Richard Ned Lebow, "Accidents and Crises: The Dogger Bank Affair," *Naval War College Review* 31, no. 1 (1978): 69, https://www.jstor.org/stable/44643155. While it was then considered the unassailable seat of Russian naval power in the East, Port Arthur had changed hands a number of times in the preceding decades. Named for a British Navy officer who had surveyed the area during the Second Opium War, the compound was built and initially fortified in the late 1880s under orders from the Qing dynasty with the assistance of a German arms manufacturing giant, Fried. Krupp. See Skřivan and Skřivan, "The Firm Fried. Krupp in the Chinese Market Prior to the First Sino-Japanese War of 1894/95." China, however, lost control of the port less than a decade later following its defeat in the first Sino-Japanese War. In an effort to further cement its presence on the mainland east of the Korean peninsula, Japan attempted to seize control of the port and the wider Liadong Peninsula by adding a clause transferring control over the territory as spoils of war in 1895 peace treaty ending that conflict. Concerned about the effect that Japanese control over such a strategically vital vantage point might have over their own interests in China – and the semi-extra-territorial arrangements each had made under the Unequal Treaties – France, Germany, and Russia intervened, pressuring Japan to cede control over the peninsula back to China. See Julius Lucas Becker, "'To Grab, When the Grabbing Begins' German Foreign and Colonial Policy during the Sino-Japanese War of 1894/95 and the Triple Intervention of 1895," *The International History Review* 44, no. 1 (January 2, 2022): 1–20, https://doi.org/10.1080/07075332.2021.1909101. Russia then gained control over Fort Arthur and the surrounding land less than two years later in 1897 as part of a lease agreement with the Chinese government, largely predicated on Russian promises to build rail links that would connect the region with the growing rail networks to the north and south. See Elleman and Kotkin, *Manchurian Railways and the Opening of China: An International History*.

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Channel, around the Iberian Peninsula into the Mediterranean, through the Suez Canal, the Indian Ocean, and finally the South China Sea – a journey of over 18,000 miles.[393] This was how the Russian squadron found itself in Dogger Bank on the night of October 21, 1904, setting in motion a major international incident before they had completed even a tenth of their journey.

2.4.3 Domestic and International Responses

When news of the incident reached London on October 24th, the reaction was swift. The MP from Hull brought a contingent of the fishermen to the Foreign Office to give their account of the Russian attack, and the London newspapers quickly picked up on the story. The Daily Mail ran an interview with the captain of one of the fishing trawlers, a Captain Peaker, under the headline "Night of Terror - Vivid Story of the Outrage"[394] while the Telegraph ran the statement of another survivor under the heading "Riddled with Shells."[395] By the next day, the morning papers carried more detailed accounts of "The Outrage By The Baltic Fleet"[396] and anti-Russian public sentiment was so inflamed that the Russian Ambassador had to be assigned a police escort so that he could leave the Russian Embassy.[397] Leading voices in government and in public

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[393] A. H. Charteris et al., "The Baltic Fleet," *The Australian Quarterly* 8, no. 32 (1936): 107, https://doi.org/10.2307/20629390.

[394] "Vivid Story of the Outrage." *Daily Mail*, October 24, 1904, 5. *Daily Mail Historical Archive* (accessed June 19, 2023). https://link.gale.com/apps/doc/EE1863048549/DSLAB?u=uclosangeles&sid=bookmark-DSLAB&xid=6bc885ed.

[395] Our Own Correspondent. "Riddled with Shells." *Daily Telegraph*, October 24, 1904, 9. *The Telegraph Historical Archive* (accessed June 19, 2023). https://link.gale.com/apps/doc/IO0708225883/DSLAB?u=uclosangeles&sid=bookmark-DSLAB&xid=2ab866ea.

[396] "The Outrage by The Baltic Fleet." *Times*, October 25, 1904, 5. *The Times Digital Archive* (accessed June 19, 2023). https://link.gale.com/apps/doc/CS84078426/DSLAB?u=uclosangeles&sid=bookmark-DSLAB&xid=a4fb92cf.

[397] Lebow, "Accidents and Crises," 70.

opinion quickly moved to demand not just reparation but "satisfaction."[398] But although similar sentiments were held by many of the members of Prime Minister Arthur Balfour's Cabinet, Foreign Secretary Lord Lansdowne[399] pressed for and was granted the chance to seek an apology and an amicable resolution to the situation via diplomatic means. To this end, in a cable sent on October 24th, Lansdowne instructed the British Ambassador in St Petersburg, Charles Hardinge, to convey to the Russian Foreign Minister "that it is impossible to exaggerate the indignation that has been provoked" and to demand an apology, reparation and "security against the reoccurrence of such intolerable incident."[400]

While the question of individual punishment for those responsible for the attack on the British trawlers had been discussed in the popular press, the first mention of it in diplomatic correspondence came from Hardinge in his October 24 reply to Lansdowne. Reporting on his initial discussions of the incident with Russian Foreign Minister Vladimir Lamsdorff, Hardinge reported he'd convinced Lamsdorff to issue a declaration that "those implicated would be adequately punished if they were proved to have been in fault," and promised that the perpetrators of the attack would be tried and punished.[401] Lamsdorff initially floated the

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[398] "The North Sea Outrage." *Times*, October 27, 1904, 7+. *The Times Digital Archive* (accessed June 19, 2023). https://link.gale.com/apps/doc/CS118288219/DSLAB?u=uclosangeles&sid=bookmark-DSLAB&xid=ce73a570.

[399] Lord Lansdowne (Henry Petty-Fitzmaurice, 5th Marquess of Lansdowne) was the Foreign Secretary in the Liberal Unionist British government during the course of these events, having been appointed during a cabinet reshuffle in 1900 after overseeing the start of the Second Boer war as Secretary of War.

[400] Lansdowne to Hardinge. October 24. Correspondence Relating to the North Sea Incident. British House of Commons, *Correspondence Relating to the North Sea Incident*, Parliamentary Papers: 1850-1908. Accounts and Papers of the House of Commons., Volume 103 (Session 14 February, 1905 to 11 August, 1905) (United Kingdom: H.M. Stationery Office, 1905), https://www.google.com/books/edition/Parliamentary_Papers/CchDAQAAMAAJ.

[401] Hardinge to Lansdowne. October 24, 1904. No. 3. Correspondence Relating to the North Sea Incident. British House of Commons.

proposal that any Russian nationals implicated in the attack would be tried in a domestic Russian military court, but Lansdowne, via Hardinge, quickly made clear that such an arrangement would be unacceptable.[402] Recognizing the weak bargaining position his country was in, Lamsdorff capitulated. Lansdowne proposed instead that the inquiry into individual responsibility and adequate recompense for the Russian actions at Dogger Bank should be "intrusted [sic]. to an independent Court possessing an international character" – specifically, one based on "Articles IX to XIV of the 1899 Hague Convention on the Pacific Settlement of Disputes."[403] While records suggest that Lansdowne actually sketched out a draft framework of this international commission that same day, negotiations over its structure and procedures would unfold over the next week. On November 12, less than three weeks after the Russian ships had opened fire on the British trawlers, the two countries agreed upon the structure, mandate, and composition of the commission.

As to structure and procedures, the commission did in fact largely comport with the model provisions laid out in the 1899 Hague Convention. In the scope of its mandate, however, it deviated somewhat from that model. Although Russia initially balked at the prospect of

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[402] While initially Lansdowne seems to have been open to a domestic inquiest in Russia conditioned on involvement or oversight by British observers, he forecloses this possibility after Hardinge passes on comments in which Lamsdorff casts doubt on the testimony of the British fishermen present on the night of the incident. While it is not explicitly said, Lansdowne seems to have been concerned that Russian authorities would be unlikely to believe the word of a British laborer over that of a Russian admiral. Understanding that it was similarly unlikely that Russia would turn over any officers implicated in the attack, Lansdowne pivots to demanding an international inquiry. Lansdowne to Hardinge. October 27, 1904. Correspondence Relating to the North Sea Incident. British House of Commons.

[403] Lansdowne to Hardinge. October 27, 1904. Correspondence Relating to the North Sea Incident. British House of Commons.

granting the commission not only investigatory powers to determine questions of fact but also the authority to determine individual culpability, both powers ultimately agreed to this more robust mandate.[404] (This issue was certainly hard-won for the British. Lamsdorff and Alexander von Benckendorff, the Russian Ambassador in the U.S., made repeated efforts to soften or undermine the commission's capacity to adjudicate responsibility – at times explicitly, floating last-minute legal questions of legal technicality,[405] and at others implicitly, subtly shifting the terms used to describe the incident and those Russian officers alleged to have been involved.[406]) The Commission, according to Article II of its founding convention, would "inquire into and report on all the circumstances relative to the North Sea incident," but also would focus in particular "on the question as to where the responsibility lies, and the degree of blame attaching to the subjects of the two high contracting parties or to the subjects of other countries in the event of their responsibility being established by the inquiry."[407] In the words of British Prime

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[404] North Sea Incident Commission, "The Dogger Bank Case (Great Britain v. Russia)," Article 1.

[405] On the advice of eminent Russian international law scholar Friedrich Martens, Lamsdorff argued that if the commission was to be based on the provisions of the 1899 Convention, provisions that provided for investigations into responsibility as issues of fact but did not include specific provisions relating to commissions' capacity to determine culpability, this commission could by extension not be granted that capacity. Lansdowne responded that "it was clearly explained [...] that what we contemplated was a Convention 'analogous' to, and not identical with those recommended by the Hague Convention." Lansdowne to Hardinge. November 15, 1904. Correspondence Relating to the North Sea Incident. British House of Commons, *Correspondence Relating to the North Sea Incident*. Lamsdorff quickly conceded, seeming to acknowledge that Martens' technical legal argument was beside the point, given that the provisions of the Hague Convention had in fact been intended as models and not binding requirements.

[406] Lansdwone to Hardinge. No. 55. November 2, 1904. Correspondence Relating to the North Sea Incident. British House of Commons.

[407] Declaration Between the United Kingdom and Russia Relating to the Constitution of an International Commission of Inquiry on the Subject of the North Sea Incident. Reprinted in James Brown Scott, ed., *The Hague*

Minister Arthur Balfour, this Commission would determine the facts of what happened, assess the culpability of "the officers who were responsible for the outrage," and "any person found guilty by this tribunal will be tried and punished adequately."[408]

As a salve to the Russians' misgivings about granting the Commission the ability to assess culpability, Lansdowne and Hardinge assured their counterparts that the Commission would not be limited in the scope of persons to which it could attach culpability. Though neither seem to have given much credence to the idea that any culpability for the incident could attach to any of the British nationals present at Dogger Bank that night, they assured the Russians that the tribunal would be empowered to "inquire as to the responsibility and degree of blame which should attach to any persons, whether subjects of Great Britain, Russia, or of other countries."[409]

The Commission would consist of a bench of five Commissioners, all high-ranking naval officials.[410] Britain and Russia would each send one admiral, as would each of three neutral

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Court Reports Series: Comprising the Awards, Accompanied by Syllabi, the Agreements for Arbitration, and Other Documents in Each Case Submitted to the Permanent Court of Arbitration and to Commissions of Inquiry Under the Provisions of the Conventions of 1899 and 1907, for the Pacific Settlement of International Disputes, Carnegie Endowment for International Peace Division of International Law 1 (Oxford University Press, 1916), 411, https://books.google.com/books?id=ez09AAAAYAAJ.

[408] "The Settlement of the Crisis by Peace: How and Why This Solution was Tried." *The Sphere, Supplement to the Sphere* 19, no. 250 (Nov 05, 1904): 1. https://www.proquest.com/historical-periodicals/settlement-crisis-peace/docview/1783866662/se-2. See also (FROM OUR SPECIAL CORRESPONDENT.). "Mr. Balfour on the Crisis." *Times*, October 29, 1904, 11. *The Times Digital Archive* (accessed March 14, 2023). https://link.gale.com/apps/doc/CS185134941/TTDA?u=uclosangeles&sid=bookmark-TTDA&xid=26c5290f.

[409] C. Hardinge to Lord Lansdowne, 18 November 1904. Correspondence Relating to the North Sea Incident. British House of Commons, *Correspondence Relating to the North Sea Incident*.

[410] Oppenheim, *International Law: War and Neutrality.*, 7–8.

Powers, France, America, and Austria.[411] The admirals ultimately chosen to fill these seats would be British Admiral Sir Lewis A. Beaumont, Russian Admiral Kaznakov, American Rear Admiral Charles H. Davis, French Admiral François-Ernest Fournier, and Austro-Hungarian Admiral Hermann von Spaun. Just weeks into proceedings, however, the aging and increasingly erratic Kaznakov would be recalled and replaced by Admiral Feodor Vassilievitch Dubasov.[412]

In addition to the five Commissioners, Britain and Russia would each be allowed to nominate a "legal assessor to advise the commissioners" and an aide or "agent" to support the work of the Commission.[413] The legal staff selected by the British and the Russians included two primary legal advisors, Sir Edward Fry of Britain and Baron Mikhail Taube of Russia, as well as two "agents", Hugh James O'Beirne and Mikhail Nekludov.[414] Although O'Beirne and

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[411] The choice to include an Austrian commissioner was actually the result of an impasse between Russian and British negotiators. Unable to agree upon a fifth member of the commission, they fell back on a clause of agreement establishing the court that provided, in the case of such an impasse, "His Imperial and Royal Majesty the Emperor of Austria, King of Hungary, will be invited to select him." See Article 1 in "Text of the North Sea Trawler Convention between Great Britain and Russia," *The Advocate of Peace (1894-1920)* 66, no. 12 (1904): 237–38, https://www.jstor.org/stable/25752423. Despite German Kaiser Wilhelm's apparent enthusiasm at the prospect of Germany being the 5th Power to participate in these proceedings, Britain and Russia opted for the Austrian option, a decision that reportedly enraged the Kaiser. See John P. Campbell, "The North Sea Incident of 1904," *U.S. Naval Institute* 100, no. 3 (March 1974), https://www.usni.org/magazines/proceedings/1974/march/north-sea-incident-1904.

[412] International reporting on this change in personnel attributed his replacement to his failing health, with contemporary accounts suggesting that it was due not to an acute change in status but to longstanding issues of mental decline and worsening alcohol addiction. See "Quits North Sea Board?: Russian Member Going Home, and It Is Said He Will Be Replaced." December 30, 1904. NYTimes. https://timesmachine.nytimes.com/timesmachine/1904/12/30/101174318.html?pageNumber=5. See also Maurice Paléologue, *Three Critical Years, 1904-05-06* (R. Speller, 1957), 148.

[413] Scott, *The Hague Court Reports [1st]- Series*, 411–12.

[414] John Norton Westwood, *Witnesses of Tsushima* (Tokyo: Sophia University, 1970), 105–7, https://books.google.com/books/about/Witnesses_of_Tsushima.html.

Nekludov appear to have been chosen to take part in the Commission largely because both were stationed as secretaries in their countries' Paris embassies, and thus were well-suited to act – per Article 1 of the Declaration establishing the Commission – as "intermediaries between the Commission and the Governments concerned," they were ultimately called on to perform much more central roles in the proceedings.[415]

Though there is no evidence that either had received any formal legal training,[416] O'Beirne took on the role of *ersatz* prosecutor, drafting the charges against Admiral Rozhestvensky and presenting those charges at the Commission's final session, and Nekludov the role of advocating against those charges in Rozhestvensky's defense. [417]

2.4.3.1 The Trial

The first official meeting of the Commission took place in Paris on December 22, 1904. This first meeting was rather short, however, as only four of the Commission's five admirals were present. Awaiting the arrival in Paris of Admiral von Spaun of Austria, the Commission tabled all items of discussion, and next met – this time with all five Commissioners and the British and Russian legal staff present – on January 9, 1905.

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[415] Scott, *The Hague Court Reports [1st]- Series*, 411.

[416] Both were mid-career diplomatic staff at the time of the proceedings. On Nekludov, see Sidney B. Fay, "The Kaiser's Secret Negotiations with the Tsar, 1904-1905," *The American Historical Review* 24, no. 1 (1918): 50–58, https://doi.org/10.2307/1835392. On O'Beirne, see Michael Hughes, "The British Embassy in St Petersburg," in *Diplomacy before the Russian Revolution*, by Michael Hughes (London: Palgrave Macmillan UK, 2000), 62–96, https://doi.org/10.1057/9780230599826_3. See also "Fate of Lord Kitchener," *Current History* 4, no. 4 (July 1, 1916): 611–12, https://doi.org/10.1525/curh.1916.4.4.611.

[417] Amos Shartle Hershey, *The International Law and Diplomacy of the Russo-Japanese War* (Macmillan, 1906), 234.

The Commissioners and staff spent most of January 1905 negotiating the details of the procedural rules that the Commission would follow. This was because – in a deviation from the model rules set out in Article 10 of the 1899 Hague Convention – Britain and Russia had agreed to delegate the task of designing almost all of the Commission's procedural rules to the Commissioners themselves.[418] Aside from the manner in which the Commission would be required to present its findings – signed by all members and sent to the "two high contracting parties" – and when it was to convene – "as soon as possible after the signature of this agreement" – the only aspect of procedure that had been established in the Commission's founding declaration was that it would decide both matters of process and content for its final report by majority vote, not requiring unanimity of the Commission's five members.[419] (This had been a point of contention between Lansdowne and his Russian counterparts. The Russians had discussed a requirement of unanimity, apparently seeking to give their Commissioner effective veto power. Lansdowne and Hardinge had pushed back, standing firmly in favor of allowing the Commission to apply majority decision making.[420])

The process of hashing out the rest of the details of how this Commission would go about its work was, by all accounts, a complicated but more or less amicable one. The British legal assessor, Sir Edward Fry, described the negotiations as follows:

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[418] Lansdowne to Hardinge. No. 42. October 31, 1904. Correspondence Relating to the North Sea Incident. British House of Commons, *Correspondence Relating to the North Sea Incident*.

[419] Scott, *The Hague Court Reports [1st]- Series*, arts. 5, 6, and 7.

[420] Hardinge to Lansdowne. No. 66. 8 November 1904. Correspondence Relating to the North Sea Incident. British House of Commons, *Correspondence Relating to the North Sea Incident*.

> It is very difficult to organize a whole system of procedure when you start, as we did, with a clean slate, and when each nation would like to write on its own ideas of what to do, the Russians hating publicity, the French wanting the judges to do all examining, and then besides, a body of five Admirals who know nothing on procedure, except in court martials and that kind of thing, and so they will discuss by the hour a matter that I should settle in two minutes, and this makes things slow – *ma pur si muove*.[421]

Ultimately, the Commissioners settled on an adversarial model, similar to the procedures followed in British courts, in which O'Beirne and Nekludoff would present opening arguments for the British and Russian cases respectively, then they would be allowed to call and question witnesses, then deliver closing arguments summarizing their respective theories of the case.[422]

The witnesses sent to testify included all 27 surviving officers and men from the British fishing fleet and a small cadre of Russian officers that had been sent to Paris.[423] Despite the implicit agreement to send "all responsible officers and material witnesses,"[424] Russia ultimately sent just four junior officers to be questioned by the Commission.[425] While there was initially some disagreement as to whether the Russian officers were to be treated as defendants or

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[421] Sir Edward Fry and Agnes Fry, *A Memoir of the Right Honourable Sir Edward Fry, G.C.B., Lord Justice of the Court of Appeal, Ambassador Extraordinary and First British Plenipotentiary to the Second Hague Conference, 1827-1918* (Humphrey Milford, Oxford University Press, 1921), 186–87, https://books.google.com/books?id=mtKzAAAAMAAJ.

[422] Fry and Fry, 184–85.

[423] Fry and Fry, 184.

[424] Lansdowne to Hardinge. October 28, 1904. No. 27.

[425] These officers were Captain de Fregate Klado, Lieutenant Ellis, Lieutenant Shramtchenko, and Ensign Ott. Lansdowne to Hardinge. November 2, 1904. No. 54.

witnesses,[426] the issue was soon moot as it became clear that all orders guiding the Russian sailors' actions on the night of the incident had all been issued by Admiral Rozhestvensky himself. As such, Rozhestvensky became the sole defendant in the Commission's proceedings, was tried in absentia based largely on the testimony given by the four junior Russian officers.

The Commission held its first public hearing, and first hearing involving witness testimony, on January 25, 1905.[427] It was to hold a total of thirteen public sessions from January to February of 1905.[428] Over the course of these sessions, the Commissioners (and a motley crowd of assembled journalists and onlookers) first heard the testimony of the British fishermen and received evidence presented by the British agent, O'Beirne, that included formal declarations by all states bordering the North Sea and by Japan itself that no Japanese torpedo boats were present in or even near the North Sea at the time of the incident.[429] Furthermore, O'Bierne presented evidence that the British trawlers had not even been the first civilian vessels that the Russian gunboats had attacked in the short time since they had left port in the Baltic. They had also fired upon a Swedish steamer in the Skagerack strait – the waters between Sweden and Denmark – and a German fishing vessel at the entrance to the North Sea.[430]

While the Russian officers would challenge the British assertions that there had been no Japanese vessels present in the North Sea at the time of the incident – testifying that they and

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[426] Lansdwone to Hardinge. No. 55. November 2, 1904. Correspondence Relating to the North Sea Incident. British House of Commons, *Correspondence Relating to the North Sea Incident*.

[427] These

[428] Hershey, *The International Law and Diplomacy of the Russo-Japanese War*, 234.

[429] Scott, *The Hague Court Reports [1st]- Series*, 406.

[430] J. W. Garner, "Record of Political Events," *Political Science Quarterly* 19, no. 4 (December 1904): 720, https://www.jstor.org/stable/2140340.

their colleagues had seen such craft that night – it soon became clear that all but the Russian Commissioner were unconvinced that any hostile vessels had in fact been present that night. This issue of fact, however, would prove to be much less important to the deliberations than the question of what the Russian officers, and their commanding Admiral, believed to be the case at the time. The Russian aide, Nekludoff, and the four Russian Officers presented testimony and documentary evidence showing that Admiral Rojdestvensky's and the senior officers in his squadron had all received numerous reports, both from Russian government and foreign intelligence sources, that the Japanese were planning to attack the Russian fleet while it was *en route* to Asia, and in particular during the vulnerable transition as they entered into the North Sea.[431] Given these reports, Admiral Rojdestvensky had placed his squadron on high alert and issued an order to fire on any suspicious vessels on sight.[432]

Although there is little discussion in the written record of the precise charges and legal standards at issue in the Commission's deliberations, this Commission's status as something akin to a multinational court martial suggests that the Commissioners likely took the charge and standard as read: the charge being unprovoked fire on the high seas against civilian vessels flying the flag of a non-belligerent nation, and the standard being the *jus in bello* standard of proportionality as a measure of the justifiability of inflicting civilian casualties.[433] The

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[431] Fry and Fry, *A Memoir of the Right Honourable Sir Edward Fry, G.C.B., Lord Justice of the Court of Appeal, Ambassador Extraordinary and First British Plenipotentiary to the Second Hague Conference, 1827-1918*, 185–90.

[432] Lebow, "Accidents and Crises," 70.

[433] While the principle of using proportionality to determine whether a given action's collateral effects on civilians would be permissible under the laws of war had not yet been adopted as a matter of positive international law in 1905, it had been widely adopted by domestic militaries at the time, with most of the European Powers incorporating some mention of weighing civilian casualties against expected benefits of any use of force into their

Commission's deliberations, then, turned on the question of whether Admiral Rojdestvensky had been justified in issuing the order to fire on any suspicious vessels, even though such an order would likely result in damage to civilian vessels. (There were other questions, such as why the firing went on so long, whether it was reasonable to mistake a well-marked fishing trawler for a torpedo boat, and why it was that the Russians had not provided assistance to the British fishermen after it was clear who they were. But the question of proportionality was the core issue as regarded the criminal aspect of the Commission's work.)

Ultimately, the Commissioners seem to have been sympathetic to Admiral Rojdestvensky's plight. Placed in command of some of the last vessels of the Russian navy – all of which were outdated, in ill-repair, and crewed by inexperienced sailors – and sent on a rescue mission vital to his country's national interests, any officer would have had cause to be overly cautious. And Rojdestvensky had been asked to take on this task entirely unprepared – prior to being placed in charge of his squadron of Baltic Fleet vessels, he had had no command experience.[434]

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domestic military codes. It had also had been included in the text of the 1874 Brussels Declaration (Article 12), a draft convention on the laws and customs of war written at the Brussels Conference of 1874, a conference attended by delegates of 15 European states. Judith Gail Gardam, "Proportionality and Force in International Law," *The American Journal of International Law* 87, no. 3 (1993): 397, https://doi.org/10.2307/2203645. Furthermore, Russia had been particularly instrumental in sparking widespread adoption of this principle. It was Tsar Alexander II of Russia that had convened the 1874 Brussels Conference, and the draft text of the 1874 Declaration had been supported and in deed authored by Russian delegation – the initial draft had been largely written by F.F. Martens himself. Eyal Benvenisti and Doreen Lustig, "Monopolizing War: Codifying the Laws of War to Reassert Governmental Authority, 1856–1874," *European Journal of International Law* 31, no. 1 (August 7, 2020): 155, https://doi.org/10.1093/ejil/chaa013.

[434] Lebow, "Accidents and Crises," 69.

2.4.3.2 Ruling and Aftermath

Perhaps unsurprisingly, when the Commission delivered its final report on February 26, 1905, its conclusions were something of a mixed bag.[435] On the one hand, the Commissioners unanimously agreed that "the vessels of the fishing fleet did not commit any hostile act," and a majority of four Commissioners agreed that there was no evidence that torpedo boats were present "among the trawlers nor anywhere near."[436] Given this, that same majority of Commissioners declared that "the opening of the fire by Admiral Rojdestvensky was not justifiable."[437] (The Russian Commissioner declined to join the majority in either finding -- that there were in fact no torpedo boats present or that Admiral Rojdestvensky's opening fire was unjustifiable. He instead included in the Commission's report his "conviction that it was precisely the suspicious-looking vessels approaching the squadron with hostile intent which provoked the fire."[438]) On the other hand, however, the Commissioners declared that, though unjustifiable, these actions were not "of a nature to cast any discredit upon the military qualities or the humanity of Admiral, or of the personnel of his squadron."[439] To further soften the blow, the Commission additionally declared that "their conclusions were not designed to cast any discredit on the military valor or the sentiments of humanity of Admiral Rojestvensky and the

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[435] Alexander Pearce Higgins, *The Hague Peace Conferences and Other International Conferences Concerning the Laws and Usages of War: Texts of Conventions with Commentaries* (University Press, 1909), 168–69..

[436] North Sea Incident Commission, "The Dogger Bank Case (Great Britain v. Russia)."

[437] North Sea Incident Commission.

[438] North Sea Incident Commission.

[439] North Sea Incident Commission.

personnel of his squadron."[440] In other words, as an editor of the Economist put it in an article discussing the outcome and ramifications of the Commission's report, Rojdestvensky had been found "guilty, with extenuating circumstances."[441] As a result of these findings, Britain was not in a position to demand punishment for Admiral Rojdestvensky, but was given leave to demand recompense for damage to its nationals. Russia paid £65,000 "to indemnify the victims of the incident and the families of the two dead fishermen."[442]

3 Conclusion

Each of the four internationalized criminal tribunals examined in the foregoing case studies were formed and completed their work in a range of different political and geographic contexts. None of the four of them represent a shining example of the kind of fair handed international cooperation to which contemporary international criminal tribunals aspire. The first three are shot through with the kinds of power differentials, cultural chauvinism, and blatant double standards that all too often characterized interactions between European states and non-European peripheral or semi-peripheral states during this period. And while the political and diplomatic playing field was somewhat more level in the fourth, being as it was between two of the European Powers, even that case played out against the backdrop of inter-imperial competition – both the particular "Great Game" between Britain and Russia[443] and the more

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[440] Charles Beard and Alvin S. Johnson, "Record of Political Events," *Political Science Quarterly* 20, no. 2 (June 1905): 352, https://www.jstor.org/stable/2140417.

[441] "The North Sea Inquiry." The Economist. March 4, 1905. P. 342. Available at: https://archive.org/details/sim_economist_1905-03-04_63_3210/page/342/mode/2up.

[442] Oppenheim, *International Law: War and Neutrality.*, 7–8.

[443] *See, e.g.*, David Fromkin, "The Great Game in Asia," *Foreign Affairs* 58 (1980 1979): 936, https://heinonline.org/HOL/Page?handle=hein.journals/fora58&id=948&div=&collection=; Edward Ingram,

general struggle between late-19th and early 20th century Powers (including the then-recently-ascendant Japan) over access to strategic and military assets in the Mid- and Far East.[444]

Even with that caveat, however, these four case studies do at the very least represent four early examples in which legal actors, faced with the question of how to respond to allegations of one or another crime of international concern opted to "stay the hand of vengeance" (to crib a now-famous phrase from Justice Jackson's opening statement at the 1945 Nuremberg International Military Tribunal)[445] – forgoing for whatever reason the option to seek redress for the alleged offenses solely through gunboat diplomacy in favor of some form of internationalized criminal adjudication. In this, these cases are emblematic of the growing support for "legalism" among international legal actors that we saw in both the previous chapters – a belief in the possibility of resolving international disputes, even those involving exceptional or highly-charged circumstances, via legal instruments and institutions.[446]

"Approaches to the Great Game in Asia," *Middle Eastern Studies* 18, no. 4 (October 1982): 449–57, https://doi.org/10.1080/00263208208700526; Seymour Becker, "The 'Great Game': The History of an Evocative Phrase," *Asian Affairs* 43, no. 1 (March 2012): 61–80, https://doi.org/10.1080/03068374.2012.646404.

[444] David J. Silbey, *The Boxer Rebellion and the Great Game in China: A History* (Farrar, Straus and Giroux, 2012); Davis, "Railway Strategy in Manchuria"; Hershey, *The International Law and Diplomacy of the Russo-Japanese War*.

[445] International Military Tribunal, *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946* (William S. Hein, 1995), 99.

[446] While this term was famously used by Judith Shklar to refer to an "ethical attitude that holds moral conduct to be a matter of rule following," this is not the sense in which I use it here. Judith N Shklar, *Legalism*, Law, Morals, and Political Trials (Harvard University Press, 1964), 1, http://books.google.com/books?id=qQfVDna_gmgC. Instead, I am following Benjamin Coates' use of the term in reference to the multidisciplinary movement among international lawyers, diplomats, national leaders, and other international legal actors during the latter decades of the 19th century and early decades of the 20th century towards "expanding the use of legal techniques and institutions to resolve international problems." Benjamin Allen Coates, *Legalist Empire: International Law and American Foreign*

We can also see this turn towards legalism in the movement during the latter half of the century towards increased use of international arbitration, the nascent practice of international arbitral and mixed claims commissions, and even domestic courts hearing cases involving the alleged violation of supra-national norms governing conduct during warfare. Some of the earliest examples of international arbitration were, of course, established under the terms of the 1794 Jay Treaty, different provisions of which were discussed in some detail in the previous chapter. But this practice saw increasing use over the course of the 19th century, notably in the adjudication of the British and American dispute arising from British shipbuilders supplying the Confederacy with ships during the U.S. Civil War.[447] Mixed claims commissions, another form of international arbitration, were prominent, for example, in the settlement of various disputes between European States and the emerging semi-peripheral states in Latin America.[448] As to domestic prosecutions involving alleged violations of international norms, this period saw a series of notable domestic cases like that of Henry Wirtz, a Confederate Captain prosecuted for war crimes in 1865 by a U.S. military commission on accusations that he had mistreated and murdered Union prisoners of war "in violation of the laws and customs of war."[449]

Relations in the Early Twentieth Century (Oxford University Press, 2016), 3, https://doi.org/10.1093/acprof:oso/9780190495954.001.0001.

[447] Tom Bingham, "The Alabama Claims Arbitration," *International & Comparative Law Quarterly* 54, no. 1 (January 2005): 1–25, https://doi.org/10.1093/iclq/54.1.1.

[448] See Frédéric Mégret, "Mixed Claim Commissions and the Once Centrality of the Protection of Aliens," in *Experiments in International Adjudication*, ed. Ignacio de la Rasilla and Jorge E. Viñuales, 1st ed. (Cambridge University Press, 2019), 127–49, https://doi.org/10.1017/9781108565967.007.

[449] *See* Beth Van Schaack and Ronald C Slye, "A Concise History of International Criminal Law," in *International Criminal Law* (Aspen Publishers, 2009), 19, http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1629&context=facpubs. For analysis of the relevance of Wirz' case to international criminal law, *see* Jens Iverson, "The Trials of Charles I, Henry Wirz and Pol

The reasons behind this emerging instinct towards legalism as a source of legitimacy were no doubt complex. But I'd argue that in each of these cases the decision to go to the trouble of expending the institutional, procedural, and performative capital involved in any internationalized adjudication can be seen, to some degree, as an outgrowth of the pervasive but ever-shifting civilizing mission that was so crucial to the justifying frameworks of the latter stages of the second wave of European colonialism.[450] In the first three of these case studies, the resort to internationalized adjudication seem to have been intended, at least in part, to legitimize the violence inherent in the European states' interventions into the affairs of the peripheral and semi-peripheral states parties, casting their actions as "civilizing violence" that was justified and indeed necessary in the face of "uncivilized" disorder.[451] And even in the fourth, a case in which both nations involved were European Powers and in which the resort to internationalized adjudication was clearly motivated by a need to provide both sides an opportunity to save face and defray tensions that could easily have tipped over into military conflict, the Russian decision to accede to the creation of the International Commission of Inquiry was based its own prior commitments to building a path towards "civilizing" the settlement of international disputes.[452]

Pot: Why Historic Cases Are Often Forgotten and the Meaning of International Criminal Law," in *Historical Origins of International Criminal Law: Volume 3*, 2015, 93–118.

[450] *See* Coates, *Legalist Empire: International Law and American Foreign Relations in the Early Twentieth Century*, 39–58; Bell, "Ideologies of Empire," 546–47.

[451] On this point, *see, e.g.*, Judith Rowbotham, "Criminal Savages? Or 'Civilizing' the Legal Process," in *Criminal Conversations: Victorian Crimes, Social Panic, and Moral Outrage*, ed. Judith Rowbotham and Kim Stevenson (Columbus: Ohio State University Press, 2005), 91–105; Daniel Whittingham, "'Savage Warfare': C.E. Callwell, the Roots of Counter-Insurgency, and the Nineteenth Century Context," *Small Wars & Insurgencies* 23, no. 4–5 (October 2012): 591–607, https://doi.org/10.1080/09592318.2012.709769.

[452] Tsar Nicholas II was initially reluctant to agree to British demand for an inquiry in the Dogger Bank incident that would involve the participation of British soldiers, on the grounds that such an inquiry would be "humiliating" to the

The tribunals in these four case studies illustrate a core element of this upswell of legalism and concern with civilizing the international sphere: the internationalization of the criminal law paradigm and the criminalization of the international sphere – what Kirsten Ainley calls the "individualization, legalization, and criminalization of responsibility in international relations."[453] Although they are not, even taken together with the other examples of internationalized criminal adjudication mentioned in the opening of Section 2 above, a clear line of causally-connected, iterative exercises in developing a body of international criminal jurisprudence, I suggest that these and other examples of 19th century internationalized criminal adjudication that may yet be identified are worth further examination, if only as a hazy line of flawed first attempts and stumbling first steps towards what was to come.

Russian Navy. British, French, and Russian foreign ministers – each of whom was in favor of permitting such an inquiry in order to prevent further escalation of the conflict – were ultimately able to secure the Tsar's support, however, by presenting the creation of an International Commission as merely an extension of "his own idea in order to secure the autocrat's approval," explicitly referencing his support for "the creation of boards of arbitration at the Hague Conference" less than a decade earlier at the 1899 Hague Conference. *See* Lebow, "Accidents and Crises," 72.

[453] Kirsten Ainley, Stephen Humphreys, and Immi Tallgren, "International Criminal Justice on/and Film," *London Review of International Law* 6, no. 1 (March 1, 2018): 407, https://doi.org/10.1093/lril/lry010.

CHAPTER 5: CONCLUSION

In this dissertation, I have examined the development of three of the conceptual foundations of the contemporary field of international criminal law and project of international criminal justice during the 19th century.

In Chapter 2, I examined the role that the concept of a supranational or universal crime played in the popular Western imagination during the 19th century. Using a corpus of over 6000 archival sources, most of them drawn from quotidian sources of information like newspapers and other periodicals, I showed that various phrases referring to one or another category of crimes of international concern – such as "crimes against humanity" and "crimes against civilization" – were in fact rather common in the popular press in both the United States during this period. And through a qualitative examination of a subset of 800 of those sources, examining the subject matter and context in which phrases related to universal or supranational crime occurred, I found that that in most cases the authors of these 19th century sources tended to use these phrases in ways not all that dissimilar to how they are used in political and public discourse today.

In Chapter 3, I explored the ways in which certain legal actors, particularly national leaders, diplomats, and issue advocates, sought to deploy the idea of supranational or universal crimes in order to address new and emerging issues of national concern during the 19th century. In particular, I focused on the development and spread of one particular tool of international criminalization – the "suppression treaty." After presenting new archival research pointing to examples of this genre of international agreement that were concluded more than a century before the earliest example discussed in the existing literature, I discussed progression by which British officials – under pressure from domestic and international abolitionist groups – turned to

international criminalization as a core element of their project of internationalizing the abolition of slavery and the suppression of the African slave trade.

In Chapter 4, I examined the ways various legal actors engaged with international criminal adjudication as a means by which to respond to the alleged commission of crimes of international concern in the latter decades of the 19th century and the first years of the 20th. In particular I examined four case studies in which legal actors – national leaders, military officials, diplomats, and other interested parties – experimented with internationalized criminal adjudication by forming *ad hoc* hybrid or mixed international tribunals. These tribunals were formed and completed their work a range of different political and geographic contexts, but they shared various qualities and themes: the prevalent influence of unorthodox legal actors, a backdrop of global imperial competition, and a burgeoning belief in legalism as a means of projecting legitimacy.

During the course of these investigations into these three foundational concepts, I've presented a number of novel findings. First and foremost, I have shown that many of the conceptual building blocks upon which international criminal law as a legal field, international criminal justice as a politico-legal project have been built were very much present in the minds of the general public, state officials, and other legal actors during the 19th century. Furthermore, I have shown that these same legal actors were experimenting with various practices by which they could put these conceptual foundations into practice, through the creation of new crimes of international concern or through the internationalized adjudication of allegations that such crimes have been committed, as early as the 1810s.

But beyond just this finding of prevalence, I have also presented another notable finding, namely that in many ways the discursive framings and experiments with legislating and

adjudicating crimes of international concern discussed in the course of the following chapters are not all that alien to our modern sensibilities. It turns out, at least in this corner of international legal history, the past isn't so foreign a country and in fact they don't do things all that differently there. Even with a century's distance, the ways that terms like "international crime" or "crime against humanity" are used in popular discourse, or even in formal legal argumentation, today are not that far removed from the ways they were used in popular 19th century sources.

In documenting the ways that these foundational ideas and practices of international criminal law and international criminal justice began to take on – even if only in fits and starts – a set of conceptual, political, and institutional forms that would be familiar to political and legal actors today, I've sought to add to the recent wave of "critical" and recuperative scholarship that has sought to "reconsider" the historical development of international criminal law and the broader politico-legal project of international criminal justice. In examining events and developments that most scholars, jurists, and practitioners would consider to be within the "pre-history" of contemporary international criminal law, I have sought to uncover and "rediscover" elements and events – particularly the importance of popular understandings and conceptual figurations of international crime and justice, the contributions of non-expert legal actors, and early experiments in enacting aspects of international criminal justice – I've sought to participate in that critical turn's project of uncovering and recovering aspects of the field's historical development that prior histories have tended to downplay, omit or ignore.

In the remainder of this final chapter, I gather together a number of threads explored in the course of this dissertation, less in an effort to conclude the inquiries pursued herein (and those parallel inquiries that were touched upon but not fully explored) and more in an effort to

lay the groundwork for further investigations.

Pathways to Continued Exploration of Existing Research

As mentioned in Chapter 2, in the course of researching the arguments presented there I gathered a corpus of over 6000 archival sources containing one or more phrase related to the concept of a supranational or universal crime, 800 of which were subjected to a qualitative subject matter analysis. Expanding that qualitative analysis to encompass the remaining texts in the corpus, whether through manual review or the use of algorithmic large-scale textual analysis tools, would likely provide a great deal more information about the range of contexts and nuanced ways in which 19th century authors used these terms.

Furthermore, any future expansion of the analysis in this chapter would ideally delve more deeply into the political and justificatory valence of the use of the rhetoric of universal or supranational crime in the corpus of popular 19th century sources already compiled. In particular, I believe further examination into the ways in which the rhetoric of universal or supranational crimes was used to differentiate between "uncivilized violence" and "civiliz*ing* violence" (understood not as violence *against* civilization but necessary violence *in the name of* civilization) could be a fruitful avenue for future research.

In the course of writing Chapter 3, I gathered a database of over 150 treaties signed by Britain between 1814 and 1895 related to the slave trade. Any future expansion or deepening of the analysis presented in this chapter would ideally continue documenting and comparing the specific language used in, and evidence of continuity in diplomatic personnel involved in negotiations of, suppression treaties past the middle of the 19th century in order to investigate additional likely continuities and instances of direct borrowing from prior treaties. In parallel with this analysis of variations in treaty language, I believe further insights into both the

evolution of the structure and content of suppression clauses and the developing understanding of international criminalization more generally could be gleaned from a review of the records of the annual meetings of the Association for the Reform and Codification of the Law of Nations (later renamed the International Law Association in 1895), the *Institut de Droit International*, and the International Committee of the Red Cross, as well as various other overlapping and adjoining organizations such as the International Penitentiary Commission/*Commission Pénitentiaire Internationale*, the *Internationale Kriminalistische Vereinigung* (IKV), and International Union of Penal Law/Union Internationale de Droit Penale. While this line of inquiry ultimately had to be dropped in the course of developing this project, in the course of researching this dissertation I conducted a great deal of original research into the I conducted into the discussion of various topics related to international criminal law generally, the relative merits of different methods of international criminalization, and suppression treaties in the proceedings of annual meetings and conventions of these organizations in the latter decades of the 19th century. This research offered promising, if preliminary, insights into the changing understandings of both transnational criminal cooperation and the creation and theoretical feasibility of the field of international criminal law.

In the course of researching Chapter 4, I amassed a good deal of evidence regarding likely connections between the tribunals discussed in each of the four case studies and later developments and experiments in international criminal law. This evidence includes archival evidence showing that these tribunals were widely covered in the international news media at the time, and thus that it would be likely that the jurists and diplomats that would later go on to participate in the early discussions regarding various aspects of international criminal law in professional associations like the Association for the Reform and Codification of the Law of

Nations or the *Institut de Droit International,* or foundational events in the institutionalization of international criminal law like the 1919 Commission on Responsibilities, would have been aware of at least some of these early experiments in internationalized adjudication. In addition to this evidence of likely indirect links, it also includes various indications of more direct connections between many of these early international law and penal law jurists and one or more of these early experiments. Further exploration of such indirect and potential direct linkages may yet help to uncover a more direct line of deliberation or causation between these 19th century experiments in international criminal justice and those in the early and mid-20th century.

A Direction for Future Research: Legacies of Empire and Colonialism

When initially conceived, and for much of the course of its development, this project was aimed not only at examining the development of the conceptual foundations of the contemporary field of international criminal law and project of international criminal justice during the 19th century but also examining how the development of these conceptual foundations was influenced by the horizon of imperial rivalries and colonial politics against which it took place. In other words, to borrow a phrase from Jennifer Pitts, this project aimed to call attention to the ways in which the "categories and formally equal rules" of ICL are "bound up with substantive inequality and European domination," but it also aims to challenge the notion that these categories and rules are "irredeemably" marked by their imperial past.[454] As the project progressed, it became clear that accomplishing both those goals would be too much to undertake in the course of one dissertation project. In future work, however, I believe that further exploration of the latter of

[454] Pitts, Jennifer. 2010. "Political Theory of Empire and Imperialism." *Political Science* 13 (1): 211–35. doi:10.1146/annurev.polisci.051508.214538. at 223

these two goals would do a great deal to build out the political and sociological background against which the legal and practical developments discussed in the previous three chapters played out.

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