Accountability for “Crimes against the Laws of Humanity in Boxer China: the experiment with international justice at Paoting-Fu

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The general view taken by the civilized world of the duty to be performed in China was not that the living representatives of the Western power in Pekin were to be rescued, but that their murder was to be avenged and their murderers punished.

- Report of the Secretary of War (30 Nov. 1900), in ANNUAL REPORTS OF THE WAR DEPARTMENT FOR THE FISCAL YEAR ENDED JUNE 30, 1900 (1900) 18

The ‘individual accountability for mass rights violations’ impulse in modern international relations is unanimously (though incorrectly) thought to have emerged sua sponte in the aftermath of the First World War through the failed efforts of European states to prosecute the German Emperor for initiating the war and Ottoman leaders for the Armenian genocide. In fact, in the century after the Napoleonic wars the Great Powers frequently turned to ‘internationalized’ courts and the rhetoric of ‘humanity’ and ‘civilization’ to project power, establish narratives, manage public opinion, express dissatisfaction and defend humanitarian values. That this history remains unwritten is a surprising weakness for a field so fixated on establishing legitimacy and cachet through pedigree. One significant but generally unknown and understudied caesare of the development of international criminal law occurred during the Boxer Rebellion, an anti-Western and anti-Christian peasant insurgency mostly located in Northeast China. Boxer attacks on Western missionaries, Chinese converts, and foreign legations and diplomats in Beijing throughout 1898 prompted the seven Western powers with an interest in China (Austria, France, Germany, Italy, Japan, Russia, Great Britain, and the United States) to dispatch an international relief force. During the early stages of the Chinese intervention, at a time when the relief force was still bogged down in Beijing, approximately seventy Christians were gruesomely murdered in Paoting-fu. Securing and “punishing” the city became a priority for Western military forces, who began the necessary short march southward once Beijing’s Legation Quarter was cleared of Boxers. The Paoting-fu operation could have taken the form of the other “punitive expeditions” organized by the allied forces, which were characterized by extreme violence on the part of European and American troops toward any Boxers (or unlucky civilians who came from villages suspected of harboring Boxers) without trial. Instead, when the foreign armies reached Paoting-fu in mid-October 1900 they established an “International Commission” to “make inquiry into the treatment of the foreigners of various nations who had suffered.” The French, German, Italian and British commissioners collected evidence for seven days and ultimately recommended death by beheading for three Chinese officials, removal from office for another and an additional trial in Tien-tsin for a fifth. The proceedings were widely hailed as “one of the most satisfactory aspects of the campaign.”

The instantiation of the Commission identifies the Rebellion as an important moment of transition from the era in which states were willing to forswear punishment for atrocities, to one in which massacre would provoke robust military and diplomatic intervention, into matters ostensibly entirely ‘local’, in humanity’s name. Confronted with mass violence, Europeans developed institutions and ways of thinking that are identifiable as progenitors of our modern international criminal law. The Commission was a physical embodiment of this punitive mandate, but portents of the reasoning that would be critical to rationalizing subsequent developments in law and policy may also be seen at work in the mind of Europe’s educated classes. Sustained interest in the judicial proceedings entangled and entrenched the ideas of appalling bloodshed, crime, punishment and humanity in a manner that moved the

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I have elected to refer throughout this paper to places and people using the spellings employed by those who lived through the Boxer Rebellion as opposed to the preferred contemporary spellings. Thus, for example, the cities today identified as Baoding and Beijing are identified as Paoting-Fu and Peking. Where there was a great deal of variation for the spelling of names, I have elected to use a spelling most common to those who wrote of the events at issue (ie, Paoting-Fu for Pao-Ting-Fu, Paotingfu, Pautingfu, etc.).
The concept of ‘crimes against humanity’ one step closer towards acquiring its contemporary meaning: a repugnant act of violence committed as part of a widespread or systematic attack on a civilian population, in contravention of international law.

Introduction

The Boxers, named for their distinct martial art style, were a secret society who capitalized on the hardships resulting from prolonged drought, floods and poor harvests to galvanize popular opinion against foreigners in fin de siècle China. Initially suppressed by the Qing government, the Boxers achieved first a détente with, and eventually the patronage of, the Chinese court. Throughout June and early July 1900 anti-foreign violence escalated in China’s Chili province as Boxers, with Imperial imprimatur, attacked Christian missionaries and Chinese converts, and participated in the attacks on the foreign legations in Peking. Western deaths were described in lurid terms by the press, galvanizing demands that the culprits be punished. Nothing came to symbolize Chinese depravity though quite as much as the reports of massacres of missionaries in Paoting-Fu and Taiyuan. From a report on the former published in The Times:

> Children were butchered before their parents’ eyes, white women were ravished and carried into captivity, mothers and fathers were tortured and murdered. [...] Surely the civilized world will not suffer this cruel massacre to remain unavenged and raise no hand to ascertain the fate of the poor martyred Christians and white women.

The persistent refusal of the Chinese government to discourage or punish Boxer violence against foreign nationals to the satisfaction of the Western powers, combined with the threat of imminent Boxer and imperialist attack on the legations in Peking, prompted France, the United Kingdom, Austria-Hungary, Germany, Russia, Japan, Italy and the United States to jointly intervene in China in the summer of 1900. Western politicians, pundits and missionaries were united in their determination to punish the Chinese for their role in “crimes unprecedented in human history”, and ensuring accountability was made a cornerstone of their wartime and post-war policies in China. As the intervening forces advanced, the Allied strategy for penalizing.
Boxers and the Imperial government shifted along with the underlying social, political and military dynamics. On 21 May 1900, a time when Imperial support for the Boxers was strongly suspected but before China had declared war on the eight Great Powers (including Austria-Hungary, Germany, France, Great Britain, the United States, Russia, Italy, and neophyte Japan) the foreign representatives in Peking sent a joint note demanding that the swift punishment “all individuals publishing, printing or distributing placards containing menaces against foreigners[,] all persons aiding and abetting, all proprietors of temples or houses where meetings of Boxers are being held[,] and the execution of those who have been guilty of outrages, murder, arson etc., [and] those who support or direct members of this society in committing such outrages”.5 In Tientsin, the first major city to fall to the Allies, Boxers were tried under the authority of the Allied-run Tientsin Provisional Government (TPG).6 A different model was adopted in occupied Peking. There, the city was initially divided into zones in which a single Power maintained responsibility for security. The International Committee administering the city considered establishing an “International Court”, though the idea was quickly dismissed in light of (1) “[t]he size of the City of Peking”; (2) “the great number of crimes”; and (3) the fact that “the different

Many business men and missionaries had been sacrificed in those atrocious massacres which were now known to have been instigated and abetted by the Chinese officials, and...if the perpetrators of those cruelties were allowed to escape with impunity, at no distant date there would be a recurrence of those atrocities. Among the friends and relatives of those who had perished there was no thought of revenge, but for the safety of life and property in China to-day it was absolutely necessary that such condign punishment should be inflicted upon those wretched and treacherous miscreants, as would burn into the Chinese official mind, as nothing else could, a wholesome dread of European power, and respect for Christian life and property, which would last for all time.

Parliamentary Debates (Hansard) House of Commons [hereinafter: “HC”] Deb, December 10, 1900, vol 88 cc366. See also his comments of 18 February 1901 in HC Deb, February 18, 1901, vol 89 cc 382-383 (“those men… have been guilty, consciously guilty, not only of the most flagrant breaches of international rights, but of treacheries and atrocities which have been perpetrated on the Christian population, both European and native.”). See also the comments of Viscount Cranborne, HC Deb 07 December 1900 vol 88 cc321 (referring to punishment of individual Boxers; “I think that the European Powers are well advised to exact just and due reparation for the wrong which they have sustained. If the Chinese Government expect to be treated in any other way they must behave differently.”)

Likewise, Sir Edward Grey, Foreign Secretary and sitting House of Commons member, said of punishment in August 1900 that territorial and pecuniary indemnity would take a backseat to “discover[ing] who in high places have been responsible for the damage done, and mak[ing] the punishment a personal punishment, in the first instance.” HC Deb, August 2, 1900, vol 87 cc478.

5 NA, Records of the Admiralty [hereinafter: “ADM”] 116/117, No. 72, ‘Sir C. Macdonald’ (May 1, 1900). For more on the naval coalition, see T. G. Otte, Dash to Peking – The international naval coalition during the Boxer Uprising in 1900 in NAVAL COALITION WARFARE – FROM THE NAPOLEONIC WAR TO OPERATION IRAQI FREEDOM (Bruce Elleman & S.C.M. Paine eds., 2008).

6 3 Hosea Morse, The International Relations of the Chinese Empire 293 (1918). The TPG counted among its councilors representatives from various occupying Powers. It was unique among the internationally administered cities in China in that it was simultaneously subject to the whims of the military and consular authorities of each of the seven represented powers. Id. 294, 298-300. For more the administration of the city by the TPG see NA, FO 233/218, FO 233/219, FO 233/220, FO 233/221, FO 17/1418 and FO 17/1429; PROCES-VERBAUX DES SÉANCES DU CONSEIL DU GOUVERNEMENT PROVISOIRE DE TIEN-TSIN (1911) (hereinafter PVCGPT); National Archives and Records Administrations of the United States [hereinafter: “NARA”], Record Group [hereinafter: “RG”] 395/ (Index No.) 120, ‘Règlements Généraux d’Administration de la Cité Chinoise de Tientsin’ (1900); Capitaine Condamy, Histoire du Gouvernement provisoire de Tien-tsin (1900 – 1902) par le Capitaine Condamy 6 REVUE DES TRoupes COLoniales (1905) 168-80, 248-64, 414-41, 507-29; Capitaine Condamy, Histoire du Gouvernement provisoire de Tien-tsin (1900 – 1902) par le Capitaine Condamy, 7 REVUE DES TRoupes COLoniales 17-45, 164-84 (1905).
contingents have their own courts [...]” [7] For months, justice in the Imperial capital was administered by the troops responsible for the sector in which the offense took place, against whom an attack had been directed, or of a state with a special interest in his case. [8] Eventually the Powers established Chinese courts with jurisdiction over *inter alia* whoever was “known to have participated in the Boxer movement and committed injury on life or property of Chinese or other foreigners” [9].

From their footholds in Peking, Tiensin and the Dagu Forts the Allies directed punitive expeditions to sites where Boxers and Imperial Army sympathizers were known to operate. The “justice” meted out during these expeditions, particularly those operations conducted prior to the Paoting-Fu expedition, was often lacking any semblance of judicial process, collective and grotesque. [10]

[7] The administering powers did, however, agree to adopt common procedural, penal, jurisdictional and substantive rules “so as to get a certain equality in the action of appearing cases.” NARA, RG 395/920, supra note 6, at ‘Committee for the Administration of the City of Peking - 4th Meeting’ (December 24, 1900) and ‘Committee for the Administration of the City of Peking – 3rd Meeting’ (December 20, 1900) (raising the possibility of establishing ‘one consolidated Court’).

[8] NARA, RG 395/920, supra note 6, at ‘Committee for the Administration of the City of Peking - 5th Meeting’ (28 Dec. 1900) (discussing the creation of a ‘Chinese Court’ that could ‘come to the true facts’ in cases carrying a penalty of capital punishment, agreeing to shared principles in the administration of justice, but leaving contingent commanders some discretion in sentencing criminals found in their respective districts). War Department, Annual Reports of the War Department for the Fiscal Year Ending June 30, 1901. Washington, D.C.: Government Printing Office, 1900, part 4 (hereinafter ‘ARWD 1901’) 527-528, ‘General Order No. 3, issued January 11, 1901’ (establishing the Chinese Court). See also NARA, RG 395/906, Letter of Captain Tillson of January 9, 1901, nominating two Chinese individuals for positions with the Chinese Court “in [the US] district.”). MORSE, supra note 6, at 184-86; *Allies Dispensing Justice* THE SOUTH AUSTRALIAN REGISTER, November 1, 1900, at 5 (reporting on frequent “drumhead court-martials” and the execution of fourteen Boxers in one day). On June 20, 1900 the German Ambassador to China, Clemens von Ketteler, was killed, possibly by Manchu bannerman En Hai. En Hai was arrested by the Japanese and transferred to German custody several months later. He was subsequently tried and executed. LANXIN XIANG, THE ORIGINS OF THE BOXER WAR: A MULTINATIONAL STUDY 335-336 (2003). See also PETER FLEMING, THE SIEGE AT PEKING 108 (1959); MORSE, supra note 6, at 223. International sympathy for the murder secured the appointment of the German Alfred von Waldersee as Field Marshal of the Allied forces. In the British quarters there are indications that executions of Boxers were predicated on a rational review of evidence provided to the police. See NA, FO 233/124, ‘Summary of Evidence in the case of Chang-Shao-Chi or Chand-Chieh-Mei accused of being a Boxer’ (undated), p. 152-5; ‘Summary of Evidence against 7 prisoners captured in the villages S.E. of Peking, Sept. 9’ (undated), p. 156-8.

[9] NARA, RG 395/918, “Recommendations by Committee appointed to prepare regulations for Peking provisional government (January 5, 1901)”.

[10] Between September 1900 and spring 1901 Allied troops launched approximately forty-six such expeditions. Germany was responsible for the overwhelming majority of these, while only seven consisted of mixed forces. ARWD 1901, supra note 8, at 495-498 ‘Roster of All Expeditions Made by Allied Forces, December 12, 1900 to May 10, 1901’. The forms that justice took during these expeditions were as varied as the personalities that led them. As a general rule “all prisoners taken [were] shot, the brutalities practiced by the enemy on European wounded who fall into their hands justifying such a drastic measure”. *Treatment of Chinese Prisoners and Wounded*, THE JAPAN WEEKLY MAIL (July 21, 1900) at 7. During some expeditions missionaries and local magistrates cooperated to sentence Boxers or obtain monetary settlements for deaths or damage to mission property. See eg ARWD 1901, supra note 8, at 491 (‘Adjunct, Camp Reilly, from Wm. Lee Karners’) and 501 (‘Report of Operations in China from November 30, 1900, to May 19, 1901, by Maj. Gen. Adna R. Chaffee, U.S.A.’). In one case a British officer held half of the headmen of a village hostage until the other half produced “those whom they considered as the most guilty parties” for trial before a Chinese magistrate. Foreign Relations 1901, supra note 4, at ‘Maj. H. Gould-Adams, to the general officer commanding the third brigade, C. F. F.’, in No. 64 ‘Mr. Rockhill to Mr. Hay’. Other commanders preferred collective punishment, destroying physical symbols of local pride and power, including
Demands for punishment of high and low ranking Chinese officials who had supported the anti-foreign movement were taken up by the Allied negotiators in Peking, who considered national, transnational and international options.\(^{11}\) Punishment proved to be a significant sticking point between the Powers. A September 1900 German proposal that China hand over for trial by the Powers “first and real perpetrators” involved in the “crimes committed in Pekin against international law”, including the murder of German Ambassador Clemens von Ketteler and the attack on the Peking legations, failed to find purchase with the other Allies.\(^{12}\) The Russians deemed the demand an “anomaly” and joined the United States in criticizing it as impractical and shortsighted, given that “punishment by the central Imperial authority would have a far greater effect throughout the whole of the Chinese Empire”.\(^{13}\) The British resisted as a matter of

\[^{11}\] The importance of bringing the Chinese government within the Allied net was articulated by Acting Consul-General Warren: “No massacre of foreigners ever occurs without the complicity, active or understood, of the officials, and it is useless to merely punish the instruments, as that has no deterring effect. It is, therefore, very necessary that the official instigators of the massacre should be punished with the utmost rigour of the law, and if firmly pressed for this course will be adopted.” China No. 5 (1901), Further Correspondence respecting the disturbances in China (HMSO 1901) [hereinafter “China No. 5”], No. 218, Warren to Marquess of Lansdowne (December 11, 1900). For a more detailed exploration of punishment in the negotiation of the Boxer Protocol see CHESTER TAN, THE BOXER CATASTROPHE 137-156, 216-223 (1967) and JOHN KELLY, A FORGOTTEN CONFERENCE: THE NEGOTIATIONS AT PEKING – 1900 – 1901 135-149 (1963).

\[^{12}\] NA, FO 405/95, No. 168 ‘Count Hatzfeldt to the Marquess of Salisbury’ (September 18, 1900) (The communiqué suggests that a massacre of those “employed as instruments to carry out the criminal work” would go against “civilised conscience”, but that the punishment of a few “instigators and leaders” whose guilt was “notorious” would have a salutary effect). The extradition demand originated with German Foreign Secretary Bernhard von Bülow, who hoped to take advantage of the inevitable Chinese resistance to derail the still embryonic negotiations until the situation on the ground was more favorable to Germany, satisfy domestic sentiment and restore Germany’s lost honor. No. 184, Count von Bülow to Emperor Wilhelm II (September 15, 1900) and No. 531, Bülow to von Hatzfeldt (November 30, 1900) in 16 DIE GROSSE POLITIK DER EUROPÄISCHEN KABINETTE, 1871–1914: SAMMLUNG DER DIPLOMATISCHEN AKTEN DES AUSWÄRTIGEN AMTES – DIE CHINAWIRREN UND DIE MÄCHTE 1900–1902 (Johannes Lepsius, Albrecht Mendelsohn-Bartholdy, and Friedrich Thimme, eds., 1924); Communiqué, Maximilian von Brandt to Lo Feng-Luh (September 22, 1900) in 4 THE HOLSTEIN PAPERS 205 (Norman Ricj & M. H. Fisher eds., 1963) (going beyond the terms of the original demand and explaining to the Chinese representative in Germany the importance of handing over “those persons who are to blame for the murder of Baron von Ketteler and so many missionaries and the attack upon the foreign legations [...]”).

\[^{13}\] NA, FO 405/96, No. 49 ‘Mr. C Hardinge to the Marquess of Salisbury’ (September 27, 1900). See also ‘The Imperial German chargé d’affaires to the Secretary of State’ (September 18, 1900) and ‘Acting Secretary Hill to the Imperial German chargé d’affaires’ (September 21, 1900) in Department of State, Papers Relating to the Foreign Relations of the United States, with the Annual Message of the President, Transmitted to Congress, December 3, 1900. Washington, D.C., (1902) [hereinafter “Foreign Relations 1900”), also available in NARA, RG 84/(Volume) 217. The American objection was also rooted in notions of complementarity: “[it is] only just to China that she should be afforded in the first instance an opportunity to do this [punish their own], and thus rehabilitate herself before the world”. Id. Russian Foreign Minister Count Lamsdorff privately expressed a preference for exile over executions, or at least executions by the Chinese as opposed to foreign governments, given their “special aptitude for the task. NA, FO 405/95, No. 192 ‘Mr. C. Hardinge to the Marquess of Salisbury’ (September 20, 1900). The Japanese agreed that punishment of ‘real instigators’ should take place prior to a formal renewal of diplomatic relations with the Chinese court, but considered the German insistence on delivery to be fraught with practical difficulties. Nr. 12458, ‘Grossbritannien – Der Gesandte in Japan an den Miniser des Auswartigen. Die japan.
principle (the plan was a “counsel of perfection”, insofar as neither the Empress nor the most-wanted Prince Tuan could “be expected voluntarily to sign their own death warrants, or those of their colleagues and supporters, though some among them may be ready to sacrifice the rest to the wolves in order to facilitate their escape”), pragmatism (“[n]or does there seem to be any practicable way to seize the guilty parties, if their surrender is refused”; punishing the Dowager Empress “would involve the destruction of all government in China”), perception (“[a]n adequate punishment of the Dowager-Empress would, from her sex, be repulsive to European feelings”) and politics (“Germany may have the view of forcing on a logical casus belli [i.e., disruption of local governance]…[and] we may feel quite confident that the operations would be guided far more by the desire for material advantages, than the pious duty of bringing criminals to justice”). Britain’s Director of Military Intelligence in the War Office, Major-General Sir John Charles Ardagh, proposed as a solution the establishment of an international “judicial commission to enquire and report upon charges which may be brought against instigators and perpetrators of outrages; and to cooperate in procuring their surrender[,] apprehension[,] trial and punishment” in the event “of the Chinese Government declining or neglecting to punish the guilty, proprio motu.” His idea was not taken up by the assembled Plenipotentiaries. Instead, the delegates sent a joint note demanding that China impose “the

Regierung über den deutschen Vorschlag’ (September 22, 1900) in 64-65 DAS STAATSARCHIV: SAMMLUNG DER OFFIZIELLEN AKTENSTÜCKE ZUR GESCHICHTE DER GEGENWART 276 (1902)

American missionaries were heavily critical of the US position. Reverend D. Z. Sheffield, an American Board missionary with thirty-six years of missionary service in China under his belt, questioned US Acting Secretary Hill’s rationale for rejecting the German proposal:

Who will punish whom? What is the meaning of such a mischievous proposition from a source from which it was reasonable to expect wise counsel and helpful action? […] The only condition of peace with China should be the banishment of the Empress Dowager to the “Cold Palace,” or to end her days among the tombs of her ancestors at Manchuria. The heads of her leading counsellors, and her most devoted tools, should fall. A punitive expedition should visit Pao-ting-fu, T’ai-Yuan, T’ai Ku, Feu Chou Fu, and other cities that have outraged the laws of civilization by their crimes, and should inflict such a chastisement that neither officers nor people throughout China would dare again to commit or allow such acts of cruel barbarity.

American Board of Commissioners for Foreign Missions Records [hereinafter: “ABCFM”] Unit 3, Reel 291, No. 210 ‘Correspondence – China’s Punishment China’s Salvation’ (printed in the Boston Evening Transcript of October 1900).

14 NA, Public Records Office [hereinafter: “PRO”] 30/40/22/4 ‘China’ Memorandum of Maj-Gen Ardagh of September 30, 1900. See also PRO 30/40/14 ‘China – Advisability of occupation of Pei-Tang, Tongshan, Ching-wang-tao, and Shan-hai-kuan; and general observations’; Memorandum of Maj-Gen Ardagh of September 22, 1900 (Germany’s proposed retribution was “much to be desired”, but how were “they [China’s officials] to be induced to put their heads into the noose? […] We shall for the present have to content ourselves with such reparations as may be afforded by a pecuniary solutum.”); NA, FO 405/95, No. 212 ‘The Marquess of Salisbury to Sir L. Lascelles’ (September 25, 1900) (discussing the sequencing of punishments and the commencement of negotiations); NA, FO 405/95, No. 208 ‘Marquess of Salisbury to Sir C MacDonald’ (September 25, 1900) (inquiring whether those guilty of attacks on the legation and “other recent outrages” could be identified and “seized”); NA, FO 405/95, No. 238 ‘Sir C MacDonald to Marquess of Salisbury’ (September 29, 1900) (certain the responsible parties could be identified, but skeptical that the guilty, Prince Tuan in particular, could be obtained); Holstein Papers, supra note 12, at 749 Paul von Hatzfeldt to Holstein (September 26, 1900) (“[Salisbury] thinks that we would be perfectly satisfied if the Chinese turned down our demand for extradition, giving rise to new difficulties and the prolongation of the state of war, so that Waldersee [German commander-in-Chief of all Allied forces][…] would still find a situation favourable to military actions and the opportunity for military and political successes.”)

severest punishment, in proportion to their crimes” on government officials believed to be involved in the attacks on the foreign legations in Peking, and the murder and torture of missionaries through northern China, described as “crimes unprecedented in human history – crimes against the law of nations, against the laws of humanity, and against civilization”. Over the course of the following year, nearly one hundred Chinese officials were executed, punished, or downgraded at the hands of their own government for their role in the anti-Western uprising.

One process utilized to satiate the Allied appetite for penal consequences stands out as particularly interesting for its resemblance to the international crimes prosecutions of the twentieth and twenty-first centuries. In late October 1900 a bespoke joint Italian-German-English-French International Commission was formed to investigate and punish individuals responsible for what colleagues of the missionaries who met their end there called “crimes against humanity”. Among the many punitive tools and techniques employed by the Allies, the Commission was the most judicatory, fair and specifically preoccupied with acts that amounted (at least by the admittedly immature standards of the day) to international crimes.

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16 Foreign Relations 1901, supra note 4, at Inclosure ‘Dispatch 482-Translation’ in No. 482 ‘Mr. Conger to Mr. Hay’ (using the phrase to describe the murder of the Japanese and German foreign ministers, desecration of foreign cemeteries in Peking, the siege of the foreign legations and incidents “in several provinces where foreigners were murdered, tortured, or attacked by Boxers and regular troops.”).

17 The Allied delegates were active in gathering evidence against high and low level Qing officials responsible for the violence against their co-nationals. On April 1, 1901 a list of ninety-six individuals with expected punishments was presented to the Chinese. In its response the Chinese court raised legal defenses with the foreign Plenipotentiaries or shared with them the exculpatory results of its own investigations in the expectation that new information might lead to exoneration or mitigation. *Id.* at Inclosures No. 1 - No. 11 in No. 107 ‘Mr. Rockhill to Mr. Hay’. See also NA, FO 405/105, No. 14 ‘Sir E. Satow to the Marquess of Lansdowne’ (February 6, 1901); NA, FO 405/107, No. 64 ‘Sir E. Satow to the Marquess of Lansdowne’ (April 24, 1901). See also infra note xxx.

18 ABCFM, Unit 3 Reel 298, No. 16 Sheffield to Smith (February 26, 1901). See also ABCFM, Unit 3, Reel 322, Atwood to Smith (September 10, 1901). Jun Zhang calculates that 92 out of 188 “upper echelon” Chinese officials lost their position in the war and the subsequent purge. Out of the twenty-six who had died, fourteen were a result of fighting and the remainder by order of the Chinese court. Jun Zhang, *Spider Manchu: Duanfang as networker and spindoctor of the late Qing new policies, 1901-1911* 30-31 (PhD Thesis, UC San Diego 2008).

19 The shape of justice in Tientsin is still largely unknown. Details of the processes employed by the TPG are not to be found in the US, German, British and Italian records related to the administration of the city, though the minutes of the TPG’s meetings found in the UK’s National Archives are somewhat instructive. These minutes paint a picture of councilors who treated justice as an afterthought. According to these documents, judicial powers were wielded directly by the TPG’s councilors. The Chief of Police presented evidence of a prisoner’s guilt along with a sentencing recommendation to the city officials, who would then invariably impose the suggested punishment. See e.g. NA, FO 233/218, ‘Minutes of the Twelfth Meeting of the Council – August 16, 1900’. These “trials” took place without the accused present and were sandwiched between consideration of anodine matters like customs rates or public health initiatives, resembling less a manifestation of humanity’s collective disgust so much as a ho-hum, bureaucratic exercise. They were generally of little interest to the public or their governments. The TPG’s councilors were as inclined to order the death penalty for those guilty of “being a Boxer” as they were for the crime of cutting telegraph wires or “being in possession of arms and...being of a notoriously bad character”. NA, FO 233/218, ‘Minutes of the Twelfth Meeting of the Council – August 16, 1900’. FO 233/221, ‘Minutes of the One Hundred and Fifty First Meeting of the Council – May 31, 1901’; ‘Minutes of the One Hundred and Sixty Third Meeting of the Council – June 28, 1901’.

There are hints, however, that this picture is incomplete. Captain Gordon Casserly of the Indian Army, reflecting on the course justice had taken after the city was de-occupied and transferred back to the Chinese, suggests that far more were punished than the relatively small number discussed in the TPG’s meeting minutes.

Scarceley a day passed without seeing a few miserable prisoners brought in from the districts round. Poor wretches! Many of them villagers who had been driven into brigandage by the burning of their houses and the ruin of their fields as the avenging armies passed. Some were but the victims...
From today’s perspective the Commission looks like a rather predictable, if far from inevitable, transitional justice countermeasure to atrocity. However, in 1900 prosecutions for heinous crimes offensive to the conscience of (Western) humanity were rare, let alone trials before international courts.20 Although the Commission has recently received attention by a few dedicated historians, it remains a neglected entity within the international criminal law community.21 The purpose of this paper is to rectify this by critically examining some aspects of this neglected caesurae in the development of international criminal law. Drawing on previously unexplored archival material, as well as missionary literature and news reports, this paper proceeds in five parts. I start with a review of the operational context of the punitive expedition to Paoting-Fu. Following this, I focus on the Commission itself, attempting to communicate some flavor of its proceedings. In Section 2 I explore some of the legal, cultural and practical factors that supported the Commission’s creation and shaped its activities, including the paradigm shift in public thinking about collective punishment and the development of a nascent international criminal law. Section 3 will highlight the social and political discourse that followed the executions of three Chinese officials at Paoting-Fu pursuant to the Commission’s recommendation, including the strikingly modern debate on the value and spirit of transnational justice that followed. I then trace the influence of this seminal experiment with individual

of treacherous informers, who, to gain a poor reward or gratify a petty spite, denounced the innocent. And, with pigtails tied together, cuffed, and hustled by their pitiless captors, they trudged on to their doom with the vague stare of poor beasts led to the slaughter. A hurried trial, of which they comprehended nothing, then death. Scarcely knowing what was happening, each unhappy wretch led forth to die. Around him stood the fierce white soldiers he had learned to dread.


It’s also possible that the TPG was acting as a quasi-court of appeal, and by extension decided only the most difficult cases. The account of Jasper Whiting, an American war correspondent, suggests that a court composed of a single magistrate, and not the TPG’s councilors, presided over Boxer cases:

The reception rooms [of the Yamen of the Viceroy were] turned into offices for the other members of the Council [TPG], and the great audience chamber became the court-room of the acting magistrate. This official performed his multitudinous duties in a way which would have made Pooh Bah green with envy. On his way to the court, if he saw a disturbance he would personally arrest the offender, and conduct the culprit by his queue to the court-room. Here he was at once judge, jury, advocate and sometimes even sheriff as well. Before him the Chinese prisoners were brought in a continuous stream, each one kneeling and knocking his head three times on the floor before the great man, who, with the aid of an interpreter and a few street Cossacks, examined them, passed sentence upon them, and if found guilty, had the punishment inflicted then and there. All this was done with such rapidity and precision that even my head swar. It must have seemed little short of supernatural to the poor wretches brought before the bar.


In the undated picture of the “Trial of a Boxer at the Magistrates Court of the Tientsin Provisional Government” printed in the Illustrated London News of 2 March 1901 a Chinese prisoner kneels before three Westerners. 116 ILLUSTRATED LONDON NEWS 299 (1900). Further research into the TPG’s judicial apparatus may ultimately reveal a system at least equally as legalistic, fair and internationalized than the Commission.

20 For a brief discussion of some prior cases see infra Section 4 pp. xxx-xxx.

accountability for crimes against humanity on later efforts to create an international jurisdiction to try the Kaiser in the wake of the First World War in Section 4. Finally, Section 5 is devoted to an exploration of the judicial character and fairness of the Commission.

1. Justice at Paoting-Fu

China was in the wrong in failing to protect non-combatant, private subjects of even the nations upon whom she was declaring war. For such a crime there would come most drastic retribution. So far as the [I]mperial Government is concerned, she either forced such persons to become belligerent in self-defence, or violated all feelings of humanity by encompassing their death, and that, too, by barbaric methods. To be shot down, as dies the soldier on the battle-field, may be passed calmly by; but one's blood boils to think of delicate women, little children, and strong men, beheaded, outraged, cut to pieces, their bodies cast to dogs and wolves. The American missionaries, burned or slaughtered at Pao-ting-fu, had never given the slightest offence, and were from homes of Christian culture and refinement.

Gilbert Reid, The Ethics of the Last China War, 32 THE FORUM 446, 454 (1901)

1.A. The Punitive Expedition

Of the dozens of punitive expeditions launched by the Allies, none aroused as much enthusiasm among Westerners as the October 1900 expedition to Paoting-Fu. The provincial capital of Chili province, located approximately 85 miles southwest of Peking, was a target of symbolic, strategic and psychological value to the Allies. The city was reported to have been a hotbed of Boxer activity throughout the summer of 1900 and served as a fallback position for Imperial troops bested by Western forces. The expedition was also the first major military operation since the Chinese siege on the foreign legations in Peking had been lifted and Tientsin had been secured; foreign fear had given way to anger at the Chinese government-in-exile for its participation in attacks on the legations and temporizing in the face of foreign demands for punishment. Nothing fed the lust for revenge though more than reports that the city had had borne witness to the gruesome deaths of twelve US and five English missionaries (and their families), including four children, as well as dozens of Chinese converts and servants.\(^2\)

\(^2\) Proposed Further Operations, THE TIMES (September 10, 1900).

\(^2\) NA, FO 881/9496x, OFFICIAL ACCOUNT OF THE MILITARY OPERATIONS IN CHINA, 1900-1901 COMPILED BY MAJOR E. W. M. NORIE, MIDDLESEX REGIMENT 133-4 (1903) [hereinafter: “Official Account”]; ARWD 1901, supra note 8, at 466 ‘Report on the Paotingfu Expedition and Murder of American Missionaries at that place’ (hereinafter “Hutcheson Report”). Hutcheson’s report is also available in NARA, RG 395/913. NARA, RG 59/ M[icrofilm] 102/R[oll Number] 6, No. 312 Fowler (US Consul in Chefoo) to Hill (August 14, 1900) (transmitting firsthand accounts of murders at Paoting-Fu); RG 59/M102/R6, No. 335 Fowler to Hill (September 5, 1900) (discussing the deaths of missionaries in Paoting-Fu and stating that “if this massacre is true, then it will be the duty of our Government to raze that City to the ground.”) forwarded to President McKinley at RG 59/130. (Acting Secretary of State) David J. Hill to (Secretary to the President) George Cortelyou (September 8, 1900). NARA, RG 59/M102/R6, No. 352 Fowler to Hill (September 18, 1900) (urging a military expedition to Paoting-Fu be organized, as “[w]e have evidence enough to hang the Empress Dowager in any Court of law. If she escapes her just desserts it will be only to punish us for our kindness”), forwarded to Secretary of War at NARA, RG 59/130 Secretary of State John Hay to the Secretary of War (Elilhu Root) (29 Oct. 1900). Also transmitting information related to the massacre at Paoting-Fu: NARA, RG 59/130 Secretary of State John Hay to Geroge S. Cortelyou (October 18, 1900); NARA, RG 59/130, John Hay to the Secretary of War (October 29, 1900); NARA, RG 59/130, John Hay to the Secretary of War (October 30, 1900); NARA, RG 59/130, John Hay to George B. Cortelyou (October 30, 1900); NARA,
stories of tortured evangelists, many exaggerated or fabricated, brought Western anger to a boil, and it was widely expected that the Allied troops would reduce the city to rubble for its crimes. 24 Suspicion that some missionary families were still prisoners of the Boxers in Paoting-Fu lent the expedition an additional air of urgency. 25

On 12 October 1900 Field-Marshal Waldersee dispatched columns from Tientsin and Peking with the objective of (1) finishing off the Boxers; (2) liberating the captive Westerners; and (3) punishing the city. 26 Both columns met up just outside of the city on 19 October 1900.

RG 395/906, Letter of J. M. Gould of August 31, 1900; NARA, RG 59/M102/R6, No. 363 Fowler to Hill (September 19, 1900); NARA, RG 59/M92/R109, No. 400 Conger to Hay (September 3, 1900).

Reverend Horace Pitkin, who was stationed at Paoting-Fu during the violence, was married to Letitia Pitkin. Her letters indicate that by 1 May 1900 Mrs. Pitkin’s father contacted his “personal friend” Senator (Ohio) J. B. Foraker seeking to ascertain the fate of his son-in-law. The State Department responded that if additional information were provided, “a full effort” would be made to discover her husband’s fate. Perhaps this personal connection explains the interest the highest levels of the US government maintained in events in Paoting-Fu.

ABCFM, Unit 3, Reel 297, No. 85, Letitia Thomas Pitkin to Smith.

ABCFM, Unit 3, Reel 297, No. 124, Porter to Smith (October 10, 1900) (“It does not appear to any of us a matter of vengeance, but of simple justice that a punitive expedition should go to Pao Ting and destroy the city where such enormities against the nations have been committed.”). The Crisis in China, The Times (August 27, 1900) at 3 (reporting widespread support for a punitive expedition to Paoting-Fu).

China No. 5, supra note 11, No. 210 ‘Sir C. MacDonald to the Marquess of Salisbury’. See also China No. 1 (1901) Further Correspondence respecting the disturbances in China (HMSO 1901) [hereinafter: “China No. 1”], No. 335, ‘Acting Consul-General Warren to the Marquess of Salisbury’ and No. 348 ‘Consul Carles to the Marquess of Salisbury’.

A copy of Waldersee’s order may be found in the Archivio Dell’ufficio Storico Dello Stato Maggiore Dell’esercito [hereinafter: “Aussme”], E-3, [Rac]coglitore 52, [fol]der 2, ‘Due Ordini Del Comte Delle Forze Internazionale in Cina Gen Wardersee All’Oggetto: operazione di Pao-Ting’. With respect to punishment, the order states that Gaselee was to (1) perpetrate no violence against the inhabitants or “requisition against the rules”, and (2) punish Boxers “with maximum severity”. There is no mention as to the form that punishment should take, who should be punished (all Boxers? all suspected Boxers? all individuals engaged at the time of capture in Boxer-like activities?), and for what acts. Nor do the orders mention the rescue of captive missionaries. Nevertheless, it seems that punishment for the July massacres and rescue formed part of a well-known subtext to Waldersee’s orders. See China No. 5, supra note 11, at No. 54 ‘General Sir A. Gaselee to India Office’ (“Under order of Field-Marshal I am to exact at provincial capital reparation for murder missionary converts [sic].”); No. 80 Sir C. Macdonald to the Marquess of Salisbury (explaining that operation was to “bring rescue to the missionaries there” and “avenged upon the town the massacres of last July.”). James William Jamieson, British Consul at Shanghai, accompanied General Gaselee and later reported that the troops had set out to punish the city and “determine the guilt of such persons concerned in these massacres as were to be found on the spot”. China No. 6, (1901), Further Correspondence respecting the disturbances in China (HMSO 1901) [hereinafter “China No. 6”], Inclosure No. 1, ‘Memorandum of Mr. Jamieson’s Visit to Paoting’ [hereinafter ‘Jamieson Memorandum’], in No. 40 ‘Sir E. Satow to the Marquess of Salisbury’; XXX (Insert Otte Waldersee diary citations). One of Waldersee’s strategic objectives in ordering the operation was to convince the Chinese court that it was in its best interests it to come quickly to terms for peace.


Column A (Tientsin) was under the command of the French General Bailloud, and was comprised of German-Italian and French units, while Column B (Peking), under the command of British General Gaselee, was comprised of French, German-Italian and British troops. Each column consisted of approximately 3,600 soldiers. Hutcheson Report.

A colorful description of the march from Peking comes to us from Mr. Angus Hamilton, one of the few foreign correspondents to travel with the column. Angus Hamilton, To Pao-Ting-Fu The Pall Mall Gazette, December 26, 1900 at 5. Hamilton wrote a follow-up article on October 18, 1900 covering the further marches of the column. At An-Tzu The Pall Mall Gazette, December 29, 1900, at 4. For firsthand accounts of Column A’s progress from Tientsin, see Scharf and Harrington, supra at 227-28; The Paoting-Fu Expedition Evening Post, December 24, 1900, at 5; The Paoting-Fu Expedition, Evening Post, December 22, 1900, at 5; Voyron, supra note
where they were approached by a deputation of civic-officials and prominent Chinese citizens. The fantai (provincial treasurer and, in this case, acting governor) Ting Yung assured the commander that their possession of the city would be a bloodless affair and offered commander Gaselee use of his sedan chair for a march through the city. Gaselee brusquely refused, and the next day he proudly led a column of Allied troops through the maze-like streets of Paoting-Fu from atop his horse.

In the absence of arrests, fighting or executions there was little sense of satisfaction in the exercise. Press reports from the frontline were subdued, and generally preoccupied with the contrast between the punishment Paoting-fu “deserved” and the unremarkable reality of an orderly transfer of power. From the *Pall Mall Gazette*:

It was a miserable morning. As we filed in, the horses in the van churned the road into mud, and the mud presently became slush, while as the rain increased out splashed and bedraggled appearance was altogether out of keeping with the dignity of the powers. Indeed, there was no doubt that the procession of our generals through the streets of a Chinese city was as preposterous an occurrence as anything that the imagination of Mr. Jamieson could possibly have devised. [...] It is due to him that the pantomimic display took place, redounding with no credit at all to us, and capable of being stretched to the widest limit possible and made to suggested to the people of China a totally and altogether false impression. The Allied procession arrived in due course at the city gates, where a group of Chinese officials in Sedan chairs were ready to meet them, chief among whom was the acting Treasurer of the Province, a man whose iniquities and cruelties to missionaries should have made him a subject more fitted for the gallows than for the pleasing duty of meeting the generals of the Allied generals in an official capacity. We know this man to have maltreated and personally persecuted the unfortunate missionaries who fell into his power; nevertheless, through the curious views of Mr. Jamieson, the whole of Europe was abashed and degraded in the face of such a man. [...] At the time of our procession it was unknown, but I have since learnt, that in at least one of the many streets through which we rode the bodies of several unfortunate missionaries who lost their lives in Pao-ting-Fu were revealed to public gaze. As another pleasant way of making manifest their opposition to the
precepts of Christianity, the Chinese in Pao-ting-fu caused the death of fourteen missionaries, among whom were four women, upon whose bodies, both before and after death, the most outrageous atrocities were committed. And yet with the memory of these events still fresh in the minds of the inhabitants of the town all that was sufficient in the eyes of the political advisor was an empty parade of forces, which was accompanied by no endorsement of that policy of firmness which is said to be the new method of treating with China. It was an empty show yesterday, devoid of meaning and the more strikingly a failure because it did not even come up to the estimate which the Chinese themselves had thought would be their just punishment.29

1.B. The International Commission of Inquiry; naissance, operation, dénouement

Of course what the correspondents did not know was that investigation into the role local officials had played in supporting the Boxers was going on behind the scenes even before the international forces entered the city; Captain Grote Hutcheson of the Sixth United States Cavalry, who accompanied General Gaselee as an attaché, reported that as early as October 19 that inquiry into the “the harsh, cruel, and inhuman treatment of foreigners” had begun.30 The results were “so damaging for officials and the inhabitants generally that it seemed some steps in the way of punishment” were called for. As the preliminary inquiry revealed that the number of American victims of Boxer excesses surpassed those of any other country, Gaselee sought Hutcheson’s “opinion as to the punishment of any persons guilty of atrocious conduct.”31 Hutcheson replied that he could not speak on behalf of his government, but that:

First. In my opinion the United States would uphold the prompt punishment of any officials whose guilty connivance was clear and plain, provided such punishment was meted out for the purpose of example and not to satisfy any petty feeling of revenge or retribution.

29 Angus Hamilton, At Pao-Ting-Fu PALL MALL GAZETTE, January 3, 1901, at 3. Another correspondent noted more outright hostile behaviors: “Though Pao Ting Fu had been occupied without opposition, it was plainly apparent to the most casual observer that the Chinese were in a very disturbed state. Europeans going through the city were received with insolent and insulting remarks, and on several occasions were the objects of spitting, a favorite form of insult.” Marching to Pao Ting Fu, THE LOS ANGELES HERALD, December 13, 1900, at 3.

30 Hutcheson Report, supra note 23, at 466. See also NARA, RG 395/911, Special Order No. 55 signed by Adjunct General Chafee (11 Oct. 1900). That Grote Hutcheson was one of only two US personnel to join the expedition was considered a betrayal by the missionary refugee community in Pekin. Reverend Perkins remarked that “[t]he US attitude…lacks in seriousness and seems to come from the same source that disbelieves in all punishment and would leave everything to moral maxim. I think it would not take this attitude had it lost heavily in commercial ways.”) ABCFM, Unit 3, Reel 297, No. 7 Perkins to Smith (November 30, 1900). From the correspondence of medical missionary Henry Porter: “The lesson of the assembly of the nations here had scarce been appreciated by the [Chinese] Court. Of course the Missionaries felt, as did the general public in China that the terrible massacre of American and other citizens at Pao Ting and in Shansi should not pass without its real and fruitful lesson and result. That Americans should consider it a matter of no importance that those dear ladies should be killed in cool blood by the acting Governor of a province, or that China should consider every man defending his life as a fit subject for beheading with indignity, seemed to us an impossibility. […] It seemed a small matter for the Americans to take a reasonable interest in the effort to find out at least whether her citizens were still living.” ABCFM, Unit 3, Reel 297, No. 124, Porter to Smith (October 10, 1900).

31 Hutcheson Report, supra at 466-67.
Second. That any steps General Gaselee thought necessary and proper under the circumstances would in my opinion meet with the approval of and be indorsed by General Chaffee; and

Third. That in view of the tense state of feeling because of the stories of the atrocious treatment and brutal murder of missionaries that had come to light, I suggested that a commission or board of inquiry should 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.  

Gaselee answered that the same idea had occurred to him, and on 21 October he established an International Commission “to make inquiry into the treatment of the foreigners of various nations who had suffered at Paotingfu.”

Although the Commission would not formally meet for its first session until the twenty-third, it was obvious to local officials that the walls were closing in. Their options limited, they made what efforts they could to secure foreign patronage. Newspaper correspondents from the United States were treated to generous accommodations, translators and guides, and given letters of introduction that ensured that they would remain unmolested in their travels throughout Chili. In exchange they were pumped for information about their European occupiers and forced to endure awkward flattery for their association with a nation that had declined to participate in the expedition. The awkwardness of the situation comes through in the frontline report of the correspondent for the Cleveland, Ohio Plain Dealer, who joined in a dinner attended by the foreign commanders, as well as the Prefect and Subprefects of Paoting-Fu:

There were scores of dishes served, but only chopsticks as weapons of attack, and the tyro made small headway until he sharpened one of them to use as a harpoon or one-tined fork. This amused the taotai, who laughed as heartily as if his death sentence were not already in preparation. Cold ham and chicken, rice, tea, soup and cakes were sufficient for a “square meal” without rashly experimenting with innumerable mysterious compounds.

The taotai asked many questions regarding the foreign forces, and said that he was grateful to the Americans for not sending soldiers with the allied expedition [to Paoting-Fu].

“It shows that you are a kind hearted people,” he continued. “You do not want to rob and murder the poor Chinese.”

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32 Id. at 467.
33 Id. Gaselee was anxious that punishment not derail negotiations in Peking, and he sought then-British delegate Claude MacDonald’s opinion as to how to deal with Ting Yung in the event he was found guilty. NA, PRO 30/33/7/9 Jamieson to MacDonald (October 20, 1900). If there was a reply, I have been unable to locate it.
34 Taking Pao-Ting-Fu, Plain Dealer, February 24, 1901; In Desolate China, Plain Dealer, March 10, 1901 (“Such extraordinary favors shows the taotai was trimming his sails, now that the foreigners had him at their mercy. […] His treatment of a correspondent was moved by fear was selfishness, no doubt […]”).
35 Taking Pao-Ting-Fu, supra note 34. The taotai was reluctant to discuss the massacres but he “would say no more than that the Boxers alone were responsible for their deaths”. Id.
Examination of the British, German, US and Italian Archives have unearthed only a few records directly referencing the Commission. These records are fragmentary, ambiguous, and in some respects in tension with each other and the limited public discourse that attended the proceedings. It has, for example, proved surprisingly difficult to pin down who was actually on the Commission. In his communications home Hutcheson listed the Commission’s membership as follows: General Bailloud (French army), 36 Colonel Ramsey (British (Indian) army), Lieutenant Colonel Salsa (Italian army), Major von Brixen, (German army), and J. W. Jamieson (civilian, British consul at Shanghai). 37 However, Lieutenant Sambuy’s procès-verbal (“Session Records”), one of only two documents that lays bare some of the inner workings of the Commission, 38 suggests that he was the Italian government’s man on the Commission (as a substitute for Italian Major Agliardi, not Salsa), and that Captain Francis Poole (and only Poole, as neither Ramsey nor Jamieson’s name appear among those who are recorded as having signed the minutes) represented the British. Sambuy’s account corresponds with the visual portrayal of the Commission at work that appears in the January 19, 1900 Supplement to The Graphic. The drawing is based on a sketch sent in by an unnamed British soldier and depicts former fantai (provincial treasurer and, in this case, governor of the city during the massacres) Ting Yung “pleading his inability to cope with the Boxers of quell the disturbances” before the forceful gaze of the Commissioners and his Australian guard. 39 In Jamieson’s brief account of the Paoting-Fu operation he describes himself as a Commissioner. 40 All sources agree that French General Bailloud was appointed President. 41

36 Waldense staffer von Rauch described a meeting with General Bailloud as follows: “On November 14, the Field Marshal receives a visit from the dashing General Bailloud [...] The sharp eagle face of the dashing horsemen General has something exceedingly interesting in it and reveals a high degree of intelligence. The boss is always pleased to argue with the general, in a chivalrous manner.” FEDOR VON RAUCH, MIT GRAF WALDERSSEE IN CHINA – TAGEBUCHAUFSCHREIBUNGEN 158-9 (1907).

37 Jamieson was described by Sir E. Satow as “a very competent Chinese scholar” who was “not popular with the men of his own service, [and who] in fact appears to be the object of universal dislike among his equals.” NA, PRO 30/33/14/11, No. 43 ‘Satow to Bertie’ (November 8, 1900). For a brief biographical sketch of Jamieson, see The Anglo-African Who’s Who and Biographical Sketchbook 1907 (David Saffery (ed.) & Walter H. Wills (compiler), reprint 2006).

38 The “Session Records” that comprise Annex 1 of this paper are a translation of “Commissione Internazionale D’inchiesta Circa Il Massacro Di Cristiani” found in the AUSSME, E-3, Rac 54, fol 40, translated with my appreciation by Federico Solchi. The diary of Captain né Commissioner Poole contains fragments of these procès-verbal. National Army Museum, ‘Microfilm diary of Capt (later Lt Col) F G Poole, Middlesex Regiment, at Peking, China, 1900; associated with the 3rd China War (Boxer Rebellion) (1900-1901)’ [hereinafter “Poole Diary”].

39 Jamieson may be the unnamed British official standing in the background. One of Gaselee’s translators described Jamieson as “the interpreter at the court.” Gatrell, supra note 28, at 149 (describing the Commission as a “court of inquiry (international)”).

40 Jamieson Memorandum, supra note 26. Jamieson was under orders to accompany the expedition as “political adviser to General Gaselee” in which capacity he was to “advise as to the most effective measures of punishing the city in certain given contingencies”. Id. He arrived in Paoting-Fu with suggestions for punishment already drafted, including (1) the execution of those concerned in murders of missionaries and converts, (2) destruction of the four corners of the city walls, (3) destruction of the gate towers, (4) burning of the temple of the guardian spirit of the town and (5) levying a fine on the city. China No. 6, supra note 26, at Inclosure 2 ‘Memorandum’ in No. 40, Satow to Salisbury., Gatrell described Jamieson as ‘the interpreter of the court’. Gatrell, supra note 28, at 149.

41 According to war correspondent George Lynch, Major-General George Richardson was initially selected as President, “but on the French remarking that ‘Il y va de l’honneur de France’ [the honor of France is at stake]” he withdrew. LYNCH, supra note 10, at 204.
Missionary literature suggests that the American Reverend James Walter Lowrie, who accompanied Gaslee’s troops as an interpreter, was a de facto Commissioner as well; “To the people he appeared to have the power of life and death. “All examinations had to be conducted through him. All accusations and evidence had to be sifted by him” wrote the missionary Arthur Brown several years later. But this source is best approached with a boulder of salt; Brown also describes Lowrie as “the only man [on the Commission] who could speak Chinese, and the only one too, who personally knew the Chinese”, a blatant falsehood assuming Mr. Jamieson’s involvement, as well as that of Dr. T. Gatrell, a British interpreter with the expedition who wrote in his letters that he was “busy on investigation all the time”. The most likely scenario is that Lowrie was used as a translator by the investigators, and his role was subsequently exaggerated to nurture a missionary metanarrative of strength and mercy in the wake of the mass killings.

Hutcheson’s expedition reports provides the name and position of the four local officials who were ultimately punished by the Commissioners:

1. Ting Yung – “the fantai or provincial treasurer, formerly and at the time the niehtai or provincial judge”
2. Quei Heng – “the chief tartar official of the city”
3. Wan Chan Kuei – “a lieutenant colonel in the Chinese army”
4. Shen Chia Pen – “the niehtai or provincial judge, but prefect at time of murders.”

Over the course of seven sessions the Commissioners directed the investigation and heard the evidence in their cases. The Commissioners were brief and not subtle in their interrogations. The fantai was asked bluntly, for example, why he did nothing to assist the Bagnall family, “becoming in this way an indirect accomplice of their deaths.” The question encapsulates the approach of the Commissioners: capital sentences were considered appropriate where, as here,

42 Arthur Brown, Report of a Visitation of the China Missions 7-8 (1902). Lowrie writes, upon seeing the five imprisoned, “I am frank in saying I do not feel any impulse in seeking their reprieve, so horrid was their crime, and so important is it that future mandarins should realize this responsibility of protecting foreigner’s lives, where possible, rests on them personally.” Lowrie’s letter of October 29, 1900, 4(2) The Assembly Herald 22 (February 1901).

43 Gatrell, supra note 28. A further hint that Lowrie’s role in the Commission was overstated comes to us in the form of a gushing eulogy from William Ellis. Ellis credits the minister, who “cherished no bitterness in his heart toward the poor, deluded people who had so foully ravaged his him and slain his closest friends and dearest comrades”, with single handedly convincing the commanders at Paoting-Fu to spare the city, but tells us “the missionary himself refuses modestly to talk about it, disclaiming merit for what he did, and declaring that the saving of the city was by no means his work alone.” William Ellis, How a Princeton Man Saved a City 15(28) The Princeton Alumni Weekly 8 (April 21, 1915).

44 For more on representations of Boxer punishments in missionary discourse, see James L. Hevia, Leaving a Brand on China: Missionary Discourse in the Wake of the Boxer Movement 18 Modern China 304 (1992).

45 Hutcheson Report, supra note 23, at 472 (emphasis added). Preparation of the report occupied all of Hutcheson’s time for a week, and by his own account represented a “full”, “thorough” and “substantially correct” account of events that was based only on corroborated evidence. ABCFM, Unit 3 Reel 291, No. 211, Hutcheson to Gould (January 24, 1901). Personally, he felt that “[t]he treatment of our own people was fiendish in its barbarity, and largely…the result of fanaticism combined with the possible hope of official preferment among the leaders.” Id. Hutcheson also reported that T’an Wen Huan “the present taotai, who it is alleged sent money and arms from Tientsin for boxers at Paotingfu” was sent by the Commission to Tientsin for trial. This decision, if taken at all, was not memorialized in the Session Records. Hutcheson Report, supra note 23, at 467. See infra note xxx (below Ragsdale citation)

46 Session Records, Second Session.
those high in authority had reinforced any single link in the chain of events that led to the massacres. Jamieson would later describe the accused as having “aided and abetted” the murders by their “culpable negligence”.47

The Commissioners rendered their unanimous verdicts on a rolling basis. Their mind was made up about Quai Heng and Wan Chan Kuei by the end of their third session. Death was recommended for the Tartar official in light of his indirect support of the Boxer movement on the fantai’s evidence that Boxers had organized in the Tartar court. The Lieutenant-Colonel was convicted on the basis of witness statements that his soldiers, either with his explicit or tacit consent, handed over an English missionary family (the Bagnells) to the Boxers. His defense that he had transferred the Bagnells to the Imperial army, over which he had no control, was unavailing.48 The Commissioners deposed the fantai during its second session, when he evaded answering a series of pointed questions concerning his support for the Boxers and neglect in protecting American and European missionaries.49 He was condemned, however, at the fourth session after being confronted with a copy of a telegram he sent to the Emperor stating that he lacked the resources to kill the Christians.50 Shen Chia Pen, the neitai was to be removed from office at the same time.51

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47 Jamieson Memorandum, supra note 26 (“[T]he Commission … had brought before it certain evidence strongly incriminating [the three officials sentence to capital punishment] of having been actually concerned in aiding and abetting the Boxer movement and thus practically directly responsible for the murders which took place.”). General Voyron, the Commander of the French Expeditionary Forces in China, presented the fantai’s and cavalry colonel’s guilt in terms of culpable omissions in his published memoirs of the command:

The Fan-Tai, who had protected neither Europeans or native Christians and allowed the massacre at the very gates of the province, the Tartar governor of the City, who was a principal organizer of the Boxer movement, and a Tartar cavalry colonel, who had left in his camp the murderers of an American missionary and her family, were beheaded in the presence of detachments of all the troops of the garrison, at the same place where the British and American missionaries were murdered.

The Nieh-tai, who seemed less guilty than the Fan-Tai, who though second in command still had a share in the responsibility for the disorder, was deposed and degraded at the same location.

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Voyron, supra note 26, at 211 (translated from the French by author)(emphasis added by author), M. Pichon, French plenipotentiary in Peking, reported simply the decapitation of the “three most senior officials responsible for the murder of the missionaries.” Ministere des affaires étrangeres, DOCUMENTS DIPLOMATIQUES – CHINE – 1900-1901 (1901), No. 9 Pichon to Delcassé (November 10, 1900). Reverend Arthur Smith, who took a great interest in news of the massacres and punishment of Paoting-Fu, wrote in 1901 of the sentence on “Ting-Jung, who had been the patron of the Boxer movement for the whole year…together with the Tartar General of the city and the Lieutenant-Colonel of the camp, who had refused protection to foreigners, and whose soldiers had stood idly by while the burning of the mission premises and the slaughter of missionaries was in progress.” Arthur Smith, “China Six Months After the Occupation of Peking” 67(15) The Outlook 33 (13 Apr. 1901).

48 Session Records, Third Session. See also Hutcheson Report, supra note 23, at 466, which describes the Colonel as “the military commander of the cavalry camp where the Bagnell family repaired without avail for refuge, and by whom their silver and other valuables were removed.” Quai Heng was “one of the most prominent men to offer moral, financial, and official aid to the Boxer movement.”

49 George Lynch hints at an aspect of the fantai’s defense in his post-war publication that does not appear in the Session Records: “That past master of equivocation…declared that no foreign lives had been taken within the city. The explanation lies in the fact that those unfortunate missionaries were just conducted without the borders, and there met their fate.” Lynch, supra note 10, at 204.

50 The authors of China Under the Empress Dowager published a letter, purportedly between Chinese officials in early July 1900, in which it is stated that Ting Yung:
The legal basis of the Commission’s findings are ambiguous, but two facets of the Commission’s design and operation suggest that the convictions were handed down for violations of what might have been dimly perceived, if never explicitly articulated, as *crimina juris gentium*. The fact that the Commission counted among its participants officers from states whose nationals had not suffered harm at Paoting-Fu (Germany, France, Italy) intimates that

[...] was largely responsible for the beginning of the trouble. I hear that about ten days ago he sent for all his subordinates to attend at his Yamen, and the Prefect of Hsuanhua, who was passing through, came to pay his respects with the others. This man said, ‘in the reign of the Chia Ch’ing there were heterodox cults of this kind, and the Emperor ordered them to be suppressed.’ T’ing Yung replied, ‘circumstances alter cases. Why should you not refer to those days?’ The Prefect answered him, ‘It is quite true that the calendar is no longer the same as it was at that time, but the enlightened principles laid down by our sacred ancestors should be a guidance to us forever.’ T’ing had of course nothing to say, and could only glare at him in silence and change the conversation.’


51 The “court-martial verdict” appears (in German) in Alfred von Müller, *Die Wirren und die Kämpfe der Verbündeten Truppen* 432 (1902), though it is not clear if the reproduction is based on the author’s recollection, an archival source, a copy of the verdict as displayed on Chinese-language posters hung by the Allies all over the city, or the public read-through of the decision at the execution of the convicted officials. Dated November 4, 1900, the “verdict” sets forth the following basis for the convictions:

Sentenced to receiving the death penalty through decapitation are the Fantai Ting Yung, who neither managed to protect Europeans and Chinese Christians, nor to prevent murder, such as massacre of missionaries, railroad officials and Christian Chinese; the Tartar Governor Kuli keng, who favored and organized the Boxers; the cavalry colonel Wang chan kuai, who allowed the massacre of the American missionary Bagnelle with wife and little daughter who sought refuge in his camp.

The Nientai Shen chia kuai, whose guilt is lesser because of smaller authority, who however participates no less in the responsibility for the misdeeds, is removed from his office and declared void of his rank.

Here we see a potential contradiction between various sources. Norie’s Official Account suggests a heightened responsibility for the *nei-tai*, and a diminished *mens rea* on the part of the *fantai*:

[...A]n order reached the city from the Viceroy Yu-lu, at Tientsin, stating that the foreigners at that place had been overcome by the Chinese troops; and that now the soldiers and the Boxers were to unite together to destroy all foreigners and all Chinese Christians. This message clearly indicated that the foreign missionaries at Pao-ting fu were to be put to death, but the fen-tai was timid about carrying it into effect, as he feared that the foreigners might again get the upper hand, and exact vengeance for any harm that had befallen their countrymen.

The nieh-tai, or provincial judge, was, however, entirely in favour of carrying out the order, and did all in his power to encourage the Boxers.

*Official Account supra* note 23, at 133. The Account was based on “all official reports and publications...and...unofficial diaries and descriptions of various incidents of the campaign.” Unfortunately, repeated searches of the National Archives have revealed none of the original reports, publications, journals, etc. that the Intelligence Department ostensibly relied on in the course of compiling its chapter on the Paoting-Fu expedition. It thus remains an open question how much the acknowledged “considerable revision and editing” of these sources resulted in a dilution of content, or loss of subtleties in language and tone that might provide insight into the operation of the Commission or resolve the tension between these sources. See Official Account, supra note 23, at Preface.
General Gaselee and his sub-commanders consciously intended the expression of exceptional and universal opprobrium. Even more tellingly, the Commission does not appear to have been limited to investigating and assigning punishments for the deaths of Western Christians. An account of the Paoting-Fu expedition by Colonel Garioni, commander of the Italian forces in China, describes a Commission tasked with punishing the murderers of Westerners, as well as Chinese Christians who should have been beyond the jurisdiction and protection of any foreign power.\(^{52}\) Jamieson’s report confirms that this was a key objective of the operation,\(^ {53}\) and the Session Records speak of murdered “Christians” without regard for nationality.\(^ {54}\) The record of the seventh session is even more explicit, announcing that the “military authority will act against all the people that will be thought to be guilty of having participated in the massacres against the Europeans and the Christians.”\(^ {55}\) It is relevant as well that foreign delegates in Peking had, echoing a phrase widely in use among China’s expatriate community, declared the massacres a crime against humanity. Four months after the Commission’s final meeting the Allies would cite the international criminal nature of the massacres throughout China to justify their demands for punishments in excess of those permitted by Chinese law.\(^ {56}\)

There are indications that the accused were convicted on the basis of more evidence than was memorialized in the Session Records. Gatrell wrote that the written testimonies of the Green family (who had been freed by the French soldiers approximately one week previously) “went a long way to bringing about the punishment” of Ting Yung and the other officials, that “everyone he saw [interviewed] laid the blame on the Fan t’ai,”\(^ {57}\) and that testimony which directly implicated Ting Yung and Quei Heng was “brought up against” them.\(^ {58}\) He mentions other evidence that would have been critical to a conviction; testimonies which, despite being “contradictory in parts,” were in general agreement that “the people of the villages immediately around the compounds took a large share in the work of destruction.”\(^ {59}\) There may have been additional documentary proof as well; in a January 1901 dispatch, a correspondent for The Times described a damning communique submitted into evidence in which Ting Yung stated that he would consider it a “disgrace to himself if one foreigner was left alive in his district.”\(^ {60}\) In his post-war retrospective, former German Army Lieutenant Alfred von Müller lists among the sources of evidence, “the testimony of the French missionary Pére Du Mont, who barely escaped death”, as well as the “concurring testimony of numerous Chinese Christians whose women and children had been killed in gruesome manner by higher level order”.\(^ {61}\)

\(^{52}\) AUSSME, E-3, Rac 55, fol 30/4 ‘La Spedizione Di Paoting-Fu. Il Combattimento Di Cu-Nan-Shien’. See also Jamieson Memorandum, supra note 26, which speaks of punishing those “responsible for the massacres” without distinguishing between victims of various nationalities.

\(^{53}\) Jamieson Memorandum. See also No. 54, supra note 26 (“Under order of Field-Marshal I am to exact at provincial capital reparation for murder missionary converts [sic.]”); Inclosure 2 ‘Memorandum’ in No. 40, supra note 40.

\(^{54}\) Admittedly, the Commissioner’s questions seem more oriented towards understanding the circumstances surrounding the deaths of Western Christians.

\(^{55}\) Annex 1, Seventh Session. See also Müller, supra note 51 (“verdict” announcing Ting Yung’s responsibility for massacre of Chinese and Western Christians).

\(^{56}\) See note xxx (will be around 82).

\(^{57}\) Gatrell, supra note 28, at 149

\(^{58}\) Id.

\(^{59}\) Id.

\(^{60}\) The Pao-Ting-Fu Expedition THE TIMES, January 5, 1901.

\(^{61}\) Müller, supra note 51, at 432 (translated from the German).
The Session Records verify none of this, but rather paint a picture of a Commission that struggled to find witnesses against the accused (with the exception of Wan Chan Kuei) or identify additional individuals who should be investigated. This experience was consistent with Hutcheson’s, who noted a number of variables that confounded his ability to put together his final Report:

It must also be borne in mind that the events to be described happened nearly four months ago, and, except in a general way have passed from the minds of most people here; that immediately following the occurrences they were much talked about, so that different versions and stories were currently believed to be true; that the principal actors have fled; that few persons can now be found who will admit having been present; and above all the slight regard in which the truth is held by the Chinese people.  

The dearth of press reports that might fill some of the gaps in our knowledge of the day to day operation of the Commission is attributable to “the officiousness” of a staff “understrapper” who excluded the press from the proceedings.  

Nevertheless, Luigi Barzini, Senior, the correspondent for the Italian Corriere della Serra, seems to have found a way in for at least one session. His account of the second sitting does not precisely track the Session Records, but it is consistent enough to warrant reproduction for the flavor it alone is capable of imparting to the proceedings:

None of the foreigners live to tell the painful story. No other foreigners reached Paotingfu until the arrival of the military expedition in October, three and a half months later. The Chinese who had participated in the massacre were then in hiding. Spectators were afraid to talk lest they, too, might be held guilty. Most of the Chinese Christians who had been with the missionaries were killed, while others were so panic-stricken that they could remember only the particular scene with which they were directly connected. Moreover, in those three and a half months such battles and national commotions had occurred, including the capture of Peking and the flight of the Emperor, that the people of Paotingfu had half forgotten the murder of a few missionaries in June.

[...] The guilty tried to shift the blame upon the innocent, and enemies sought to pay off old scores of hatred upon their foes by charging them with complicity in the massacres.

Brown, REPORT OF A VISITATION, supra note 42, at 3-4, 8. Dr. Peck, a missionary travelling through Paoting-Fu in March 1901, also had a difficult time finding witnesses willing to speak to him about the violence of summer 1900. He eventually found a local constable “who saw the affair.” His conclusions are published as “Letter of Dr. Peck of 14 March 1900” in The Missionary Herald vol 97 (Beacon Press, 1901) 245-46.

62 Hutcheson Report, supra note xxx at 468. In the earliest draft of his report, dated October 22, 1900, Hutcheson states that he had at that time received “[…] no direct testimony of eyewitnesses […].” Over the course of the next few days at least one eyewitness must have come forward, as this language was changed in the final version, dated October 25, 1900, to “[…] little direct testimony of eyewitnesses […].” NARA, RG 395/906, Grote Hutcheson, ‘Pao-ting-fu China, Oct. 22, 1900 - Statement of the Death of American Missionaries’ (October 22, 1900). Reverend Arthur Brown, who travelled to China in 1901 to assess the state of the Presbyterian Church in the aftermath of the widespread attacks on missionaries, put together his own account of the events at Paoting-Fu and explained the difficulties he faced in acquiring reliable information:

BROWN, REPORT OF A VISITATION, supra note 42, at 3-4, 8. Dr. Peck, a missionary travelling through Paoting-Fu in March 1901, also had a difficult time finding witnesses willing to speak to him about the violence of summer 1900. He eventually found a local constable “who saw the affair.” His conclusions are published as “Letter of Dr. Peck of 14 March 1900” in The Missionary Herald vol 97 (Beacon Press, 1901) 245-46.

63 Lynch, supra note 10 at 204. See also Thomas F. Millard, Punishment and Revenge in China, 29 SCRIBNERS MAGAZINE 187, 192 (1901) (“The commission began sitting immediately in secret session. No correspondents were permitted to be present.”); The Execution of Ting Yang  THE JAPAN WEEKLY MAIL (November 25, 1900) at 4 (“In forming an opinion [about the Commission] we labour under the great disadvantage of not knowing exactly what evidence was submitted to the court martial.”).
The Fang-tai was accused of having supported anti-Europe forces.

This magistrate defended himself with a real fury in front of the International Military Tribunal. Small, plump, bilious, with numerous words and gestures he worked tremendously to tear any responsibility from his shoulders, throwing it profusely over the Emperor, Empress, and Prince Tuan. [Realizing it was a] lost game, he embraced a leg of the table of the court, as if begging from the table the justice denied by the white men. The table was, naturally, Chinese.

The Tar-Tar governor put the court in a good mood. Imagine a seventy year old man, deaf as a post, who does not understand a word unless it is yelled in the left ear of a servant, especially in charge of this operation, which has the voice of a terribly shrill musician. The questions from the judges passed to the interpreter, the interpreter to the servant, and finally by the servant to the governor, who did not understand.

- Why--they asked him - have you allowed Boxers to use rooms in your house for meetings?
- My son--he answered--has been in Peking for six months.

He was also accused of having directly encouraged I-ho T’ciuan and the Ta-To-Que.

The colonel of cavalry had delivered the American missionary Bagnall and his family to the Boxers. He defended weakly. He simply asked if they would cut off his head. They answered yes. Then he made a gesture as if to say: It's fine! - and withdrew with dignity.64

Ting Yung, Quei Heng, and Wan Chan Kuei were recommended to capital punishment “by the Chinese method in vogue for criminals – beheading.”65 The Commissioners also advised the destruction of several local sites of religious and civil import, including all of the pagodas, buildings and towers along the city walls.66 General Gaselee left for Peking on October 28, 1900 and personally delivered the Commissioner’s recommendations to the Field-Marshal.67

64 LUIGI BARZINI, NELL’ESTREMO ORIENTE 306-307 (1905) (my translation from the Italian). It is also possible that Barzini did not witness these testimonies himself, but instead relayed the story as he heard it from someone present at the hearing. For more on Barzini in China, see SHIRLEY ANN SMITH, ITALIANS IN CHINA, 1900-1947 25-66 (2012), and Piero Corradini, Luigi Barzini e la Guerra dei “Boxers” 4 Cina 70 (1958).
65 Hutcheson Report, supra note 23, at 471. Jamieson Memorandum, supra note 26 at (“[T]he sentence was in the nature of a recommendation to the Field Marshal, with whom the ultimate decision rested […]”).
67 Jamieson Memorandum supra note 26. See also NA, FO 17/1449, ‘Movement of Troops’ (November 3, 1900). The precise relationship between the Field-Marshal and the allied contingents comprising the China Expeditory Force was never entirely clear. In the words of T.G. Otte, “[n]either the scope, nor the nature, nor the duration of his command were even specified.” THE CHINA QUESTION – GREAT POWER RIVALRY AND BRITISH ISOLATION, 1894-1905 (2007) 227. Gaselee was informed of Walderesee’s appointment in the following terms:
throughout China would have been united in eagerly awaited confirmation. The capture and trial of the officials was an unexpected surprise; no one had expected that in Paoting-Fu “any of the guilty parties would have the courage to remain” as other local governors had either fled or committed suicide in the face of the Allied advance. 68 Moreover, this would be the foreign soldier’s first opportunity to view a Chinese-style decapitation. Appealing to the Westerner’s baser instincts and thirst for a settling of scores, the execution was at that time without parallel in the Chinese adventure.

As they waited for Waldensee’s ratification of the recommendations, residents of Paoting-Fu were treated to the Commission-mandated destruction of a temple that the Boxers had used for their meetings and as a prison for various captured missionaries (Chi-Sheng-An Temple), and the official temple of the city (Cheng-Huang-Miao Temple). 69 Meanwhile the captured officials, who knew nothing of their proposed sentences, remained confined to their cells. Coincidentally, these were the very same rooms that had been utilized by the Presbyterian mission for Sunday services in Paoting-Fu before the violence. 70 Lowrie provides us with some insight into their mindset at this time:

My artist friend, Mr. McCormick, and I looked through the window, where so often curious gazers have gaped on us [Christians] of a Sunday morning service, and heard [Ting Yung’s] pitiful sighs and moans as he lifted up his morsel of food[,] and that only to put it down again untasted. He is a handsome man of forty-five. A reporter visited him two days since and after a conversation in which he deplored his folly in seeking enormous wealth and failing to discover the empty boasts of the Boxers, he then asked the reporter to loan him his revolver[,] evidently intending to commit suicide. This I should not be surprised to hear he had done before the day of execution arrives.

You will, as the General Commanding the Forces of a loyal Ally, afford him [Waldensee] every support in carrying out the operations that he may decide upon. You will foster, by every means in your power, the most friendly relations and feelings of true comradeship between all ranks under your command, and the soldiers of all the foreign contingents employed in North China. The command of the troops supplied by us, however, rest always with you, and the superior officers under your orders, although their special sphere of action, of the part they are to take in any particular operation, will be decided by Field-Marshal Count von Waldensee, and all order to the force under your command should he given through you or your Brigadiers.

Official Account, supra note 23, at 121.

General Vyon was initially ordered to “not fail to place his relations with the Marshal upon a proper footing”, though even this restrictive concession to foreign command was removed once the threat to the legations in Peking abated. China No. 1 (1901), supra note 25, at No. 215. Ultimately, the French refused to place a representative on the Field-Marshal’s staff. Official Account, supra note 23, at 120. See also Emmanuelle Braud, The International Expedition in China, 1900-1901: The Concept of a Sole Command in Multinational Operations, Alliances, and International Military Cooperation – Past and Future 57 (Robert Rush & William Epley eds., 2006).

68 Jamieson Memorandum, supra note 23. See also An Obituary List of High Officials, 1900 THE NORTH CHINA HERALD AND SUPREME COURT & CONSULAR GAZETTE (November 21, 1900).

69 Annex 1, Third Session. See also Hutcheson Report, supra note 23, at 472. It is a mystery why the Commissioners destroyed these sites without Waldensee’s confirmation, but awaited his approval for other acts of symbolic punishment.

The Official Account indicates that a parallel (and more summary) justice process was taking place outside of the International Commission; “[…] several Boxers implicated in the murders of the missionaries were also captured, tried, and shot”. Official Account, supra note 23, at 134.

70 ARTHUR BROWN, NEW FORCES IN OLD CHINA: AN UNWELCOME BUT INEVITABLE AWAKENING 210 (1904).
In the same [...] is another distinguished criminal under the sentence of death[,] if Count Waldersee approves, which he is almost certain to do, Fair [T’an] Wen Huan, a taotai of Tientsin. These men together with an old Manchu Commandant, Keui Hong [Quei Heng], bitterer even than they, the entire population of the city unite in judging worthy of death. There is another, Wang Chan Keui [Wan Chan Kuei], a military man in charge of the camp east of the city, who stopped the Bagnalls [a missionary family] in their flight, took their valuables and gave themselves over to the hands of the Boxers.\footnote{Lowrie, \textit{supra} note 42.}

That Waldersee approved the Commission’s recommendations would have surprised no one. This was, after all, a man who described himself as having only two principles of action in the China theatre; “to treat all Chinese like dogs, and to refuse everything asked of him by the Russian Minister.”\footnote{NA, FO 800/119, Colonel Satow to Lord Landsowne (December 20, 1900) (describing Waldersee’s comments to his English adjunct, Colonel Grierson). Waldersee wrote in his diary that “[o]nly if one behaves harshly and ruthlessly against them [the Chinese] can one make progress with them.” Annika Mombauer, \textit{Wilhelm, Waldersee, and the Boxer Rebellion \textit{in THE KAISER – NEW RESEARCH ON WILHELM II’S ROLE IN IMPERIAL GERMANY} 91, 115} (Annika Mombauer & Wilhelm Deist eds., 2003).} On 6 November the noises of a capital city waking up were punctuated by a series of explosions; the integrity of the city walls and adorning pagodas had been destroyed. Two hours later Ting Yung, Quei Heng and Wan Chan Kuei were executed, and Shen Chia Pen was publicly degraded:\footnote{T’an Wen Huan was beheaded shortly thereafter in Tientsin. According to the minutes of the TPG meeting of November 26, 1900 he was offered up to the Council by the Germans as having been “tried by a Chinese court and condemned to be decapitated, the sentence being approved by the Emperor.” NA, FO 233/118, minutes of TPG meeting of 26 November 1900, p 64. Although the Council had agreed to decapitate the prisoner, notes from the December 5, 1900 meeting indicate that the TPG was furnished “certain documents” by the Chinese, suggesting that a fresh review of the case accounting for new evidence was undertaken at that time. The TPG affirmed its earlier decision, and apparently felt the need to ensure that his death was at least as spectacular as that of his peers, as they now ordered that he should be “marched through the streets with a proclamation stating the cause of his execution and that “his head be exposed for five days with a copy of the proclamation.”” NA, FO 233/118, minutes of TPG meeting of December 5, 1900, p 83, also available at PVCGP, \textit{supra} note 6, at 61). Noting the actual execution; NA, FO 233/118, minutes of TPG meeting December 7, 1900, p 88, also available at PVCGP, \textit{supra} note 6, at 62. Their orders were carried out to a tee: He was brought here under a strong German guard, and marched through the Settlement - and executed at the North Gate at 11 o’clock in the day, after having been paraded before his countrymen as a condemned man. He seemed very indifferent, but made an offer of 50,000 taels ... if anyone would get him released. All nationalities were represented at the execution, and included a British Guard, Italians, Germans, Russians, Japanese, French, etc. The military were drawn up in a square on a vacant piece of land. [...] The executioner then made his first cut, and the blood spurted out. He followed it with five lesser chops, and finished by sawing through the rest of the muscular portion. The man who was holding the victim then let the trunk fall, and it splashed up the blood as it fell. An English officer had charge of the execution. During the different stages of the execution foreign officers were coolly taking snapshots. Usually if the criminal is only a murderer, or of the common kind, his head is severed at one blow, but as this was a special case his head was taken off a little at a time. Outside of the soldiers the natives crowded round, laughing and talking excitedly. The head was put in a basket, and the body left lying as it fell. We afterwards came across the executioner and his assistant hanging the head up in the basket on the city wall, where it now hangs as a warning to all evildoers.}
In the distance, now the sounds of a lively march were audible, international policemen (soldiers with red armbands) cleared the roads, the troops that were selected to be present during the execution of the three condemned moved in. Under the burning pagoda, through the mighty gate, passing by the hills of a Chinese cemetery, the march went past the destroyed part of the wall, where the execution was to take place in the presence of the magistrates and personally led by the police prefect. There the troops assembled in the form of a rectangle open to the wall, French and German troops side by side. Two sections of German soldiers, led by an officer, brought the delinquents and placed themselves with them in the open side of the rectangle. Major v. Brixen and Lt. Col. Ramsey stepped forward and read aloud, each in his own language, the judgment of the court-martial as confirmed by Field Marshal Count Waldersee. The convicts were led into the middle of the rectangle, where they awaited the Chinese executioner. Thereafter the condemned were led into the center of the rectangle, where the Chinese executioner was waiting for them. There followed successively and with much circuitousness, thus slowly and mercilessly for the delinquents, the execution of the three condemned, while the fourth had to watch. The corpses were packed in black coffins, while the heads of three were fixed on high bars, where they remained until the Chinese people had been convinced of the enforcement of the judgment. It was impressive how those condemned ones went to their deaths. With firm steps, but ashen faces, they walked up to the executioner; proudly they looked around before they knelt down without being forced in order to receive the mortal blow.

Soon after the retreat of the troops the Chinese rushed to the execution place and looked respectfully at the heads of the men, by whom they had previously been oppressed. Silently they crept home, but not without pausing to read the large posters on the way, which announced the wording of the judgment in Chinese. The finishing sentence of the judgment [the fine of 100,000 taels (500,000 Marks) against the shen-she] was registered with a certain malicious joy. Thus the punishment was not imposed as a contribution of the city with its poor inhabitants, but the rich and truly guilty ones had to pay. In the first case the town council certainly would have extorted 600000 Marks from the population and in the process diverted 100000 Marks into their own pocket. This was to be prevented,

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*Australians in China, The Evening News, January 28, 1901, at 8*

The precise relationship between the Commission and T’an Wen Huan needs to be explored further. While other records suggest either a TPG or Chinese trial, Hutcheson’s report, Lowrie’s letter home, and news media suggest that his case was decided by the Commission. See *Australians in China, infra* (“Documentary evidence was found in the Yamen that the man had acted as paymaster to the ‘Boxers,’ and he was known to have taken a very active part in the proceedings generally. While in Pao Ting-Fu, a day later, fresh evidence was found convicting him of his anti-foreign sentiments.”). See also *The Position of China, The Manchester Guardian, December 1, 1900, at 10* (“Tang Wen Huan, the Provincial Treasurer, who was sentenced to death by the Paoting-Fu military tribunal, is being brought to Tientsin to be publicly decapitated by the City Government executioner at the request of the Paoting-Fu military authorities.”).
and the fair and aforethought sympathetic consideration was also perceived as such by the population.\textsuperscript{74}

2. The International Commission and some essential cultural-legal contexts

The way to prevent a repetition of the terrible outbreak in China...is to bring the Chinese mind into close touch with the mills of justice when they grind exceeding fine.

\textsuperscript{74} Müller, \textit{supra} note 51, at 433-4 (translated from the German). Two first-hand accounts of the sentences were published by the press. In both cases the correspondents were cognizant that what they were witnessing was no mere execution, but a \textit{performance} intended to \textit{send a message}. The responses of the reporters to the theatricality of the beheadings, however, varied greatly. The unnamed reporter from \textit{The Advertiser} relished the martial atmosphere, underlining the acrobatic prowess of the executioner and his assistants, the efficient order to the proceedings, the evil nature of the deceased, and the merciless nature of the spared magistrate. \textit{Winter Quarters}, \textit{The Advertiser}, January 22, 1901. Barzini painted a more intimate picture, calling attention to the spoken and unspoken behavioral ticks of the parties involved:

Killing a man is nothing, especially for soldiers, even more so when in China; watching him be killed is terrible. […] General von Kettler nervously tapped his boots with his riding stick, committing all of his attention to this gesture. General Bailloud repeated to his neighbors: \textit{Mais c’est bien long, mon Dieu!} [But this is taking long, my God!] […]

Suddenly a large blade, grabbed with two hands, shone in the sun. The executioner beat the ground with his foot and raised the Sciabola. Twice he approached the bare neck to make a cut, there was a flash, and then a thud. […] The executioner turned toward the members of the military court, raising his thumb as if to say: ‘this makes one!’ After a few minutes the three heads of the condemned were hung on top of as many pikes in the middle of the square. The executioner threw the bloody sword on the grass, approached the judges, and uttered the sacramental words: “xing xian fa” [justice has been done!]

Meanwhile, a curious scene took place. The ancient Nieng-tai of Paoting-Fu, condemned to destitution, seeing himself in the square expected a terrible punishment. After losing the "face", he should have to lose his head. With Chinese resignation he waited his turn. But after these executions, [Shen Chia Pen] looked around in wonder, supposing that he had been forgotten by the axman. The interpreter of the military court told him that he was to be returned to prison, and that from this point forward he was no longer a Mandarin, but a Cooley. With every word the interpreter spoke, the old Nieng-tai was filled with superhuman joy; his eyes sparkled, his cheeks reddened, and his mouth opened up and, with a smile of bliss, sent exclamations of glad surprise. When the soldiers resumed bringing the new Cooley to prison, he went gleefully, lavishing bows and smiles to all the Zouaves of his escort.

\textit{Nell’Estremo Oriente, supra} note 64, at 307-313 (translated by author from Italian).

\textit{See also} Bourgon, \textit{supra} note 21, at 48-50; \textit{Brown, New Forces}, \textit{supra} note 70 at 210 (stating that few Chinese attended the execution: “The people fear and obey [Chinese magistrates] as long as they are officials, but often care little for what becomes of them afterwards.”). According to Norie’s Official Account “[t]he astonishment and horror of the Fen-tai, when he realized that he was to be executed for his guilt, were almost ludicrous. It was impossible, to his Chinese mind, that a magistrate of his rank could be in such a position, without hope of escape.” Official Account, \textit{supra} note 23, at 134. \textit{Le Petit Journal} (‘Exécution à Pao-tin-fu’, illustrated supplement dated 21 January 1901) and \textit{The Graphic} (5 January 1901) both depict the execution.

For information on the continued occupation of Paoting-Fu by French and German troops after November 1900, see \textit{Sous-Intendant Rupp, Les services administratifs à la colonne de Pao-Ting-Fou (Chine 1900-01)} 16 \textit{Revue du Service de l’Intendance Militaire} 105-119, 319-352, 614-634, 721-735, 1093-1130, 903-930, 983-1105 (1903).
The war in China has already developed, on the part of the allied powers, three distinct phases—resistance, punishment, and revenge. The first was natural, the second necessary. The third is criminal.

Thomas F. Millard, *Punishment and Revenge in China* 29 SCRIBNERS MAGAZINE 187 (1901)

The ambiguous and somewhat thin records of the Commission uncovered to date leave one with a sense of incompleteness. Where are the attempts on the part of the Commissioners to reconcile different visions of the law? Where is the effort to elucidate the legal and moral conditions that justified the Allies in their decision to supersede China’s sovereignty and prosecute foreign nationals? It’s possible that new documents held in the archives of any of the Powers participating in the Boxer intervention may come to light and reflect a vibrant exchange of ideas on these and other topics. But the paucity of the relevant records located so far in Germany, Britain and Italy suggest that these issues, which form a part of the topography of international criminal law today that we simply take for granted, never came up. In one regard then, the Commission is remarkable; perhaps no other international court has been developed with as little deliberation.

Yet the creation of the Commission was neither random nor *ex nihilo*, but rather a product of its time. In this section I unpack two of the Commission’s essential cultural and legal backdrops. I first suggest that, from the perspective of the commanders and sub-commanders involved in the Paoting-Fu operation, the establishment of the Commission was compatible with (1) the law of occupation; (2) the law of diplomatic protection; and (3) emerging principles of international criminal law, each interpreted through the lens of imperialism. I then propose that the Commission was an effort to mediate between the extreme humanitarian and militarist-revengist sentiments that vied for dominance in the wake of the Boxer intervention.75

2.A. The culturo-legal context

The conflict in China coincided with a profound transformation in the law of occupation. The newly minted Convention with respect of the Laws and Customs of War on Land (Hague II), imposed new obligations on commanders, including a general obligation to treat civilians with humanity and a responsibility to respect local law as they found it.76 But the obligation had not yet been incorporated into any Western military manuals, and the old standard afforded the commanders wide discretion over matters of justice. From the British Manual on Military Law (1899):

A commander of troops in time of war, and in occupation of a foreign country, or any part thereof […] stands temporarily in the position of governor of the country or part of the country which he occupies. In this latter capacity he imposes such laws on the inhabitants as he thinks expedient for securing, on the one hand, the

75 My goal in this section is not to offer a definitive causal explanation for the Commission, but rather to provide a brief overview that partially accounts for the anomaly and suggests some directions for subsequent research.
safety of his army, and on the other, the good government of the district which, by reason of his occupation, is for the time being deprived of its ordinary rulers. […]

As a general rule, the rule of military occupation extends only to such matters as concern the safety of the army, the invader permitting the ordinary civil tribunals of the country to deal with ordinary crimes committed by the inhabitants. The course, however, to be adopted in such cases is at the discretion of the invader. He may abrogate any law of the country and substitute other rules. He may create special tribunals, or leave the native tribunals to exercise their usual jurisdiction. […]

The most important power exercised by the invader occupying a territory is that of punishing, in such manner as he thinks expedient, inhabitants guilty of breaking the rules laid down by him for securing the safety of the army. […]

Although the laws and jurisdiction of the conquering State do not extend over such foreign territory, yet the laws of war confer upon it ample power to govern such territory, and to punish all offences and crimes therein by whomsoever committed. The trial and punishment of the guilty parties may be left to the ordinary courts and authorities of the country, or they may be referred to special tribunals administering martial law, organized for that purpose by the government of military occupation […].

HENRY WAGER HALLECK, 2 HALLECK’S INTERNATIONAL LAW (3rd ed., 1893) 439-440. See also WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 71 (4th ed., 1895) (“On entering an enemy’s territory an invader replaces the civil government by military control, and makes any changes which are necessary for his safety and success […]”); HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW (4th ed., 1904) 484-85 (“Military government…supersedes, as far as may be deemed expedient, the local law, and continues until the war or rebellion is terminated […]”). The British Manual was also consistent with the US Army’s field guide. United States Army, THE MILITARY LAWS OF THE UNITED STATES 830 (4th ed., 1901) (“It is authorized by the laws of war for a military officer commanding in time of war in a region of military occupation, and where the ordinary courts are closed by the exigencies of the war, to appoint a special court or judge for the determination of cases not properly cognizable by the ordinary military tribunals.”). The Hague Conventions were not incorporated into the British Manual until the 1907 reprint.

The German Militärstrafgesetzbuch (Military Code) of 1872 specifically made foreigners and Germans “in a foreign territory occupied or garrisoned by German troops” who commit “an act punishable according to the laws of the German Empire, against German troops or other appertaining to the same, or against any authority constituted by an ordinance of the Emperor” subject to Germany’s domestic criminal law, “as if their act had been committed [in Germany]” (Art. 161). William Winthrop (translator), MILITARY PENAL CODE (MILITAR-STRAFGESETZBUCH) FOR THE GERMAN EMPIRE [WITH THE ORDINANCE ESTABLISHING IT]. ISSUED JUDE 20, 1872; TO TAKE EFFECT FROM OCT. 1, 1872 (1873). A slightly different translation of Article 161 is given in ISABEL V. HULL, ABSOLUTE DESTRUCTION— MILITARY CULTURE AND THE PRACTICES OF WAR IN IMPERIAL GERMANY 125 (2005). See also Art. 5(4) Militärstrafgerichtsordnung (Military Procedure Code) (1898) available in ADOLPH WEISSLER, PREUSSISCHES ARCHIV: SAMMLUNG DER GESETZE UND DER DAS RECHTSWesen BETREFFENDEN VERORDNUNGEN UND VERFÜGUNGEN PREUSSENS UND DES REICHES (1898) (reaffirming Art. 161 of the 1872 Code by providing German court-martials with jurisdiction over natives). The French Code de Justice Militaire (1857, updated 1875) granted French conseil de guerre operating in foreign occupied territory jurisdiction over “nationals of the invaded country, foreigners found there, and French who, being outside of France, and may not come before the ordinary justice system of the French courts.” ANDRÉ TAILLEFER, LA JUSTICE MILITAIRE DANS L’ARMÉE DE TERRE EN FRANCE ET
Although this understanding of the law was now technically passé old habits of thinking would hardly have been replaced overnight, particularly in the context of an intervention in the affairs of a semi-civilized state. At any rate, Hague II offered its own potential justification for the establishment of the Commission; Article 43 only obliged occupying powers to respect local law to the extent that doing so did not interfere with their primary obligation to ensure “public order and safety.” No officer present in Paoting-Fu would have hesitated to declare that provincial officials who participated in mass crimes represented a security threat.

The Commissioners would also have been able to make use of the expansive concept of diplomatic protection endorsed by contemporary jurists and backed by extensive state practice. The following from Paul Pradier-Fodéré’s *Traité de Droit International Public, Européen et Américain* may as well have been written just for the occasion:

> It is the duty of all states to protect their nationals in foreign countries by all means which international law authorizes. [...] It owes them such protection when the foreign state has proceeded against them in violation of the principles of international law: for example, if the foreign state has...forced them to abjure their religion, if it has despoiled them of their property, if it has treated them with cruelty [...]. It ought to protect them even when the bad treatment or damages sustained by its nationals are not directly the act of the foreign state...but of persons having a private character as well. ... From this results the right to obtain...

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DANS LES PRINCIPAUX PAYS 224 (1895). The Italian *Codice Penal* (1869) was the most limited, affording courts-martial convened during war jurisdiction personal jurisdiction only over persons involved with the military, their servants, prisoners of war, and anyone who perpetrated some specifically enumerated crimes. *CODICE PENALE PER L’ESERCITO DEL REGNO D’ITALIA* (1869) Art. 545 & 546.

79 Hague Convention, *supra* note 76, at Article 43.

80 The obligation to respect local law was rarely respected in the immediate aftermath of Hague II. Even the otherwise law-abiding Japanese gave the provision short shrift, trying dozens of “treasonous” Chinese before military courts applying martial law in Japanese occupied territories of neutral China during the Russo-Japanese War (1904-1905). Nagao Ariga, Professor of International Law at the Military and Naval Academies, may as well have been speaking on behalf of any Great Power when he offered the following justification:

> The practice of martial law, in our view, a legitimate defense for an army in a foreign country. If this army was operating in its own national territory, the existing laws are sufficient to protect her, and she could entrust the application to the courts, which would not fail to punish any act harmful to its security. But in foreign countries, it must have the right to make the law and apply it herself, because, firstly, we can not be certain that the laws of the country where it is located offers sufficient protection in all circumstances, and secondly, in the event that they are sufficient, we cannot be confident that the [local] courts will want to apply or have the authority to ensure its implementation. This double reason, from which results the right for an army to enact laws and to hold military tribunals, applies not only to an army operating in enemy country, but also an army located in a neutral country, as was China, or ally, as was Korea. That is why our army has not hesitated to use this right in both of these two countries.


81 M. OFFUTT, THE PROTECTION OF CITIZENS ABROAD BY THE ARMED FORCES OF THE UNITED STATES (1928); Department of State, Office of the Solicitor, RIGHT TO PROTECT CITIZENS IN FOREIGN COUNTRIES BY LANDING FORCES, SECOND REVISED EDITION (US Government Printing Office 1929) 26-34 (summarizing the state of doctrine)
justice by force if it cannot be done otherwise. […] Whoever maltreats a citizen indirectly offends the state which ought to protect this citizen. The sovereign of such citizen ought to avenge his injury, and compel, if he can, the aggressor to make entire reparation or punish him […]. To oppose the acts which caused the damage, to make reparation, or to punish the authors, the state of the offended persons [...may go] even to war [...]. 82

Additionally, it was around this time that the entanglements between notions of humanity, crime, personal accountability and punishment reached critical density, triggering the appearance of a new norm of individual criminal responsibility under international law. This fresh wrinkle in the law of nations was closely connected with other aspects of the Allied response to the Boxer Rebellion, particularly with the lengthy negotiations over the punishment of high ranking Boxers taking place in Peking. The deployment of the phrases like “crimes against the law of nations, against the laws of humanity, and against civilization” and “abominable violations of international law” to refer to acts of abuse perpetrated against Westerners in Allied communiques addressed to the Chinese government established the illegality of mass violence as a theme at the peace conference and a problem that the Imperial officials would have to address. 83 These appeals to international law were not merely hortatory; the Chinese twice asserted that the punishments demanded by the foreign ministers were incompatible with Chinese law and twice were met with the answer that their responsibility must be assessed under international law. 84 By doing so the representatives of the Powers in Peking, much as the British would decades later at Constantinople and the Allied Powers would nearly half a century later at Nuremberg, elevated “crimes against humanity” from an invocation of ceremonial significance to a genuine legal category with a powerful material effect of allowing the international

82 Right to Protect Citizens, supra note 81 at 26 (emphasis added) translating and citing 1 Paul Pradier-Fodéré, Traité de Droit International Public, Européen Et Américain—SuiVant Les Progrès de La Science et de la Pratique Contemporaines 614-630 (1885-1906). The German Criminal Code of 1871 embodied an understanding that “[…] when a foreigner has committed a crime in a desert, or in another state which refuses to use its right of punish[ing], and thus deprives the Empire or its dependents of a legitimate satisfaction, the Empire acquires a natural right of punishing that foreigner.” Geoffrey Drage, The Criminal Code of the German Empire Translated with Prolegomena and a Commentary 90 (1885).

83 Infra note xxx. See also China No. 6, supra note 26, at Inclosure 1 ‘M. de Cologan to the Chinese Plenipotentiaries’ (a joint communique of the foreign ministers to the Chinese government declaring twelve Chinese thought to be involved in the attacks on foreigners officials guilty of “abominable violations of international law”) in No. 41 ‘Sir E. Satow to the Marquess of Lansdowne’.

84 In May 1901 the Chinese pointed out that the punishments demanded by the foreign Plenipotentiaries exceeded those available under Chinese law. “The foreign representatives, in asking punishment of Chinese officials”, the Chinese optimistically wrote, “naturally can not [sic] desire that it should be in violation of the statutes of China.” The Allies were disinclined toward leniency and noted that their “preoccupation has been to repress with moderation and justice crimes against the law of nations, against the laws of humanity, and against civilization, crimes which, being without precedent, had not been foreseen by Chinese law.” Foreign Relations 1901, supra note 4, at ‘Inclosure 9a’ and ‘Inclosure 11’ in No. 107 ‘Mr. Rockhill to Mr. Hay’. A similar objection had been raised (with identical results) in February 1901 about the requested punishment of two high ranking court officials. NA, FO 405/105, supra note 17, at ‘Satow to the Marquess of Lansdowne 6 Feb 1901’ (Responding to an objection that Ying Nien and Duke Lan should be held accountable as accessories, not principals, as a matter of Chinese law: “I answered that the offences committed were not against Chinese law, but against the law of nations and of humanity. Chinese law could not be taken into consideration.”).
community to reach purported perpetrators whose behavior had been consistent with relevant domestic law. 85

The consolidation of substantive international criminal law gained traction along with the correlated idea of the *sui generis* international criminal court. A mere two years before the Boxer intervention Europe’s Great Powers had established a series of international tribunals at Crete to try individuals accused of participating in or inciting mass violence. Such immediate and authoritative evidence of a pan-European commitment to the principle that some violations of international law were of supranational concern and could only be adequately answered for before the representatives of that community would have exercised a powerful influence on any of the Commissioners who were aware of it. 86

Of course the twenty-first century historian or lawyer, sensitive to allegations of retroactivity and unfairness, will no doubt pick up on the limits of these justifications. We may quibble, for example, over whether the law of occupation was applicable at all to the Paoting-Fu sortie. 87 After all, the traditional understanding, reflected both in the British Manual and Hague II, was that a state of occupation was predicated on the existence of an inter-state armed conflict, and the circumstances in China at the time the expedition was launched were ambiguous enough that it is not clear whether this prerequisite was satisfied as of October 1900. To wit, at that time no declaration of war had been addressed by China to the foreign powers, 88 and the Chinese

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85 I am in no way asserting that “crimes against humanity” in the same sense as we know it today had emerged by 1901, only that CAH as a general legal category had come into its own. The specific acts that populated that category were not clearly defined. “Massacre” was probably a good candidate given that this term was widely used by Western states throughout the nineteenth century in association with their various humanitarian interventions, though the word does not appear to have ever been given a precise legal definition. David Rodongo, *The ‘Principles of Humanity’ and the European Powers’ intervention in Ottoman Lebanon and Syria in 1860-1861* in *HUMANITARIAN INTERVENTION – A HISTORY* 162 (Brendan Simms and D. J. B. Trim, eds., 2011).

86 The various courts and commissions that maintained law and order, and prosecuted what we would refer to today as crimes against humanity (though that phrase was not used in connection with the outbreaks of inter-ethnic violence or attacks on European occupiers) in Crete are dealt with expertly in R. John Pritchard, *International Humanitarian Intervention and Establishment of an International Jurisdiction over Crimes against Humanity: the National and International Military Trials in Crete in 1898* in *INTERNATIONAL HUMANITARIAN LAW: ORIGINS, CHALLENGES, PROSPECTS* 1-87 (John Carey, William V. Dunlap, R. John Pritchard, eds., 2003 ). Further research will need to be done in order to determine how much crossover, in terms of personnel or information, between the international justice endeavors in Crete and those in China. News reports and official documents, however, do suggest that comparisons between the two operations were obvious and commonplace, and that General Gaselee was aware of the Crete precedent in a general sense. NA, ADM 116/118, Case XIII ‘Important of Arms into China’ (discussing the Allied experience with blockade in Crete); NA, FO 17/1471, Gaselee to Satow (Mar. 1901) quoted in No. 106, Satow to Lansdowne (Mar 16, 1901) (“There was no Commander-in-Chief in Crete and yet order was restored in that island. Our experiences of a Commander-in-Chief [Waltersee] have hardly been happy.”). Ardagh also drew comparisons between the two occupations. See Memorandum of Maj-Gen Ardagh of September 22, 1900, supra note 14 (suggesting that the occupation of Chili province should be organized on the principle of one nationality per district “as was successfully done in Crete.”) Collective occupations afforded opportunities “for plunder, extortion, massacre and wanton destruction, for which no one can be brought to account […]”). *See also Our London Letter The MERCURY* (December 15, 1900) (comparing the Crete and China expeditions).

87 Another interesting question is whether courts established by an occupying power could “reach back” and hear cases involving acts that predated the occupation. French courts, repeatedly confronted with the questioned, consistently answered in the affirmative. Taillefer, *supra* note 78, 241-243.

88 The Dowager’s June 21, 1900 “declaration of war” was not sent directly to foreign ministers and was ignored by many provincial officials, suggesting that the Empress lacked the capacity to speak as the ‘single voice’ of her country on this issue. See Immanuel C. Y. Hsu, *Late Ch’ing foreign relations, 1866-1905,* in 11 *THE CAMBRIDGE HISTORY OF CHINA*, 123-4(1980); Esherick, *supra* note 2 at, 302-3. For more on the competing contemporary
plenipotentiary and new viceroy of Chili province Li Hung-Chang had not only disavowed the actions of the Boxers, but when informed that the Powers intended to mount an expedition to Paoting-Fu, had instructed the provincial officials under his authority to cooperate with the foreigners and imperial troops in the area not to oppose the advance. Additionally, the law of diplomatic protection only allowed the Allies to reach cases involving their own nationals. How to justify the preoccupation of the Commission with massacres of foreigners and converts alike?

In answering these questions, the *fin de siècle* law of nations would have been considered through the lens of prevailing Western ideology, the *mission civilisatrice*, according to which the Chinese, as a decadent, cruel, backward and violent people, were not entitled to the benefits of membership in the civilized community of nations, even where law dictated otherwise. This partially explains why widespread looting, rapes and massacres perpetrated by foreign troops in China were sanctioned at the highest levels of some Allied commands, despite the obligation memorialized in the Preamble to the Hague Convention to uphold a minimum standard of conduct even when fighting an “uncivilized” power. Boasts of brutality, like the following

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89 China No. 5, supra note 11, at No. 80 ‘Sir C. MacDonald to the Marquess of Salisbury’.

90 1 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 34 (1905). NA, WO 32/6414, No. 4 Grierson to Knox (November 20, 1900) (German military theory is “excellent probably for European warfare, but quite inadequate for war in semi-civilized countries.”). WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 44 (4th ed., 1895) (‘Tacitly, and by inference from a series of acts, states in the position of China may in the long run be brought within the realm of law; but it would be unfair and impossible to assume, inferentially, acceptance of law as a whole from isolated acts or even from frequently repeated acts of a certain kind”). THOMAS HOLLAND, STUDIES IN INTERNATIONAL LAW 128-29 (1898) (“[The Chinese] have shown themselves to be well versed in the ceremonial of embassy and the conduct of diplomacy. To a respect for the laws of war they have not yet attained.”). For more on the “standard of civilization”, see G. GONG, THE STANDARD OF “CIVILISATION” IN INTERNATIONAL SOCIETY (1984).

91 Nowhere is racial and cultural animus more apparent than in the reports of Field-Marshal Waldersee, who in the very same missive in which he informed the Kaiser of his approval of the Paoting-Fu expedition, contended that “one can only command the respect of the Asian through force and its ruthless application.” Sabine Dabringhaus, *An Army on Vacation? The German War in China, 1900-1901*, in ANTICIPATING TOTAL WAR: THE GERMAN AND AMERICAN EXPERIENCES, 1871-1914 469 (Manfred F. Boemke et al., eds., 1999) quoting *Denkwürdigkeiten*, supra note xxx, at 28. Dabringhaus. Hull and Hevia both attribute the pervasiveness of Allied excesses throughout the Boxer conflict to racial attitudes. *Id.* at 463-472. See also Hevia, supra note 44, at 186-314; Hull, supra note 78, at 135-6, 148-152.

92 See generally Dabringhaus, *supra* note 91; Hevia, *supra* note 44, at 198-240. Consider the Kaiser’s infamously inflammatory “Hun speech” of 27 July 1900, delivered to one of the first batches of German army troops *en route* to China:

A great task awaits you: you are to revenge the grievous injustice that has been done. The Chinese have overturned the law of nations; they have mocked the sacredness of the envoy, the duties of hospitality in a way unheard of in world history. It is all the more outrageous that this crime has been committed by a nation that takes pride in its ancient culture. Show the old Prussian virtue. Present yourselves as Christians in the cheerful endurance of suffering. May honor and glory follow your banners and arms. Give the whole world an example of manliness and discipline.

You know well that you are to fight a cunning, fearless, well-armed and cruel foe. When you arrive, know this: pardon will not be given, prisoners will not be taken! As a thousand years ago the Huns made a name for themselves, so must the name ‘German’ through your actions be upheld in China, so that for a thousand years never again will a Chinese person dare even to look askance at a German.
drafted by the commander of Russian forces in Manchuria and published in the *Amur Gazette*, set the expectations for the standard of conduct troops would adopt:

Until recently the Russians and Manchus have lived in harmony together, which was productive of much good, especially to you; but a month ago you were guilty of the insolent absurdity of attacking Blaoveshinsk and the Russian inhabitants, forgetting the terrible strength of the Russian Czar in lands, men, and arms. For this you are terribly punished. The town of Aigun and the villages along that bank of the Amur which dared to attack the Russians have been burnt, your troops are destroyed. The Amur is polluted by masses of Manchu corpses. None of the inhabitants of Manchuria dare to return to the villages on the banks of the Amur.93

Clearly the idea that confrontations with semi-civilized peoples fell within the remit of humanitarian law had not yet been fully internalized by the Great Powers.94 The officers of the Paoting-Fu expedition, even those who may have deplored the us/them divide that persisted in the law and welcomed the incorporation of notions of a common humanity into warfare, were still operating as the representatives of societies whose relations with China had been steeped in the logic of the civilizing mission for a century, and whose citizens had been slaughtered in horrific circumstances. Paternalistic Eurocentrism with its attendant entitlement and pedagogical imperative was one of the lodestars by which the occupiers steered the ship of justice. Under these conditions it was virtually inevitable that any benefits of the doubt that in other

The Kaiser’s demagoguery was cited by German soldiers as justification for their disregard of the Hague rules. JOHN C. G. RÖHL, WILHELM II: INTO THE ABYSS OF WAR AND EXILE, 1900-1941 76-77, 84-86 (2014).

93 FO 405/96, Inclosure ‘Extract from the “Amur Gazette” of August 14, 1900’ in No. 51 ‘Mr. C Hardinge to the Marquess of Salisbury’ (October 1, 1900). The process of humanizing conflicts with inferior powers was advanced by pragmatists as much as idealists. Sir Charles Hardinge, British Councilor of the British Embassy in Russia and eminent pragmatist, wrote of the Russian commander’s letter:

General Gribsky appears to be striving to emulate the example of General Skibeloff when he endeavoured to exterminate the Tekke-Turcomans after their final defeat at Goe-Tepe. Such a policy…though ruthlessly cruel, had at least its justification as a practical measure, since the Tekke-Turcomans numbered only 30,000 in all; but General Gribsky has not even this excuse for his inhuman conduct, since it would be impossible to exterminate 5,000,000 Manchus.

In any case, the Chinese may be reasonably expected to consider such indiscriminate massacres of their countrymen as palliating, if not justifying, their own inhuman barbarities.

*Id.* at No. 51.

94 PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: THE CONFERENCE OF 1899 83, 287, 343 (James Brown Scott ed., 1920). The tensions between those who wished to see the Chinese treated with respect and those who perceived the country as a barbarous backwater deserving of whatever atrocities the Allies doled out is nowhere better illustrated than in the following interaction between the progressive China correspondent Thomas Millard and an unnamed American lawyer:

“I guess they’re very uncivilized?” he said.

“Why, not at all,” I replied. “They were civilized when our forefathers were naked savages.”

He seemed a bit staggered by my answer, although he must already have known what I told him.

“Well, if they’re so civilized,” he retorted, “how does it happen that we can lick them so easily?”

circumstances might cut in favor of an accused, or misgivings that their International Commission had exceeded the letter or spirit of the law, would be resolved in favor of Allied caprice. To return to the question of the applicability of the laws of occupation, the officers would have found themselves persuaded by at least one of several immediately apparent counter-arguments: the laws of belligerent occupation should apply by analogy to “peaceful occupations” or “police actions”; the Allied attacks on the Dagu forts in mid-June 1900, as well as the Imperial edict of June 21, 1900, amounted in sum and substance to mutual declarations of war, and there had not yet been any formal surrender by the Chinese government to the Allies; and Li Hung-Chang’s averments as to the antagonism between the Boxers and the Imperial government flew in the face of the known facts and were, in any event, beyond his remit to negotiate the terms of peace.

Their imperialist heritage would also have shaped the Commissioners’ attitudes towards international courts. Colonial policies had introduced into the Western intellectual portmanteau the idea of ‘othered’ legal spaces geographically within but spatiolegally divorced from the territory on which they sat. Consistent with their treatment of other semi-civilised states, over the course of the nineteenth century European nations and the United States had impelled the Chinese government to grant extraterritorial privileges excepting foreigners from Chinese law and entitling them to have their cases heard before judges from their own country or by jointly administered Mixed Courts. The longstanding acceptance by all but the Chinese of these unconventional institutions primed officers at Paoting-Fu, as well as the wider community of foreigners, to validate the (otherwise not necessarily intuitive) turn to exceptional internationalized punishment.

2.B. Prudential considerations

The bivalent imperatives of culture and law may explain how the Commission was understood as legitimate. But to appreciate why the turn to an international institution was prudent, we must also understand how polarized the nineteenth century public was with respect to appropriate role of collective punishment during the lead-up to the Paoting-Fu expedition. Many foreigners in China were vocal in their support of a “total war” on China, the *Pekin and Tientsin Times* going so far as to propose reducing Paoting-Fu to ashes, and summarily removing the heads of those local officials against whom “any” evidence existed, every captured member of the “late [Imperial] Government,” and any local found to be in possession of arms. For this

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95 Xiang, *supra* note 8, at 282, 289-90 (quoting various political and military officials who perceived the attacks on the Dagu forts as a *de facto* declaration of war).


97 The 1899 Hague Conventions marked a turning point in the erosion of the traditional rule that an entire population could be penalized merely by virtue of their association with an enemy state, in favor of a new expectation that, regardless of the standard of civilization of the enemy, “[n]o general penalty, pecuniary or otherwise, can be inflicted upon a population on account of the acts of individuals for which they can not be regarded as jointly and severally responsible.” Hague Convention, *supra* note 76, at Article 50. State practice and some segments of the reading public, at least, were slow to catch up with the change.

98 *How China Should be Dealt With JAPAN WEEKLY MAIL* (January 26, 1901) 11 (reprinting the suggestions, noting that a “leading English periodical” supported these propositions, and commenting that the bloodthirstiness on display was excessive); *The Chinese Question* *THE TIMES* (September 28, 1900) (“[N]othing can be counted as effective until Pao-ting-fu is razed to the ground […].”). The missionary W. A. P. Martin suggested levelling the city and salting the earth. *THE SIEGE IN PEKING, CHINA AGAINST THE WORLD* 139-140 (1900).
subset of the population, the logic of symbolic and psychological warfare was simply too compelling to deny. But their voices were counterbalanced by individuals like journalist Thomas Millard, for whom “the spectacle of a Chinese baby torn from its dead mother and bayoneted or thrown to drown in a river, is as pathetic as if that child were white” and the Japan Weekly Mail, which in grand humanist tradition questioned: “[…] what was Paoting’s share in that atrocity? Was it not perpetrated by the Boxers with the consent – implied if not expressed – of the local officials? We have never heard that the citizens of Paoting were responsible for it, and surely to destroy the city for such a reason would be a hideous outrage.”

Those charged with effectuating the punishment of Paoting-Fu would have been aware of these cultural crosscurrents and weighed their options accordingly. The instantiation of an International Commission from this perspective was an inspired attempt at satisfying both the stridently humanitarian press that had castigated and galvanized public opinion at home against Allied troops run amok in Tientsin and Peking, as well as those domestic constituencies and expatriates who had developed an appetite for revenge. International Commissions on the whole had cultural cachet among those Westerners interested in humanizing, systematizing and rationalizing punishment by virtue of their inclusion in the Hague Convention for the Pacific Settlement of International Disputes (1899). With respect to individual punishment, trial by International Commission implied that accused had received the benefits of, if not the most due process theoretically possible, then at least a rational process. Collective punishments – in this case fines and destruction of property – would not be eliminated completely, but could at least be legitimated through their association with an international institution. Moreover, the Commission

99 In James Wilson’s Under the Old Flag the author recounts how a British officer, General Barrow, operating under his command requested his permission to blow up a pagoda. When Wilson questioned the rationale for its destruction Barrow replied that “if the Christians did not destroy this famous Chinese temple, the Chinese, who had destroyed many missionary churches, would conclude that their gods to whom the Pagoda was dedicated were more powerful than the God of the Christians.” 2 JAMES WILSON, UNDER THE OLD FLAG 530 (1912).

100 The Expedition to Paoting JAPAN WEEKLY MAIL (October 20, 1900) at 3. Millard, supra note 63, at 194 (“Events such as the months of September, October and November brought to China have carried war back to the Dark Ages, and will leave a taint in the moral atmosphere of the world for a generation to come.”). War correspondent Harry Thompson criticized the Allies for the wanton destruction of cities as a breach of international law, though he regarded Lord Elgin’s burning of the Summer Palace in 1860 as a “short and sharp” punishment superior to the demand for the death of leading Chinese officials by the plenipotentiaries in Peking. HARRY THOMPSON, CHINA AND THE POWER: A NARRATIVE OF THE OUTBREAK OF 1900 129-132, 225 (1902).

The same tension between progressives and martial extremists manifested in other turn-of-the-century conflicts. The 1900’s saw the United States and Great Britain both engaged in brutal guerilla wars, the former in the Philippines, and the latter in South Africa. In both the American-Philippine and Anglo-Boer wars Western commanders employed policies of “total war,” directing their subordinates to target civilians for torture, imprisonment and death, and collective punishment. And in both cases scathing coverage of these strategies by the news media prompted high-profile courts-martials for these excesses. These trials, which post-date the Commission by several years, confirm that some portion of the public and members of the international community of states had conceded in the early years of the twentieth century that at least lip service needed to be paid to the idea that the rules of war applied even to conflicts against the “savages” of the world and prohibited acts of appalling destruction. Glenn Anthony May, Was the Philippine-American War a “Total War”? in ANTICIPATING TOTAL WAR, supra note 91, at 437-459. Guenael Mettraux, US Courts-Martial and the Armed Conflict in the Philippines (1899–1902): Their Contribution to National Case Law on War Crimes, 1 J INT’L CRIMINAL JUSTICE 135 (2003). Joseph R. Vergolina, “Methods of Barbarism” or Western Tradition? Britain, South Africa, and the Evolution of Escalatory Violence as Policy” 77 JOURNAL OF MILITARY HISTORY 1303 (2013).

101 Commissions of Inquiry were described by the 1899 Hague Convention for the Pacific Settlement of International Disputes, according to which Commissions could be called into being by the mutual agreement of disputing states to elucidate “the facts” and “facilitate a solution to…differences”. 1899 Hague Convention, supra note 76, at Arts. 9-14.
would, hopefully, channel the collective punishment impulse away from looting, rape and murder, and towards symbolic (and less acute) forms of retribution. In short, by mediating punishment through an International Commission the Allies were able to validate their punishment of the city officials, justify as not unduly harsh or illegal the other ‘indelible brand[s]’ left on the city, manifest the sort of decisive and spectacular action expected of them as Great (and Christian) Powers occupying a semi-civilized country, and close the gap between their imperial and moral obligations.

3. Diplomatic, public, and missionary discourse in the wake of the execution

The trial and punishment stimulated a vibrant and even nuanced dialogue at the diplomatic, public and inter-personal level, as Paoting-Fu’s supports and discontents grappled with the same Great Questions that bedeviled diplomats, politicians, lawyers and academics today: How should captured enemies be dealt with? Will a judicial reckoning reinforce or undermine peace? What are the goals of international justice and what sort of institutions accomplish them? What punishment is appropriate for heinous crimes? Does it matter for sentencing purposes that the perpetrator was swept up in a mob frenzy? When the dust of international justice has settled, who should have benefitted? Who should be swept up in the net of justice? Who should determine guilt and allocate punishment? What is the appropriate relationship between forgiveness and unforgivable crimes? Why is individual punishment to be preferred to collective retribution? How much should the rule of law be bent in the quest for accountability or truth?

From the Chinese point of view the Commission and executions were not only incursions on their sovereignty, but an existential threat to the Imperial government. In deputizing and

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103 Smith, China in Convulsion, supra note 10, at 616. For more on the punitive and retaliatory impulses of the Allies, see Hevia, English Lessons, supra note 21, at 195-235.

104 The British government was sensitive to the criticism from the progressive camp. In early August 1900 Acting Consul-General Warren cabled Salisbury with a proposal to “that they will be held responsible for any outrage […], and further, that their ancestral tombs at Mukden and Peking will be utterly destroyed.” NA, FO 405/94, No. 17 ‘Acting Consul-General Warren to the Marquess of Salisbury’ (August 2, 1900). The return cable was instructive: “The threat to destroy the tombs of the Manchu dynasty would be very repugnant to public opinion here in Europe, and we are also informed that it would create a bad impression in China generally.” NA, FO 405/94, No. 29 ‘The Marquess of Salisbury to Acting Consul-General Warren’ (August 3, 1900)

105 Li Hung-Chang was “extremely saddened” to hear of the execution, and privately questioned Empress “how [the foreigners] could violate our sovereignty like this?” Guojia dan an ju Minq Qing dang an guan, 2 Yi he tuan dan an shi liao 765 (Zhonghua shu ju, 1959). The execution must have made quite an impression on the minister. At an interview with Barzini in December, after covering the proposed indemnities, the behavior of the foreign troops, and the Russian activities in Manchuria, the Li Hung-Chang asks the correspondent “why, if he [Waldensee], is a kind person, did he behead the mandarins at Pao-ting-fu?” When Barzini replies that it was a military tribunal that had ordered the decapitations on the grounds that the officials were guilty of the persecution of Europeans, Li Hung-Chang, no doubt disappointed not to have found a sympathetic ear that might provide him with some insight into how to avoid a similar outcome in the future, replied then you have done well to kill them” and quickly changed the subject. Barzini, supra note 64, at 331 (translated from Italian by author). Jung Lu, a senior minister and confidant of the Empress Dowager, felt that “the death of these officials should be sufficient for the wrong suffered by the powers.” Tan, The Boxer Catastrophe, supra note 11, at 140 citing Li Hung-Chang, Li Wen Chung Kung Ch‘u’an Chi (Complete Works of Li Hung-Chang 1905), Jung Lu to Sheng, K26/9/24 and Wuanhuai Sheng, Yü-ch‘ai ts’un kao (Wên hai chu pan shê, 1963) 45/23 and 45/26. There were reports that Shin Sin, the former President of
relying on local officials to assist with the investigation and carry out the capital sentences, the foreigners were signaling their willingness to openly convert traditional power-brokers from Chinese to Western agents. The risk that more Imperial authorities would be instrumentalized by foreigners and the domestic situation destabilized as a result was not lost on Chinese Plenipotentiary Li Hung-Chang, who suggested approaching the foreign negotiators with a request that they refrain from punitive expeditions in the future. US minister William Rockhill was the first diplomat approached, no doubt for his recent and forceful rejection of the German plenipotentiary’s proposal that high level officials be tried by the Powers. The Chinese communiqué shrewdly framed the request as one that it would be in the Powers’ own interest to grant:

Sir: I have learned that the allied forces at Paoting Fu killed the provisional treasurer of Chihli, Tung Yung, and others, in all six men. I have also learned that the foreign soldiers have gone to various districts, imprisoned and killed various magistrates. Although the reports in the foreign press say that the treasurer, Ting, had connived at and tolerated the “Boxers”, nevertheless since August he certainly repented of his past deeds and dispatched soldiers to exterminate the “Boxers” bandits. Further, when the foreign soldiers went to Paoting Fu and the various districts, the treasurer did not lead his troops against the foreign soldiers, but went outside of the city to receive them and presented them with oxen and wine. It may be said that he certainly treated them kindly. Nothing was said beforehand that it was the purpose of the foreign forces to kill the treasurer, and, further, no explanation was made as to the crime he committed and a request made to China to deal with him herself. This can only cause foreigners to be treated with contempt, and still further give rise to a feeling of hatred in the future. It will be difficult for the Chinese officials to open their mouths in having any control in arranging peace, and the will be very much harassed. [...] I ask you to consult with Mr. Conger and request the United States Government to use its best endeavors with the foreign powers to prevent them from again using their military power, so that the minds of the people may be set at rest and avoid further complications [...] ¹⁰⁷

the Board of Rites, committed suicide specifically to avoid the fate of the officials at Paoting-Fu. The Crisis in China CHRONICLE (January 5, 1901).

¹⁰⁶ Specifically, Li Hung-Chang intended to “try to stop them from taking action that would damage the peace.” Yi he tuan dan an shi liao, supra note 105, at 765.
¹⁰⁷ Foreign Relations 1901, supra note 4, at Inclosure No. 1 ‘Viceroy Chang Chih-tung to Mr. Rockhill’ in No. 22 ‘Mr. Rockhill to Mr. Hay’. An examination of the extensive list of Chinese sources listed in Xiang’s bibliography has not revealed the existence of additional documents that might shed light on how the events at Paoting-Fu influenced the subsequent behavior of the Qing government. Xiang, supra note 8. The executions at the provincial capital are, however, mentioned in a letter by Ku Hong-Ming, a European-educated high court official and author of the well-known anti-imperialist Papers from a Viceroy’s Yamen (1901) in the Japan Weekly Mail:

An act of war is to inflict punishment upon the nation, not upon individuals. But as in this case certain Agents of the Imperial Government were believed to have been guilty of acts outraging the laws of nations, the Allied Powers were justified, if they thought fit, to exercise what in modern usage of war, is called the right of reprisals, is, to seize and summarily punish the guilty Agents. Such a punishment, however, is an act of war: it is not a judicial punishment.*
Rockhill forwarded the telegram to Washington D.C., but by way of substantive reply would say only that the US took “no part whatsoever” in the Paoting-Fu expedition—technically true, but a more than minor exaggeration given Hutcheson’s validation of the Commission to Gaselee, the Lieutenant’s probable reliance on the same sources of evidence adduced before the Commission, and the eagerness with which the US diplomatic community in Peking, and President McKinley himself, awaited the results of his investigation. The matter

*The execution of the Provincial Treasurer of Paoting-fu would be a legitimate act of reprisal. But the allied Powers gave no warning or notice: therefore the Chinese looked upon it as an act of bad faith and treachery. H.E. the Viceroy Liu’s feelings on the execution at Paoting-fu were [...] pity and indignation.

But the punishment of the guilty by the Imperial Government is quite a different thing. The question for the allied Powers to decide at the time was whether after such an outrage as the attack upon the Legations, they were willing still to recognize the existence of the Chinese Government. If the Power decided not to [...] it was evidently the duty of the Power to immediately take over the responsibility of Government in China. But if the Powers recognized the existence of the Chinese Government, as they evidently did, then the Powers were bound to respect the sole and absolute jurisdiction of the Imperial Government over all Chinese subjects.

Now as soon as a state of war is created, the right and wrong of the quarrel becomes at once one, not between individuals in the nation and the foreign Powers, but between the Chinese nations and the allied Powers. As far as punishment is concerned vis-à-vis the Allied Powers, war with its consequences, is, in itself, a punishment. What then the Imperial Government really owed to the Allied Powers, was simply to absolutely repudiate the act of the attack on the Legations. But as soon as the Imperial Government repudiated the act of the attack on the Legations, all persons responsible for the attack were guilty of crime-not vis-à-vis the Allied Powers – but against the authority of the Sovereign and against the peace and security of the Empire: all such persons were liable to punishment. But the punishment of Chinese subjects from the highest state ministers to the meanest Chinese subject – as long as China is recognized as an independent sovereign state – can only be carried out by the sole authority of the sovereign and in accordance with the laws of the Empire.

*Latter-Day Notes on the Chinese Question* JAPAN WEEKLY MAIL, August 24, 1901, at 20 (text partially corrected by author in issue of September 21, 1901, at page 13).

108 Foreign Relations 1901, *supra* note 4, at No. 16 ‘Mr. Hill to Mr. Rockhill’. See also NARA, RG 84/763, ‘Rockhill to American Consul, Hankow’ (November 16, 1900). Rockhill’s reply, though an exaggeration by the standards of a common-sense definition of participate,” was consistent with the views of the commander of American forces in China, Major General Chaffee: “The United States troops did not participate in [the Paoting-Fu expedition], it being my opinion that the less the disturbance of the country by military operations, the sooner would arrive the opportunity to diplomatically arrange full reparation for all wrongs committed, and for the further reason that every indication pointed to the utter collapse of organize armed opposition by the Chinese.” ARWD 1901, supra note 8, at 450 (‘Report of Lieut. General Commanding the Army’) (emphasis added).

109 RG 395/929, Letter from Conger to Hutcheson (November 7, 1900) (“Am I asking too much in requesting a copy of your Paoting Fu Report? I would like very much especially to have that portion relating to your investigation of the murder of our American Missionaries and the trial and sentence of the Chinese officials by the Military Court of the Allies.”) I can find no other instance where the US representative requested a military report from the China Expedition.

Conger, who was trapped in Peking during the summer 1900 siege, had previously suggested that, in response to “[t]he base treachery and savage brutality of this Chinese Government,” which he considered to be without parallel, “[n]one of its members should in future be recognized by any civilized powers.” NARA, RG 84/217, Conger to Secretary of State, from US Legation Peking (undated) via Chefoo (undated), received August 20, 1900. See also NARA, RG 59/M92/R110, Conger to Secretary of State (12 Oct. 1900) (includes handwritten note
appears to have rested there, as there is nothing in the Italian, British or German records to suggest that the Chinese ever lodged a formal protest with powers that had been officially represented on the Commission.\textsuperscript{110} Edwin Conger, US Ambassador to China, privately expressed that the convicted “richly deserve the punishment inflicted” but thought that the means chosen had counterproductive: “a wiser course would have been to hold the prisoners for execution by the Chinese authorities, under a peremptory demand by the powers.”\textsuperscript{111} Whether the US Consul in Tientsin, James Ragsdale, harbored his own reservations about the proceedings or was merely aware in a general sense dissatisfaction with the executions is not clear. But he certainly approved of the end result: “whether the proceedings of the Court Martial is [sic] justifiable or not, at this time, there can be no question that [the fantail] richly deserves the punishment proposed.”\textsuperscript{112} Sir E. Satow, British minister in Peking, called the executions “fitting atonement” and anticipated an “excellent effect.”\textsuperscript{113} He was not alone in this view. Waldsee similarly reported to the Kaiser that the expedition had exercised “a moral influence of far-reaching importance […].”\textsuperscript{114}

The logic of the trial and execution was widely discussed in the press. Considering the outrage the Western world manifested when it learned of the brutal massacres of Christians in China, it will come as no surprise that the majority of the commentary regarded the trial and punishment as justified, and as a positive turning point in the ongoing negotiations with the Chinese and the war effort. The Pall Mall Gazette was disappointed only that it would be some time before the next “sanguinary but salutary crop of heads is harvested.”\textsuperscript{115} The Times of London predicted that events would be “received with satisfaction throughout the civilized

\textsuperscript{110} Despite the lack of formal protest, the content of the Chinese protest was well-known and widely reported. See e.g. Foreign Politics THE PIONEER, December 5, 1900, at 2 (“The Celestial authorities…are bewildered and indignant that the Powers should have made him [Ting Yung] a victim, instead of contenting themselves with a few of the helpless coolies whom the soldiers of the German Emperor are slaughtering wholesale with Attila-like barbarity.”); China, JACKSON DAILY CITIZEN, November 19, 1900, at 4.

\textsuperscript{111} Foreign Relations 1900, supra note 13, at No. 451 ‘Mr. Conger to Mr. Hay’.

\textsuperscript{112} NARA, RG 84/218, No 110 James Ragsdale to Conger (December 4, 1900). Ragsdale mistakenly identified the individual “tried by a Court Martial, found guilty and condemned to be executed publicly in Tientsin at an early date” as the Fan-Tai of Paoting-Fu). Ragsdale corrected his error two days later, identifying the prisoner as “Tan Wen Huan, a Hee pu tao who held the office of Military Intermediary and was prominent as a Boxer leader.” NARA, RG 84/218, No. 111 Ragsdale to Conger (December 6, 1900).

\textsuperscript{113} China No. 6, supra note 26, at No. 40 ‘Sir E. Satow to the Marquess of Salisbury’. NA, PRO 30/33/14/11, No. 44, Satow to Admiral (November 8, 1900) ("[…] the Paotingfu expedition has returned & 3 leading officials who were convicted of responsibility for murder & ill treatment of foreigners have been executed by Count Waldsee’s orders."). Satow recorded in his diary on November 3, 1900 that he “abstained from interfering” in the execution as it was a “military matter” and it was “quite possible that these executions would produce a good effect”. He later informed the translator for the Chinese plenipotentiary that he had “tried to delay [the] execution, but [the] order had already been sent.” Either Satow waffled in his support for the execution, or he was lying in an attempt to turn the situation to the advantage of England. 1 THE DIARIES OF SIR ERNEST SATOW, BRITISH ENVOY IN PEKING 45, 52-3 (1900-06) (Ian Ruxton ed., 2006).

\textsuperscript{114} ALFRED, COUNT VON WALDSEE, A FIELD MARSHAL’S MEMOIRS: FROM THE DIARY, CORRESPONDENCE AND REMINISCENCES OF ALFRED, COUNT VON WALDSEE 226 (Frederic Whyte (tr), 1924).

\textsuperscript{115} Occasional Notes, THE PALL MALL GAZETTE, November 13, 1900 at 2. A correspondent for the North-China Herald was inspired by the executions to call for the “very salutary” prosecution of the magistrate of Szeyap district, near Canton, for his “crime against humanity” of publishing an edict announcing a reward for the death of some Western and native Christians. Canton News, THE NORTH - CHINA HERALD AND SUPREME COURT & CONSULAR GAZETTE, December 5, 1900.
world,” and hoped that “Li Hung-Cheng and his friends have…awakened to the fact that the International Commission are as ready to condemn on sufficient evidence, and the Powers are as ready summarily to beheaded, Prince Tuan [a member of the Imperial family and high ranking Boxer supporter] himself, as they were to try and to execute Ting Yung.”116 The Manchester Guardian reported on the “feeling of lively satisfaction” evoked in Peking at the prospect that the days of the West’s “misplaced leniency” were over,117 as The Age styled the “court-martial” a triumphant “commencement of the righteous work of doing justice […]”.118 In the United States the Jackson City Patriot celebrated Conger’s decision not to participate in the “international courtmartial”; “[t]hat the murderers of Americans should be punished by German and British officers is evidence that national vindictiveness did not dictate the penalties.”119 Le Temps described the “salutary effect” the sentence of the “complicit” local officials had on the Chinese government: it was reported to have prompted an apology for the murder of German representative Von Ketteler in Peking the previous June.120 Correspondence published in La Civiltà Cattolica, a semi-official organ of the Holy See and a bellwether for Catholic papers around the world,121 adopted a similar line, applauding the example of “European justice” before a “field military court” as a solution to the dilemma of how to rouse the Chinese government to more vigorous repression of the Boxers.122

The Japan Weekly Mail (initially and with reservations) embraced the trial and execution as “one of the most satisfactory incidents of the campaign.”123 Eventually, however, it deemed the punishment insufficient given the enormity of the crimes:

[T]hat summary punishment was inflicted upon the three officials principally responsible must be regarded as a very lenient administration of justice. It is becoming the fashion in these latter days to plead a mob suggestion as rendering a crowd immune from responsibility for the acts it perpetrates. There is something to be said on behalf of that theory, and still more on behalf of the undoubted truth

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116 No title, THE TIMES, November 13, 1900, at 9 (“Without the stern punishment, not merely of the highest local officials who instigated or participated in the Boxer outrages, but of the highest Imperial officials who devised that patriotic volunteer movement for the murder of foreigners, the insecurity of European residents in China … will certainly continue, and almost certainly increase.”). See also Foreign Politics, THE PIONEER, supra note 110; Our London Letter, THE MERCURY, December 15, 1900; Fitting the Crimes, SUNDAY TIMES, November 4, 1900, at 8. No title, THE TIMES, November 5, 1900, at 9 (“A beginning has been made at last in the necessary work of punishing Chinese officials of rank for the atrocious crimes perpetrated at their instigation, or with their connivance.”) Also attributes expression of “profound regret” at the death of von Ketteler issued by Imperial edict in October to Paoting-fu, which “supplied the incentive for its issue.”).

117 THE SITUATION IN CHINA, THE AGE, November 26, 1900, at 5.

118 CHINA, JACKSON DAILY CITIZEN, November 19, 1900, at 4.

119 No title, THE TIMES, November 6, 1900, at 2.


121 [1(1)0] La Civiltà Cattolica 379 (1901) (“If the mandarins are convinced they have to pay out of their pockets, their person will be imprisoned, and [they may] even as appropriate [pay] with their lives, oh I can tell you that they will display the most zealous and solicitous to prevent the moving and to repress them.”) (Translated by author from the Italian).

122 Notes on Current Events, THE JAPAN WEEKLY MAIL, November 17, 1900 at 9. The approval expressed in this issue was preliminary and conditioned on whether “sufficient evidence of their guilt has been obtained.”
that although the resultant of the forces exercised by units of a mob be savagely murderous, the forces themselves may be almost harmless separately. A party of soldiers have been known to bear a man into a pulp with their belt-buckles, though each delivered only one blow and that a comparatively light stroke not intended to do serious injury. [...] But surely neither hypnotism nor the resolution of forces can apply apologetically to officials who superintend and sanction such performances.\footnote{Pao-Ting-Fou, THE JAPAN WEEKLY MAIL, February 9, 1901, at 11.}

The reaction serves as a stark lesson in the value of public over private proceedings. The editor’s vitriol was predicated on his (incorrect) understanding that the international inquiry had confirmed the worst of the rumors; that “young girls had had their breasts shred off and in that condition had been led through the streets; that women had been abominably outraged, and that little children had been slung upon poles, one ankle and one wrist tied together, and in that plight had been carried about the town [...]”.\footnote{Id. (this information was supposedly withheld “lest a knowledge of them should rouse the allied troops to ungovernable fury.”). Hutcheson specifically disclaims these rumors. Though the missionaries at Paoting-Fu were murdered and humiliated, they were not tortured in the manner described by the Japan Weekly Mail. Hutcheson Report, supra note 23, at 465.}

A few commentators gave their imprimatur only begrudgingly. One reporter found himself sympathizing with the ‘difficult position’ of the punished, whose tolerance of crimes against Christians ultimately stemmed from their erroneous backing of the wrong horse at a time of national upheaval,\footnote{With the Indian Contingent, THE TIMES OF INDIA, December 7, 1900, at 4. Sympathy for the difficult situation of the Chinese was rare, but not unheard of. One member of the British Parliament expressed similar sentiments several months later when punishments for other high and low lever officials were being negotiated between the intervening Powers and Imperial government:}

Detractors, what comparatively few there were, generally limited themselves to questioning the effectiveness of the executions, some sharing Conger’s anxiety that the beheading of provincial officials who had handed over the keys to the city without a fight would

\footnote{Lord Tweedmouth, (Hansards) HL Deb 28 March 1901 vol 92 cc21-22}

\footnote{China EVENING NEWS, January 28, 1901, at 4.}
be perceived as “treacherous” and ultimately derail the Peking negotiations.128 A few sceptics worried over the potential for intensified conflict, convinced that the Allies had created martyrs and that vengeance in their name would follow.129 Criticisms of the trial process itself were exceedingly rare. At one point the Japan Weekly Mail doubted that a Commission “composed of foreign officers sitting at Pao-ting and obliged to rely upon such scraps of testimony as could be obtained from Chinese witnesses themselves in terror of their lives” could effectively reach the truth.130 The hypocrisy of the foreign powers, who had tried provincial officials under circumstances they would have found offensive had the boot been on the other foot, had also

128 Mistakes of the Powers in China, TIMELY TOPICS. December 7, 1900, at 8 (reprinting and quoting an article from the St. Louis Globe-Democrat). See also Pekin THE MANCHESTER GUARDIAN, November 29, 1900, at 7; Unrest in China, THE ADVERTISER, January 3, 1901, at 9 (“They have executed the Actg. Viceroy Ting Yung at Paotingfoo and occupied (and looted?) the Imperial Tombs […] – very appropriate as punitive action, but decidedly impolitic; the first will enrage the whole mandarinate and the second prevent the Emperor’s return – so that order will not be speedily re-established.”); No. 2914, Hart to Campbell, in 3 ARCHIVES OF CHINA’S IMPERIAL MARITIME CORRESPONDENCE, CONFIDENTIAL CORRESPONDENCE BETWEEN ROBERT HART AND JAMES DUNCAN CAMPBELL 514 (1900); Morse, supra note 6 at 317 fn 130 (citing R. Hart, Inspector-General of China’s Imperial Maritime Customs Service, to E. B. Drew, Commissioner of Customs; “The Paotingfu doings will, I fear, brand us forever with treachery in Chinese estimation: we got the Prince to order Chinese soldiers out of the way, and the officials came out and met them in a friendly manner: we then turned round and tried a lot of the officials, sentenced them, etc., and if report is true, the next step will be the looting of the city! It is a nasty business altogether.”). Robert Hart would work closely with Li Hung-Chung to negotiate the Boxer Protocol.

The traveler adventurer James Miller attributed anti-Western sentiment and delays in the negotiation of the terms of peace to the face that foreigners had ordered “[t]he summary execution of three officials convicted for the murder of the missionaries at Paoting-Fu by drum-head court-martial.” James Miller, China, ANCIENT AND MODERN: A HISTORY OF THE CHINESE EMPIRE FROM THE DAWN OF CIVILIZATION TO THE PRESENT TIME 477-8 (1900).

Reverend E. G. Tewksbury did not criticize the punishment at Paoting-Fu directly, but nearly a year later, when confronted with a situation where the Chinese refused to execute an individual accused of harming a Christian in the absence of Western observers, he indicated a clear preference for purely local punishment. His writings indicate a preoccupation with the pedagogy and optics of retribution:

[The missionary seeking punishment] was not willing that the Chinese officials should thus shirk their responsibility and before the common people and to Li Hung Chang then report that the men were executed by force on account of presence of foreign troops. As I understand, the mission, in seeking some punishment for the recent outrages, is only willing to push the sad necessity, because they feel that such capital punishment if made by the proper Chinese authorities and in a suitably public manner, will not only appeal to all as a just penalty for misdeed, but have a strong deterrent effect in the coming days. These objects I do not believe are conserved by executions in presence of foreigners and without the consent of the legitimate Chinese higher and lower officials, and take on too much the nature in many instances of private cases or of personal revenge.

Unit 3, Reel 300, No. 18 Tewksbury to Smith (May 6, 1901).

128 Les événements de Chine LA PETIT PARISIEN, November 7, 1900, at 2. See also Mistakes, supra note 128; Pekin, THE MANCHESTER GUARDIAN, November 20, 1900, at 7; Disturbed China THE JAPAN WEEKLY MAIL, November 24, 1900 at 2 (“The affair…shows the danger of any attempt on the part of the foreigners to administer justice on their own account. The Pao-ting execution was intended to strike terror into the hearts of anti-foreign officials. Apparently its effect has been to rouse a strong anti-foreign sentiment among the people.”).

130 Disturbed China, THE JAPAN WEEKLY MAIL, at November 24, 1900, at 4 (“It is not easy to see how a court martial of foreign officers, sitting in a place just occupied by their troops, could thoroughly investigate candidates and justly judge charges such as those upon which Ting and his colleagues were presumably arraigned … [… A] drumhead court martial is of all tribunals the least fitted to render an impartial judgment ….”).
been condemned in the pages of that periodical a few days before.\textsuperscript{131} Six months after the executions, the \textit{Shen Pao (Shanghai News)} alluded to new evidence, Ting Yung’s “published correspondence”, which purportedly cleared him of “complicity” with the Boxers, in labelling the \textit{fantai}’s death “a judicial murder on the part of the too hasty allies.”\textsuperscript{132}

The authors of these letters and editorials were talking past – not to – each other, their one-off observations not amounting to a conversation so much as an unlinked series of remarks. Not so the missionary discourse, which was complex, sustained and dynamic. The origins of this discourse lie in the charge that foreign missionaries, by their relentless (and allegedly un-Christian) calls for punishment, had kept Western sentiment at a boil and exacerbated the poor circumstances of the Chinese who fell into the hands of Western troops.\textsuperscript{133} No less a personage than Mark Twain attacked the missionaries for their revengeful zeal with his characteristic sarcasm: “We have Mr. Ament’s impassioned assurance that the missionaries are not ‘vindictive.’ Let us hope and pray that they will never become so, but will remain in the almost morbidly fair and just and gentle temper which is affording so much satisfaction to their brother and champion today.”\textsuperscript{134} Unsurprisingly, accusations that the Lord’s messengers had betrayed the precepts of their faith struck a nerve, and numerous influential missionaries devoted significant time, intellectual capital and ink to publically and privately defending their actions.\textsuperscript{135} Arthur Smith, for example, a veteran missionary of the American Board in China, passionately argued that punishment was the only bulwark against repeated acts of barbarity:

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\textsuperscript{131} \textit{Disturbed China}, \textit{The Japan Weekly Mail}, November 17, 1900, at 4 (“Had the mayor and municipal officials of an American or European city, surrendered the place peacefully to an American or European army, and had the latter then proceeded to apprehend the mayor and municipal officials, try them by drum-head court martial and place them before a platoon of musketry, the civilized world would have raised a cry of indignation”). German Army Major Justus Scheibert alluded to “faint-hearted souls back home” who were of the opinion the local officials should have been warned they were not immune from punishment before the city was occupied. According to Scheibert, none among the French, German and Italian soldiery regretted this omission. \textit{Der Krieg in China, 1900-1901: Nebst Beschreibung des Landes, seiner Sitten und Gebrauche} 481-2 (1909).

Although it does not relate to the punishments at Paoting-Fu directly, it is noteworthy that Sir E. Ashmead-Bartlett pointed out in Parliament the hypocrisy of demanding “the punishment of Chinese who took part in the massacre of 200 or 300 Europeans” in light of the “exceedingly cruel brutality with which this campaign has been carried on by some of the allies … [including] massacres deliberately committed by the Russian troops, which are almost without parallel in modern times.” Parliamentary Debates (Hansard) 6 December 1900 vol 88 cc 168 and 10 December 1900 vol 88 cc364.

\textsuperscript{132} \textit{Notes and Queries} 36 \textit{Journal of the China Branch of the Royal Asiatic Society} 223 (1905) (reprinting \textit{Shen Pao} article of 20 April 1901).

\textsuperscript{133} \textit{Wilber Chamberlin, Ordered to China} 59-60 (1903) (“I have talked with a number of them and they all insist that the only thing to do in China is to cut off the head of every mother’s son of a Chinaman who had anything to do, directly, with the Boxer movement, or who sympathized with it. Indeed, they are much more emphatic in their demands for blood than was Emperor William a month ago. […] [I]t sounds a little strange to hear a disciple of the Messenger of Peace calling for blood so loudly that everybody hears him or her.”) (from page 129: “We are condemned by the missionaries and the citizens because we have been lenient. They say, ‘Chaffee is chicken-hearted. Why don’t he kill a lot of these devils and teach them a lesson?’ They demand blood, always blood, and they point us to Germany as an example of what should be done!”).  

\textsuperscript{134} \textit{Mark Twain, To the Person Sitting in Darkness} 122 \textit{North American Review} 161, 165 (1901). For background information to the dispute read \textit{Larry Clinton Thompson, William Scott Ament and the Boxer Rebellion: Heroism, Hubris and the “Ideal Missionary”} 205–14 (2009).

\textsuperscript{135} \textit{Missionaries on their Defence} \textit{The Chinese Recorder and Missionary Journal – July 1901 to December 1901} 371 (1901), quoting an editorial from the \textit{North-China Daily News}.
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Of all the acts of the military since the capture of Peking, [Paoting-Fu] is the one most righteous in itself and most salutary in its result, yet it has been perversely criticized as a bloodthirsty cry for “vengeance” unworthy of Western nations! […] When it is remembered what these men have done, and with what savage brutality many of them have plotted to exterminate every foreigner in their jurisdiction, it is evident to every one acquainted with the conditions that in the New China, that ought to ensue after peace negotiations have been completed, such officials ought not for a moment to be tolerated. […] If Western Powers, whether moved by sentimentality or by a desire to trade upon the supposed good will of the Chinese, to be gained by minimizing the guilt of the guilty, are to slur over the past and deal weakly with those who are not only criminals in our eyes but in those of the Chinese themselves, the inevitable result must be to reawaken in all Chinese officials and people alike a thorough contempt for Westerners who are so easily hoodwinked. The Chinese will attribute the result to every motive but the real one, and will certainly think and feel that Powers who have held the sword in hand so long, and yet have failed to employ it as Chinese know that it ought to be employed, are not to be dreaded in the future; and it is a moral certainty that the Chinese will act in accordance with this view.136

The perception of the Chinese as incapable of drawing the right lesson from displays of magnanimity was common to missionaries in Peking, as was a view of the Chinese leadership as immoral and indecisive.137 Only through the crucible of punishment could the Chinese character be forged into something capable of exercising the hindsight and foresight that are the staples of

136 SMITH, CHINA IN CONVULSION, supra note 10, 714-15, 726-27. See also A. Brown, Future Missionary Policy in China in 23 THE MISSIONARY REVIEW OF THE WORLD 858 (1900) (referencing an interdenominational conference at which “several of the missionaries felt that the instigators and leaders of the uprising should be punished in the interest of future security.”); The Missionary Herald, supra note 62, at 161 (Letter from Dr. Ament of 27 December 1900) (“[W]e have learned by long experience that the Chinese learn slowly and time is a large element in their education. Softness, such as our soldiers have manifested on some of their tours, is mistaken for weakness, and the lesson has to be taught in a more vigorous fashion, however disagreeable it may be”) The Situation in China THE CHRISTIAN WORK 1 (November 29, 1900) (“The way to prevent a repetition of the terrible outbreak in China…is to bring the Chinese mind into close touch with the mills of justice when they grind exceeding fine.”).

John Marshall Lowrie, Walter Lowrie’s grandson, wrote on the punishments inflicted during the Boxer Rebellion for his Master’s Thesis at the University of Illinois: “As a preventative measure a penalty should be imposed with some view to the standards of the people committing the crime, and while some of the more barbarous modes of punishment have been abolished in China…it is clear that any indecisive action by the powers in this matter could not but lead the Chinese to feel a contempt for the magnitude of their offenses and they would be tempted to other crimes.” John Marshall Lowrie, ‘International Law and Diplomacy of the Boxer Uprising in China’ 86 (MA Thesis, University of Illinois, 1908).

137 ABCFM, Unit 3, Reel 297, No. 1 Perkins to Smith (January 20, 1900) (“China’s rulers almost to a man lack moral principle…[and] are temporizers who every day must lurk at the wind-vane before they know what to do.”). See also ABCFM, Unit 3 Reel 298, Sheffield to Smith (March 26, 1901). Sheffield also felt that the Chinese were incapable of learning lessons drawing the right conclusions from the anti-foreign violence: “Officials are disposed to assume that there was fault on the part of Christians, otherwise how could the people have risen up in the manner they did against them? This is good Chinese logic […]” ABCFM Unit 3, Reel 298, Sheffield to Smith (June 12, 1901). See also ABCFM Unit 3, Reel 298, Sheffield to Smith (July 9, 1901); ABCFM Unit 3, Reel 298, Arthur Smith to Dr. Smith (May 25 1900) (on the sending of dispatches demanding cessation of attacks on missionaries: “It is much like sending a strong protest down the hole of a rattle-snake which threatens to exterminate you and your family, with the menace that if he does not uncoil and go away, you will send him another and even stronger dispatch later on, indefinitely.”).
good government and interrupting the predicted cycle of revenge killings. In the words of Reverend Devello Z. Sheffield, Presbyterian missionary and President of the North China College:

The punishment of princes and high officials who took a leading part in the bringing on this calamity serves to emphasize the magnitude of the crime against humanity, and to break the power of the part that opposes reform. [...] After such events, to have allowed the leading offenders to go free of punishment would have prolonged confusion and indefinitely delayed reconstruction. [...] Not to make restitution, and not to bring leaders in crime to account is to entail endless trouble to future years. It is not only native Christians that have suffered – a much larger number of Chinese outside of the church have suffered. Without restitution and punishment such people are certain to follow up their wrongs, and if law does not reach offenders they will reach them in secret ways that will entail indefinite bitterness upon innocent and guilty.  

Gilbert McIntosh, in his aptly named apologia *Is there anything in it? Some after-crisis vindication*, offered a riposte to the claim that calls for the punishment of those who were guilty of

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138 ABCFM Unit 3 Reel 298, No. 16, Sheffield to Smith (February 26, 1901). See also ABCFM, Unit 3 Reel 298, No. 17 Sheffield to Smith (March 26, 1901) (“Government has been trampled under foot and it can only recover itself by asserting its power. It is not ‘bloodthirstiness’ in missionaries to desire to see further shedding of blood, but an understanding of Chinese character and conditions, and a realization that the policy of general forgiveness means the loss of many valuable native and foreign lives.”); ABCFM Unit 3 Reel 296, No. 282 Peck to Smith (March 14, 1901). Unit 3, Reel 300, No. 18 Tewksbury to Smith (May 6, 1901) (attributing a revenge killing on the part of a local Christian to delays and inadequacies in Chinese justice.); ABCFM Unit 3, Reel 300, Letter of Tewksbury (January 23, 1901) in No. 10, Tewksbury to Smith (February 18, 1901) (“Forgiveness of crime – moral suasion – demands an educated intelligence to understand, and this does not exist plentifully among the heathen natives here! Leniency, forgiveness, are called cowardice, lack of care for our church members, etc. etc.”).

The vast majority of American Board materials examined by this author suggest that most missionaries embraced a right and perceived a duty to call for punishment, Reverend Sheffield in a letter home acknowledges that some regarded punishment as “a function of Government” and beyond their temporal remit. ABCFM Unit 3, Reel 298, Sheffield to Smith (June 12, 1901). The case of Reverend E. G. Tewksbury is instructive in this regard. Prior to 23 January 1901 the Reverend abstained from pushing for punishment of Boxers, despite the requests of many native Christians for him to do so. According to his letters, his resisted assuming this role, as in his view:

1. The church of Christ cannot establish itself as a court to arrest, examine, and condemn criminals against it or the criminal law.
2. There seemed to be in existence no proper Chinese or foreign court which would take up the matters involved and render justice.
3. Most of the Boxer criminals had fled from their homes.
4. There was (and is) great danger of incurring (the senseless) criticism of being bloodthirsty and vengeful [...].
5. The [was a] danger of encouraging a revengeful spirit in our church members, an old Testament ‘tooth for a tooth’ spirit.

By late January, however, Tewksbury had come to feel that “[Jesus] would wish us to secure certain security against recurrence of crime, i.e. legal punishment for the criminals in terms that common heathen can understand.” Stirred by the newly stable situation on the ground and the acknowledgement on the part of a local official that the present circumstances represented a golden opportunity to rid society “of notorious villains,” he consented to begin recommending cases to the Chinese for trial and punishment. ABCFM Unit 3, Reel 300, Letter of Tewksbury (January 23, 1901) in No. 10, Tewksbury to Smith (February 18, 1901).
massacre had been un-Christian, refracting international politics through the prism of Christianity to suggest that punishment was the superior moral and political imperative:

If governments are the ministers of God's righteousness, then surely it is the duty of every Christian government not only to uphold the right but to put down the wrong, and equally the duty of all Christian subjects to support them in so doing. For China as for Western nations, anarchy is the only alternative to law. Both justice and mercy require the judicial punishment of the wrong-doers in the recent outrages. For the good of the people themselves, for the upholding of that standard of righteousness which they acknowledge and respect, for the strengthening and encouragement of those officials whose sympathies have been throughout on the side of law and order, and for the protection of our own helpless women and children and the equally helpless sons and daughters of the church, we think that such violations of treaty obligations, and such heartless and unprovoked massacres as have been carried out by official authority or sanction, should not be allowed to pass unpunished.139

Missionary passions were occasionally justified in secular terms, as an appropriate expression of a value – Justice – deeply embedded in the fundamental order of social and inter-state relations. This leaning towards natural law is apparent, for example, in Dr. Henry Porter’s private letters:

The American commanders here ask, out of their ignorance; why the Missionaries are so bloodthirsty? There is a sense of justice in the minds of men which must be met. It is not bloodthirsty to expect and to secure the ignominious death of a murderer and a brigand. When a Nation undertakes really to punish another Nation for its bitter crimes there is no other element, than that of simple justice to be considered.140

In other letters punishment was framed as: (1) a practical response to the existence of manifestly dangerous individuals;141 (2) a means of strengthening the hand of the negotiators in

139 GILBERT MCINTOSH, IS THERE ANYTHING IN IT? SOME AFTER-CRISIS VINDICATION 54 (1902). Appeals to a “sense of justice” were frequent. See 97 Missionary Herald 7 (1901) (“There can be no question as to what strict justice would require.”); Martin, The Siege in Peking, supra note 97, at 165-66 (commenting that the punishment of inner-circle officials for attacks on foreigners in Peking “commends itself to our sense of justice”); Brown, REPORT OF A VISITATION, supra note 42, at 62 (“The men who are guilty of the atrocities perpetrated last summer violated every law, human and divine […]”); ABCFM Unit 3, Reel 296, No. 289 Peck to Smith (June 30, 1901) (failing to punish at least a few of the most guilty would be a “shirking of a duty which Providence has laid upon us.”).

140 ABCFM Unit 3, Reel 297, No. 126 Porter to Unknown (October 28, 1900). See also See also ABCFM, Unit 3, Reel 297, No. 124 Porter to Smith (October 10, 1900); Martin, The Siege in Peking, supra note 97, at165 (“The punishment of the guilty princes commends itself to our sense of justice.”); The Boxer Rising: A History of the Boxer Trouble in China 83 (1900) reprinting letter of Mr. Gammon, Tientsin agent of the American Bible Society to Dr. Hykes of the same Society (August 25, 1900) (“[It is to be hoped that some detachment of the allied troop may be sent to punish the people of that region [Paoting-Fu], especially as it is reported that three of four foreigners are hiding in that vicinity. We do not any of us ask for revenge, but, as a home paper puts it, for justice. It is right and proper to punish crime, and Pao Ting Fu has fed one of the main roots of the growth of the uprising.”).

141 ABCFM Unit 3, Reel 298, Sheffield to Smith (July 25, 1901) (“[…] it is not by promiscuous forgiveness that these conspicuous murderers still with weapons in hand and prowling the country can be made to order their lives according to law. If they are not punished for past crimes they will ultimately be punished for later ones. I am
(3) an extension of Christian duty to take a life for a life, and generally provide for the spiritual needs of native and foreign Christians; (4) better than the amnesty or apathy, which would foster a perception of the Western powers as “abettor[s] of the Boxers by [their] neglect”; (5) an appropriate psychological response to the traumas experienced by victims of the Boxers; (6) the only means of advancing the security of otherwise disempowered Chinese Christians.

While an in-depth consideration of the relationship between secular and eschatological aspects of punishment as a response to heinous crimes is beyond the scope of this paper, as is an assessment of the strengths and weaknesses of the various positions staked out by the interested parties in light of the political and legal realities of the time, it is interesting that, despite the passage of over a century and sea-changes in the field of international criminal law since 1900, some of these justifications still resonate today, particularly those aspects of the discourse that hint at a criminological theory of punishment based on consequentialist, retributive, and deontological principles. The dialogue elaborated in this Part underscores a need and an opportunity for further research to make sense of this consonance. Have these ideas been refined over time, sharpened and evolved in the intervening century, and by extension can it be said that ‘progress’ in the development of international criminal law is possible? Or is the present is one more in a long line of contexts in which old ideas are repackaged and deployed based not on their underlying soundness, but because the recurrence of old dynamics of power demand such justifications? Do international criminal law’s signposts point to anything but themselves?

4. Jurisprudential ripples

The international criminal law endeavors of the long nineteenth century are instinctively intriguing because of the possibility that they served as a fillip or made some dramatic contribution to international justice as we know it today. But like the 1893 Franco-Siamese Tribunal, the 1898-1899 Crete Tribunals and the 1860-61 “crimes against humanity” trials in talking about desperate characters, no men for a few months driven by a wave of excitement into excesses, and now ready to waken out of delirium and become good citizens. […] [T]he country will not be in settled condition until several thousands of such men have been punished, or course in different degrees. […] [W]ith the country filled with desperate characters direct efforts must be put forth to capture and put beyond power to do further evil, a few leading names.”).

142 ABCFM Unit 3, Reel 297, No. 126, Porter to Unknown (October 28, 1900); ABCFM, Unit 3 Reel 298, No. 15 Sheffield to Smith (December 14, 1900); ABCFM Unit 3, Reel 298, Sheffield to Smith (August 19, 1900).

143 ABCFM, Unit 3 Reel 296, No. 282 Peck to Smith (March 14, 1901); ABCFM Unit 3 Reel 298, No. 16, Sheffield to Smith (February 26, 1901); ABCFM Unit 3, Reel 297, No. 126 Porter to Unknown (October 28, 1900); ABCFM Unit 3 Reel 298 No. 16 Sheffield to Smith (February 26, 1901) (“An eye for an eye’ is the rule of action.”).

144 ABCFM, Unit 3, Reel 322, Atwood to Smith (May 4, 1901).

145 ABCFM Unit 3, Reel 322, Atwood to Smith (September 10, 1901) (“It is not at all strange that that the Christians here harbor feelings of revenge. They can never forget these awful crimes against their teachers and against humanity.”).

146 ABCFM Unit 3, Reel 298, Sheffield to Smith (July 9, 1901).

147 French imperialist pretensions in Southeast Asia suffered an unexpected setback in 1893 with the death of Inspecteur de la Garde Civile Grosgrerin at the hands of Siamese troops. The French insisted on their right to try the perpetrator, Phra Yot, and inserted an Article III in the Franco-Siamese Convention of October 1893 to that effect. The Accused was found guilty of murder by a Mixed Court comprised of three French and two Siamese judges (who abstained from signing the verdict) in June 1894. The Court was unique among colonial-era institutions, and though it was quickly forgotten it established important precedents in substantive and procedural ICL. Benjamin E.
Ottoman Syria before it, the Commission was cursed by an inherently short memetic half-life and largely overlooked by history. A few scattered mentions of the Commission and execution of Ting Yung and his cohorts in missionary and military literature published in the wake of the conflict mark its contribution to recorded public discourse. Its slip into obscurity was sharp even within the missionary community most attuned to matters of Boxer punishment. When Dr. Peck was dispatched on behalf of the American Board of Commissioners for Foreign Missions to rebuild its operations in the region, he wrote from the situs a mere year after the infamous massacres:

[…] in general the impressions given the Chinese by our attitude of forbearance is that of wellness not goodness at all, the fact that none of the local boxer leaders have been punished for the atrocities of last year leads to many expressions of disdain which are frequently coming to my ears that the protestant church is of no account and can be plundered with impunity.


148 In 1860 inter-ethnic violence in the Mt. Lebanon region claimed over 3,000 lives. The scale and grisly nature of the violence perpetrated by warring Druze, Christian and Ottoman communities prompted the Great Powers of Europe - France, Great Britain, Prussia, Russia and Austria - to deploy a joint military force to restore peace and establish (with Ottoman participation) an International Commission empowered to propose and implement measures that would guarantee against the recurrence of violence. The initial efforts of the local Ottoman Representative to secure justice for victims of the violence were regarded by the Commissioners as ‘blundering’ and too overtly political, and over a six month period the Europeans asserted and consolidated their power; (1) to submit any observations as to absolute guilt or innocence or degree of culpability; (2) to examine, approve or revise verdicts handed down by the Ottoman Extraordinary Tribunal (3) to mandate the use of amnesties in securing peace; and (4) to impose jurisdictional limits on and set basic rules of procedure for the Extraordinary Tribunals. British records from this period indicate that hundreds were executed, exiled for life, and put to work on road construction projects by the Extraordinary Tribunals and the Commissioners. A communication from the assistant to the Ottoman Governor to the Commissioners marks the earliest known use of the phrase “crimes against humanity” in reference to mass atrocities coming under judicial scrutiny. See generally Benjamin Brockman-Hawe, Constructing Humanity’s Justice: Constructing Humanity’s Justice: Accountability for ‘Crimes Against Humanity’ in the Wake of the Syria Crisis of 1860 in 3 Historical Origins of International Criminal Law (forthcoming 2015).

149 It was also a singular event in the Allied intervention in China. Although Lancelot Giles, an employee of Britain’s General Consular Service present at the siege of Peking, writes that the “war crimes trial” by “mixed military commission” at Paoting-Fu “was generally adopted throughout North China, being applied more or less harshly as circumstances dictated,” the author can find no evidence that the model of inquiry-by-International Commission was emulated elsewhere. Mr. Giles was probably referring to the more general policy of compelling Qing officials to execute their own, which became commonplace after the execution of several provincial officials in Paoting-Fu. LANCELOT GILES, THE SIEGE OF THE Peking LEGATIONS – A DIARY 99 (1970). See HEVIA, ENGLISH LESSONS, supra note 21, at 228.

150 In addition to those sources already cited, the Commission is mentioned in FREIHERR EUGEN BINDER VON KRIEGSTEIN, DIE KAMPE DES DEUTSCHEN EXPEDITIONS KORPS IN CHINA UND IHRE MILITARISCHEN LEHREN 53 (1902); GIEHRL RUDOLF, CHINA FAHRT, ERLEBNISSE UND EINDRÜCKE VON DER EXPEDITION 1900-01 59 (1903); SMITH, CHINA IN CONVULSION, supra note 10, at 611. Les Événements Militaires en Chine (1900-1901) (1) 59 REVUE MILITARIE DES ARMÉES ÉTRANGERS – RÉDIGÉE A L’ÉTAT-MAJOR DE L’ARMÉE 256, 262 (January-June 1902); La Campagne de Chine (1900-1901) et le Matériel de 75, 59 REVUE D’ARTILLERIE 413, 450-1 (1901-1902).

The procès-verbal of the Commission’s proceedings (the document reproduced here as Annex 1) was summarized without citation in MARIO VALLI, GLI AVVENIMENTI IN CINA NEL 1900: E L’AZIONE DELLA R. MARINA ITALIANA 632-4 (1905).

151 No. 289, Peck to Smith (30 June 1901) ABCFM Unit 3, Reel 296 (emphasis added).
The Paoting-Fu experiment cast a fairly short shadow in the scholarly community as well. In the years following the Boxer conflict the Commission was linked with the exceptional, i.e. non-belligerent (technically) and collective, nature of the occupation itself, and was trotted out as an answer to legal questions that could arise under the laws of war in very restrictive factual circumstances. Robert Ruzé’s *La Juridiction des Armées d’Occupation*,\(^{152}\) Arthur Lorriot’s still-cited *De la Nature de l’Occupation de Guerre*,\(^{153}\) and Raymond Robin’s influential *Des Occupations Militaires en Dehors des Occupations de Guerre*\(^{154}\) cited the Paoting-Fu precedent only to develop a theory of the extent of an occupant’s jurisdiction in cases where international occupation did not follow a formal declaration of war. No one positioned the Commission as a nexus point where the law of occupation, the customary international law right of access to justice, the law of humanity and the obligations of criminal repression overlapped, and in the absence of broader framing the possibility of proliferation of the Paoting-Fu precedent as an example of or model for the exercise of international criminal law *talis quails* was limited.

There is one indication that the Allied experience with multilateral justice during the Boxer Rebellion, including the International Commission, carried over into the new century and influenced subsequent political and legal practice. In the wake of the First World War a new generation of statesmen and attorneys confronted the question of what to do with the German emperor and others accused of war crimes. The first state-sponsored report to make the case for the ex-Kaiser’s trial, Ferdinand Larnaude and Alfred de Lapradelle’s *Examen de la responsabilité pénale de l’empereur Guillaume II*, made no mention of the China precedent whilst arguing that trial before an international criminal court was the best option.\(^{155}\) Likewise, no mention of the International Commission is to be found in the First, Second and Third Interim Reports of the (British) Committee of Enquiry into Breaches of the Laws of War.\(^{156}\) However, David Miller and James Scott, legal advisers to the US delegation to the Paris Peace Conference, in their January 1919 memoranda drafted for the President of the United States (Document 213)\(^{157}\) took the position that the trial of the Kaiser for the crime of engaging in illegal war would be contrary to the prohibition on *ex post facto* laws, but that international law permitted the victorious states recourse to “political action to restrain a disturber of the public peace.” The actions of the Allied powers to punish Boxers were considered:

\[\ldots\] [p]olitical punishment rather than...a precedent for judicial or legal punishment, because although the Powers stated that their action was taken to punish “crimes against the Law of Nations,” no judicial process of any kind appears to have been invoked to establish the criminal responsibility of the alleged offenders or to determine their punishment. \[\ldots\]

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\(^{153}\) Arthur Lorriot, *De la Nature de l’Occupation de Guerre* 339-341 (1903).


\(^{155}\) F. Larnaude and A. de Lapradelle, *Examen de la responsabilité pénale de l’empereur Guillaume II*, (1918)

\(^{156}\) NA, CAB/24/72, Interim Reports of the Committee of Enquiry into Breaches of the Laws of War, with Appendices. Presented to the Right Honourable the Attorney General, 16 January 1919.

\(^{157}\) David Hunter Miller and James Brown Scott 1 *My Diary at the Conference of Paris, with Documents* 86 (1924) [hereinafter: “Miller Diary”].
[With respect to the punishment of eleven high level officials in the early stages of the negotiations,] none of the usual safeguards of ordinary jurisprudence to assure justice to accused persons appear to have been present in this case. There is no indication that any of the accused were present, either personally or by counsel, at the meeting of the allied ministers which decided their fate, or that they were given any opportunity whatever to defend themselves.

The incident cannot therefore be regarded as a legal precedent for the punishment of crimes against International Law; it was nothing more than the arbitrary determination by the political representatives of the Powers who had military control at Peking that certain Chinese officials whose guilty connection with the Boxer uprising they regarded as notorious should suffer death.

Of the same character seems to have been the actions of the allied military expedition at Pao-ting during the same Boxer disturbances. [...] China protested against the violation of her sovereignty and of the agreement of the Allies that she should herself punish the guilty parties.158

Miller and Scott’s dismissal of the proceedings led them to conclude that, with respect to trials for war crimes before an international military tribunal, “the enemy may in [some] cases find ground for serious objections to the presence of an officer upon a commission trying crimes not committed against his army of nationals.” Apprehension of this outcome led them to recommend “separate tribunals for each nation or each group of nations whose armies were actually united in campaign.”159 Ultimately, seven of the nine powers participating on the post-War “Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties” overruled US resistance to international trials and rejection of the “laws of humanity” as a distinct legal category of international crimes,160 and agreed to recommend to the Council of Four the formation of a High Tribunal to try individuals accused of violating international law.161

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158 Id. at 474, Document 213, ‘Memorandum Regarding the Responsibility of the Authors of the War and for the Crimes Committed in the War’

159 Id. at 505-6.

160 Memorandum of Reservations presented by the Representatives of the United States to the Report of the Commission on Responsibilities, April 4, 1919’ and ‘Reservations by the Japanese Delegation’, REPORTS OF MAJORITY AND DISSSENTING REPORTS OF AMERICAN AND JAPANESE MEMBERS OF THE COMMISSION OF RESPONSIBILITIES (1919) 64 (American Delegation: “The laws and principles of humanity vary with the individual, which, if for no other reason, should exclude them from consideration in a court of justice, especially one charged with the administration of criminal law.”) 74 (American Delegation: “The American Representatives felt very strongly that too great attention could not be devoted to the creation of an international criminal court for the trial of individuals, for which a precedent is lacking, and which appears to be unknown in the practice of nations.”) 80 (Japanese Delegation: “A question may be raised whether it can be admitted as a principle of the law of nations that a High Tribunal constituted by belligerents can, after a war is over, try an individual belonging to the opposite side, who may be presumed to be guilty of the laws and customs of war.”).

161 Id. at 23. The delegates rejected US suggestions that a Commission of Inquiry be established “to consider generally the relative culpability of the authors of the war and also the question of their culpability as to the violations of the laws and customs of war committed during its course.” Under the American proposal, the Commission would have a mandate to “examine the evidence, and to reach a judgment, and then to present this as a report to the world at large through the public press in order that the opinion expressed in the report should be examined or tested by public opinion.” Suffice to say, the proposal was rejected. “A trial they wanted,” Scott said
I have, however, uncovered nothing in the negotiation record that suggests that the other entente powers ever challenged the US position on the punishments inflicted in China.

What accounts for this quietness? Most probably by 1919 an effective challenge to the American position was simply impossible to mount, with the relevant documents either lost or buried and the institutional memories too degraded. There are clues that point in other directions though. The aforementioned references in legal scholarship and the missionary accounts, the fact that the US delegates were able to cobble together a Commission-based argument, and the sophistication of the other entente delegates tantalize with the suggestion that a memory of the Commission persisted despite the intervening two decades, and that European silence was calculated. In one interpretation, the pro-trial Powers’ taciturnity might be attributable to anxiety that a debate necessitating a meticulous historic inquiry into such an obscure entity would unnecessarily delay prosecutions. Moreover, if the delegates had assumed (correctly, as it turned out) that the Americans would resist “legal” international trials on principle no matter how much evidence or pressure was brought to bear,162 convincing them that Boxer punishments were more legal than political would only have only have diminished the prospects of achieving even quasi-judicial “political” prosecutions, as this measure would now be considered unprecedented. Alternatively, perhaps by 1919 the Commission had been discredited by virtue of its connection with a war fought with little restraint. If a trial were going to be legitimized, the thinking might have gone, it must be in a way that casts the Germans as the barbarians and reinforces the civilized status of the entente powers. Defending the Commission might rekindle some memories of some of their own unsavory conduct, and ultimately prove more trouble than its worth.

5. By way of response to Miller and Scott: the judicial character and fairness of the Commission

It is interesting to ponder what the response might have looked like had Miller and Scott’s memo provoked a more vigorous European effort to overcome the portrayal of the Commission insufficiently juristic and unfair.163 To the credit of the US State Department’s


162 The United States never was able to coax the other members of the Council of Four into abandoning their plans for a trial of the Kaiser or others accused of war crimes, though they were ultimately victorious in persuading the other entente powers to ignore the Commission’s recommendations and remove any reference to “international law” in favor of language in the Versailles Treaty to the effect that the Kaiser’s trial would be for “a supreme offense against international morality and the sanctity of treaties,” and that the trial would be guided by “the highest motives of international policy.” Article 227, Treaty of Versailles. Robert Lansing. American representative and Chairman of the Commission on Responsibility, wrote that “[m]anifestly the tribunal … is not a court of legal justice, but rather an instrument of political power which is to consider the case from the viewpoint of high policy and to fix the penalty accordingly.” R. Lansing, Some legal questions of the Peace Conference, 13 American Journal of International Law 647 (1919). James Scott noted that “[b]ecause of [President Wilson’s] refusal [to consent to the Kaiser’s trial for a criminal offense] the Supreme Council rejected the majority report of the Commission of Responsibility, and as a compromise agreed upon an article according to which the Kaiser, if the Allied could get their claws on him, should be arraigned for an offense against international morality. President Wilson thought, as I believe, that this was the most that could be permitted, and that it would not be a legal but a political offense that the punishment should not be a criminal but a political punishment.” What Really Happened, supra note 161, at 475.

163 Gauging whether an entity has crossed the line from board of inquiry to court, and a trial from unfair to fair, is never easy. The difficulty is compounded where, as here, the relevant records are ambiguous or incomplete, and scattered across archives in multiple countries, and the degree to which the documents that are accessible have been
experts, it is difficult to deny that both claims have at least some superficial appeal. With regard to the former, the various names of the investigative body most commonly used in official English-language sources – “Commission of Inquiry” or “International Commission” – are evocative of a body limited in its mandate to elucidating facts related to the origin of the incident under investigation, or to put it differently, the determination of factual causes, not legal responsibility. On top of this, many aspects of the operation of the Commission are anathema to contemporary common-sense notions of ‘law’ and ‘tribunal-ness’. The imposition of various collective punishments is redolent of military-administrative, not judicatory, power, as is the Session Record indicating that the fifth meeting of the Commission was devoted essentially to looting.

On the other hand, the full name of the Commission as recorded in the Session Records denotes a fundamentally judicial body: “The International Investigative Commission to seek out, judge and punish the principal authors of the massacres of Christians, and the promoters of the same.”164 A mention of the Commission in a report by Colonel Garioni, commander of the Italian forces in China, is written in a way that suggests that the exercise of investigatory and sentencing powers – essentially the sine qua non of a court – were the raison d’être of the body from the start.165 Moreover, whatever its formal title and charge, in practice the primary function of the Commission was receiving evidence concerning the responsibility of individuals for crimes, apportioning responsibility among them, and determining the legal consequences that would follow – inherently judicial tasks. The judicial nature is also evident in the sorts of powers the Commissioners exercised as their inquiry progressed – ordering the arrest of suspects, directing the appearance of potential witnesses and the seizure of documents, and interrogating the accused and witnesses.166 The relationship between the Commission and the Field-Marshall confirms the Commission’s judicial character. Although styled mere “recommendations,” the act of handing over its findings to the supreme commander for review is analogous to the process of confirming, remitting or dismissing verdicts that was employed before national courts-martial.

Distorted by the tendency of their authors to legitimate their own process, or elide their own agendas, biases and errors, is unknown. The task is further complicated by the problem that the inquiry itself requires the use of terms like “justice”, “court” and “law” whose meaning has changed over time. Assessing the “fairness” of the proceedings poses particular challenges. The field of comparative history of military law is still in its formative stages. While scholars like Peter Richards, in his Extraordinary Justice (2007) have made a good start at building a foundation, it is still far from clear what a fair trial would or should have meant to a nineteenth century jurist, let alone a clique of military officers of diverse nationalities thrust into the role of investigator-judges in near-unprecedented international proceedings. A thorough examination of these issues would require a reconstruction of the principles, perceptions, and assumptions that shaped fin de siècle understandings of fairness in regular criminal as well as courts-martial proceedings across (at a minimum) China, Germany, France, Great Britain and Italy. These limits were never far from my mind as I prepared this section. I implore the reader to understand the conclusions I reach in this section merely as first, albeit considered, impressions.

164 Annex 1 (emphasis added).
166 A debate over the judicatory nature of various bespoke statutory tribunals established by Parliament played out in Britain over the course of the nineteenth century. The judicial nature of military courts of inquiry was considered by the House of Lords in 1873. Despite their executive origins, limited powers and administrative function, the military courts, which were organized pursuant to the Queen’s Regulations for the Army (1859), were determined to be “court[s] duly and legally constituted and recognized in the Articles of War” for domestic purposes, based on their having ‘all the qualities and incidents of a court of justice.” Dawkins v. Lord Rokeby (1873) 8 LR QB 255 cited in Chantal Stebbings, Legal Foundations of Tribunals in Nineteenth Century England 302 (2006).
The judicial nature of the Commission was perceived, constituted and confirmed by the perceptions of Westerners, including the European agents involved with the Commission. This is apparent from the nomenclature used to discuss the Commission. Although there was no consistency in the language used to discuss the body, all of the designations used – the diplomatic and public record is rife with references to the “court martial”, “international military tribunal”, “war crimes trial”, “international court,” “international tribunal” and “military court” – connote a judicial power and process.\(^\text{168}\) If anyone questioned the applicability of such overtly judicatory appellations, their objections were not recorded in any document uncovered by this author.

Defending the Commission against allegations of unfairness would have been more challenging. In the absence of robust diplomatic, scholarly and public commentary on point, there is no evidence that the proceedings, construed into a ‘trial’ by countless commentators of varying national origin and profession, underwent a parallel consummation into a ‘fair process.’ Any effort to develop a rubric for an “ideal” proceeding against which the Commission might be tested \(a\) \(p\)\(osteriori\) would have ended in frustration, as the divergences between the relevant national military codes were simply too extreme to permit the establishment of a baseline. The relevant Manuals differed markedly in the rights they recognized and in their conception of the circumstances and persons to which those rights would apply. The German \textit{Militärstrafgerichtsordnung} (Military Code of Criminal Procedure, 1898), for example, afforded a right to adduce arguments on appeal which its British analog did not.\(^\text{169}\) The British \textit{Manual of Military Law} (1898) (unsurprisingly, given its common-law roots) provided extensive procedural protections for the accused in most cases, incorporating the entire corpus of English evidentiary law and adopting as a guiding philosophy the principle that “[t]he accused is to be allowed great latitude in making his defense, and will not, within reasonable limits, be stopped by the court merely for making irrelevant observations.”\(^\text{170}\) But the British \textit{Manual} also introduced the Field-General Court-Martial, a forum which exempted commanders from applying these and other burdensome rules when “necessary” and limited defendant’s rights to those which were

\(^{168}\) Even Commissioner Jamieson described himself “as the delegate of General Gaselee on a Military Court of Inquiry or court-martial […]” NA, FO 405/102, Inclosure 1 ‘Memorandum of Mr. Jamieson’s Visit to Paoting’ in No. 131 Satow to Marquess of Salisbury (sent 14 Nov. 1900, received 21 Jan 1901) (unredacted version of Jamieson Memorandum) (adding “[I act] not by any means in a civil capacity, inasmuch as the modes of procedure differed \textit{toto valo} from those observed in Civil Courts and I have absolutely no \textit{locus standi} in the matter as a civilian.”). Elsewhere in the same communication Jamieson referred to the body as a “Military Commission.” Jamieson Memorandum, supra note 26. Prior to the first sitting of the Commission, Jamieson wrote MacDonald that if Ting-Yung were guilty a “drumhead courtmartial could suffice.” NA, PRO 30/33/7/9, Jamieson to MacDonald (October 20, 1900).

The Intelligence Department’s \textit{Official Account} uses the \textit{linga franca} of law as well, stating that Ting-Yung, Quei Heng and Wan Chan Kuei each had their cases…tried before the International Commission”, which “sentenced” them to beheading. Official Account, supra note 23, at 134. Gaselee reported the outcome of the proceedings to London thusly; “[t]he trial was by International Commission, and the proceedings were confirmed by Count von Walderssee.” China No. 5, supra note 11, at Inclosure No. 3 ‘General Sir A. Gaselee to Sir E. Satow and the Secretary of State for India’ in No. 40 ‘Sir E. Satow to the Marquess of Salisbury’.

The wide variation in nomenclature used to discuss the Commission is awkward, though unsurprising given the relative secrecy in which the body operated, its distance from the command centers of Tien-Tsin and Peking, and the novelty of the institution.

\(^{169}\) \textit{Militärstrafgerichtsordnung}, supra note 78, at Art. 382; \textit{MANUAL OF MILITARY LAW}, supra note 77 at 66 (verdict needed to be confirmed, disconfirmed or revised by officer holding authority to do so) 153 (accused could challenge a court-martial for lack of jurisdiction or failure to adhere to the rules concerning proper constitution).

\(^{170}\) \textit{MANUAL OF MILITARY LAW}, supra note 77, at 58, 71-106.
“practicable” given the exigencies of the situation.\textsuperscript{171} Foreigners within the ambit of British military justice were explicitly not guaranteed even these limited protections.\textsuperscript{172} The \textit{Militärstrafgerichtsordnung}, in comparison, set a single standard for justice that applied to foreigners and occupier alike, during times even of heightened danger, but (consistent with its civil-law heritage) provided far fewer rules concerning the admissibility of evidence.\textsuperscript{173}

At a more profound level, there would have been disagreement over what “fairness” meant in the context of the Paoting-Fu operation. Was the principle of \textit{nullum crimen sive lata}, implicit to the German, British, French and Italian Military Manuals, at least insofar as those manuals dealt with crimes perpetrated by their own citizens, equally applicable to proceedings against foreigners? The courts-martial envisioned by the Manuals had been developed primarily to dissuade soldiers from disobedience and cowardice with the threat of harsh, quick and decisive punishment. The Commission, on the other hand, was created not to maintain discipline within an armed force, but to prosecute a proto-crime against humanity perpetrated by foreigners made subject to the occupation jurisdiction of the Allies.\textsuperscript{174} With this in mind, the relevance of the non-retroactivity principle would have been far from self-evident. Nor would it have been obvious that a principle developed in the domestic sphere would have pertained in the international.\textsuperscript{175} xxxObjections on grounds of \textit{jus de non evocando} may have also resonated.

\textsuperscript{171} Manual of Military Law, supra note 77 at 657-65. The French \textit{Code du Justice Militaire} (Code of Military Justice, 1857, modified 1875) also truncated the notice, case-preparation and appeals rights of defendants as necessity dictated. Victor Nicolas, Commentaire Complet Du Code de Justice Militaire pour les Armées de Terre et de Mer 87 (1898) (Art. 156, commentary) (stating that the usual formalities of justice are to be complied with “only if there is time.”).

\textsuperscript{172} Manual of Military Law, supra note 77, at 297. The Italian \textit{Codice Penal} went one step further and authorized trials \textit{in absentia} at the discretion of the military authority. Codice Penal, supra note 78, atArt. 557.

\textsuperscript{173} Militärstrafgerichtsordnung, supra note 78. As a general rule, witness testimony could not be replaced with interrogatories (Art. 304); witnesses may be examined by the accused, counsel, and/or the judges at trial (Art. 293).

\textsuperscript{174} To be sure, by 1900 the prohibition on \textit{ex post facto} laws and punishments was a common fixture within regular European criminal justice systems. M. Cherif Bassiouni, \textit{Principles of Legality in International and Comparative Law} in 1 \textit{International Criminal Law} 78-79 (M. Cherif Bassiouni, ed.) 2008 citing Giuliano Vassalli, \textit{Nullum Crimen Sine Lege} 8 Nuovo Digesto Italiano 1173 (1939). This does not mean that the principle would have applied in contexts where the law of occupation held sway. French military law permitted the prosecution, even for crimes that did not appear in the Code of Military Justice, of foreigners who threatened the safety of the occupying army. Nicolas, supra note 171, at 33 (Art. 63 (commentary)). Tailfeather acknowledges this line of precedent, but nevertheless claims later that “[…] in French practice, the inhabitants of occupied countries are entitled to justice in accordance with the same procedure and the same conditions as the soldiers of the French army. The guarantees offered to them are the same. It is these rules that have been applied in Italy, Mexico, etc.” Tailfeather, supra note 78, at 225, 230. The British Manual afforded invaders complete discretion over the law that would apply in occupied territories, and did not even guarantee locals recourse to a legal process. Commanders were specifically authorized to punish “in such manner as he thinks expedient, inhabitants guilty of breaking the rules laid down by him for securing the safety of the army.” Manual of Military Law, supra note, at 297. The German military code mandated the application of German law in occupied territories. See n xxx. The Italian \textit{Codice Penale} provided that, in times of war, “persons outside the army that commit or contribute with someone in the army to commit an offense under this Code will be subject to the same punishments [under this Code].” (Art. 236). In terms of personal jurisdiction, however, courts-martial could only heard cases against persons involved with the military, their servants, or prisoners of war. (Art. 545). In short, it seems that in 1900 the prohibition of \textit{ex post facto} laws was not envisioned as extending to natives residing in occupied territory.

\textsuperscript{175} International legal positivism in the late 1800’s “provided for a certain latitude in punishing those who were deemed to manifest social dangerousness, irrespective of the specificity of the written law.” M. Cherif Bassiouni, \textit{Crimes Against Humanity – International Criminal Law} 94 (2nd revised ed., 1999) citing Enrico Ferri, \textit{Sociologia Criminale} (1898) and Raffaele Garofalo, \textit{La Criminologia} (1815). \textit{See also} Hans Kelsen, \textit{Peace Through Law} 87 (1944) (arguing in favor of the development of an international judiciary that “[t]here is no rule of
Although this principle has long been one of international criminal law’s bête noires, and its applicability before international fora has been discounted since the 15th century trial of van Hagenbach, the situation is arguably different where the defendants were, as at Paoting-Fu, tried before a court applying procedures and laws that were ill-defined and departed from those of their own country.

In the circumstances the pro-trial powers would have done well to approach the Commission on its own terms, and emphasize those features that were conspicuously legal, rational and decorous. If the Session Records are to be believed, translators were employed for defendant’s benefit, the accused were given an opportunity to state their case and comment on the evidence adduced against them, and Chinese law was considered for sentencing purposes. There is nothing in the record to suggest that an attempt was made to force confessions from the accused, or that the integrity of the proceedings was affected by meddling from the military and political leadership in Peking. When the newly appointed Prefect and Subprefect scared up some purported “Boxers” for presentation at the sixth session, the Commissioners declined to make scapegoats of three of the suspects they considered innocent. The Commissioners made no sentencing recommendation with respect to suspected Boxer Chen–Che-Chiang, essentially declining to try him in absentia. Sentencing followed the placement on the record of evidence that indicated support for the Boxer cause or more direct involvement in Christian deaths. It is also noteworthy that the Commissioners doled out sentences other than capital punishment. The decision to demote Shen Chia Pen suggests that verdicts were not predetermined, and that there was an effort to make punishment proportional to crime, a fundamental principle of justice common to the legal traditions of all of the countries from whence the Commissioners hailed.

Communiques from the field also indicate that Commissioner Jamieson did not succumb to revengist sentiments. In fact, he maintained an admirable impartiality toward the accused, inclining neither toward a belief in Western revenge as its own reward or a presumption of guilt, at least with respect to the fantai. His letter to MacDonald seeking the British representative’s views on the punitive role of the Paoting-Fu expedition, drafted on the eve of the Commission’s first sitting, indicates a mind open to acquittal:

general customary international law forbidding the enactment of norms with retroactive force, so called ex-post facto laws”). B. Broomhall, Art. 22 Nullum Crimen Sine Lege in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 713-729, 735 (Otto Triftterer, ed, 2nd edn., 2008)) (“By the start of the First World War, [nullum crimen sine lege] was recognized in the legal systems of all developed countries and their dependent territories, although not always in the same way.”)

177 Annex 1, Second Session.
178 Annex 1, Sixth Session.
179 Annex 1, Seventh Session.
180 Another American, Lieutenant Turner, also accompanied Hutcheson as an aide-de-camp to General Gaselee. Although his report emphasizes the logistical aspects of the operation, the author noted that he fully concurred in the version of events described by Hutcheson, and mentioned in passing the punishments recommended by the “international court of inquiry” after “careful investigation.” ARWD 1901, supra note 8, at 468, Soulard Turner, ‘Report on March of Troops Composing Paotingfu Expedition’ (November 2 1900). Turner’s report is also available in NARA, RG 395/913.
181 As well as their considered mitigation of Quei Heng’s sentence during the Commission’s second session.
182 Assuming Jamieson was, in fact, one of the Commissioners. See infra p. xxx.
As soon as we [indecipherable] into a house (which I hope will be tomorrow) I shall go into the whole questions and be able to arrive at a conclusion as to his guilt or innocence. […]

Ting [Yung] has certainly been courageous enough to stay here, has carried out his order to cause the Imperial troops to disperse and rendered every assistance in procuring supplies. To punish little fish who let themselves be caught and leave unscathed the big ones who are beyond reach would not seem equitable[,] however I trust you will favour me with an expression of your opinion as to the political expediency at the juncture of executing Ting [indecipherable] shot should he be found guilty. In any case he should be cashiered and imprisoned in neglect of duty. He is a [indecipherable] influential clansman and that in itself could tend to make him inclined to carry out Tuan’s orders.183

Given the politically charged atmosphere, the brutality that characterized the campaign in China, and the logistical challenges that attended occupation of the provincial capital in a hostile foreign country, the trial of the first provincial officials to fall into Western hands (and notoriously bad characters at that) was conducted with a surprising degree of civility and respect for the defendants. If the cloth from which the Commission was stitched together included patches of imperialism, bigotry and revanchism, the tapestry that emerged as a whole looked far fairer than might have been expected. While far from the judicial ideal, a case could certainly have been made that the Commission skewed more in the direction of a good-faith stab at substantive justice than that of a star chamber proceeding.

6. Conclusion

The establishment of the International Commission at Paoting-Fu is a watershed event in the history of international criminal law, though it largely passed under the radar at the time. Its instantiation during the transitional period, from the era of collective, political, and arbitrary punishment, to the individualized and internationalized proceedings that in the post-WWII era have become a fait accompli shows that international criminal law was not moribund during the long-nineteenth century. Although it has been eclipsed by the International Military Tribunals established in the wake of the Second World War, the Commission effectively and systematically responded to an atrocity crime with criminal sanction, validated the suffering of Christians, and generated sincere consideration of the values, rights, and obligations humanity vis-à-vis punishment among multiple constituencies. In these endeavors we may discern some of the portents of what would become, in the twentieth century, a revolution in international law.

Has the field of international criminal law been ennobled by the Commission’s rediscovery? The inklings of some of the most laudable aspects of our contemporary international legal order – a striving to resist capricious butchery and punish based on law and reason, penalize those guilty of crimes against humanity, emphasize the culpability of individuals over that of groups, distinguish between greater and lesser wrongdoers, incorporate the tools of law into the soldier’s and diplomat’s punitive arsenal, and concretize a progressive legal and cultural ethos in a tangible institution – are discernable in the story of the International

183 NA, PRO 30/33/7/9 Jamieson to MacDonald (n xxx) (emphasis added). The suggestion that Ting Yung be cashiered or imprisoned is best read, based on the structure and tone of the note, as contingent on a finding of guilt.
Commission. The stirrings of universal jurisdiction at Paoting-Fu and invigoration of the concept of the international criminal in Boxer China decades before the gestures towards accountability made in the post-Great War and Second World War environments. Focusing on this aspect of the Commission, there is a certain dignity conferred by the discovery of a new institutional ancestor to our contemporary courts. In a field consistently accused of ‘winging it’ it is always reassuring to know that we are not, in fact, making it up as we go along, but are on drawing on centuries, as opposed to mere decades, of intellectual precedent when the controversial decision to pursue international justice is made. The Commission also allows us to frame contemporary ICL not as a new development divorced from longstanding policies and law, but rather as a natural, even welcome, ‘coming of age’ of a longstanding impulse towards accountability. But telling the whole story complicates the romantic vision of ICL to which many of its devotees fall prey. The Commission is marred by its reliance on the symbology of vengeful retribution (public beheadings) as opposed to those of justice (open trials) to teach its lesson, as well as its association with an intervention in which the most ignoble impulses of the Allies were often given free reign (and the intellectual traditions that justified this state of affairs). The institution is a somewhat uncomfortable addition to the pantheon of international criminal courts.

If the field has not been unqualifiedly ennobled, at least it has been enhanced. The Commission serves as a reminder that, to the extent contemporary international courts are genuinely apolitical, non-ideological and impactful, these qualities should not be taken for granted, but appreciated for the accomplishments that they are.
Paoting-Fu

International Investigative Commission to seek out, judge and punish the principal authors of the massacres of Christians, and the promoters of the same.

President. French General Bailloud
   German Major Von Brixen
   English Captain Poole
   Italian Major Agliardi (substituting Captain Ferrigo and afterwards the Navy Lieutenant Di Sambuy)

Procès-verbal of the Sessions

The following notes were taken during the sessions of the commission and are not exhaustive, but include the procès-verbal of the members, and are an integral part of the paperwork of the Investigating Commission that need to be presented to the Field-Marshall Von Waldersee.

Lieutenant Di Sambuy

Minutes of the 1st session (23-10-00)

Field-Marshall Waldersee

I have the honor of letting you know that the investigation commission of which you made me the honor of being president, held today its first session.
   All the designated members are present.
   The commission considered all the information available about the Boxer movement in Paoting-Fu, the harassment suffered by the Christians and the massacres.
   After a careful examination of all the documents this commission has decided to arrest all the people that were believed to be at fault.

   (Bailloud)
   (etc etc)

1 Annex 1 is an English translation of ‘Commissione Internazionale D’inchiesta Circa Il Massacro Di Cristiani’ found in the AUSSME, E-3, Rac 54, fol 40, translated with my appreciation by Federico Solchi. I have reproduced as closely as possible this record’s formatting in this Annex.
   Fragments of these procès-verbal written in English and French are also found in the diary of Commissioner Poole, held as ‘Microfilm diary of Capt (later Lt Col) F G Poole, Middlesex Regiment, at Peking, China, 1900; associated with the 3rd China War (Boxer Rebellion) (1900-1901)’ by the National Army Museum in London. I have included excerpts from the Poole Diary in footnotes where it clarifies, expands, or deviates in a potentially meaningful way from the more complete and official-looking Italian document.
This report is clearly incomplete, given that I was not present at the time.

Lt. Di Sambuy

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Minutes of the 2nd session (24-10-00)

The commission held its second session on October 24th at 9 a.m. All the designated members are present. The Fangtai (supreme treasurer) who was arrested the evening before is introduced and interrogated.

He is asked the following questions:

1- Why have you authorized the use of your seal on the manifesto (of which we have here a copy) encouraging the insurrectional movement of the Boxers?
2- Why have you encouraged the removal and condemned the Mandarins that fought against the Boxers and tried to protect the Christians, who were obedient to the order to the Viceroy?
3- Why haven’t you protected the Missionary Green and his family, leaving them in the hands of the Boxers, who could have killed them even if you did not give an explicit order to do so?
4- Why when you heard from the Chinese Colonel Wang-Shong-Kwei that the Europeans, American subject Mr. Bagnall and his family were located in a village near Paoting-Fu you did not do anything to assist them, becoming in this way an indirect accomplice of their deaths?

To all these questions the Fangtai gives evasive answers saying that he was not aware of these facts or that he did not have enough power to intervene or that he was only following orders coming from his superiors.

At the conclusion of these answers it seems to the Commission not possible to keep the Fangtai in his role, and so the Commission has the honor to present to Marshall Von Waldersee the removal of the Fangtai from his position. The Fangtai is also kept in preventive detention since the Commission needs to understand his role in the massacres.

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After this appears in front of the Commission the Nie-Tai Shai-Kuan.

The following questions were asked

1- Why did you order on the 28th day of the 8th moon the billposting of an old edict of the Emperor that was hostile to Europeans and asked the Chinese of Christian religion to forswear their religion or to face death penalty?

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2 Poole Diary: “Why have you not protected Mr. Green [unreadable] and his family and communicated to the Boxers the desire to have them massacred though not actually giving the order[?]”
3 Poole Diary: “Why have you done nothing when the Colonel Wang told you the missionaries were there?”
4 Poole Diary: “To all these questions, the Fengtai answered in an evasive fashion, pleading ignorance and superior force against him and other orders, his inability to cope with matters.”
2- Were you advised by Father Dermont that the Christians in the village of Thien-Che Kuang were being attacked: why didn’t you do anything to protect them?
   To the first question the Nietai answers that he does not remember about that particular decree.
   On this matter an Italian missionary, Father Scipione asserted that he had a copy of this decree in Gausu and was sent there to bring it to the Commission but at this stage he had not made his return, so the commission decides to postpone this part of the questioning to tomorrow in order to shed some light on this very important part of the proceedings.
   To the second question the Nietai answers that he made all that was in his power, but could not do more given that he was not the Supreme Chief.6
   Given these circumstances the Commission decides to keep the Nietai under house arrest with continuous surveillance of the military authorities until tomorrow at 3 p.m. At that time the copy of the decree will have come from Gausu and it will be easy to prove his responsibility, culpability or innocence.

The third accused:

Wang-Shang-Kui
Colonel of the Chinese Cavalry acknowledges that he received in his camp the Bagnall family.
He sent the Bagnalls to Paoting-Fu escorted by his soldiers who gave the family to other Chinese soldiers, who in the end gave the Bagnall family to the Boxers, who killed them. He says that the papers he was given have been burned but that he saved a note.7
   The Commission in the meanwhile sends for some Chinese who are believed to have witnessed the massacre. While waiting for them to arrive the session is suspended.

Once the commission is again in session the witnesses have not yet arrived and so the “Tartar Governor”, Commander of all the Manchu troops, is introduced. He was arrested on October 22nd as per order of the English General Gaselee.
   The Governor has been indicated as being the supreme nominal head of the Boxers, having given them the support of his Prefect, given that his age and his deafness did not allow him for a direct action.

1st question: Why have you given full support to the Boxers?
1st answer: He answers that in reality he prohibited the Boxers to go on with their meetings but they did not obey to his orders.

2nd question: Why haven’t you at least stopped your son and your nephew who have been a very active part of the Boxers revolution?
2nd answer: he sustains that his son did not do anything.

5 Poole Diary: “Why have you posted the 28th of the Eighth moon an Imperial edict hostile to Europeans and ordering Chinese Christians to abjure their religion under pain of death [unreadable] a statement hostile to Christians, and also afterwards a proclamation of the Emperor protecting the Christians?”
6 Poole Diary: “To the 2nd question the Nietai said he wasn’t at the head of affairs.”
7 Poole Diary: “Their valuables, etc were handed to him, the papers had been burnt. A note has been made of the amount.”
The commission had already decided from the first session to have his son arrested but unfortunately the son had been in Peking for more than a month.

3rd question: Why, after the Fang-Tai closed the Boxers’ meeting place, did you allow them to use your court in order for them to meet?

3rd answer: He still denies that this is the truth, but the Fang-Tai once more asked about this matter says that if these meetings were not held in the neighborhood court, they were held in the houses of the neighborhood of the tartar section. The culpability of the Tartar governor being verified, the Commission condemns him to the death penalty. The advanced age of the Tartar governor would have suggested mitigation to another punishment, but given that there is not an alternative severe punishment available in this country he is condemned to death, if the Marshall approves.  

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**Minutes of the 3rd session (25-10-00)**

President is General Baillaud
All members present

All members agree in destroying the temple where the missionaries were tortured before being massacred on the 1st of July and where Miss Norrell was walked naked and dragged by her hair and feet. (The temple was indeed burned down on the 27th day of this month)

After this decision the testimony against:

Wang-Shang-Kui

The Colonel of the Chinese Cavalry is heard, the witnesses affirm that his own soldiers placed the Bagnall family into the hands of the Boxers and also cut the head off of their little girl.

The witnesses affirm that Wang-Shang-Kui saw all this.

Unanimously the Commission decides to condemn Wang-Shang-Kui to death.

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**Minutes of the 4th session (27-10-00)**

President is General Baillaud
All members present

The Fangtai (Supreme Treasurer) appears and a telegram that he sent to the Emperor is presented to him. The telegram reads, “I do not have enough troops to kill the Christians, if a simple Christian villain or a simple soldier would have come to rescue them, a calamity would have happened.”

The Commission unanimously proposed that the FangTai be put to death.

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8 Poole Diary: “Tartar Chief. Guilty, only his age in his favour. Unanimously agreed death, regrettable owing to his age.”
9 Poole Diary: “Witnesses against Wung Shang Kui said that his soldiers had given the Bagnall family to the Boxers and had cut off the head of the little girl, and had seen everything.”
10 Poole Diary: “Unanimously agreed guilty of death.”
11 Poole Diary: “Fantai confronted with his dispatch to the Emperor saying he had not sufficient troops to kill the Christians, and that if a Christian bandit or a simple barbarian soldier came to save them it would be a great calamity. [sic] He turned pale and made no answer.”
12 Poole Diary: “Unanimously agreed guilty of death.”
For the Nietai, the commission decides to proceed immediately with his dismissal.

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Minutes of the 5th session (29-10-00)

The Commission gets together in the house of the Fang Tai (condemned to death) to select a few pieces of art to send as a present to Marshall Wandersee. Major Von Brisceu takes note of them and is given the task of sending them to Marshal Waldersee.

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Minutes of the 6th session (31-10-00)

The commission is reunited for its 6th session on Wednesday 31st October at 9 a.m. All the members are present and the presidency is given to General Bailloud.

The (current) Prefect is introduced. He brings with him three Shen-She (counselors) of the various neighborhoods of the city. He also brings nine respectable businessmen and four prisoners who were currently being held in Chinese prisons.

The Prefect has brought to the commission the Shen-She and businessmen because they are well respected in town and could help the commission in making a decision about the kind of justice that needs to be done on this matter and the same is thought about the businessmen.

All the Shen-She and the businessmen are interrogated by the President in order to know what is their knowledge about the massacres and if they are aware of any Boxers name that need to be arrested and punished. All of them, naturally, respond almost in a chorus that they are not aware of anything, that they have not seen anything and that during the massacres they were in their business or busy in other matters.

The president tells them that since they are notables in the city they must be aware of what happened in their city, and that in some way they are also indirectly responsible of the massacres. The President adds that if they refuse the answer he will ask the commission to condemn them with a fine.

All the witnesses continue their denials. They are then brought outside.

After this 4 peasants are introduced by the Subprefect as Boxers and presents to the Commission the accusation for each of them.

Except for the first one whose name is Hu-Sang-Tien, who is a very bad person and really indicated as a Boxer, all the other three are just poor and dirty boys between 16 and 18 years of age that were arrested by the Chinese forces because they were playing [?] on the road at night.

The commission unanimously decides to retain only Hu-Sang-Tien while the other three are remitted to the Prefect and the Subprefect so that they can ensure a punishment for them and this punishment will need to be communicated to the Commission once decided.

After a while the Prefect and the Subprefect come back to the room stating that the Shen-She are not in any way useful to shed light on the massacres or to find people that might be involved in the massacres. The Commission decides to give them until next Sunday November 4th, when the members of the commission will reunite for the last time, to give precise indications so to find other guilty participants to the massacre.
During this session the Fangtai and the Nietai are also reintroduced before the commission in order to understand a bit more about their role, but the first one is as possessed by the Devil and is returned to prison while the second one says he does not know anything more than what he said and his powers were anyway limited, etc. etc., for this reason also the Nietai is taken back to prison.

Von Brixen
Captain Poole
Signatures
Lt. Sambuy
General Bailloud

Minutes of the 7th session (4-11-00)

General Bailloud is the President and all the members are present.

The Prefect and Subprefect are called in and are asked if they have any news to give and if they have found any other Shen-She (counselors) that need to be interrogated. The two answer that the other Shen-She are not in Paoting-Fu but that they were told that they needed to come to be interrogated.

The commission decides to take down the names and the address of these Shen-She in order to act against them, in case it was necessary, upon their return to Paoting-Fu, or in case they were arrested.

The Commission also decides that the military authority will act against all the people that will be thought to be guilty of having participated in the massacres against the Europeans and the Christians.

Chen–Che-Chiang, who was suspected of having taken an active role in the massacres, could not have been arrested since he had since long time taken refuge in the mountains.

The commission, having terminated its work decides to terminate the sessions.

Given that the Shen-She are without doubt responsible, even if only indirectly, for the disorders in Paoting-Fu, the commission decides that a fine will be given to them. The amount of this fine is decided to be 100,000 taels and the Prefect of Paoting-Fu is given the order to ensure this is executed. The Prefect is given a month of time to acquire this sum and hand it over to the military commander at the headquarters of the second French brigade (This sum will be given to the General Baillaud, since he is older than General Von Kessler, who is the Commander of the German troops in Paoting-Fu).

The General Commander Bailloud will then give this sum to His Excellency Marshall Von Waldersee, supreme commander of the international troops. He will then redistribute this sum to the European missionaries who had been affected during the revolution.

The Commission also decides that the execution of the death penalty for the three people condemned will take place Tuesday 6th November 1900 at 10 a.m. at the very same place where the protestant missionaries were massacred. At the same place will also occur the destitution of the Nietai after the execution of the death penalties. The destruction of the pagodas located on top of the city walls and the breach in the walls will also occur on the same day at 8 a.m.
The commission will take part at the execution together with troops located in Paoting-Fu.

Von Brixen  
Captain Poole  
Signatures  
Lt. Sambuy  
General Bailloud

**Paoting-Fu, 6 November 1900**

Execution of the punishments decided by the International Investigative Commission.

At 8 a.m. the explosion of 6 mines prepared by the German army causes the breach of the walls of the city of the dimension of approximately 50 meters. This breach is located on the east part of the walls and in the proximity of the South East corner. In the meanwhile the four pagodas that were on top of the door of the walls and the other four that were on the corners of the walls were set on fire and were almost completely destroyed.

At 10 a.m. on the ground just outside the above mentioned breach and in proximity of the place of where the Boxers massacred the Europeans and in presence of the French and German troops detached in Paoting-Fu, together with 4 Indian chevaliers representing the English troops and 4 Italian Navy troops representing the Italian forces.

The French forces are being represented by circa 1000 men are formed by navy infantry, a squadron of chivalry and a legion of mountain artillery. The German forces, also being represented by circa 1000 men, are formed by marine infantry and a battery of country artillery.

General Baillaud, together with his Chiefs of staff and the members of the investigative Commission take place in the middle of the square and so does General Von Kettler with his Chiefs of staff.

The troops pay their honors to their respective Commanders and after that following the order of the President, are brought in front of the people by German soldiers:

- The Fangtai
- The Tartar Governor
- The Colonel of Cavalry
- The Nietai

The first three are condemned to decapitation while the fourth one is condemned to degradation and removed from office.

The executioner, once he obtained the authorization from the President, proceeds in cutting off the heads of the first three. The heads are then held up to be shown to those in attendance. The Nietai is taken to prison.

The troops disperse and return to their headquarters

Signed Di Sambuy  
Member for Italy of the Investigative Commission  
Peking, November 1900.

Lieutenant Pietro Verri made a true and faithful copy of this document.