

# The Enigma of a Taiping Fugitive: The Illusion of Justice and the “Political Offence Exception” in Extradition from Hong Kong

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On July 25, 1865, Colonel William Henry Sykes, a member of the British Parliament, condemned Britain’s role in the extradition and brutal execution of a man known as “Mo Wang,” a Taiping chief who sought refuge under the British flag in Hong Kong. According to Sykes, the fugitive was delivered up by the British consul in Canton and “taken to the execution ground, tied to a cross, and was cut to pieces in a manner too horrible to bear recital.” Sykes charged the British Consul, Daniel Brook Robertson, and the Hong Kong Acting Governor, William Thomas Mercer, with complicity with the Chinese government while being “perfectly aware of the antecedents of Chinese officials in the perfidy, cruelty, and baseness exhibited towards Taiping (sic) rebels.”<sup>1</sup>

Sykes’s complaint prompted the Foreign Office to inquire into the so-called “Mo-Wang case.” A conclusion was reached after 6 months, in January 1866, when Lord Clarendon declared that the conduct of the British officials was “perfectly blameless” and that there was “abundant evidence to support the decision of the magistrate” to extradite the prisoner.<sup>2</sup>

1. The National Archives (hereafter TNA) FO 17/613, 101–104, Colonel Sykes, M.P., to Earl Russell, July 25, 1865. The original report that he cited appeared in *Overland Trade Report* on May 30, 1865 and was reprinted in the *London Evening Standard* on July 22, 1865. In a later dispatch (FO 17/613, 1215), he attached a letter from an “Englishman” in the *Daily News* (August 8, 1865) attributing the rendition to the greed of the Chinese mandarin of Canton who was “certain of his promotion should he succeed in catching so famous a rebel.” According to this modified view, the British consul had been tricked into backing up the Chinese official’s request.

2. FO 405/11, 20, The Earl of Clarendon to Sir R. Alcock, January 6, 1866.

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The prisoner was not a Taiping rebel, nor was he a pirate as some had claimed. He was a “boat robber,” no more and no less. In surrendering him to the Chinese authorities, the acting governor took “every precaution in his power to carry his provisions of the Treaty of Extradition into proper extradition.”<sup>3</sup>

The closure of the investigation raised many questions. The Great Qing Code treated piracy as a crime akin to both treason and robbery, and prescribed summary execution by decapitation for repeat and serious offenders. Slicing, or *lingchi* (popularly known as “death by a thousand cuts”) was reserved only for the most heinous crimes such as rebellion, treason, or the murdering of three or more persons in the same family.<sup>4</sup> It is unlikely that the Qing judicial system would subject a petty boat robber to the most extreme death penalty. But if the prisoner was indeed a rebel leader, why did the British Foreign Office, after a thorough investigation, insist that he was only a boat robber? Was it simply mistaken?

In the course of solving these mysteries, this article makes several contributions to the history of interstate justice in nineteenth century China and Hong Kong. First, it corrects a long-standing misconception that the prisoner was only a pirate “mistaken” for the Taiping rebel, an interpretation that writes off Sino-British collaboration in the rendition of a rebel leader to China and reduces it to an internal debate within the British legal and administrative circles about the specifics of extradition law.<sup>5</sup> Reopening the case and understanding its legal and political ramifications contextualizes the origin of Hong Kong’s ongoing extradition dilemmas in the history of legal imperialism. The case demonstrates that the conflict cannot be reduced to an ideological opposition between liberalism and authoritarianism, or differences between two legal cultures, because extradition was from its beginning intertwined with Hong Kong and China’s ability to administer personal jurisdiction, border control, and social stability, and was a manifestation of the colonial authority of the British Empire.

3. FO 405/11, 21, The Earl of Clarendon to Sir R. Alcock, January 6, 1866.

4. Zhang Rongzheng, Liu Yongqiang, and Jin Maochu, eds., *Da Qing lüli* (Tianjin: Tianjin guji chubanshe, 1993), 640. Robert J. Antony, “Pacification of the Seas: Qing Anti-Piracy Policies in Guangdong, 1794–1810,” *Journal of Oriental Studies* 32 (1994): 19.

5. Originated misconception in the verdict of the Foreign Office after its investigation, and is more recently endorsed in Ivan Lee, “British Extradition Practice in Early Colonial Hong Kong,” *Law & History* 6 (2019): 102. In addition to Lee, the only significant mention of the case is in James Norton-Kyshe’s *The History of the Laws and Courts of Hong-Kong*, vol. 2 (London and Hong Kong: T. Fisher Unwin and Norosha and Company, 1898), 83, but because it is only based on published records of the case in newspapers and parliamentary papers, this account is full of misconceptions and serves primarily as a reminder of the inadequate state of scholarship on the subject.

As a British colony from 1841 to 1997, the port city's legal structure and close vicinity to mainland China made it into what Elizabeth Sinn has called a "paradise-like haven for those seeking refuge from troubles in China."<sup>6</sup> In his analysis of the United States–Canada border, Bradley Miller writes that "borders and the sovereignty they delineated created and empowered settler states, but they also limited law's reach," in part because the governments on two sides of the border "did not fuse the jurisdictions together, nor could they disconnect the administration of the criminal law from domestic politics and community dynamics."<sup>7</sup> The Canton–Hong Kong border shared these characteristics. Due to the different legal and political systems between China and Hong Kong, treaties of extradition were often ineffective, disputed or unimplemented. The proposed extradition bill introduced by Chief Executive Carrie Lam in 2019, which led to mass protests and police crackdowns, was only the most recent manifestation of a century-long legal morass. For all its controversial nature and contemporary implication, however, the history of Hong Kong–mainland extradition has received surprisingly little scholarly treatment. Existing studies have either approached it as a facet of Hong Kong's legal history, or as a debate within the British legal system.<sup>8</sup> Although historians have examined *consular* jurisdiction in Chinese treaty ports (also known as extraterritoriality),<sup>9</sup> there has been little scholarship on *colonial* jurisdiction over Chinese fugitives and its effects on mainland China's border control and legal order. The lack of attention to this history has resulted in a prevailing misconception that Hong Kong's extradition

6. Elizabeth Sinn, "Fugitive in Paradise: Wang Tao and Cultural Transformation in Late Nineteenth-Century Hong Kong," *Late Imperial China* 19 (1998): 61.

7. Bradley Miller, *Borderline Crime: Fugitive Criminals and the Challenge of the Border, 1819–1914* (Toronto: University of Toronto Press, 2016), 48.

8. An example of the former is a section in Christopher Munn's "Our Best Trump Card": A Brief History of Deportation in Hong Kong, 1857–1955," in *Civil Unrest and Governance in Hong Kong: Law and Order from Historical and Cultural Perspectives*, ed. Michael H.K. Ng and John D. Wong (London: Routledge, 2017), 26–45; of the latter, see Jennifer Wells, "Clashing Kingdoms, Hidden Agendas: The Battle to Extradite Kwok-A-Sing and British Legal Imperialism in Nineteenth-Century China," *University of Pennsylvania East Asia Law Review* 7 (2011): 161–93; Peter Wesley-Smith, "Kwok A-Sing, Sir John Smale, and the Macao Coolie Trade," *Law Lectures for Practitioners* (1993): 124–34; and Lee, "British Extradition Practice in Early Colonial Hong Kong," 85–114.

9. Pär Kristoffer Cassel, *Grounds of Judgement: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan* (Oxford: Oxford University Press, 2012); Robert Nield, *China's Foreign Places: The Foreign Presence in China in the Treaty Port Era, 1840–1943* (Hong Kong: Hong Kong University Press, 2015); and Teemu Ruskola, *Legal Orientalism: China, the United States, and Modern Law* (Cambridge, MA: Harvard University Press, 2013).

debate is a recent phenomenon dating back only to the colony's handover in 1997.<sup>10</sup>

Compared with the obscurity of the "Mo Wang" case, the "Kwok A-Sing" case of 1872, concerning British imperial jurisdiction over a Chinese coolie who mutinied on a French ship at sea and escaped to Hong Kong, has attracted far more scholarly attention.<sup>11</sup> The "Kwok A-Sing" case, however, was far less significant to the Qing government, as the mutineers were largely unknown figures and their actions did little to disturb local Chinese governance. In contrast, the "Mo Wang" case was connected to the Taiping Rebellion (1850–64), the deadliest civil war in Chinese history, and its judicial outcome set an important precedent for subsequent judgments, including the Kwok A-Sing case.<sup>12</sup> The diplomatic and legal resolutions to the "Mo Wang" case had long-lasting implications on how subsequent diplomats, judges, and scholars of international law approached extradition with China over the next few decades. Diplomatic correspondence, press coverage, and parliamentary debates over the case cemented British imagining of the Chinese penal code as cruel and arbitrary, and introduced "political offence" as a category of crimes excluded from extradition to China. Most importantly, it resulted in a fundamental change in the implementation of Article 21 of the Treaty of Tianjin. Previously, any offences that violated the Qing code would be considered extraditable; afterwards, the article only applied to offences that were considered extraditable in the British legal system. To fully understand the origins of Hong Kong's extradition battles, I must return to the "Mo Wang" case.

Second, this article connects Sino-British extradition in Hong Kong with the larger scholarship on the transnationalization of criminal law and the tension between personal jurisdiction and territorial jurisdiction in law and empire. The legal profile of "Mo Wang" makes it a perfect case study of transnational crime law, defined recently by Karl Härtel as a "legal regime comprising a variety of public/governmental and non-state actors, experts and practitioners, extending to transnational as well as

10. See, for example, Mike Ives, "What is Hong Kong's Extradition Bill?" *New York Times*, July 10, 2019. <https://www.nytimes.com/2019/06/10/world/asia/hong-kong-extradition-bill.html>. The majority of press coverage on the bill similarly traces the origin of the conflict to the 1997 handover.

11. The major publications on Hong Kong's early extradition history all focus on the Kwok A-Sing case: Elliott Young, "Chinese Coolies, Universal Rights and the Limits of Liberalism in an Age of Empire," *Past & Present* 227 (2015): 121–49; Wells, "Clashing Kingdoms, Hidden Agendas"; and Lee, "British Extradition Practice in Early Colonial Hong Kong."

12. As Lee points out, as far as the Privy Council's judgement was concerned, the "Kwok A-Sing" case merely replicated British policy adopted in the "Mo Wang" case of 1865 ("British Extradition Practice," 112).

national levels and characterised by various judicial and administrative procedures, legal pluralism, multinormativity, legal collisions and conflicts of jurisdiction, and most notably, by processes of transnationalisation.”<sup>13</sup> European and American legal scholars have recently explored modes of cooperation used in the suppression of transnational crimes and the dissolution and coalescence of judicial consensus regarding the political offence exception in the nineteenth and twentieth centuries.<sup>14</sup> All these legal debates and developments had important, yet unexplored, repercussions to fugitive rendition across the Canton–Hong Kong border.

This case also reveals how extradition law was articulated and practiced at the interstices of empires, where the larger shift from personal to territorial jurisdiction resulted in tangles of political alliances. Much of the legal drama that will be subsequently analyzed was connected to the colonial government’s attempts at streamlining and consolidating the legal system in Hong Kong to make it conform to an imperial standard, and as they did so, the original extradition agreements that Britain had signed with the Qing decades ago started to look anachronistic and inhumane. But it would be a mistake to see the case merely as a reflection of a battle between Britain’s newfound universal liberalism and the tyranny of despotism. Sykes’s indictment and the Foreign Office’s investigations provides an example of how the “despotism talk”—the anxieties about petty despotism and legal abuses prevalent in the early to mid-nineteenth century—were inextricably connected to institutional changes in British colonies. Benton and Ford have argued, in the context of the anti-slavery and anti-piracy legislation of the British Empire, that many of the “humanitarian campaigns to secure human rights . . . had less to do with universal principles than with efforts to remake the interface between imperial and municipal structures of authority.”<sup>15</sup> To casual observers, the “Mo Wang” case indeed appeared as one such humanitarian campaign against Chinese tyranny, but following Benton and Ford’s cue, I argue that the tensions and politics driving the case were multilayered: the jockeying of power between British colonial officials and diplomatic agents, and between colonial/provincial administrators in Hong Kong and Canton, on the one hand,

13. Karl Härtel, “Transnationalisation of Criminal Law: 19th and 20th Century,” in *The Transnationalisation of Criminal Law in the Nineteenth and Twentieth Century*, ed. Karl Härtel, Tina Hannappel, and Jean Conrad Tyrichter (Frankfurt: Vittorio Klostermann, 2019), 3.

14. Julia Jansson, *Terrorism, Criminal Law and Politics: The Decline of the Political Offence Exception to Extradition* (London: Routledge, 2019); Miller, *Borderline Crime*; and Härtel, *The Transnationalisation of Criminal Law*.

15. Lauren Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800–1850* (Cambridge, MA: Harvard University Press, 2016), 5.

and imperial/metropolitan authorities in London and Beijing, on the other, both played decisive factors in shaping its outcome. In other words, the tension was as much between China and Britain, as it was between local agents (in Canton and Hong Kong) and central diplomatic offices of the two countries.

Third, this article seeks to understand the Chinese experiences and restore their agency, a perspective that has generally been ignored in studies of Sino-British extradition.<sup>16</sup> It examines how fugitives, rebels, local administrators, and the Zongli Yamen (the Qing's foreign office) negotiated their relationship with each other and vis-à-vis the British government. For the Qing, the consequences of the "Mo Wang" debacle were long-lasting and detrimental. The British Foreign Office's insistence on changing their extradition practice from the original provisions in the Treaty of Tianjin deprived the Chinese government of an essential legal tool for enforcing law and order after quelling the deadliest rebellion in Chinese history.<sup>17</sup> It introduced a new legal space for rebels and trouble-makers who had fled the mainland to claim the status of "political offenders" and foment sedition in the name of anti-despotism. By blocking legal channels of fugitive rendition, it forced Chinese officials, police agents, and diplomats to resort to extra-legal means such as abduction or assassination to recover, intimidate, or punish fugitives, further validating the image of Qing despotism.<sup>18</sup> To put it simply, the "political offence exception" provided the legal framework and rhetorical contours of the development of the political opposition that eventually toppled the Qing dynasty. And yet throughout the decades of political upheavals and despite their mutual misgivings, diplomats and administrators across the Canton-Hong Kong border continued a degree of collaboration with the tacit understanding that strictly enforcing British extradition law in Hong Kong was impractical and inimical to local order.

This article is divided into six parts. The first section untangles the conceptual conflation between "political offence" in nineteenth century Europe

16. None of the existing studies on the subject has used Chinese-language sources; on the other hand, scholarship on the experience of the Chinese communities in Hong Kong has rarely touched extradition history.

17. For an overview of the rebellion, see Jonathan Spence, *God's Chinese Son: The Taiping Heavenly Kingdom of Hong Xiuquan* (New York: W. W. Norton & Company, 1996); for a recent work on the rebellion and its connections to Western powers, see Stephen R. Platt, *China, the West, and the Epic Story of the Taiping Civil War* (New York: Alfred A. Knopf, 2012).

18. Jenny Huangfu Day, "Mediating Sovereignty: The Qing Legation in London and its Diplomatic Representation of China, 1876–1901," *Modern Asian Studies* (2020): 1–34.

and “political crimes” in the Chinese legal tradition, whereby leaders of the Taiping Rebellion were treated as akin to political refugees in post-revolutionary Europe. The following four sections reveal the identity of the prisoner and follow the case to four localities—Canton, Hong Kong, Beijing, and London—to see how it played into local and national politics. I show that the case was constructed in many different ways based on local and metropolitan concerns, and should not be reduced to a clash of cultures between a liberal ideology tolerant of sedition and an illiberal system wary of political offences.<sup>19</sup> The legal resolutions that concluded the case, rather than settling the problem, ultimately opened the door to a further alienation between extradition in legal code and extradition in practice, leading to the exclusion of China from the newly emerging regime of interstate rendition. The final section offers reflections on the problems arising from conflating the European concept of “political offences” with the Chinese legal concept of “political crimes” and forcefully transplanting the “political offence exception” to a society where rebellions rarely involved purely “political” offences, but were often realized through violent, apocalyptic upheavals.

### **Are Taiping Rebels “Political Offenders”?**

It can be easily forgotten just how recently the political offence exception took shape in the Western world. Lassa Oppenheim’s research into the history of extradition shows that eighteenth-century treaties frequently stipulated the extradition of “political fugitives, conspirators, military deserters, and the like” between European states.<sup>20</sup> The term “political offenders” and theories about “political crimes” in international law only came into existence after the French Revolution, as states saw political offenders as “heroes rising against tyranny” and worthy of protection. The political offence exception was first introduced in international treaties with the Franco–Belgian Treaty of 1834, and it would take several decades to become widely adopted.<sup>21</sup> The Webster–Ashburton Treaty of 1842 between Great Britain and the United States “specifically targeted political motivated criminals who sought to escape justice by crossing the vast

19. For an example of how this framework has been applied to an analysis of political offence in late Qing, see J. Y. Wong, *The Origins of a Heroic Image: Sun Yat-sen in London, 1896–1897* (Oxford: Oxford University Press, 1986).

20. Lassa Oppenheim, *International Law: A Treatise* (London: Longmans, Green & Co., 1912), 504.

21. Jansson, *Terrorism, Criminal Law and Politics*, 75.

US-Canada border,”<sup>22</sup> and in 1843, Great Britain refused to include the exception in its treaty with France.<sup>23</sup>

Therefore, it is no surprise that in 1842, when the Treaty of Nanjing was ratified, the British government did not foresee the later difficulty surrounding political offence in extradition. The Treaty ceded Hong Kong to Great Britain and established a simple, straightforward process of fugitive rendition based on the assumption that Chinese criminals would be held against the Qing’s legal code.<sup>24</sup> In the early decades of the colony, the government of Hong Kong generally resorted to what Christopher Munn has called “cheap, summary, and sharp justice,” giving up Chinese pirates or fugitives to the Qing authority when *prima facie* evidence of guilt could be established against the prisoners. Munn observed that in the 1840s and 1850s, the Hong Kong authorities paid little attention to the rights of the prisoners and often handed them over without the request of the Chinese government.<sup>25</sup> This attitude toward rendition was largely the result of the resource limitations of the Hong Kong judicial system and the belief held by British colonial authority that “many punishments in English law were impractical and ineffective” for Chinese offenders.<sup>26</sup>

From the mid-1850s on, as Sino-British collaborations in the suppression of the Taiping rebellion and piracy received more publicity in the English-language press, the results of such joint efforts were also more visible to British audiences. As Li Chen has observed, in the decades before the First Opium War, “visual and textual depictions of Chinese judicial torture and punishments, interpreted through the Enlightenment concepts of sympathy and universal humanity, turned Chinese law and people into a global specter of barbarism and cruelty.”<sup>27</sup> News of the Anglo-Chinese allied army’s brutal suppression of the rebels was seized by the oppositions to the Liberal Party and Taiping sympathizers among England’s religious groups. Likening the Taiping rebels to the liberty-seeking Italians who were then opposing the tyranny in Rome and Naples (Colonel Sykes, for example, termed them China’s “national party”), they charged the

22. *Ibid.*, 78.

23. I. A. Shearer, *Extradition in International Law* (Manchester: Manchester University Press, 1971), 166–67; and Christopher Pye, *Extradition, Politics, and Human Rights* (Philadelphia: Temple University Press, 2001), 82.

24. The relevant article 9 is found in the Supplementary Treaty signed in Bogue on October 8, 1843.

25. Christopher Munn, *Anglo-China: Chinese People and British Rule in Hong Kong, 1841–1880* (Richmond: Curzon Press, 2001), 247.

26. *Ibid.*, 245–53.

27. Li Chen, *Chinese Law in Imperial Eyes: Sovereignty, Justice, and Transcultural Politics* (New York: Columbia University Press, 2015), 246.

Liberal Government with supporting the Imperial troops and violating its stated policy of neutrality.<sup>28</sup>

These charges fell in line with the general drift of public sentiments in Europe and America regarding the extradition of political offenders, which can be summarized by a much-quoted statement by United States Secretary of State William Marcy in 1853: “To surrender political offenders is not a duty, but, on the contrary, compliance with such a demand would be considered a dishonorable subservience to a foreign power and an act meriting the reprobation of mankind.”<sup>29</sup> The mid-nineteenth century was the height of what Julia Jansson has termed “the era of romantic liberalism,” characterized by an “understanding of political criminals as heroic figures,” with goals “perceived to outweigh and justify . . . the use of violence in pursuance of self-determination and liberty.”<sup>30</sup>

The debate about the Mo Wang case in 1865 must be understood in the context of the new legal opinions in Europe regarding political offence, and their incongruity with Article 21 in the Treaty of Tianjin signed during the Second Opium War (1856–60). Most crucially, the changing public sentiments and the gradual consensus about the impossibility of surrendering political offenders in mid-nineteenth century England made virtually no impact on the new Sino–British treaty.<sup>31</sup> Article 21 in the Treaty of Tianjin (1858) essentially retained the 1842 legal basis regarding the extradition of Chinese fugitives:

If criminals, subjects of China, shall take refuge in Hongkong, or on board the British ships there, they shall, upon due requisition by the Chinese authorities, be searched for, and, on proof of their guilt, be delivered up. In like manner, if Chinese offenders take refuge in the houses or on board the vessels of British subjects at the open Ports, they shall not be harbored or concealed, but shall be delivered up, on due requisition by the Chinese authorities, addressed to the British consul.<sup>32</sup>

28. Platt, *Autumn in the Heavenly Kingdom*, 177–81.

29. Cited in John Bassett Moore, *A Treatise on Extradition and Interstate Rendition*, vol. 1 (Boston: The Boston Book Company, 1891), 305.

30. Jansson, *Terrorism, Criminal Law and Politics*, 73.

31. For the debate between England and France about political refugees, see Bernard Porter, *The Refugee Question in Mid-Victorian Politics* (Cambridge: Cambridge University Press, 1979).

32. In Hong Kong, the legal procedure for the rendition of criminals had been specified in Ordinance No. 2 of 1850, which vested the governor of Hong Kong with considerable discretionary power to determine the outcome of the case. Upon the hearing at the magistrate’s court, the governor shall issue orders relative to the “further detention, discharge, or transmission of such persons to the nearest Chinese authorities.” Ordinance No. 2 of 1850, “An Ordinance to provide for the more effective carrying out of the Treaties between Great Britain and China in so far as relates to Chinese subjects within HK (20th March, 1850),”

The article makes no mention of which types of crimes were considered non-extraditable, and in practice, *prima facie* evidence against the prisoner based on the Qing legal code was accepted as sufficient grounds for extradition. In other words, although the tolerance of political offenders became normalized in England, such changes were not reflected in British policy toward China, as it was dictated by an entirely different set of concerns prioritizing trade expansion and diplomatic representation. When the British forces suddenly joined the Qing government in arresting remnants of Taiping rebels beginning in 1864, public outrage in the West against the rendition of Chinese rebels, and the resultant change in the British policy, caught the Qing by surprise and left it befuddled and unprepared.

To the Qing government, the concept of “political crimes” was a far cry from the objections of an oppositional party in a liberal political system where a “strong distinction between state and society as well as between the political and the social was typically made.”<sup>33</sup> According to historian Philip Kuhn, political crimes in the Chinese legal tradition were conceptualized as “transgression against the values or institutional foundations of the polity … activities [which] attacked the legitimacy of the imperial system and challenged the cosmological foundations of its sovereignty.”<sup>34</sup> Although political crimes in the Qing often corresponded with the “ten great evils,” Joanna Waley-Cohen has argued that collective responsibility was a more reliable indicator for which crimes were considered political in the Chinese legal tradition, as it was seen as an effective “intimidating means of trying to check a trend whose political implications were unmistakable.”<sup>35</sup> In other words, the term signaled a different spectrum of political activities in the Chinese context, often associated with large-scale sectarian uprisings that challenged the very foundation of the state itself. In hindsight, the effects of political crimes in the Qing might be closer to the European concept of “social crimes,” which came to describe the violent, destructive deeds of the anarchists and

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*The Ordinances of Hong Kong* (London: George E. Eyre and William Spottiswoode, 1866), 70–71.

33. Jansson, *Terrorism, Criminal Law and Politics*, 98.

34. Philip Kuhn, “Political Crime and Bureaucratic Monarchy,” in *Soulstealers* (Cambridge, MA: Harvard University Press, 1990), 85.

35. Joanna Waley-Cohen, “Politics and the Supernatural in Mid-Qing Legal Culture,” *Modern China* 19 (1993): 342; Joanna Waley-Cohen, “Collective Responsibility in Qing Criminal Law,” in *The Limits of the Rule of Law in China*, ed. Karen G. Turner, James V. Feinerman, and R. Kent Guy (Seattle: University of Washington Press, 2000), 112–31.

socialists between the 1880s and 1930s, a type of crimes deemed not worthy of legal protection.<sup>36</sup>

Furthermore, to the Qing government, the idea of refusing to surrender a prisoner because of new legal distinctions between political and non-political offences, which solidified only years after the signing of the treaty, amounted to a betrayal of the original intentions of the treaty's signatories.<sup>37</sup> Indeed, even after such distinctions became boiler-plate language after the 1870s, the phrase "political offence" was notoriously vague and open to interpretation among European and American jurists.<sup>38</sup> It was difficult to distinguish, for example, the motives of political offenders in complex cases in which crimes of an ordinary nature, such as "murder, arson, theft, and the like" were also committed, and prolonged debates ensued on whether mixed motives warranted extradition.<sup>39</sup> The gradual adoption of the Belgian *attentat* clause by Western states effectively de-politicized violence and withdrew protection for persons whose actions were deemed destabilizing of the world order.<sup>40</sup> If the Qing government had been more in tune with these developments, they might have been able to argue that leaders of the Taiping rebellion followed a well-established tradition of resorting to violent means of social destabilization, making it problematic to categorize their offences as primarily political.

The ambiguity of "political offence" in extradition law can be seen in the nearly unanimous insistence, by all British politicians and commentators on the "Mo Wang" case, that political offenders must be treated as exceptions, and yet in practice officials treated them the same. The defendant's lawyer, the first Hong Kong barrister to be made a Queen's Counsel, obviously knew that the law officers had ruled in favor of the Chinese government in a similar request for the extradition of a political offender in 1862, and chose not to mention the prisoner's past involvement with the Taiping rebellion.<sup>41</sup> A lack of unanimity can also be seen in conflicting opinions in the Hong Kong press on whether Taiping rebels should be considered as "political offenders." The *China Mail*, for example, published an article

36. Richard Bach Jensen, "The Rise and Fall of the 'Social Crime' in Legal Theory and International Law: The Failure to Create a New Normative Order to Regularize Terrorism, 1880–1930s," in *The Transnationalisation of Criminal Law*, 197–211.

37. Regrettably, this logic was formally expressed by Qing diplomat only decades after the incident (CO 129/295, Luo Fenglu to Foreign Office, 476, August 2, 1899).

38. Pye, *Extradition, Politics, and Human Rights*, 83.

39. Oppenheim, *International Law*, 515–16.

40. Jansson, *Terrorism, Criminal Law and Politics*, 86.

41. The Police Magistrate's Notes of the two hearings contain no mention of Hou as a political offender. See in FO 405/11, 15–18.

on September 21, 1865, to justify the extradition of the prisoner from a legal and moral standpoint:<sup>42</sup>

His movements had no political significance whatever; and, even at the best, nothing of a political character could ever be attached to his nefarious achievements...For many years the man referred to carried everything before him with a high hand. If it suited him to identify himself with the rebels, he was ready to fly their flag; or, on the other hand, if the colours of different nations pleased him better, they were ready to be mounted on the fore-topmast.<sup>43</sup>

The definition of “political offender” adopted by this article is much narrower than the prevailing legal definition in the 1860s. Even if the prisoner was a Taiping refugee, it would still have been proper to have the man extradited because the Taipings “had never had any political status accorded to them whatever, and if the Tien Wong himself had taken refuge in Hong Kong, it would have been nothing more or less than the duty of our local authorities to have given him up.” In other words, it refuses to recognize the Taiping forces as a legitimate contender for power, and on that basis, denies the claims that the prisoner was a political offender. As to the form of punishment meted out to the prisoner, it says, “it appears to be perfectly foolish on our part to legislate as to the punishment which awaits Chinese offenders when given up to the Canton authorities. We might as well dictate to Louis Napoleon with regard to the particular form of execution that he ought to impose upon criminals taken in England for capital crimes.”

Yet this uncertainty about extradition law was largely written out of the final report delivered by the acting governor of Hong Kong, when he insisted, contrary to evidence elsewhere, that the magistrate had taken into consideration the “political offence” but failed to establish the identity of prisoner as a Taiping chief in cross-examination.<sup>44</sup> As will be discussed in the subsequent section, to counter Colonel Sykes’ allegations that British officials were culpable in the “Mo Wang” case, all traces of evidence establishing the prisoner as a political offender were concealed from the House of Commons papers that the British foreign office selectively printed for parliamentary debate on the case.

42. For a discussion of the political views of the *China Mail*, sometimes characterized as pro-government and anti-Taiping, see Prescott Clarke and Frank H.H. King, *A Research Guide to China-Coast Newspapers, 1822–1911* (Cambridge, MA: Harvard University Press, 1965), 62–63.

43. *China Mail*, September 21, 1865.

44. See Mercer’s dispatch to Colonial Secretary Mr. Cardwell printed in *House of Commons*, vol. 12, 6.

Thus, prior to the Mo Wang case in May 1865, the Hong Kong government quietly tiptoed around the political offence issue, while the law officers of the crown endorsed the interpretation that Chinese laws should be the basis for the execution of Article 21. After Mo Wang's execution led to political backlash, colonial officials and diplomats rushed to retroactively cover up their previous neglect of the political offender problem. In the end, British imaginations of the Chinese penal law, especially its application of *lingchi*, resulted in the “political offence” exception finding its way into the application of Article 21 without altering the text of treaty. The Chinese government was forced to accept the exception with no legal recourse, and was probably quite ignorant of why these changes were demanded. The post-revolutionary European notion of “political offence” and “political crimes” in the Chinese legal tradition thus became permanently and inextricably conflated.

To understand how this conflation happened, I will first uncover, through a careful reconstruction of the case, the true identity of the prisoner and the crimes for which he was extradited. This will be followed by how the case played into the politics and bureaucratic maneuvering in three sets of relations: first, the local relationship between the Qing provincial administration and the British Consul in Canton; second, the cross-border relationship among the Hong Kong government, the Canton government, and their mediator, the British Consul in Canton; and third, on a national scale, the diplomatic relationship among the British Foreign Office, the Zongli Yamen, and their mediator, the British diplomats stationed in Beijing.

### **Who Was the Real “Mo Wang”?**

In the southern coastal regions of Guangdong and Guangxi, the political allegiance of the large underclass was never something to be taken for granted.<sup>45</sup> The career of Hou Yutian (1829–65), thrice crossing the boundary of loyalty and treason, was a case in point. A native of Jiaying prefecture of Guangzhou, he cast his lot in with the Triads as a teenager, led by rebel leader Zhang Jiaxiang.<sup>46</sup> When Zhang defected to the pro-Qing militia in 1849 because of a fallout with the God Worshipper Society (soon to

45. For a study of and law enforcement in south China, see Robert J. Antony, *Unruly People: Crime, Community, and State in Late Imperial South China* (Hong Kong: Hong Kong University Press, 2016).

46. For a discussion of the relationship between the Triads and the Taiping in the early years of the movement, see Yi-faai Laai, “The Part Played by the Pirates of Kwangtung and Kwangsi Provinces in the Taiping Insurrection” (PhD diss., University of California, Berkeley, 1950).

become the Taiping Heavenly Kingdom), Hou followed him into the imperial force sent on a campaign to capture the Taiping insurgents in Hunan. Two years later, he was captured by the Taiping, but because of his military acumen and native-place connection with its leaders, he was welcomed into the rebel forces and gradually made his way up the rebel forces' military hierarchy.<sup>47</sup>

Various secondary accounts have attributed to Hou, probably with some exaggeration, the work of building a naval force for the Taiping.<sup>48</sup> What can be ascertained from firsthand sources is his curiosity about Western naval power and his interest in collaborating with foreigners. In November 1858, when Captain Barker of the *H.M.S. Furious* (accompanying the British Plenipotentiary Lord Elgin) sailed up the Yangzi River to look for potential trading ports, Hou sent him a semi-official diplomatic note representing the Taiping government. Calling him "my virtuous brother," Hou pleaded for a gift of a few "foreign cannons." Barker politely declined, citing the principle of non-intervention in foreign civil wars, but Hou persisted by reminding Barker that "all good Christian brothers ought to assist each other."<sup>49</sup> He never succeeded in obtaining war instruments from the British.

After the Taiping lost their capital of Nanjing to the imperial troops in 1864, Hou changed into civilian clothes, shaved his forehead (Taipings had let their hair grow long instead of following the Qing law of adopting the Manchu hairstyle) and braided his hair into the Manchu-style queue, and arrived in Hong Kong with large sums of money.<sup>50</sup> He opened an import and export shop serving the trade between Hong Kong and Shanghai, but among the goods he sent to the mainland were guns, ammunition, and food destined for the remnant Taiping forces in the Zhangzhou region of Fujian, led by the "Servant King" Li Shixian.<sup>51</sup>

47. Luo Ergang, *Taiping tianguo shi*, juan 69 (Beijing: Zhonghua shuju, 2000), 2216.

48. Wang Jinrui and Zhang Qinghua, "Taiping tianguo Tongcheng shoujiang Hou Yutian he tade shuijun," *Lantai shijie* 9 (2014): 91–92.

49. For Hou's exchanges with Captain Barker, see Jin Yufu and Tian Yuqing, eds., *Jindai Zhongguo shiliao congkan xiji: Taiping Tianguo shiliao* (Taibei: Wenhui chubanshe, 1976), 141–43. According to some accounts, Hou made five unsuccessful attempts at obtaining foreign cannons in 1858. His persistence was not because of his lack of knowledge in international law, but perhaps reflected the Taiping force's awareness of the ongoing Sino-British conflict and their attempt at winning the British to their side. For other Taiping attempts at making a diplomatic relationship with Lord Elgin, see Stephen Uhalley, Jr. "Lord Elgin and the Taipings," *Journal of the Hong Kong Branch of the Royal Asiatic Society* 10 (1970): 24–35.

50. Luo, *Taiping tianguo shi*, 2220.

51. Ibid.

For witness, the Canton authorities sent Chen Zhenjie (Chan Tsun-kit) who claimed that he was captured by Hou's piratical gang in June 1862. Chen lost his entire cargo and 3000 taels of silver and was kept on board to work as a coolie until Hou's forces were captured by the Qing troops in August 1864. Chen escaped to Hong Kong 2 months later, and soon discovered that Hou had opened a shop on Praya West Street named "Kom Shing-tai." Chen went back to Canton the next day, contacted a fellow victim who had also been captured by Hou, and together they reported Hou to the provincial government.<sup>52</sup> Hou tried to defend himself by claiming that he had been a mere trader between Canton and Shanghai for 2 years before he arrived in Hong Kong, and was tending shop when Chen and another man walked in and demanded money from him. He refused to give in, and some of his employees threw night soil at them. According to Hou, in retaliation of his refusal, they reported him to the Canton authorities with a false charge of piracy dating from 1862.

It is worth observing that in his testimony, Hou was completely silent about his involvement with the Taiping Rebellion, nor did his barrister, Mr. Edward Pollard, try to defend him as a political offender in order to establish his crime as being non-extraditable. The main objections raised by Mr. Pollard was the lack of sufficient evidence, and more importantly, that piracy was a crime that the Hong Kong court had power to deal with, but these objections were disallowed.<sup>53</sup> According to the attorney general's notes, the magistrate decided, at an early stage of the hearing, that there was probable cause for believing Hou's guilt.<sup>54</sup>

Historian Luo Ergang has shown that neither Hou himself nor his contemporary Taiping comrades referred to him as the "Mu Wang" (also romanticized as "Mo Wang"), a major Taiping leader who was betrayed and murdered in December 1863 by his fellow kings before they capitulated to Li Hongzhang. It was Augustus Lindley, a British ex-Taiping officer, who falsely identified Hou as the successor to the Mu Wang in order to elevate Hou's status and gain domestic sympathy to the Taiping cause. In his memoir published soon after Hou's execution in 1866, Lindley depicted Hou's death as a "judicial murder by those who unlawfully gave him up to so frightful a doom."<sup>55</sup> Ironically, it was Lindley's identification of Hou as the "Mo Wang" that sealed his case posthumously in the

52. FO 405/11, 15, inclosure 8 in no. 12, Sir F. Rogers to Mr. Hammond, December 6, 1865.

53. Ibid.

54. FO 405/12, 11, The Attorney General to the Acting Colonial Secretary, May 2, 1865.

55. Augustus F. Lindley, *Ti-Ping Tien-Kwoh; the History of the Ti-ping Revolution* (London: Day & Son, 1866), 800.

Foreign Office's investigation in 1865, and allowed for an immediate acquittal of the colonial authorities in his extradition. For when it was shown conclusively that the real Mo Wang was killed in Suzhou in 1864, it enabled the Foreign Office to draw the immediate conclusion that Hou could not have been the Taiping chief, and therefore not a political offender.<sup>56</sup>

### How the Extradition was Conceived in Canton

The Canton government discovered in 1864, the last year of the Qing's long campaign against the Taiping Rebellion, that remnants of the rebels were fueled with firearms smuggled from the British colony of Hong Kong. Their weapons were traced to Hou Yutian's arms smuggling operations in Hong Kong under the cover of a trading firm. The intelligence was handled with extreme caution by Guo Songtao, the Acting Governor of Canton, renowned for his open-minded acceptance of Western culture and his amicable relationship with foreign diplomats, notably the British Consul in Canton, Daniel Brook Robertson.<sup>57</sup> In 1865, Guo's successful mediation enabled the Confucian gentry of Chaozhou to put down their arms and accept foreign residency in the county, which helped him win the trust of the British consul.<sup>58</sup> As the second highest ranking official in Canton, Guo served as an advisor to the region's highest administrator, the governor-general (first Han official Mao Hongbin, and then Manchu official Ruilin) and worked closely with Consul Robertson on the rendition of Hou.

On the day that Hou was delivered, Guo jotted down a vague and self-congratulatory note: "This event marks the start of [the imperial government's] recovery of fugitives from Hong Kong, and it is all due to a humble plan." The plan was described by Consul Robertson, in a private letter to Colonial Under-Secretary Edmund Hammond:

The truth is, that How Yu-teen was a Taeiping Chief, called Shen Wong, who was busily engaged at Hong Kong in purchasing and shipping off arms and munition of war for the rebel forces near Amoy; but *the Viceroy was acute enough to keep all political element out of sight* (emphasis mine), and having a clear case of piracy against him, grounded the demand for his rendition on that, and on that, too, tried and condemned him. It was then he was asked

56. *House of Commons, Accounts and Papers*, vol. 12, 5.

57. Jenny Huangfu Day, *Qing Travelers to the Far West: Diplomacy and the Information Order in Late Imperial China* (Cambridge: Cambridge University Press, 2018), ch. 4.

58. Guo Tingyi, *Guo Songtao nianpu* (Taibei: Zhongyang yanjiuyuan jindaishi yanjiusuo, 1971), 354.

whether he was not the Shen Wong. He boldly admitted he was; refused to kneel to the Viceroy, saying he could kill him but once; and launched out into abuse of the Prefect, one of his Judges particularly, and the Imperial Government generally. On this, one of the guards struck him on the face, and he was led out to execution.

In other words, Robertson was well aware of Hou's identity as a Taiping leader, but seemed satisfied that Guo's method of extradition avoided the question of political offence. Another revelation that Robertson made in the same letter was about the manner of Hou's execution: he intimated that what appears on surface to be *lingchi* was a ruse. According to him, the Canton administration essentially executed Hou summarily prior to putting on a show of "death by a thousand cuts," the punishment prescribed for rebel chiefs. He emphatically noted that: "neither before, or at, or after his trial was he tortured, and the 'cutting to pieces' takes place after life is extinct."<sup>59</sup>

Robertson might not have been aware that this modified method of *lingchi* (slicing after a quick death) was not an uncommon practice at the time. Its existence is corroborated by diplomatic dispatches and at least one account from a British eyewitness at a different execution who reported that "the criminal he saw so executed was put out of his misery at once, and that the mutilation took place *after* the death and not before."<sup>60</sup> It can be understood in the context of the "quick justice" adopted by provincial authorities eager to do away with bandits and reduce the mounting judicial backlog. The long delays in carrying out punishments, as Robert Antony has argued, could diminish the didactic purpose of justice and make bandits lose fear of the law. Therefore, the Canton government had on several occasions passed sub-statutes to legalize summary executions in times of large-scale uprisings.<sup>61</sup> Weiting Guo's study likewise shows that the Taiping Rebellion resulted in a devolution of criminal jurisdiction onto the local authorities, reversing the practice earlier in the dynasty through which only the emperor had the ultimate power to order execution, and that this trend toward decentralization proved difficult to abolish even after suppression of the Taiping Rebellion.<sup>62</sup> Although the local authorities obtained imperial permission to execute criminals immediately, they also modified the methods of execution, partly to placate

59. FO 405/12, 11, private, Consul Robertson to Mr. Hammond, June 10, 1865.

60. A.B. Freeman-Mitford, *The Attaché at Peking* (London: Macmillan & Co, 1900), 198.

61. Antony, *Unruly People*, 206.

62. Weiting Guo, "The Speed of Justice: Summary Execution and Legal Culture in Qing Dynasty China, 1644–1912" (PhD diss., Vancouver: University of British Columbia, 2016), ch. 3.

Westerners who helped them with rebel suppression and who regularly witnessed these executions. The summary execution of criminals before *lingchi* allowed the governor-general to memorialize to the throne that Hou was “put to death by the slow process on the public execution ground.”<sup>63</sup> At the same time, it also enabled the consul to report that the prisoner’s death was quick and painless, and to deny that he condoned torture.

Although the Canton administration’s modification of *lingchi* by executing the prisoner beforehand was significant enough to merit repeated mentions in British diplomatic dispatches, the fact that hardly find any reference to this can be found in contemporary Chinese accounts raises the likelihood that the Chinese did not accord the modification the same significance. In their study of *lingchi*, Timothy Brook, Jérôme Bourgon, and Gregory Blue have argued that pain was not the defining feature of the various gradations in Chinese corporeal punishments, but rather “the consequences for the body that had been separated into parts.”<sup>64</sup> For prisoners undergoing *lingchi*, in particular, the real penalty did not come from the process of execution, but rather the imagination of the prisoner’s “tormented death” in hell resulting from somatic disintegration.<sup>65</sup> Therefore, the British belief that “torture” was the end goal was a misreading of the punishment, and the Canton administration’s modified *lingchi* actually met the standard of justice according to Chinese law.

Now I return to the question of how Governor Guo managed to sidestep the political offence exception in his demand of the prisoner. Consul Robertson insisted, in his letter to the Foreign Office, that he had nothing to do with the Hou case except to forward the Canton government’s request to Hong Kong. But this statement is directly contradicted by his own private dispatch to Mr. Hammond a few days later, on June 20, 1865, in which he intimated, with much pride, Chinese gratitude for his assistance in the extradition of Hou. To prove this, he enclosed the latest intelligence from Canton in the form of a memorial by Acting Viceroy Ruilin and Governor Guo Songtao, on the conclusion of the Hou Yutian case. The memorial acknowledged that Robertson “in all matters advises earnestly and seriously with your servants, and is devoted to maintaining the cause of the State, is preeminently worthy of approbation.”<sup>66</sup> In

63. The original Chinese memorial can be found in *Chouban yiwu shimo, Tongzhi chao* (Beijing: Zhonghua shuju, 2008), juan 32, 1382–83. The English translation is taken from FO 405/12, 13.

64. Timothy Brook, Jérôme Bourgon, and Gregory Blue, *Death by a Thousand Cuts* (Cambridge, MA: Harvard University Press, 2008), 11.

65. On Chinese imaginations of punishments in the underworld, see *ibid.*, ch. 5.

66. The original Chinese memorial can be found in *Chouban yiwu shimo*, juan 32. The English translation is taken from FO 405/12, inclosure in no. 10, “Memorial by the

Robertson's own words, it was "the first instance, to my knowledge at least, of the high Chinese authorities admitting that *they take counsel with a foreign Representative*, and shows that the barrier of exclusiveness is gradually breaking down . . . . This has been my object all along, and I venture to think the memorial *proves that my labour has not been in vain* (emphases mine)."<sup>67</sup>

It remains to be asked what it was exactly that Robertson did that moved the Canton administration to memorialize for his approbation. Guo's journal mentioned that in 1863, a similar extradition request was denied by the Hong Kong authority.<sup>68</sup> The most reasonable explanation is that Robertson told Canton officials why the previous extraditions had fallen through, and mentioned the general rule against extraditing people known as "political offenders" in international law. It was left to the Chinese officials to come up with a different charge for Hou and send the necessary witnesses to Hong Kong. The strategy that Guo and Robertson followed of strictly concealing Hou's connection with the Taiping Rebellion was instrumental in the smooth rendition of the fugitive. Thus, the story of Hou's extradition as it was planned in Canton points to a pattern of local collaboration between the Cantonese provincial administration and the British Consuls in the years after the Second Opium War.

Faced with pressure from the Foreign Office, Consul Robertson denied that he had anything to do with the case, having served only as the messenger of Canton. He delivered the sealed envelope from the governor-general without opening it, and deliberately avoided writing a cover letter to endorse it. In following such a course of action, the British consul departed from the usual practice by serving as the mediator between the provincial government and the Hong Kong governor. This deceptively small procedural anomaly offers the next clue in understanding how the case was viewed from Hong Kong.

### How the Extradition was Handled in Hong Kong

The Hong Kong government's rendition of Hou occurred under a confluence of factors peculiar to the colony's legal and administrative priorities, and it illustrates the second set of relationships shaping the case: the

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Acting Viceroy Sui-Lin and Governor of Kwantung Kwo, reporting the Extradition from Hong Kong and Execution of How Yu-teen, alias How Kwan-shing, a late Chief among the Nanking Rebels."

67. FO 405/12, no. 10, "Consul Robertson to Mr. Hammond." Emphasis mine.

68. Guo Songtao, *Guo Songtao riji* (Changsha: Hunan renmin chubanshe, 1982), 235.

tension between local administrators (in Canton and Hong Kong), on the one hand, and the political and diplomatic agents pulling strings from the metropoles of London and Beijing, on the other. The request for Hou came in amid intensified Anglo-Chinese efforts at controlling the human traffic between Canton and Hong Kong. The Canton administration and the Hong Kong government shared the frustration that outlaws could maneuver their way across the border to evade law enforcement. Colonial anxieties about Chinese flooding Hong Kong reached a peak in the spring of 1864, when ferry fare from Canton to Hong Kong was reduced to a fifth of its previous value.<sup>69</sup> The colonial government had temporarily suspended the rendition of pirates to the Chinese authority during the Arrow War of 1856–60 for fear of their potential recruitment into the Chinese force against Britain. With the end of Sino-British conflict and the increased talk of “cooperative policy,” the colonial government of Hong Kong was once again interested in the revival of pre-Arrow War extradition of pirates to the Chinese authorities in Canton, at least on a selective basis.<sup>70</sup>

In August 1864, the Hong Kong Governor Sir Hercules Robinson proposed that pirates taken by British gunboats in the neighborhood of Hong Kong should be delivered to the local Chinese government for trial and punishment, with three important provisions: (1) the offence had not been committed on British waters or on the property of British subjects, (2) the delivery should be accompanied by a Chinese guarantee that the criminals should not be tortured, and (3) this course was consistent with the existing laws of Hong Kong. After some hesitation, the Colonial Office approved of the proposal. What remained to be done was for the government of Hong Kong to pass corresponding legislation to give effect to it.<sup>71</sup>

These discussions resulted in ordinance no. 13 of 1865 for the “rendition in certain cases of Chinese Subjects charged with piracy,” which turned out to be abortive and never implemented.<sup>72</sup> The ordinance was introduced by Acting Governor W. T. Mercer and passed by the Legislative Council on July 3, 1865. The text of the ordinance did not include the condition of the Chinese guarantee that criminals should not undergo torture. In his note to Mr. Cardwell, Secretary of State for the Colonies on July 10, 1865, Acting Governor Mercer explained this glaring omission. He argued that securing the Chinese guarantee against the use of torture should be left

69. Munn, *Anglo-China*, 338.

70. Ivan Lee, “British Extradition Practice in Early Colonial Hong Kong,” 99–101.

71. FO 405/12, 2, Sir F. Rogers to Mr. Hammond, March 16, 1865.

72. CO 129/105, 449–57, Mercer to Cardwell, July 10, 1865.

to the executive branch of Hong Kong for their negotiation with the provincial government of China. The publication of such conditions in an ordinance, he argued, might not be considered “courteous” to the Chinese government. In leaving out the guarantee in the ordinance, Mercer’s intention was to treat the rendition of pirates (and other criminals arrested by British forces) as a matter of negotiation between his government and the provincial administration of Canton. As Hong Kong had no treaty right to request fugitives from China except in the case of British subjects, Mercer’s decision to leave the guarantee as a matter of executive negotiation might have been intended to increase his own leverage in discussions about prisoner rendition.

In the meantime, Mercer believed that the use of the British diplomats as linguistic and legal mediators between Hong Kong and Canton was outdated, cumbersome, and constrained his authority. From a conversation with his predecessor Sir Hercules Robinson, Mercer had learned that the Canton Consulate’s involvement in extradition requests came during a time when the Hong Kong government “was not yet provided with qualified interpreters, and was dependent on the Consulate for the necessary translations.” This problem, he mistakenly assumed, was already resolved by the passage of their final examinations by the cadets in the Hong Kong Civil Service, a date that coincided with the beginning of Mercer’s tenure as acting governor of Hong Kong. In other words, Mercer considered the mediation of the British Consul no longer necessary.

Furthermore, Mercer believed that the practice of sending extradition requests through the British Consul entailed a misunderstanding of Article 21, which provided that “if criminals, subjects of China, shall take refuge in Hong Kong, or on board the British ships there, they shall, *upon due requisition by the Chinese authorities*, be searched for, and, on proof of their guilt, be delivered up” (emphasis mine). In his reading, the British Consul was not a Chinese authority, and therefore did not have the power to make due requisition to the Hong Kong government.<sup>73</sup>

Finally, Mercer complained about the British Consul in Canton for “the obstructions that had been persistently thrown in the way of [his] Government” in their attempts at communicating with the Canton authorities regarding Hong Kong’s extradition requests. He listed three recent cases in which the Hong Kong government’s requests for the rendition of Chinese robbers who committed offences in Hong Kong were ignored by the governor-general with the support of the British consul. When questioned, the consul replied that the governor-general recognized no treaty provision which would enable Hong Kong to make such requests, and

73. FO 405/12, 23, Memorandum by Mr. Mercer, June 22, 1865.

quoted Article 16 of the Treaty of Tianjin to the effect that criminal acts committed by Chinese against British subjects should be punished by Chinese authorities. To Mercer and the attorney general of Hong Kong, this was an outrageous misinterpretation of the treaty because Article 16 made no reference to the British Colony of Hong Kong. It amounted to saying that Great Britain would “waive her right to punish all offences committed within her own territory.”<sup>74</sup> If the Chinese interpretations were valid, the Hong Kong government would have a one-sided obligation to arrest and surrender Chinese fugitives to the provincial governments, but could do nothing about fugitives who committed crimes in Hong Kong and took refuge on the mainland. To his dismay, the British consul, working closely with the Canton administration, endorsed the Chinese interpretation of the clause.

Thus, Mercer’s interpretation of the Treaty of Tianjin and his commitment to Hong Kong’s judicial sovereignty convinced him that his government had every right to enter into direct communication with the Canton government with regard to extradition, without the mediation of the British consul. On several occasions, he made overtures to Mao Hongbin, the Governor-General of Liangguang (Guangxi and Guangdong), but his letters were returned, unopened. To the Canton administration, the use of mediation and counsel provided by the British consul (as specified in the Treaty of Tianjin) was not only a useful source of legal advice, but also afforded a leeway for reconciliation.<sup>75</sup>

Offended by what he saw as rude condescension by the governor-general, Mercer dispatched a sharp-worded letter of remonstrance. A few days later, on April 21, 1865, he was pleasantly surprised when the governor-general responded with a direct communication asking for the rendition of a criminal, without the mediation of the British consul.<sup>76</sup> This direct reply in fact had nothing to do with Mercer’s remonstrance, but rather was the result of the replacement of Mao by the affable Manchu official Ruilin as governor-general. Instead of issuing another stern refusal, the diplomatic-minded Ruilin decided to reply to Mercer’s dispatch with an explanation for why he thought that future communications should still be mediated by the British consul. At the same time, he wasted no time in applying for the extradition of a Chinese criminal, and the man he wanted was none other than Hou Yutian. Consul Robertson, knowing the problematic nature of Hou’s extradition request,

74. FO 405/12, 24, Memorandum by Mr. Mercer, June 22, 1865.

75. FO 405/12, 34, The Viceroy Mao to Consul Robertson, August 16, 1864.

76. FO 405/11, 13, The Acting Governor-General of the Two Kwang to the Acting Governor of Hong Kong, April 21, 1865.

judiciously left the letter unopened to avoid being implicated, and avoided writing his own endorsement. Unfortunately, Ruilin's two letters arrived in reverse order, leading to Mercer's imagining, on seeing the governor-general's request for Hou, that "his remonstrance had had effect."<sup>77</sup>

Under such a misunderstanding, the Hong Kong government carried out the rendition of Hou with the utmost alacrity and resolution. Mercer issued an order to deliver Hou up to the Chinese authorities after two quick hearings in the police magistrate's court. Based on the attorney general's report, Hou's barrister had requested that the magistrate "hold the papers in his hands in order that he might make an application of some kind or other" to the Supreme Court. The latter replied that he had no authority to do so but was willing to add a note to the acting governor that "such an application had been made." But Mercer entertained no requests for further delays; therefore, Hou was delivered the second day.<sup>78</sup>

Although the acting governor's thoughts cannot be divined, it is rather unlikely that his decision was wholly unconnected to his desire to keep direct communication with the governor-general open. By promptly delivering Hou, he was nudging the governor-general to reciprocate the favor by sending back the Chinese subjects who had escaped from Hong Kong to Canton. The delivery of Hou within such a short window warranted the acting governor to still use his (mis)interpretation of Ruilin's letter to secure further direct correspondence. His letter stated that "the man in question was, after a lengthened investigation, committed to prison by the magistrate of police" and that he had "ordered the necessary steps to be taken for his delivery" according to the treaty provisions.<sup>79</sup> The "lengthened investigation" he claimed was pure fiction: Ruilin's request was written on April 21, the two short hearings at the magistrate's court occurred on April 24 and May 1, and the prisoner was delivered to the Chinese authorities on May 3. No investigation was made by the magistrate apart from hearing the testimonies at court. This was an extremely speedy process: only 12 days from the initial request to the delivery of the prisoner.

Thus, similar to the circumstances in Canton, the Hong Kong government's decision to hand over Hou—and the manner in which he was delivered—were rooted in contingency and the priorities of local governance. In particular, the decision was driven by the Hong Kong government's desire to establish the colony's judicial sovereignty and streamline criminal justice. To do so, Governor Mercer attempted to use

77. FO 405/12, 23, Memorandum by Mr. Mercer, June 22, 1865.

78. FO 405/11, 18, The Attorney General to the Acting Colonial Secretary, May 2, 1865.

79. FO 405/11, 19, The Acting Governor of Hong Kong to the Acting Governor-General of the Two Kwang, May 3, 1865.

the extradition of Hou to solicit reciprocal gestures from Canton, and to establish extradition as a local/judicial, instead of a national/diplomatic, issue. Mercer's response to the Foreign Office also mirrored that of the British consul in his immediate denial of accountability. Mercer claimed that the treaty only specified that he was responsible for seeing to the delivery of the prisoner, not to the manner of his punishment.<sup>80</sup> This would be the last time a governor of Hong Kong could make such a claim. Between May and November, 1865, voluminous exchanges among Hong Kong, Canton, Beijing, and London soon changed the treatment of "political offenders" in extradition between China and Hong Kong.

### **Damage Control, Containment, and Modifications of Article 21**

Statesmen and diplomats in London and Beijing dealt with a different set of conundrums from those dealt with by local officials. For a number of coincidental reasons, the rendition and the execution of Hou conflated the *lingchi* meted out to a rebel chief with regular punishments given to all pirates according to the British view of Chinese law. As had been discussed, the private correspondence from Consul Robertson to at least one of the under-secretaries of the Foreign Office had revealed Hou's identity as a leader in the Taiping force. This important revelation, along with Robertson's self-congratulatory note about the Chinese government's appreciation of his assistance, makes it certain that *some* British officials in the Foreign Office knew of the complicity of Consul Robertson. For those who knew of (or suspected) British complicity, attempts to unearth the truth must be weighed against the need for damage control. If Hou's real identity as a Taiping leader was to be confirmed and revealed to the public, doubts about the integrity and competency of the diplomatic and colonial officials must be taken seriously. If, on the other hand, Hou's crime remained piracy, then his punishment by the *lingchi* method must be attributed to his guilt as a pirate according to the Chinese legal code. In the former scenario, British diplomats and colonial officials must be held responsible for the death of Hou. In the latter case, the blame would be shifted to the brutality of the Chinese legal system for applying the extreme method of slicing to an ordinary case of piracy. This would also cause grave concern about the continuation of extraditing pirates or other criminals back to China.

80. FO 405/11, 11, The Acting Governor of Hong Kong to Mr. Cardwell, September 20, 1865.

In the meantime, the continuation of British naval campaigns against pirates near the Chinese coast resulted in new developments in the pattern of collaboration with the Chinese government. In a recent case, reported by Consul Pedder in the Fujian province, a British gunboat *Bustard* had arrested a piratical lorcha full of Chinese subjects, and delivered them to the local Chinese authorities in Xiamen (Amoy) for trial and punishment. Because several of these Chinese subjects made important revelations about their lorcha (registered under the Portuguese authorities) and were willing to repeat these statements in the Hong Kong Supreme Court, the consul requested that they be taken to Hong Kong as witnesses. The Chinese authorities agreed to send them, but stipulated that they be returned to Xiamen to stand their own trial, based on Article 21 of the Treaty of Tianjin. In his letter to the Hong Kong government, Consul Pedder appeared excited to see this as a new pattern of collaboration, yet was unsure what the proper course should be for the legal custody to ensure their safe return to Xiamen.<sup>81</sup> But for the Hong Kong government and the Foreign Office, already troubled by the Hou case, such collaborations entailed even greater ethical dilemmas. Should these witnesses, after rendering useful service to the Supreme Court, be sent back only to meet the ghastly fate that had befallen Hou?

To the Foreign Office, the crux of the issue was: whether there was any reason to believe that the pirates might all meet the unfortunate fate of Hou and receive punishment by *lingchi* if sent back to Canton, or whether the Hou issue was an anomaly. For this information, it could only rely on the intelligence provided by British diplomats in China, linguists, and experts in Chinese government and law. The question was directed back to Consul Robertson and Thomas Wade, the chargé d'affaires of the British Legation, who had proved himself capable of gaining the trust of high officials of the Zongli yamen.

But the opinions of British diplomats in China were ambiguous and contradictory. On the one hand, Consul Robertson suggested that the method might not be as cruel as one might imagine: it is “rapid in its operation, the death stroke being given before the cutting up takes place.” On the other hand, Robertson also insisted that Hou’s punishment was not unusual for a pirate, and that slicing was not only reserved for rebellion and disloyalty, but also for aggravated cases of robbery and piracy.<sup>82</sup> This abysmal view of Chinese legal system was confirmed by the correspondence of Wade, where he reported that, on the one hand, the Zongli Yamen officials “stoutly denied that piracy is, any more than burglary, punishable by the

81. FO 405/12, 61, Consul Peddler to the Colonial Secretary, Hong Kong, May 26, 1865.

82. FO 405/12, 71, Consul Robertson to Earl Russell, September 25, 1865.

*lingchi*,” and yet on the other hand, he himself had found that “repeated acts of piracy and resistance of the Executive” were to be sentenced by *lingchi* in a manual of criminal law dating back to 1780 and published by 1859.<sup>83</sup> Wade knew perfectly well that Hou was punished as a rebel leader, not as a pirate,<sup>84</sup> but he nevertheless implied that Hou’s case indicated the possibility that pirates were punishable by *lingchi*.

The opacity of Chinese law in the eyes of British officials led them to settle for workarounds; namely, adding a requirement that the Chinese government submit a guarantee of “no torture” as a condition for extradition. British officials had been contemplating this guarantee for some years. This guarantee was one of the necessary conditions that the Colonial Office specified before they allowed Ordinance 13 of 1865 on the rendition of Chinese pirates. It was also the primary reason for Acting Governor Mercer’s attempts at making direct communication with the provincial government of Canton, for without such guarantees, the ordinance would be inoperable. Wade himself was a proponent of the guarantee, and in 1864, he talked to the Zongli yamen about the possibility of commuting *lingchi* for the chief among the Taipings. As Wade recounted to the Foreign Office, in his interview with Yamen officials he drew upon his knowledge of Chinese legal history to show that the more draconian punishments had been mitigated or suppressed, and that most recently, Emperor Daoguang himself had made a revision to the Penal Code in 1832 to “propitiate heaven in a time of famine.” To this Prince Gong replied (as paraphrased by Wade):

It was a punishment which this dynasty would never have invented; that this dynasty (which is a fact) had abolished various punishments of an atrocious nature: but to impress upon the people the eminence assigned by Chinese morality to the duties of subject to ruler, child to parent, and wife to husband, it was necessary to mark the violation of these by an extraordinary penalty, and that it was for this cause that the statute providing it remained unrepealed; that it was seldom or never inflicted in Peking, and in the province only in the case of rebels.

Along with his paraphrase of Prince Gong’s statement, Wade added his recent observations that provincial governments, instead of sending rebels to Beijing for execution as required by law, seemed to have preferred more local and low-key executions within their own headquarters, which he attributed to the deterring effects of the presence of foreign diplomats in the capital. Furthermore, his intelligence also suggested that “late

83. FO 405/12, 88, Mr. Wade to Earl Russel, November 9, 1865.

84. FO 17/613, 42, Consul Robertson to Mr. Wade, June 8, 1865.

executions have been in reality summary, and that the horrors which revolt modern civilization were not perpetrated, at all events during the life of the prisoners condemned.” In other words, Wade shared Consul Robertson’s belief that what appeared to be *lingchi* were in fact summary executions.<sup>85</sup> Modifications aside, Wade did not think that the Chinese government had any immediate intention of abolishing *lingchi*, and “no guarantee that the Chinese could give us would be worth our acceptance; there is no engagement of the kind that could not be set aside by fifty subterfuges; and no precautions that we might hope to take could secure what we desire, unless we are prepared to insist, in every case, on witnessing the execution of every criminal surrendered.” Thus, the unpredictability and unknowability of the Chinese legal system precluded the possibility that their guarantees could be accepted.

If Wade’s objection to the no-torture guarantee was phrased diplomatically, he did little to conceal his aversion to the Hong Kong government’s attempts at bypassing the consul to directly communicate with the Canton authorities.<sup>86</sup> But here, too, his objection was framed in terms of the immaturity and stubbornness of the Chinese. First, he did not think that “the Chinese authorities can be compelled to correspond with the Colony on any question,” and second, that “the Chinese authorities would be much astonished if, after all the explanations it has received on the subject of diplomatic relations, it were to learn that there is in these parts any exponent of Treaty questions except Her Majesty’s Representative in the capital.”<sup>87</sup> On this point, however, it seems that Wade underestimated the flexibility and pragmatism of the Chinese. On August 26, 1865, Acting Governor Mercer reported with satisfaction that Canton officials no longer refused to correspond with him directly.<sup>88</sup>

But the deadlock over the no-torture guarantee between the acting governor of Hong Kong and the British Legation continued. On November 8, 1865, the Foreign Office forwarded the case to the Law Officers of the Crown, with a view of formulating a set of new instructions for Sir Rutherford Alcock, the newly appointed minister to Beijing, for reaching new understandings with the Chinese government. In their letter to the Law Officers, Mr. Hammond framed their inquiry in two parts. The first part had to do with the no-torture condition for extradition from Hong Kong, or “whether as a Christian Power Great Britain would not be entitled to insist on the renunciation by the

85. FO 405/12, 8, Mr. Wade to Earl Russell, February 16, 1865.

86. FO 17/613, 1, Mr. Wade to Earl Russell, July 8, 1865.

87. FO 17/613, 2–3, Mr. Wade to Earl Russell, July 8, 1865.

88. FO 405/12, 56, The Acting Governor of Hong Kong to Mr. Cardwell, August 26, 1865.

Chinese Government, in some form or other, of the infliction of cruelties repugnant to humanity on Chinese criminals placed at the disposal of the local authorities; and failing to obtain this, to refuse altogether to give effect to the XXIst Article of the Treaty of Tien-tsin.”

The second part of Mr. Hammond’s inquiry turns to Mercer’s complaint about China’s refusal to surrender Chinese subjects of Hong Kong who, having committed crimes in Hong Kong, sought asylum in China. More specifically, the Foreign Office was unsure whether “in strictness a nation is bound under an Extradition Treaty to give up one of its own subjects. In this country no objection is made on that ground, but it is believed that France would not surrender a French subject.”

The law officers were split in their opinions. The attorney- and solicitor-general adopted a more positivistic interpretation of Article 21, stating that they were unable to support the view that the British government could rightly refuse to perform the extradition unless the Chinese government renounced the usage of their own laws. In their own words, “they do not see how the Article can be read as containing any implied condition that the criminal law in China shall, in these cases, be administered in a manner conformable to Christian views of humanity.”<sup>89</sup> The queen’s advocate, on the contrary, believed that the no-torture requirement must be understood as an “implicit condition” in all treaties signed between a Christian power and a Heathen state, and deemed it inconceivable that “any authority acting under Her Majesty should deliver up a Chinese subject guilty of felony, with the knowledge that he will be burnt alive, or subject to any torture by the Chinese authorities.”<sup>90</sup>

Although their opinions differed, the law officers jointly proposed a solution to the conundrum. They pointed to the vagueness of terms such as “criminals,” whose “guilt” must be “proved” in the language of Article 21, and proposed that advantage be taken of these uncertainties to justify introducing new conditions for its enactment. Because the article did not define whose laws should be applied for the considerations of “crimes” and “guilt,” they counseled: “The rule, in all our other Extradition Treaties, is not to regard anything as a crime, for the purpose of extradition, which would not be so in the place where extradition is demanded, if the act had been done in that place. It is difficult to see, how the authorities of Hong Kong can try the question of guilt, by the rules of the Chinese, and not of their own law.”<sup>91</sup>

89. FO 405/12, 73, The Law Officers of the Crown to Earl of Clarendon, November 25, 1865.

90. *Ibid.*

91. FO 405/12, 74, The Law Officers of the Crown to Earl Clarendon, November 25, 1865.

According to this new interpretation, Article 21 should not be extended to persons known as political offenders. It must be observed that in delivering these opinions, the law officers of the crown treated the Hou case implicitly as what it actually was: a case of disguised extradition under the subterfuge of piracy. To prevent a similar case from happening again, the law officers alerted the Foreign Office that “it would be a just ground of complaint on our part, if advantage were taken on extradition on one ground, and try and punish a man upon a different charge, and not on that, upon which extradition was demanded.” One can only conjecture that perhaps the conflation of the two crimes was cleared up, by private correspondence, from officials in the Foreign Office who knew Hou’s real identity as a Taiping leader.

As to the question of piracy, the law officers observed that as Article 21 referred only to persons who took refuge in Hong Kong, it did not apply to Chinese pirates captured by British authorities. The latter should be tried in Hong Kong by British Law, and not, as specified in Ordinance 13 of 1865, be surrendered to the Chinese, and the ordinance was disallowed in January, 1866.<sup>92</sup> This would have made the acting governor’s decision to surrender Hou unlawful. Mercer clearly understood this, and with the tacit permission of the Foreign Office, he changed the crime that Hou was charged with from piracy to “robbery from a boat” in his final explanations on the case.<sup>93</sup> The adjudication of piracy was formally separated from the crimes covered under Article 21, relegated to a high court for suppression of piracy, introduced by an ordinance of 1868.<sup>94</sup> At the same time, the problem with Chinese pirates brought to Hong Kong by British naval vessels was resolved in Beijing, in a negotiation between Alcock and Prince Gong. With the support of the British Admiralty and the Foreign Office, the Chinese government began chartering British steamers for their own anti-piracy purposes, thus equipping themselves with the means of bringing pirates back into their own jurisdiction.<sup>95</sup>

In December, 1865, Earl Clarendon, the new Foreign Minister, issued a delicately worded instruction to the newly appointed Minister to China, Sir Rutherford Alcock. He described the difficulty in delivering a literal compliance with Article 21, given that “British authorities should not be accessory in any degree whatever to the infliction of punishments revolting to

92. FO 405/12, 91, Mr. Cardwell to Acting Governor Mercer, January 26, 1866.

93. FO 405/11, 11, The Acting Governor of Hong Kong to Mr. Cardwell, September 20, 1865.

94. Ordinance No. 1 of 1868, “An Ordinance to make provision for the more effectual Suppression of Piracy,” May 22, 1868, Hong Kong Laws (1890), 982–89.

95. Grace Estelle Fox, *British Admirals and Chinese Pirates, 1832–1869* (London: Kegan Paul, Trench, Trubner & Co, 1940), 160–76.

humanity, and long since looked upon with reprobation by all Christian nations.” Alcock was instructed to induce the Chinese government, “while abiding by the terms of the Treaty, and maintaining unaltered the laws of Chinese, to enter with Her Majesty’s Government into some less formal agreement than a Treaty, by which the Chinese Government would promise not to ask for the extradition of a criminal,” who might be subject to torture or inhuman punishment, or to agree to waive such inflictions. In addition, the minister should also negotiate with the Chinese government to remedy the lack of reciprocal extradition from China to Hong Kong, and to remind the Zongli Yamen that it was in the interest of China not to be made a refuge for foreign criminals.<sup>96</sup> These instructions, as vague and provisional as they were, signaled a turning point in the British government’s understanding of what it had agreed to in Article 21, and the beginning of a long process of negotiation over what kind of guarantee against torture was necessary and acceptable.

### The Aftermath

Reflecting on his lifetime of public service, Guo Songtao noted in his autobiography that the rendition of Hou Yutian was one of his major achievements. “Hong Kong was a hideout of criminals, and the more eagerly local officials sought after their extradition, the more eagerly foreigners protected them.”<sup>97</sup> And yet he admitted that even though Hou’s recovery was successful, its cost was dear. “All doors to the recovery of fugitives from Hong Kong are forever closed,” he wrote with regret. He attributed the failure to Governor-General Ruilin’s direct communications with Acting Governor Mercer containing pointless discussions of formality, which allowed the affair to attract public attention. This affair should never have been discussed with such extravagant fanfare (*puzhang*), but rather in a cool and restrained manner.<sup>98</sup>

Although Guo was mistaken about how the affair came to the attention of the British government, he was right that the Hou affair changed the ground rules for extradition from Hong Kong. To say that it forever blocked “all roads to the recovery of fugitives,” however, was an exaggeration. It was no longer plausible for the Canton administration to petition for the rendition of political offenders *as* pirates or other criminals. The Hou affair also led to reinterpretation of Article 21 and denied the

96. FO 405/12, 77–78, The Earl of Clarendon to Sir R. Alcock, December 11, 1865.

97. Guo, *Guo Songtao nianpu*, 325.

98. *Ibid.*

Chinese government the ability to recover fugitives whose crimes were not extraditable in Britain. Under such a constraint, political offences were no longer considered an extraditable crime, and any “disguised extradition” was expressly forbidden. No prisoner would be surrendered without an undertaking on the part of the Chinese government guaranteeing a fair trial and a promise not to use any torture. In this way, British diplomatic agents performed the dual function of gate-keepers and a monitors of the conduct of local tribunals.<sup>99</sup>

But on closer examination, what the Chinese authorities promised was quite different from what the British thought that they had secured. To the request that he provide a written guarantee not to apply *lingchi* to prisoners renditioned from Hong Kong, Governor-General Ruilin gave a spoken agreement, but said that he “could not state so in writing as he would lay himself open to attack . . . nor was there anything in the Treaty authorizing such a stipulation as now made by Her Britannic Majesty’s Government.”<sup>100</sup> In the letter that Ruilin did send to the British Consul a week later, he stated the guarantee in the following terms:

When the circumstances of a case have been thoroughly probed and maturely weighed, and distinct proofs are forthcoming, if the prisoner persists in denial of his guilt and refuses to utter the truth, inquiry by torture is proceeded with, as is provided by law; but cruel forms of punishment and torture, in excess of the law, are not permitted to be used. Henceforward, in the case of criminals escaping to Hong Kong, and seeking refuge there [...] it will be (the Viceroy’s) duty to issue injunctions to the functionaries charged with the conduct of the trial, requiring them to investigate the case with strict impartiality, and forbidding the illegal infliction of cruel forms of torture, in order that the principles of humanity be not infringed.<sup>101</sup>

According to this statement, Ruilin agreed not to inflict torture “in excess of the law,” but defended the rightful use of torture as an integral part of the Chinese legal system. This was by no means a total rejection of the use of torture or *lingchi* as understood by the British.

The problematic nature of this agreement meant that the Mo Wang case, rather than settling the dispute, was merely the beginning of a legal nightmare for officials of both countries. As the post-Arrow War collaboration between Qing officials and British diplomats continued over the next three decades, so did the tension and conflict of interests between the British

99. FO 17/614, 38–39, Sir F. Rogers to Mr. Hammond, January 18, 1866.

100. FO 17/614, 23, Consul Robertson to Sir Rutherford Alcock, November 15, 1865.

101. FO 405/12, The Acting Viceroy of the Two Kwang to Consul Robertson, 93, November 12, 1865.

diplomats in China and the Hong Kong administration on matters of interstate justice. Whereas British diplomats sided with the Chinese government in arguing for the implausibility of abolishing torture as a precondition of rendition, the Hong Kong government, citing the precedent of the Mo Wang case, defended its own judicial sovereignty and refused to surrender any prisoners whom they suspected might be subject to any judicial torture, not just *lingchi*.<sup>102</sup> In the meantime, local administrations in the coastal provinces were handicapped in recovering cross-border fugitives. In one of the longest extradition proceedings, lasting from 1880 to 1885, thirteen Cantonese fugitives (charged with multiple homicides within one family) escaped to Hong Kong, were first arrested upon requisition by Canton, but then were released because of concerns about the use of torture after their rendition. By the time the Chinese government issued a reiteration against torture and reapplied for their extradition, the fugitives had joined the Roman Catholic Church in Hong Kong, and with the help of the archbishop, reframed themselves as victims of a religious persecution, and hence entitled to the political offence exception. They were eventually released on an executive order of the governor.<sup>103</sup> This case illustrates how the use of torture, combined with the political offence exception, created loopholes for cross-border fugitives to escape justice.

Christopher Munn has pointed out that the difficulty surrounding extradition forced the Hong Kong government to resort to deportation to rid the colony of unwanted refugees.<sup>104</sup> From the Chinese government's perspective, such tactics undermined the Qing's administration of justice and border control; in certain cases, it forced the political fugitives to be ever more elusive and unpredictable in their political strategies and alliance making.<sup>105</sup> As the Qing defeat in the Sino-Japanese War in 1894–95 engendered new waves of cross-strait collaborations to overthrow the dynasty, the label "political offender" was routinely used in colonial communications to describe a wide range of rebels who engineered armed insurrections, penned incendiary pamphlets, and formed anti-dynastic organizations. Frustrated by their

102. See, for example, the debate between Sir Rutherford Alcock, British Minister in China, and Sir Richard Graves MacDonnell, the Governor of Hong Kong, on the issue of torture. CO 129/131, 193–216.

103. For details of this case, see Day, "Mediating Sovereignty," 18–28.

104. Munn, "Our Best Trump Card."

105. For example, Li Hairong's research has shown that activities by political exiles such as Kang Youwei were not a matter of personal choice; Kang's constant movement from colony and colony in search of overseas alliances and support was driven by British deportation orders against him. Li Hairong, "Yingguo zhengfu dui Kang Youwei liuwang taidu zhi kaoshi: jianlun baohuanghui de moluo," *Shilin* 1 (2019): 89–100.

inability to bring such persons to justice, the Qing government occasionally resorted to assassinations and abductions for prominent troublemakers.<sup>106</sup>

The most renowned figure acquitted by the political offence exception was Sun Yat-sen who, while in exile in London following a failed attempt to overthrow the Canton government in 1895, was arrested by Qing diplomats in their London legation to be sent back to China. Immediately upon his release, as a result of the Foreign Office's intervention, Sun minted his image as the quintessential political fugitive by publishing a sensationalized pamphlet *Kidnapped in London*, drawing attention to his moral duty as a Christian to overthrow a despotic Qing and referring to his armed organizations as a "reform party" in the British press.<sup>107</sup> Many have pointed to Sun's arrest and acquittal in London as a turning point of his political persona,<sup>108</sup> but it is also worth observing that the "political offence exception" probably played no small part in how Sun's new revolutionary image came to be.<sup>109</sup> It should not come as a surprise, then, that as leaders of anti-dynastic organizations crafted their public personas and political rhetoric to mimic the "liberal revolutionaries who fought to overthrow autocracies" in the European romantic imagination,<sup>110</sup> the Qing government's requests for the rendition of such figures were met with flat refusals, without exception, often against the legal conscience of British officials and the legal trends after the 1880s.<sup>111</sup>

## Conclusion

As Sir Francis Taylor Piggott, Chief Justice in Hong Kong and a legal expert on extradition, puts it at the beginning of his treatise on extradition:

106. On the Qing's attempts at assassinating Kang Youwei and colonial countermeasures, see CO 129/285, 394–97; on the Qing's successful murder of Yung Kui Wan, see CO 129/321, 263–75, 317–23, 348–57.

107. Sun Yat-sen, *Kidnapped in London: Being the Story of my Capture by, Detention at, and Release from the Chinese Legation, London* (Bristol: Arrowsmith, 1897).

108. See, for example, John Y. Wong, *The Origins of a Heroic Image: Sun Yat-sen in London, 1896–1897* (Oxford: Oxford University Press, 1986).

109. In addition to his first-hand knowledge of Hong Kong, Sun's familiarity with colonial law can also be traced to his mentor and confidant, Sir Kai Ho Kai (He Qi), a Hong Kong barrister and member of the Legislative Council. For the relationship between the two and Ho Kai's role in Sun's revolutionary planning, see Marie-Claire Bergère, *Sun Yat-sen* (Stanford: Stanford University Press, 1994), 33, 53, 85.

110. On competing images of the political offender as endorsed by supporters and opponents of the political offence exception, see Pye, *Extradition, Politics, and Human Rights*, 141.

111. One of the clearest expressions of this sentiment can be seen in CO 129/378, Chief Justice F. T. Pigott's address to the Supreme Court of Hong Kong, 156–62, May 22, 1911.

“Extradition is a political question, the law governing it having been created by statute and treaty.”<sup>112</sup> Discourses on the extradition from Hong Kong, as elsewhere, were never just a matter of law, but rather were inextricably bound up with local and geopolitical concerns. By examining the cross-border legal, administrative, and diplomatic experiences of Chinese and British officials, this article makes sense of the multilayered political contentions underlying debates about extradition law. What first appears to be a conflict of legal cultures was the far more complicated—and morally ambiguous—story of collaborations between Chinese and British officials in Canton, jurisdictional jostling between the diplomatic and colonial branches within the British government, and the desperate attempts by British foreign policy makers to square the discrepancies between Britain’s extradition law and its treaty obligations to China.

Through untangling the history of the “Mo Wang” enigma and restoring the network of agencies at play, I have shown how a complex story of Sino-British collaboration, intrigue, and administrative foolhardiness dissolved in a labyrinth of paperwork, assembled not so much to unearth the truth as to establish that British officials involved in the case were “perfectly blameless.” The story that became the stuff of public imagination—the sensationalized news coverage, the dry facts itemized in the acting governor’s cleansed reports printed for the Parliament—served to reinforce existing tropes about the orient: the ghastly execution of the prisoner, the cruel inhumanity of the Chinese judicial system, the hypocrisy and dishonesty of the Cantonese officials, and the general untrustworthiness of the Chinese government. Because it was never made clear who “Mo Wang” was, why the Chinese government wanted him back, and why a pirate had to undergo *ling-chi*, all of these uncertainties were ultimately attributed to the inscrutability of the Chinese legal system. As has been discussed, these issues were introduced to the case precisely because of the involvement of British officials at various stages. Once British complicity was removed, what remained was an even stronger consensus—the only consensus among British officials—that the Chinese judicial system was opaque, arbitrary, and off-limits to rational inquiry. This renewed consensus, in turn, generated more self-righteousness and the belief in the necessity of the British presence for their discretionary gate-keeping and monitoring of the Qing’s adherence to their undertakings.

The legacy of the “Mo Wang” case is felt not only in how it affected China’s ability to recover fugitives from colonies, but also in how it kept China out of an emerging international order over the jurisdiction of cross-border fugitives. Legal opinions about extradition did not remain

112. Francis Taylor Piggott, *Extradition: A Treatise on the Law Relating to Fugitive Offenders* (London: Butterworth; Hong Kong: Kelley & Walsh, 1910), 5.

unchanged among Euro-American powers, nor did the concept of “political offender” remain static. The decisive debate within England about whether political offences should be included in future treaties would not take place until 1866, a year after the “Mo Wang” case.<sup>113</sup> As extradition treaties proliferated after the 1870s between the “civilized” states whose legal systems were considered comparable to each other, and as the definitions of “political offence” became more expansive, the effects of China’s exclusion also became more pronounced.<sup>114</sup> The attempts of the Qing government to seek fugitive rendition by extra-legal means after 1895 should not be attributed to a cultural inclination toward despotism or a disregard of law, but rather must be understood in the context of China’s long-term exclusion from international law and its second-class status among the powers.

It is perhaps only with hindsight that one can see the problems in equating Chinese anti-dynastic rebels with “political offenders” in the European legal tradition. In a society where the political authority was diffused into family, kinship, and community structures, rebellious activities were seldom purely “political,” but rather were often achieved through prolonged, open conflicts or even civil war driven by apocalyptic visions. In these cases, the “political offence exception” in extradition law posed a much larger threat to local governance than in contemporary Western societies where the term signified a different range of political activities. In the 1890s, when many states were shaken by violent political movements and frequent assassinations, legal scholars of Europe would indeed “plead openly and directly for the abolition of the [non-extradition of political criminals] principle, maintaining that it was only the product of abnormal times and circumstances” of the early nineteenth century.<sup>115</sup> In 1911, when the Qing was overthrown by Republican revolutionaries, Sir Francis Piggott gave the gloomy prediction that “the extradition of political offenders will very soon become one of the recognized means of stopping revolution in Europe.”<sup>116</sup> The flurry of debates and revisions of extradition treaties in those decades proves him right.<sup>117</sup> And yet, although British

113. Pye, *Extradition, Politics, and Human Rights*, 87–90.

114. Although no systematic studies have been done on this subject, the Qing legation’s communications with the British Foreign Office (FO 17 in TNA) contain many testimonies to how this exclusion undermined China’s sovereignty. On how the difficulty of criminal rendition from Hong Kong prompted the Qing to revise its treaty with the Portuguese authority in Macau, see Wu Zumin, “Wanqing Yue Ao zuifan yindu shulun,” *Wenhua zazhi* 101 (2017): 84–96.

115. Oppenheim, *International Law*, 519.

116. CO 129/378, 157.

117. Tina Hannappel, “Extradition and Expulsion as Instruments of Transnational Security Regimes against Anarchism in the Late Nineteenth Century,” in *The*

and Chinese officials occasionally discussed the signing of an extradition treaty to replace the antiquated Article 21, the specter of *lingchi* was a powerful deterrent against delivering up any persons whose charges might have contained a political element. The “political offence exception” created an uncertain but viable legal space for fugitive rebels to reinvent themselves as legitimate political contenders at the turn of the twentieth century.<sup>118</sup>

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*Transnationalisation of Criminal Law*, 65–97; Jansson, *Terrorism, Criminal Law and Politics*, 95–108.

118. “Execution of a Taeping Chief at Canton,” p. 6.