Law and History Review (2022), **40**, 437–458
doi:10.1017/S0738248022000220

ASLH AMERICAN SOCIETY FOR LEGAL HISTORY CAMBRIDGE UNIVERSITY PRESS

ORIGINAL ARTICLE

From Reciprocity to Territoriality: Extradition, the Opium War, and the Idea of British Sovereignty in Hong Kong, 1842–44

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On April 8, 1843, the body of a Chinese fisherman, Wong Yaong Fook, was found near the village of Chai Wan on the east coast of Hong Kong Island. It "bore the mark of a severe wound inflicted on the top of the head, apparently by a knife, which had cleft the skull, and cut through the bone."[1] Four months later, the Chinese police arrived in Hong Kong with a warrant for the arrest of six Chinese men as well as Wong's wife, Nei She, on suspicion of murder. The warrant carried the seal of Chief Magistrate Lau of the County of Xin'an, whose jurisdiction had included Hong Kong before the recent Opium War (1839–42).[2] A scrappy exchange ensued between Lau and his British counterpart in Hong Kong, William Caine, over the legality of Lau's intervention. Caine accused Lau of exceeding his authority, while Lau blamed his staff for glossing over the location of the crime.[3] Both men understood, of course, that China had ceded Hong Kong to Britain under the momentous Treaty of Nanjing. The question was precisely what the cession entailed. Presently, Caine agreed to have the seven suspects arrested under a *British* warrant, and to inquire into "the truth of the charges" against them. He promised that he would then leave it to the newly appointed governor of Hong Kong, Sir Henry Pottinger—who was also the British minister to China—to decide whether to send the alleged murderers to Xin'an "for punishment," or to release them "as being falsely accused."[4]

[1] Proceedings of *The Queen v Lo Atow and others* (at the Magistrate's Court of Hong Kong), Colonial Office Records Series CO 129/2, fo. 389, 395–96, The National Archives, United Kingdom.

[2] Translation of Warrant, CO 129/2, fo. 419. Lau's name is recorded variously as "Laou" and "Law". Xin'an appears as "Sinan" and "Sunon". The latter is a Romanization of the Cantonese name for the county. See Patrick H. Hase, *Forgotten Heroes: San On County and Its Magistrates in the Late Ming and Early Qing* (Hong Kong: City University of Hong Kong Press, 2017).

[3] Caine to Lau, letter received on August 22, 1843, and Lau to Caine, August 30, 1843, CO 129/2, fo. 424–26.

[4] Caine to Lau, September 4, 1843, CO129/2, fo. 430.

What was the nature of Caine's response to the murder in Chai Wan? Was he articulating a procedure of extradition, by which the extraditing state was entitled to decide if a *prima facie* case was made out against any fugitive of the requesting state? Terms of this kind were recently included in Britain's extradition agreements with the United States (1842) and France (1843).[5] But that could not have been the totality of Caine's reasoning, because it does not explain why a British official would consider extraditing fugitives for a crime committed in British territory. Such practices were not customary in the West, where sovereign states divided criminal jurisdiction strictly along territorial lines.[6] Alternatively, perhaps Caine was acknowledging a Chinese treaty right of extraterritorial jurisdiction, analogous to the right that Britain asserted over British subjects in Mainland China? But, if so, what gave Caine, Pottinger, or any British official the authority to withhold Chinese subjects from Chinese law enforcement? Or, finally, perhaps Caine's account of the law was simply confused. But even that begs the question of why it was unclear in these particular ways.

The events surrounding the murder in Chai Wan illustrate the early imperfection of British sovereignty over Hong Kong. Christopher Munn has described the 1840s as a time of "confusion and false starts" in the establishment of colonial rule on the island.[7] But the link between that confusion and the British interpretation of their treaty rights and obligations is not well understood. Indeed, the implications of the cession of Hong Kong have gone largely unexplored in recent studies on British legal imperialism in China. Much has been written on the politics and practice of British and other Western jurisdiction in Chinese territory, but not the fleeting possibility of the reverse practice: Chinese jurisdiction in Western territory.[8] From earlier studies, by comparison, all that can be gleaned is that the legal status of Hong Kong and its inhabitants

[5] Treaty between H.M. and United States of America, Washington, C. (1st series) 424, UK Command Papers LXI.1 (1842); Convention between H.M. and King of the French, for Mutual Surrender of Persons Fugitive from Justice, C. (1st series) 444, UK Command Papers LX.487 (1843). See I.A. Shearer, *Extradition in International Law* (Manchester: Manchester University Press, 1971), 16–21.

[6] Paul O'Higgins, "The History of Extradition in British Practice, 1174–1794," *Indian Yearbook of International Affairs* 2 (1964): 78–115, at 106.

[7] Christopher Munn, *Anglo-China: Chinese People and British Rule in Hong Kong, 1841–1880* (Hong Kong: Hong Kong University Press, 2001), 53–54.

[8] See, for example, Emily Whewell, *Law Across Imperial Borders: British Consuls and Colonial Connections on China's Western Frontiers, 1880-1943* (Manchester: Manchester University Press, 2019); Robert Bickers, "Legal Fiction: Extraterritoriality as an Instrument of British Power in China in the 'Long Nineteenth Century,'" in *Empire in Asia: A New Global History, Volume 2: The Long Nineteenth Century,* ed. Donna Brunero and Brian P. Farrell (London: Bloomsbury Academic, 2018); Pär Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan* (Oxford: Oxford University Press, 2012); Turan Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China* (Cambridge: Cambridge University Press, 2010); Alex Thompson, "The British State at the Margins of Empire: Extraterritoriality and Governance in Treaty Port China, 1842–1927" (PhD diss., University of Bristol, 2018); and Emily Whewell, "British Extraterritoriality in China: The Legal System, Functions of Criminal Jurisdiction, and its Challenges, 1833–1943" (PhD diss., University of Leicester, 2015).

was not settled bilaterally. It was rather the British who unilaterally rejected the sharing of legal authority over the island. The British are said to have done that either during or after the Chai Wan incident (accounts differ), but this is where the literature lacks explanatory precision.[9]

This article will show that the hardening of the British position on their jurisdiction in Hong Kong was preceded by a complex dissection of the intellectual premises of the Opium War treaties, namely the Treaty of Nanjing (August 1842) and the "Supplementary Treaty" of the Bogue (October 1843).[10] The legal status of the Chinese people of Hong Kong was an emergent question. It did not come up at the talks in Nanjing, only afterwards. When the question did come up, it induced the British to rationalize the treaty regime more holistically. In their own right of immunity from Chinese law, the British saw an underlying principle of jurisdictional reciprocity: supposedly, each country was to discipline its own offenders under all circumstances. Crucially, however, that principle clashed with the territorial underpinning of the cession of Hong Kong. Which principle ought to prevail? It did not help that Pottinger and his Chinese counterparts also negotiated a vague agreement for the mutual surrender of fugitive offenders. Exactly who was a fugitive? How did the surrender agreement apply to Hong Kong? Ultimately, these uncertainties revolved around how everything fit together. In an effort to craft a coherent legal position, British officials sought briefly to reconcile reciprocity with territoriality. They mooted various interpretations of the treaties, which cut across extant ideas of sovereignty and subjecthood.

As the following pages will show, Wong Yaong Fook was murdered in Chai Wan before any policy could be implemented. In that context, the colonial government of Hong Kong eventually responded with a sloppy assertion of absolute territorial sovereignty. This turn of events cast the British immunity from Chinese jurisdiction in a new and negative light. It suggests a need for problematizing the legal content of the Opium War treaties. It proves that such ideas as mutual extradition, unequal extraterritoriality, and the jurisdictional severance of Hong Kong from China were not written into the treaties at all. On the contrary, they crystallized retrospectively through parochial British legalism. In other words, it was Britain's domestic practice and discourse that imbued the Opium War treaties with their notorious meanings. This is not necessarily to say that the treaties turned out harsher than initially agreed, although in a sense, they did. Nor is it merely to confirm scholarly findings that the treaty framework of the British presence in China was shoddily

[9] G.B. Endacott, *Government and People in Hong Kong* (Hong Kong: Hong Kong University Press, 1964), 32–35. Compare with John K. Fairbank, *Trade and Diplomacy on the China Coast: The Opening of the Treaty Ports, Volume 1: 1842–1854* (Cambridge, MA: Harvard University Press, 1953), 128–29; and Frank Welsh, *A History of Hong Kong* (London: Harper Collins, 1993), 164. See also Christopher Munn, *Anglo-China*, 53–54, 164; and Christopher Munn, "The Criminal Trial Under Early Colonial Rule," in *Hong Kong's History,* ed. Tak-Wing Ngo (New York: Routledge, 1999), 47–48.

[10] Treaty between H. M. and Emperor of China, Nanking, August 1842, C. (1st series) 521, UK Command Papers LI.327; and Supplementary Treaty between H.M. and Emperor of China, October 1843, C. (1st series) 534, UK Command Papers LI.341 (Treaty of the Bogue).

https://doi.org/10.1017/S0738248022000220 Published online by Cambridge University Press

improvised. On the whole, it certainly was.[11] This article aims to show, instead, that the contingency of law-making ran deeper than the scope of Britain's rights and obligations, or the scope of what British officials could or could not do in response to particular disputes. As we shall see, the very nature of those arrangements was in flux. It was one thing to agree to a mutual surrender of fugitives, and quite another to see that as extradition; one thing to claim an absolute right to discipline one's subjects, and another to see that as extraterritoriality; one thing to take foreign territory under treaty, and another to work out the contours of territorial sovereignty. In the wake of the Opium War, these concepts jostled for purchase in the British legal imagination.

Coming to Terms with Peace

The origins of the Opium War are well known. Historians agree that the British government, egged on by the mercantile lobby, wanted to carve out a less-restrictive trading environment in China. Since the eighteenth century, Qing China had confined Western trade to Macao and the port of Canton (Guangzhou). Opium catalyzed hostilities because it was a lucrative commodity, and the local British stockpile of the drug was confiscated and destroyed in 1839 by order of Imperial Commissioner Lin Zexu.[12] But the precarious status of British subjects under Chinese law was a deeper grievance. The custom at Canton was such that Westerners enjoyed a degree of jurisdictional autonomy. They could resolve their disputes *inter se* and even punish their own people for minor crimes against Chinese victims.[13] However, serious crimes were more contentious. In the famous case of the *Lady Hughes* (1784), Chinese authorities convicted and executed an English sailor after pressuring his superiors into giving him up for an alleged double murder.[14] By the 1830s, therefore, the British merchant elite was pushing hard for formal immunity from Chinese jurisdiction. As their argument went, the British crown should ideally seize

[11] See, for example, Robert Bickers, *The Scramble for China: Foreign Devils in the Qing Empire, 1832–1914* (London: Allen Lane, 2011); and P.D. Coates, *The China Consuls: British Consular Officers, 1843–1943* (Oxford: Oxford University Press, 1988).

[12] Song-Chuan Chen, *Merchants of War and Peace: British Knowledge of China in the Making of the Opium War* (Hong Kong: Hong Kong University Press, 2017); Frederic Wakeman Jr., "The Canton Trade and the Opium War," in *The Cambridge History of China, Volume 10: Late Ch'ing 1800–1911, Part 1*, ed. John K. Fairbank (Cambridge: Cambridge University Press, 1978).

[13] For present purposes, it does not matter whether or not the provincial custom was approved by the Chinese imperial government. Suffice it to say there has been some debate on this point: Li Chen, *Chinese Law in Imperial Eyes: Sovereignty, Justice, and Transcultural Politics* (New York: Columbia University Press, 2016), 54–55. Compare with Cassel, *Grounds of Judgment*, 40–43; R. Randle Edwards, "Ch'ing Jurisdiction Over Foreigners," in *Essays on China's Legal Tradition*, ed. Jerome Alan Cohen, R. Randle Edwards, and Fu-Mei Chang Chen (Princeton: Princeton University Press, 1981).

[14] The sailor was serving on the merchant ship, the *Lady Hughes*. He killed two Chinese boatmen while firing a gun salute under superior orders. Although the records do not disclose the precise degree of his culpability, he might equally have been convicted for manslaughter if not murder had he been tried by a British court: Li Chen, "Law, Empire, and Historiography of Modern Sino-Western Relations: A Case Study of the Lady Hughes Controversy in 1784," *Law and History Review* 27 (2009): 1–53.

an island near Canton and set it up as a trading post free from Chinese interference. Hong Kong was eventually chosen for that purpose, although the more northerly island of Chusan was also occupied during the war.[15]

It was for those reasons that when it came to peace, the twin concessions of island territory and legal immunity were intrinsically connected. This connection was and still is obscured by the untidy organization of the Treaty of Nanjing. Whereas the cession of Hong Kong was set out in Article 3 of the Treaty,[16] the legal immunity—or what came to be referred to as the "extraterritoriality" provision—was woven into Clause 13 of a separate set of "General Regulations" governing British trade at the Chinese treaty ports.[17] The General Regulations were only finalized in July 1843 and appended to the treaty thereafter.[18] They were not part of the main Treaty of August 1842, which was dispatched ahead for mutual ratification while the delegates who had met in Nanjing moved on to the finer details of the peace settlement. Another product of the later negotiations was the "Supplementary Treaty" signed in October 1843 at the Bogue or Bocca Tigris, a strait in the Pearl River Delta. All this is important because it implies that the exact wording of the legal immunity for British subjects was seen as one of the finer details. The general principle of it was common ground. It was so common that it was not debated at the time, nor did anyone express concerns that its omission from the main Treaty of Nanjing might derail the peace process.[19]

[15] Christopher Munn, "The Chusan Episode: Britain's Occupation of a Chinese Island, 1840–46," *Journal of Imperial and Commonwealth History* 25 (1997): 82–112.

[16] Article 3: "It being obviously necessary and desirable that British subjects should have some port whereat they may careen and refit their ships when required, and keep stores for that purpose, His Majesty the Emperor of China cedes to Her Majesty the Queen of Great Britain, etc., the Island of Hong-Kong, to be possessed in perpetuity by Her Britannick Majesty, her Heirs and Successors, and to be governed by such laws and regulations as Her Majesty the Queen of Great Britain, etc., shall see fit to direct."

[17] This provision should not be confused with Article 13 of the Treaty of the Bogue. The latter was a different provision on the clearance of goods at Chinese customs. The General Regulations, Clause 13, read as follows: "Whenever a British subject has reason to complain of a Chinese, he must first proceed to the Consulate and state his grievance; the Consul will thereupon inquire into the merits of the case, and do his utmost to arrange it amicably. In like manner, if a Chinese have reason to complain of a British subject, he shall no less listen to his complaint, and endeavour to settle it in a friendly manner. If an English merchant have occasion to address the Chinese authorities, he shall send such address through the Consul, who will see that the language is becoming; and, if otherwise, will direct it to be changed, or will refuse to convey the address. If, unfortunately, any disputes take place of such a nature that the Consul cannot arrange them amicably, then he shall request the assistance of a Chinese officer, that they may together examine into the merits of the case, and decide it equitably. Regarding the punishment of English criminals, the English Government will enact the laws necessary to attain that end, and the Consul will be empowered to put them in force; and regarding the punishment of Chinese criminals, these will be tried and punished by their own laws, in the way provided for by the correspondence which took place at Nanking, after the concluding of the peace."

[18] Pottinger to Aberdeen, July 19 1843, FO 17/68, fo. 62.

[19] See the records of the British Foreign Office, series FO 705/45 and FO 17/57–71, The National Archives, United Kingdom. For a similar account of this aspect of the negotiations, which draws on Chinese sources, see Mao Haijian, *The Qing Empire and the Opium War: The Collapse of the Heavenly*

https://doi.org/10.1017/S0738248022000220 Published online by Cambridge University Press

What did raise controversy was the combined effect of the twin concessions on the legal status of *Chinese* subjects. This issue came up after both sides agreed, in September 1842, that the enlarged and formally autonomous British presence on the Chinese coast was not meant to undermine China's authority over Chinese people. Although it was clear that British offenders would come under British jurisdiction, the senior Chinese delegate, Imperial Commissioner Qiying (Keying) considered it equally important for the treaty instruments to state that Chinese offenders should "receive punishment from their own Country." Qiying was afraid that the new system of trade would enable Chinese fugitives to "betake themselves" to British ships. Accordingly, he proposed, and Henry Pottinger agreed, that all such fugitives should be "delivered up" to Chinese jurisdiction and not "concealed" from justice.[20] And since Chinese fugitives were just as likely to hide in British Hong Kong as on British ships, Pottinger took the initiative to include Hong Kong in that tentative agreement.[21] In a letter to the Foreign Secretary, the 4th Earl of Aberdeen, Pottinger remarked that these measures were "so reciprocal and advantageous, that they require no comment."[22]

But therein lay the unforeseen problem: what about the Chinese people who were already in Hong Kong? For a start, Pottinger proposed to distinguish the island's permanent residents from "temporary sojourners and casual traders." The former, he suggested, could "become subject to [British] Laws," while the latter could "be considered Subjects of the Emperor of China" and handed over to China as required.[23] When Qiying rejected this idea, Pottinger offered instead to surrender all Chinese subjects for "serious crimes... involving Capital or other severe punishment," but not for "trifling offences" such as "theft, assault, shoplifting, picking pockets, gambling, rioting, [and] drunkenness."[24] This was also refused. For Qiying, Pottinger's proposal "[did] not appear so good as... the system in [Portuguese] Macao," where there was a local Chinese magistrate to discipline Chinese offenders. In the case of Hong Kong, Qiying was willing to meet Pottinger halfway: he would station an officer at Tsim Sha Tsui in Kowloon, which, like Hong Kong Island, was part of Xin'an County.[25] But he would not renounce jurisdiction entirely.[26] Pottinger realized then that the Chinese delegates would not entertain any dilution of their idea of jurisdictional reciprocity. He reported to Aberdeen that he "had not anticipated" such anxiety over what Qiying himself had described as a "little trifling

Dynasty, trans. Joseph Lawson, Craig Smith, and Peter Lavelle (Cambridge: Cambridge University Press, 2016), 450–51.

[20] Keying, Elepoo, and Newkien to Pottinger, September 1, 1842, FO17/57, 335, 339–41.

[21] Pottinger's Memorandum of September 5, 1842, FO17/57, fo. 345, 348–49.

[22] Pottinger to Aberdeen, September 3, 1842, FO17/57, fo. 206.

[23] Pottinger's Memorandum of September 5, 1842, FO17/57, fo. 348–49.

[24] Pottinger to Keying, Elepoo, and Newkien, September 17, 1842, FO17/58, fo. 125–26.

[25] Tsim Sha Tsui was later ceded to Britain in 1860 as part of the cession of the Kowloon Peninsula (south of modern-day Boundary Street). The rest of Kowloon remained under Chinese rule until 1898, when Britain leased it for 99 years along with the rest of what came to be called "Hong Kong's New Territories."

[26] Keying, Elepoo, and Newkien to Pottinger, September 27, 1842, FO17/58, fo. 131–34.

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matter."[27] For his part, Pottinger could "not yet see" how a British government could maintain order in Hong Kong "unless our Officers on the spot are vested with what may be termed *Police* authority, in contradistinction to *Judicial* powers."[28]

There are several layers of nuance in this exchange. First, it reads like a subplot in the post-Nanjing proceedings. It is certainly possible that Pottinger and Qiying played down the Hong Kong question for strategic reasons: to get the other to concede a point, each may have tried not to make too big a deal of it. But the fact remains that the treaty instruments ended up focusing on the commercial aspects of the treaty port system, such as the mechanisms for enforcing the treaty tariffs. The minutiae of criminal law were seemingly overshadowed by myriad other matters that were believed to deserve more attention. Second, to the extent that Pottinger had a vision for Hong Kong, it occupied a vague middle ground between the practices of formal and those of informal imperialism. Pottinger's instinct at this stage was not to assert absolute sovereignty, but rather to conceive of British rule in Hong Kong in terms of Britain's peripheral position in China. Not even to Aberdeen did he suggest that the ideal arrangement, whether by right or as a matter of expedience, ought to be the complete ousting of Chinese authority from the island. Whatever else Pottinger thought, therefore, it seems that he was beginning to realize that he had underestimated the complexity of the Hong Kong question.

When the negotiations resumed in January 1843, the best Pottinger could do was to repeat to the Chinese delegates what he had written to Aberdeen. He was, he said, willing to accede to their demands. His only condition was that "the British authorities at Hong Kong must be allowed to exercise Police jurisdiction *to a certain extent*, else it will be impossible to keep in any degree of order or restraint the large assemblage of People of all Nations, who have settled at, or who occasionally resort, to Hong Kong."[29] The Chinese delegates proposed that in that case, all Chinese persons who offend in Hong Kong should be handed over to Kowloon, "even should the Crime be a light one."[30] Pottinger agreed, although he stressed that "British Officers must in all cases investigate" disputes involving "foreigners," by which he meant Westerners. Only if Chinese subjects were "found to be in the wrong" would they be "sent with the evidence to Kowloon to be punished according to [Chinese] Laws."[31] At this point, the Chinese delegates did not quibble further. They told Pottinger that his revised proposal was "exceedingly right and proper."[32] Thus, at least two questions were left ominously unanswered: what degree of proof was required to trigger the surrender process, and what role British law enforcement would play in crimes involving Chinese

[27] Ibid, fo. 133; and Pottinger to Aberdeen, October 16, 1842, FO17/58, fo. 102, 107.
[28] Pottinger to Aberdeen, ibid (emphasis in original).
[29] Richard Woosnam's Minute of January 21, 1843, FO17/66, fo. 141 (emphasis added).
[30] Elepoo, Kekung, and Liang Paouchang to Pottinger, February 1843, FO17/66, fo. 331, 335–336.
[31] Pottinger to Elepoo, Kekung, and Liang, February 20, 1843, FO17/66, fo. 338.
[32] Kekung to Pottinger, March 9, 1843, FO17/66, fo. 338–44.

https://doi.org/10.1017/S0738248022000220 Published online by Cambridge University Press

subjects *inter se*. Both of these ambiguities would arise in Chai Wan to expose the instability of this arrangement.

There was also a bigger problem: even if both sides believed that they had agreed on something, they did not entrench their agreement in the treaties. As mentioned, the immunity of British subjects from Chinese jurisdiction was eventually written into Clause 13 of the General Regulations addendum to the Treaty of Nanjing. This lengthy clause concluded with a peculiar statement, which can only be a reference to the bilateral discussions on Hong Kong (because Chinese criminals were not discussed in any other context): "regarding the punishment of Chinese criminals, these will be tried and punished by their own laws, in the way provided for by the correspondence which took place at Nanking, after the concluding of the peace."[33] Yet the title of the General Regulations did not mention Hong Kong: it named only the "Five [Treaty] Ports" of Canton, Amoy (Xiamen), Fuzhou, Ningbo, and Shanghai. In later years, Chinese officials would read Clause 13 as standing for a general rule that in criminal cases, "the subjects of China should be judged by Chinese Mandarins" regardless of the *locus delicti*.[34] British officials would argue to the contrary that Clause 13 did not apply to crimes committed in Hong Kong.[35]

What definitely applied to Hong Kong was the original agreement for the mutual surrender of fugitive offenders, which Pottinger had lauded as thoroughly "reciprocal and advantageous."[36] That agreement was entrenched separately as Article 9 of the Treaty of the Bogue. Tellingly, however, Article 9 referred only to Chinese subjects who would "*flee* to Hong Kong" or "English ships"; it was silent on Chinese subjects who would offend in Hong Kong itself.[37] This suggests that the issue was avoided, and that in the same vein, the clumsy formulation of Clause 13 was not a mere drafting error. Neither side could do better than to refer vaguely to their previous correspondence

[33] Clause 13 is reproduced in full in note 17. Qiying spent the autumn and winter of 1842–43 in Nanjing. From there, he corresponded with Pottinger, who was based mostly in Macao.

[34] Keying to Davis, June 21, 1844, CO 129/8, fo. 284–85; and Keying to Davis, private letter received on January 3, 1845, CO 129/11, fo. 51.

[35] George Bonham to Earl Grey, November 21, 1849, CO129/30, fo. 324–25; Bonham to Palmerston, November 26,1849, FO17/159, fo. 110–11; *China Mail*, March 13, 1851, CO132/2, fo. 177.

[36] See discussion accompanying note 22.

[37] Emphasis added. Article 9: "If lawless natives of China, having committed crimes or offences against their own Government, shall flee to Hong-Kong, or to the English ships of war, or English merchant-ships, for refuge, they shall, if discovered by the English officers, be handed over at once to the Chinese officers for trial and punishment; or if, before such discovery be made by the English officers, it should be ascertained or suspected by the officers of the Government of China whither such criminals and offenders have fled, a communication shall be made to the proper English officer, in order that the said criminals and offenders may be rigidly searched for, seized, and, on proof or admission of their guilt, delivered up. In like manner, if any soldier or sailor, or any other person, whatever his caste or country, who is a subject of the Crown of England, shall, from any cause or on any pretence, desert, fly, or escape into the Chinese territory, such soldier or sailor, or other person, shall be apprehended and confined by the Chinese Authorities, and sent to the nearest British Consular or other Government officer. In neither case shall concealment or refuge be afforded."

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because that correspondence carried a different meaning for each party. For the Chinese, there was essentially a reciprocal agreement for each country to discipline its own people. Everything else was a technicality. For Pottinger, on the other hand, the reciprocal agreement was defined by its allowance for "a certain extent" of British jurisdiction in Hong Kong.[38] The caveat was more important than the rule. For that reason, there was no meeting of minds; there was at most wishful thinking on both sides. Had anyone pressed the issue, they would have prolonged the negotiations and possibly jeopardized what everyone agreed was more important: the rest of the treaty port regime. It follows that the precise meanings of Article 9 and Clause 13 were left hanging, and that the missing link was how each provision affected Hong Kong. This overarching defect in the treaty instruments was never identified, let alone formally resolved.

Abortive Compromises

Meanwhile, news of the talks in China trickled back to London. The first papers to arrive in December 1842 included only the main Treaty of Nanjing and copies of Pottinger's earliest correspondence with Qiying. Those papers did not portend the imminent controversy over Hong Kong.[39] In that context, Hong Kong did not register in the British official mind. In a dispatch to Pottinger of January 1843, Foreign Secretary Aberdeen wrote only about the ordering of the treaty ports in Mainland China. Aberdeen wanted the new regime to follow the model of the Ottoman Capitulations. He specifically reminded Pottinger to obtain China's "formal consent" to absolute British jurisdiction over British subjects. Pottinger was also to push for "concurrent jurisdiction" in mixed cases, in which Chinese and British subjects were party to the same crime or civil dispute.[40] Of course, those arrangements were already in the works. Aberdeen had not realized that it was not jurisdiction over British subjects but rather over Chinese subjects that China was refusing to renounce. Thus, Aberdeen's early instructions to Pottinger confirm the emergent nature of the Hong Kong question. The British government did not contemplate the legal status of the island's population until the issue was discovered and referred home.

It was consequently only between February and March 1843 that officials in London worked on a policy for Hong Kong. Building on Pottinger's reports, they began by rejecting any blanket surrender of Chinese offenders. The strongest objections came from the Secretary of State for the Colonies, Lord Stanley. In Stanley's view, "it would, according to European maxims and usages, be a great anomaly that an offence committed within the precincts, and against the Law, of an Independent Country should be tried in the Courts of another Country." To give up every Chinese offender would be to accept that "Hong Kong [was] transferred to Great Britain in occupancy not in Sovereignty." In

[38] See discussion accompanying note 29.

[39] Aberdeen to Pottinger, January 4, 1843, FO17/64, fo. 19.

[40] Ibid., fo. 37–38.

https://doi.org/10.1017/S0738248022000220 Published online by Cambridge University Press

practice, injustice could also result from differences between Chinese law and English law in terms of the definition of serious crimes like murder and rape. If surrendered to China, offenders of Hong Kong origin might escape punishment that a British court would have thought they deserved.[41]

Nevertheless, British officialdom was not blindly hypocritical. It was obvious enough that Stanley was proposing to deny China exactly the reverse of a right that China was itself prepared to concede. Wary of embarrassment, Aberdeen noted that there was a sense in which Britain had "no alternative" but to reciprocate the Chinese concession. In principle, "the Chinese Government could hardly be expected to place greater reliance on British Courts or on British Law, than the British Government [was] willing to place on Chinese Courts or on Chinese Law."[42] Stanley's own Permanent Under-Secretary, James Stephen, agreed that the British right was implicitly meant to be enjoyed on reciprocal terms: "As we do so we must expect and submit to be done by."[43] Stephen also suggested that Stanley's concerns about fair punishment and the sovereignty of the British crown were not worth "raising a new quarrel with the Chinese."[44]

As the discussion unfolded, a consensus emerged that Hong Kong was special enough to call for a compromise between reciprocity and territoriality. This was for the reason (which Pottinger had also alluded to) that there were two groups of Chinese people on the island. On the one hand, there were the traders and other visitors from the Chinese Mainland, "whose position more closely correspond[ed] with that of British subjects in Chinese Ports."[45] In Aberdeen's opinion, Britain could not justly deny Chinese jurisdiction over that group of people. On the other hand, there were the permanent residents of Hong Kong, who were now permanent residents of British territory. Aberdeen intimated that this second group was unique, because Britain had not ceded territory to China. There was therefore nothing to reciprocate on that front, and no reason to deviate from territoriality.[46]

The trickier question was what the policy of compromise ought to be. An obvious option was to devise a legally compelling means of distinguishing Hong Kong's permanent from its temporary residents. A close equivalent to such an approach was proffered by the law officers of the crown.[47] When the Foreign Office consulted them, the law officers advised that "the persons residing on the Island, and continuing to reside there after the cession to the British Crown," should be deemed to have become British subjects and "no longer subjects of the Emperor of China." The law officers believed that this change of nationality was implied by the article of cession, Article 3 of the Treaty of Nanjing. Accordingly, they believed that British jurisdiction

[41] Stephen to Henry Unwin Addington, February 22, 1843, CO129/3, fo. 94–96.
[42] Addington to Stephen, March 22, 1843, CO129/3, fo. 153.
[43] Stephen's Minute of March 23, 1843, CO129/3, fo. 165.
[44] Stephen's Minute of February 11, 1843, CO129/3, fo. 93.
[45] Addington to Stephen, March 22, 1843, CO129/3, fo. 153.
[46] Ibid., fo. 154–56.
[47] That is, Attorney General Frederick Pollock (the 1st Baronet), Solicitor General William Webb Follett, and Queen's Advocate John Dodson.

https://doi.org/10.1017/S0738248022000220 Published online by Cambridge University Press

should be extended to the original inhabitants of Hong Kong on the basis of their new subject status. As for the island's temporary residents who remained Chinese subjects, it was legally permissible to give them up to China as required.[48]

The law officers' advice was not taken because their account of subjecthood was contested. In response to their claim that Hong Kong's original inhabitants were "no longer subjects of the Emperor of China," James Stephen remarked that: "They are not his subjects while [in Hong Kong], i.e., are not locally subject to him. But they are still his subjects. They have the *Jus Postliminii* & if they return to China are still Chinese."[49] Stephen's comment invoked the distinction in English jurisprudence between the different forms of allegiance a sovereign could command. In the present case, Stephen believed the relevant principle was that "every alien owes a local and temporary allegiance to the Sovereign and to the Law of the Country, within which he happens to be."[50] As its name suggests, local allegiance (*ligeantia localis*) was purely a function of a person's physical location. Even their place of residence was legally irrelevant.[51] Thus, the English idea of local allegiance denoted the wider European custom of territorial sovereignty. It was exactly the kind of thinking that the British government was reluctant to apply too strictly to Hong Kong.[52]

By contrast, the law officers had in mind a more permanent form of allegiance, which was acquired either through naturalization or denization (*ligeantia acquisita*).[53] By the nineteenth century, it was well established that aliens could become British denizens by inhabiting a territory that was annexed to Britain. In other words, the British crown could and did acquire individual allegiance by conquering territory.[54] What was contested was whether such denization necessarily followed each conquest, or whether the crown had to express its desire for denization to occur. In the context of Hong Kong, the law officers took the former view of automatic denization upon the ratification of the treaty of cession. Stephen endorsed the contrary position, for which there was recent judicial authority, that "without express provision in a treaty, the subjects conquered [were] aliens."[55] The implicit premise in Stephen's

[48] Dodson, Pollock, and Follett to Aberdeen, March 18, 1843, CO 129/3, fo. 166–70.

[49] Marginal note in Stephen's handwriting, likely March 24, 1843, CO129/3, fo. 168.

[50] Stephen's Minute of July 12, 1843, CO129/3, fo. 219.

[51] *Calvin's Case* (1608) 7 Co. Rep. 1a at page 5b.

[52] On the various forms of allegiance in English law, see Hannah Weiss Muller, *Subjects and Sovereign: Bonds of Belonging in the Eighteenth-Century British Empire* (Oxford: Oxford University Press, 2017), ch 1.

[53] *Calvin's Case* (1608) 7 Co. Rep. 1a at page 6a. See Keechang Kim, *Aliens in Medieval Law: The Origins of Modern Citizenship* (Cambridge: Cambridge University Press, 2004), ch. 8.

[54] William Forsyth, ed., *Cases and Opinions on Constitutional Law* (London: Stevens & Haynes, 1869), 266–77, 333; and *Campbell v. Hall* (1774) 1 Cowp. 161 at 171.

[55] *Mayor of Lyons v. East India Company* (1836) 1 Moo. P.C. 175 at 287 (opinion of the Judicial Committee of the Privy Council). As late as in 1930, a South African jurist argued that the conferment of British subjecthood upon the conquest of territory was only a "very uncertain" presumption in the absence of express treaty provision: E.F.W.G. van Pittius, *Nationality Within the British Commonwealth of Nations* (London: P.S. King & Son, 1930), 72. See also Clive Parry, ed., *A British Digest of International Law, Volume 5* (London: Stevens & Sons, 1965), 142.

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account of the law was that Article 3 of the Treaty of Nanjing was not sufficiently indicative of crown intention to acquire the allegiance of the people of Hong Kong.

It is possible that Stephen's views were shared at the Foreign Office. After reading the law officers' report, Aberdeen hinted that the government might bypass the ambiguities of denization by taking positive steps to complete the process. Even if the people of Hong Kong were still aliens, Aberdeen thought it was not too late to make them British subjects and thereby amenable to British jurisdiction. Specifically, British officials could "require from the Chinese settlers in Hong Kong a renunciation of their allegiance to the Emperor of China, and a recognition of the absolute supremacy of England, as the price of their being allowed to remain on the island."[56] This would presumably be done as an act of prerogative, by using the law-making power that Article 3 had conferred on the British crown.[57] Again, Aberdeen seemed to imply that he was not prepared to interfere with Hong Kong's temporary residents: only Chinese *settlers* would be compelled to declare their allegiance to Queen Victoria. Nevertheless, Aberdeen dropped this idea after the Colonial Office cautioned that it "might lead to embarrassment and could be of no practical advantage." The concern came once again from Stephen, who may have sensed that the people of Hong Kong might refuse to renounce their birth allegiance.[58]

While these discussions were still ongoing, Pottinger came to believe that the imperial government would accept nothing less than exclusive jurisdiction in Hong Kong. It is unclear how he got that impression, although he reported that he had heard "some verbal remarks" of the sort from a Lieutenant Colonel George Malcolm.[59] Malcolm was originally a member of Pottinger's delegation in China. In September 1842, he travelled to London with the British copy of the Treaty of Nanjing. To reward his work, the imperial government promoted him from major and sent him back to Hong Kong in January 1843 with further instructions for Pottinger.[60] That was how Pottinger claimed to have received news of an imperial policy on Hong Kong. We know, however, that no such policy had been made before Malcolm left London. It seems, then, that there was a serious miscommunication between London and Hong Kong, which further complicated what was already a confusing situation.

In any case, Pottinger decided to act on his impression of the imperial position. He decided that he was now obliged to renege on his prior commitment, such as it was, to give up all Chinese offenders. Remarkably, he developed an alternative proposal that resembled Aberdeen's abortive idea for the denization of Chinese settlers. But Pottinger's version was internally inconsistent. As Pottinger explained, he would first require everyone in Hong Kong, of all

[56] Addington to Stephen, 22 March 1843, CO129/3, fo. 156.

[57] Article 3 ceded Hong Kong "to be governed by such laws and regulations as Her Majesty the Queen of Great Britain, etc., shall see fit to direct."

[58] Stephen to Addington, March 30, 1843, CO129/3, fo. 162.

[59] Pottinger to Aberdeen, June 13, 1843, FO17/67, fo. 263–265; and Pottinger to Aberdeen, March 17, 1843, FO17/66, fo. 221.

[60] Aberdeen to Pottinger, January 4, 1843, FO17/64, fo. 13–15.

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nationalities, to register at a registry office. He would forbid unregistered persons from residing on the island even temporarily. To that end, his rationale was that "all Persons registered are to be considered amenable to the Police Laws of the Island."[61] In other words, a person's right of residence was to be predicated on their submission to British *territorial* jurisdiction. So far, so good. But then Pottinger added that in the proposed scheme, "the option [would] be given to all Chinese on the Island whether to quit the Island being paid for their Lands and Houses,*or to remain as subjects of the British Crown* and as such entitled to British Protection and subject to British Laws."[62] Now, registration would confer more than just residency rights. It would somehow give rise to British subjecthood if a person was Chinese, but not if they were of any other prior nationality. Although Pottinger did not address this tension in his proposal (if he even realized that it was there), he clearly continued to perceive the Chinese people of Hong Kong as *sui generis*. Apparently, they were so different that even if London had commanded that they be governed territorially—which, to be clear, was *not* the case—some gesture must still be made that they would not be treated just like other residents of British territory.[63]

Pottinger did acknowledge that his proposal for registration contradicted the outcome of the post-Nanjing negotiations. Nevertheless, he insisted that he was still acting "in exact unison" with Article 3 of the Treaty of Nanjing.[64] Qiying disagreed. He reminded Pottinger that the treaty was premised on reciprocity, and that the Chinese refusal to be governed by English law was "a thing of the same nature" as the British refusal to be governed by Chinese law. Furthermore, Article 3 "had reference to *the cession of the ground* [of Hong Kong] for [British] merchants and people… to repair their vessels and store their goods there; it was not therein provided, that [Hong Kong's] inhabitants should become British people."[65] Thus, Qiying's interpretation of Article 3 resembled James Stephen's as to the status of Hong Kong's native population. Stephen was right to point out that the question of jurisdiction could not be resolved by using Article 3 to stretch the category of British

[61] Pottinger to Aberdeen, May 5, 1843, FO 17/67, fo. 145, 147, 153; and Pottinger's Memorandum of May 13, 1843, FO 17/67, fo. 265.

[62] Pottinger's Memorandum, ibid (emphasis added).

[63] To be sure, the language of protection would pervade contestations over the scope of British and other Western jurisdiction in the Chinese treaty ports. In the late nineteenth century, the Western presence in China became more intrusive when extraterritorial rights were increasingly extended to people of Chinese descent. However, none of the treaty ports were ever considered sovereign British territory. What makes the present case study conceptually striking is the complexity of British jurisdiction in what was supposed to have become a possession of the British crown; that is, Hong Kong. On the extension of extraterritorial protection to the Chinese "protégés" of Western powers, see generally Richard S. Horowitz, "Protégé Problems: Qing Officials, Extraterritoriality, and Global Integration in Nineteenth-Century China," in *The Extraterritoriality of Law: History, Theory, Politics,* ed. Daniel S. Margolies, Umut Özsu, Maïa Pal, and Ntina Tzouvala (New York: Routledge, 2019); and Eileen P. Scully, *Bargaining with the State from Afar: American Citizenship in Treaty Port China, 1844–1942* (New York: Columbia University Press, 2001).

[64] Pottinger's Memorandum of May 13, 1843, FO 17/67, fo. 265.

[65] Keying to Pottinger, undated letter of May 1843, CO129/3, fo. 363 (emphasis added).

https://doi.org/10.1017/S0738248022000220 Published online by Cambridge University Press

subjecthood. The problem was that Article 3 was never meant to serve that purpose. It was only meant to guarantee the rights of those who were already British subjects.

What the British government actually decided to do was quite different. By contrast to the allegiance-based approaches, which proved fraught with difficulty, the Foreign Office and Colonial Office eventually agreed on a more constitutional compromise between reciprocity and territoriality. They agreed that they would accept Chinese jurisdiction over Hong Kong's Chinese population as long as that jurisdiction was exercised in Hong Kong. In other words, Chinese subjects who offend in Hong Kong would not be sent anywhere. Instead, judges "selected by the Emperor of China" would sit in Hong Kong "to administer in the name of The Queen the Law of China in cases [involving] the Chinese subjects of the British Crown."[66] British money would support those judges; they "would not be a charge upon any province of the Emperor's dominions." In return, the Chinese judges would "hold their offices at the pleasure of the Crown—that is, of the Governor [of Hong Kong]—not at the pleasure of the Emperor, and... they should be understood to be the Queen's Judges and not the Emperor's."[67]

Essentially, the British government was willing to host a kind of quasi-consular system in Hong Kong, which would mirror the British system at the Chinese treaty ports. The difference was that whereas Britain was understood to have free rein to staff her consulates, China's appointees in Hong Kong would be subject to dismissal by the British authorities. This denial of judicial independence was presumably intended to preserve formal British sovereignty as well as to ensure against the kinds of substantive injustice that perturbed Lord Stanley (in cases of serious crimes such as murder and rape).[68] More importantly, this policy sidestepped the jurisprudential difficulties of residency and subjecthood. As Stephen observed, "the distinction between transient and domiciled Inhabitants [in Hong Kong] might well be laid out of account."[69] Also, Chinese subjects who wished to be placed under British criminal jurisdiction could still apply to be naturalized as British subjects.[70] Since Hong Kong was slated to be a crown colony—letters patent to that effect were issued on April 5, 1843—its Legislative Council would have the power to naturalize alien persons by ordinance.[71]

Such as it was, the imperial policy was never implemented. By the time news of it reached Hong Kong in July 1843, Pottinger had already mooted his own idea for registration, and Qiying had objected to that. The imperial

[66] Addington to Stephen, March 22, 1843, CO129/3, fo. 151, 157–59.

[67] Stephen's Minute of March 23–24, 1843, CO129/3, fo. 165.

[68] Most colonial judges of the mid-nineteenth-century British Empire were also appointed at pleasure, as opposed to "during good behaviour"; that is, they had no security of tenure: John McLaren, *Dewigged, Bothered, and Bewildered: British Colonial Judges on Trial, 1800–1900* (Toronto: University of Toronto Press, 2011), ch. 3.

[69] Stephen's Minute of March 23–24, 1843, CO129/3, fo. 165.

[70] Stanley's Minute of March 27, 1843, CO129/3, fo. 165.

[71] By authority of the Act of 10 & 11 Vict., c. 83 (1847). See Rieko Karatani, *Defining British Citizenship: Empire, Commonwealth and Modern Britain* (London: Frank Cass, 2003), 55.

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policy was also conveyed to Pottinger in half-hearted language. In Aberdeen's words, "it would unquestionably be much more agreeable" if Pottinger could convince the Chinese to drop their claims entirely. But as there was "no reasonable ground" for expecting success on that front, "the course now pointed out [i.e., as to the appointment of Chinese judges in Hong Kong] affords the best chance of obviating the inconveniences which may be apprehended from the existence in as confined a space as Hong Kong of two systems of criminal jurisdiction."[72] In other words, the British government did not insist on a course of action. When all was said and done, Pottinger was still to have some discretion. Pottinger responded by reporting his view that the Hong Kong question remained "undecided," and that it would continue to form "a subject of future negotiation."[73] In fact, it never did, because further discussions were short-circuited by the murder of Wong Yaong Fook in Chai Wan.

Precedent Before Principle

In 1843, the part of Hong Kong known as Chai Wan, or Firewood Bay, featured a fishing community on the coast and a small village further inland. One fishing family was that of the deceased, Wong Yaong Fook, and his wife Wong Nei She. The couple had an infant child. On the night of April 6, a fight broke out on their boat, which was also their home. This was witnessed by another fisherman, Po Asye, from his own boat parked 60 meters away. Asye would later testify that he saw five men on the Wongs' boat. Although it was too dark to identify the men, Asye believed that he heard the voice of a local villager, Lo Atow.[74]

Two days later, Asye found what looked like Yaong Fook's body floating in the bay. He quickly got hold of Yaong Fook's brother, Yaong Po, to identify the body. At the time, Yaong Po was also living in Chai Wan. But Yaong Po and Yaong Fook had an older brother who was away on a fishing expedition. Everyone called this older brother Ayee (or Ah Yee), so his full name was probably Wong Yaong Yee. As it happened, Yaong Po decided to track down Ayee before reporting Yaong Fook's death. Meanwhile, he brought Yaong Fook to the village of Nam Tong and buried him there. Nam Tong was the Wong brothers' ancestral home. It was on the Chinese Mainland, about 5 kilometers from Chai Wan by boat.[75]

Separately, Asye decided that the Wong family's tragedy was no longer his concern. When he was later questioned by Chief Magistrate William Caine, he said that was why he did not mention it to the headmen of Chai Wan Village. He also claimed that he was too poor to report the murder at the British settlement, which was soon to be named Victoria, as that would have involved a considerable journey of about 10 miles or 16 kilometers.[76] But it is just as likely

[72] Aberdeen to Pottinger, April 6, 1843, FO17/64, fo. 212.
[73] Pottinger to Aberdeen, July 27, 1843, FO17/68, fo. 231.
[74] Proceedings of *The Queen v Lo Atow and others*, CO129/2, fo. 389, 395–96.
[75] Ibid., fo. 389–90.
[76] Ibid., fo. 396.

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that British justice did not cross Asye's mind. After all, it was still anyone's guess whether and how the British would attend to crimes between Chinese people *inter se*. If that was an open question even at the highest levels, it is difficult to imagine that a simple fisherman would have taken British involvement for granted.

Asye and Yaong Po's actions explain why Caine did not find out about the murder until August 1843. Also, the news finally came not from Chai Wan but from the Chinese county of Xin'an. That was because Yaong Po and his brother Ayee decided to report their case there. As a result, Magistrate Lau of Xin'an responded by sending his officers to Hong Kong. This was how the case took on a jurisdictional significance. Yaong Po explained that he had gone to Xin'an out of simple convenience.[77] Again, the real reason was probably that he did what he felt was right and customary. Either way, there was nothing that Caine could do about all this embarrassment but put it to Lau that the authorities in Hong Kong should be the first port of call for reporting local crimes.

In his letter to Lau, Caine acknowledged that "the culprits of [China and Britain] shall be mutually delivered over for punishment by the officers of their own nations." As authority for that rule, Caine cited "the supplementary arrangements now pending."[78] As we have seen, those arrangements were fluid. It was unclear how they applied to Hong Kong. In those circumstances, all Caine would have known for sure was that Pottinger had agreed back in January 1843 to send Chinese offenders to Kowloon, while reserving "a certain extent" of "police jurisdiction" in Hong Kong.[79] It made sense, then, that Caine proceeded to take that position with Lau. For Caine, the power to arrest suspects "must rest in the hands of the officer holding the government of the place... It can never be admitted that the officer of one country should send to search for and seize offenders within the Territory of the other."[80] For his part, Lau did not deny that he had breached due process. It was enough for him that Caine agreed to give up Yaong Fook's killers upon establishing "the truth of the charges" against them.[81] Lau had framed those charges—of murder and abetting murder, among other lesser charges—in response to the Wong brothers' petition.

The Wong brothers named seven individuals. The first and principal accused was Lo Atow, the man whose voice Asye reported hearing on the night of April 6. Then, there were Atow's five brothers, the youngest of whom, Lo Asam, was only 13 years old. Finally, there was Yaong Fook's wife, Nei She. According to Asye, Nei She and Atow were having an affair. Yaong Fook found out about it and confronted Atow, so Atow must have returned with his brothers to settle the score. In this account, Nei She did not kill her husband, although she did lead the Lo brothers to him.[82]

[77] Ibid., fo. 393.
[78] Caine to Lau, letter received on August 22, 1843, CO129/2, fo. 424.
[79] Woosnam's Minute of January 21, 1843, FO17/66, fo. 141.
[80] Caine to Lau, letter received on August 22, 1843, CO129/2, fo. 424.
[81] Ibid.; and Lau to Caine, August 30, 1843, CO129/2, fo. 426.
[82] Proceedings of *The Queen v. Lo Atow and others*, CO129/2, fo. 389.

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In September, the seven accused were brought before William Caine. At the end of the hearing, which lasted 5 days, Caine advised Pottinger to send Atow and Nei She to Xin'an, and to release Atow's five brothers. Caine explained that the complainants' case was problematic. Yaong Fook's evidence was almost entirely hearsay, while there were major discrepancies in Asye's testimony. On the other hand, the evidence of the defense was not credible. The prisoners denied all knowledge of the murder, yet they could remember the night of April 6 well enough to present highly detailed alibis. The implication was that if the prisoners were truly ignorant, they would not have found the night in question particularly memorable. For Caine, "[the prisoners'] prevarications afford a most melancholy instance of their wickedness."[83] On balance, Caine found enough evidence to justify sending only Atow and Nei She to Xin'an for trial.

The significance of the Chai Wan case lies in how Pottinger chose to resolve it. In the first place, he did not surrender Atow and Nei She. Instead, he had them released and returned to Chai Wan along with Atow's brothers. In a memorandum, which he forwarded to London, Pottinger explained that considering all the work that Caine had done, to send the two prisoners to Xin'an would be "tantamount to pronouncing them to be guilty." Essentially, Pottinger did not believe that the prisoners would receive a fair trial. In his view, the Chinese authorities were likely to "subject those two persons to torture, in order to extort confessions of guilt from them."[84] To be sure, Pottinger's reservations echoed the wider Western suspicion of Chinese law, which had long animated the British refusal to be subject to it.[85] Now Pottinger extended that suspicion to China's treatment of its own subjects. In the 1860s, this refusal to cooperate would ossify into a rule under the law of Hong Kong that fugitives should never be extradited to face judicial torture.[86] At the same time, Pottinger might also have been channelling his government's fears for the safety of Chinese subjects who had worked or traded with British forces during the Opium War. Although there was no evidence that Atow and Nei She were anything of the sort, the question of their surrender to Xin'an was considered at a time when China was generally known to conduct reprisals against suspected collaborators.[87]

In spite of all that, the Chai Wan case of 1843 did not concern the legal conditions of extradition so much as whether a process resembling extradition should even take place when the *locus delicti* was in Hong Kong. Pottinger understood that. In his memorandum on Caine's hearing, he rationalized its outcome as being partly about standards of proof: if the case against Atow and Nei She had been stronger, so that (by his reckoning) they would not be

[83] Remarks on the Trial by the Chief Magistrate, September 14, 1843, CO129/2, fo. 411–14.

[84] Pottinger's Note of September 30, 1843, CO129/2, fo. 415–17.

[85] Chen, *Chinese Law in Imperial Eyes*.

[86] Jenny Huangfu Day, "The Enigma of a Taiping Fugitive: The Illusion of Justice and the 'Political Offence Exception' in Extradition from Hong Kong," *Law and History Review* 39 (2021): 415–50.

[87] See, for example, Kaori Abe, "Middlemen, Colonial Officials, and Corruption: The Rise and Fall of Government Compradors in Hong Kong, 1840s–1850s," *Modern Asian Studies* 52 (2018): 1774–805, at 1780. I am grateful to one of the anonymous reviewers for bringing this point to my attention.

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tortured in China, then he would have given them up. But as Caine had judged that the case was weak, Pottinger felt entitled to release the prisoners under the "police jurisdiction" that he had claimed at the post-Nanjing negotiations. In that sense, Pottinger was only denying Chinese jurisdiction "in this instance," and only for lack of evidence. He was not claiming exclusive jurisdiction for the courts in Hong Kong. For good measure, Pottinger instructed Caine to "inform" Chief Magistrate Lau of this subtle reasoning.[88]

In a subsequent report to London, however, Pottinger framed the case differently. He referred to Caine's proceedings as a "Trial"—not just a pre-trial hearing—which "establishes beyond all future doubt or cavil the entire Sovereignty of England over this Colony and its Chinese population."[89] This remarkable conclusion drew on a different line of reasoning in Pottinger's memorandum. It was that by acquiescing to Caine's proceedings, "the Chinese Government [had] tacitly waived the right they first claimed of trying all Persons (residing on the Island of Hong Kong) who might be charged with capital or other serious crimes."[90] Thus, Pottinger believed that the British government could see the Chai Wan case as precedent for the principle of exclusive jurisdiction. The intimation in this alternate narrative was that the seven prisoners were not merely discharged for lack of evidence to commit them for trial: they were actually tried and acquitted. Obviously, this was not how Caine understood his own proceedings. If nothing else, Caine would have needed a jury to convict or acquit the accused, and no jury was ever summoned. Perhaps Pottinger's loose language betrays his lack of legal training, although Caine was not legally trained either. But the point is that the ambiguities in the treaties made it possible for Pottinger to rationalize his actions in different ways. They let him have his diplomatic cake and eat it too.

Pottinger's vacillation did not sit well with Aberdeen. In March 1844, the foreign secretary observed that by agreeing not to interfere with Caine's inquiries, Chief Magistrate Lau could only be said to have accepted Britain's *executive* not its judicial authority in Hong Kong. Consequently, Aberdeen was concerned that Pottinger had made further arrangements with the Chinese government, which he had neglected to report.[91] Even so, Aberdeen was not inclined to reopen the case. Now that Hong Kong was a crown colony, its internal affairs were under the purview of his colleagues at the Colonial Office, who were intent on doing nothing. "As the Prisoners in this case underwent no punishment," wrote James Stephen, "it is not necessary to express any opinion on the lawfulness of the proceedings against them. There would seem to be quite reason enough why such an opinion should not be expressed without necessity." The Colonial Secretary Lord Stanley was of the same mind.[92]

Another complication was that Pottinger's term as minister to China and governor of Hong Kong was coming to an end. He was to be succeeded in

[88] Pottinger's Note of September 30, 1843, CO129/2, fo. 417.
[89] Pottinger to Stanley, December 9, 1843, CO129/2, fo. 381.
[90] Pottinger's Note of September 30, 1843, CO129/2, fo. 415.
[91] Aberdeen to Davis, March 26, 1844, CO129/8, fo. 71–74.
[92] Stephen and Stanley's Minutes of March 8, 1844, CO129/2, fo. 384.

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May 1844 by John Francis Davis. Although Davis had served as a diplomat in Canton in the 1830s, he was living in England during the Opium War and its aftermath. There was little, then, that Aberdeen could expect Davis to do about Pottinger's decisions. Indeed, Aberdeen suggested to Davis that "if no practical inconvenience [arose] from leaving the question in its present state, it [was] on every account desirable to avoid all risk of exciting the suspicion or jealousy of the Chinese government by displaying too much anxiety respecting it."[93] Since Qiying had said nothing about the Chai Wan incident, there was nothing to be gained for Davis to bring it up.

All this meant that British sovereignty in Hong Kong was a fait accompli. After Davis took office, he wrote in reply to Aberdeen's dispatch that he had "heard from" Pottinger that China had dropped its jurisdictional claim.[94] It also transpired that Pottinger had followed up on the Chai Wan case by allowing Caine to decide other cases of serious crimes committed by Chinese subjects, such as piracy and armed robbery.[95] By May 1844, ninety-four prisoners, mostly Chinese, were being held at the colony's prison, Victoria Gaol, on various charges and convictions. For Davis, those prisoners pointed to Britain's "virtual right and possession" of exclusive criminal jurisdiction in Hong Kong. It was now a "practical impossibility" to share that jurisdiction with China, as that would reduce the British position on the island to "a mere occupancy."[96] With those words, Davis ended the debate within British officialdom on the legal status of Hong Kong and its people. Although the Chinese government would mostly stand by its view of jurisdictional reciprocity, British officials would become increasingly intolerant of such discourse as the century progressed.[97] The governors of Hong Kong would still surrender Chinese fugitives, but only for crimes committed beyond British territory.[98]

Conclusion

Between 1842 and 1844, the British understanding of criminal jurisdiction in Hong Kong shifted substantially. It shifted from being centered on reciprocity and nationality, to being explicitly territorial. This shift did not stem from a prospective policy decision. It was rather the result of a retrospective reliance on the dubious precedence of a magisterial hearing. That the Chai Wan incident was used to entrench territoriality at all proves that British officialdom was not opposed to the idea. It was merely that territoriality seemed diplomatically and jurisprudentially unworkable when it was first scrutinized in the abstract. As events unfolded, the idea prevailed despite those difficulties because it became the path of least resistance. To put it more strongly,

[93] Aberdeen to Davis, March 26, 1844, CO129/8, fo. 74.

[94] Davis to Aberdeen, May 23, 1844, CO129/8, fo. 253.

[95] For an account of some of these trials, see Christopher Munn, "William Caine and the Hong Kong Magistracy," *Hong Kong Law Journal* 25 (1995): 213–38.

[96] Davis to Stanley, July 6, 1844, CO129/6, fo. 357–63.

[97] For example, Pauncefote's Memorandum of July 3, 1865, FO17/613, fo. 255–57.

[98] Ivan Lee, "British Extradition Practice in Early Colonial Hong Kong," *Law & History* 6 (2019): 85–114.

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British territorial sovereignty in Hong Kong emerged from of a degree of official cowardice. No British official wanted to be responsible for bringing about that state of affairs. But when the opportunity arose, everyone proved willing to convince themselves that they had achieved in practice what they had tried to avoid in principle.

What did the agents of the British Empire set out to do in China, if not to carve out sovereign territory? They set out to ensure that Chinese authorities would never have control over British subjects. That much is clear, but it is still worth considering how the resulting treaty regime is best understood. Most historians refer to it as containing an "extraterritorial" arrangement. This is appropriate insofar as the word accurately describes how the Opium War treaties authorized British jurisdiction over British subjects in Chinese territory. Yet the present case study suggests that an analytical emphasis on extraterritoriality can obscure subtle complexities in the inceptive meaning of the treaties. Legal scholars have recently cautioned that "the very idea of extraterritoriality seems to presuppose the authority and legitimacy of territoriality."[99] As we have seen, the drafters of the Opium War treaties did not presuppose territoriality. A modicum of territoriality inhered in the cession of Hong Kong, but the cession raised controversy precisely because it was universally perceived as a deviation from the wider jurisdictional agreement, which was premised upon reciprocity and nationality. Since the controversy had to do with how and whether the deviation could be justified, it was no coincidence that British officialdom tried to resolve the problem through the lens of English nationality law. Territoriality only came a bit later, sloppily and contingently. It was not the language in which the treaties were initially drafted and understood.

It was the *idea* of territoriality that was contingent, and not merely what substantive rights and duties the British thought they had created. In his work on the Chinese experience of extraterritoriality, Pär Cassel argues that China's concession of extraterritorial rights to Western subjects was made against a domestic backdrop of "ethnic legal pluralism."[100] Regardless of its relations with the West, the Qing Empire "primarily enforced [its] legal code over people, not territories."[101] Thus, a notion of "personal jurisdiction" formed the "operative principle" of Western extraterritoriality.[102] To Cassel's insight, it is now necessary to add that from the British point of view, that there was also a temporal aspect to the conceptual link between personal and extraterritorial jurisdiction. By asserting territorial sovereignty over Hong Kong in 1844, the British made their treaty rights in China more distinctively extraterritorial and thus more unequal.

[99] "Introduction," in *The Extraterritoriality of Law: History, Theory, Politics*, ed. Daniel S. Margolies, Umut Özsu, Maïa Pal, and Ntina Tzouvala (Oxford: Routledge, 2019), 1.

[100] Cassel, *Grounds of Judgment*, 15–22.

[101] Pär Cassel, "Extraterritoriality in China: What We Know and What We Don't Know," in *Treaty Ports in Modern China: Law, Land and Power*, ed. Robert Bickers and Isabella Jackson (Oxford: Routledge, 2016), 24.

[102] Cassel, *Grounds of Judgment*, 9, 42.

https://doi.org/10.1017/S0738248022000220 Published online by Cambridge University Press

In 1845, Davis said to Qiying that there could be no reciprocity over jurisdiction because circumstances differed in British and Chinese territory. Whereas Chinese subjects had "free permission" to move around British dominions, the movement of British subjects was restricted in Chinese territory. For Davis, those restrictions justified the British immunity from Chinese jurisdiction.[103] Fair or not, such rhetoric would not have made any sense pre-Chai Wan. Post-Chai Wan, British jurists and officials would rationalize their privileges in China for a century. Their excuses would become increasingly abstract and steeped in an emerging legal positivist view of international law, in which states like China and Ottoman Turkey were deemed imperfectly civilized and hence imperfectly sovereign.[104] As far as China was concerned, Hong Kong was the first piece of this intellectual puzzle. Had Britain embraced Chinese jurisdiction on the island, there may have been no need for the British to rationalize their consular rights in Mainland China for some time; possibly not until the 1870s, when the Chinese government started questioning the legal status of Chinese subjects in other British territories, especially the Straits Settlements.[105] As it happened, the territorialization of British rule in Hong Kong brought the irregularity of Western extraterritoriality right to China's doorstep.

In broader terms, the post-Nanjing dispute over Hong Kong was an episode in the British traversal of the conceptual boundaries between formal and informal imperialism. Historians can and do interpret the Opium War treaties as comprising three separate jurisdictional arrangements: British sovereignty in Hong Kong (Article 3 of the Treaty of Nanjing), British extraterritoriality in treaty port China (Clause 13 of the General Regulations in the Treaty of Nanjing), and the reciprocal extradition of fugitive offenders (Article 9 of the Treaty of the Bogue). But the present account has shown that the ideas of territorial sovereignty, extradition, and extraterritoriality were mutually constitutive, and that they co-emerged through retrospective and iterative domestic discourse. That discourse was not merely an exercise in diplomatic improvization. It was, more significantly, a process of refining the intellectual premises of equivocal events and decisions on the ground: a process of giving a stable meaning to events that could sustain multiple interpretations. Law is partly a matter of human perception. Only when the British perception of Hong Kong's legal status became (relatively) clear, did the meaning of the cross-border arrangements with China also crystallize: British jurisdiction in Mainland China became extraterritoriality, properly so called, and the surrender of Chinese fugitives from Hong Kong to China veered closer to extradition

[103] Davis to Keying, January 4, 1845, CO129/11, fo. 53. British colonies and self-governing territories would only begin to restrict Chinese immigration sporadically from the 1850s, and decisively from the 1880s: Philip A. Kuhn, *Chinese Among Others: Emigration in Modern Times* (Singapore: NUS Press, 2008).

[104] Turan Kayaoğlu, *Legal Imperialism; Anthony Anghie, Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004).

[105] Eddie Tang, "British Policy Towards the Chinese in the Straits Settlements: Protection and Control, 1877–1900 (With Special Reference to Singapore)" (PhD diss., Australian National University, 1970).

https://doi.org/10.1017/S0738248022000220 Published online by Cambridge University Press

in the modern sense of the practice. For a moment in time, therefore, the legal complexion of Britain's Chinese Empire turned on Hong Kong; and, as history would have it, an obscure fishing village lay at the center of everything.

Acknowledgements. The author thanks the Editor, Gautham Rao and the anonymous reviewers for their constructive comments and criticism on earlier drafts of this article.

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Cite this article: Ivan Lee, "From Reciprocity to Territoriality: Extradition, the Opium War, and the Idea of British Sovereignty in Hong Kong, 1842–44," *Law and History Review* (2022): **40**, 437–458. https://doi.org/10.1017/S0738248022000220