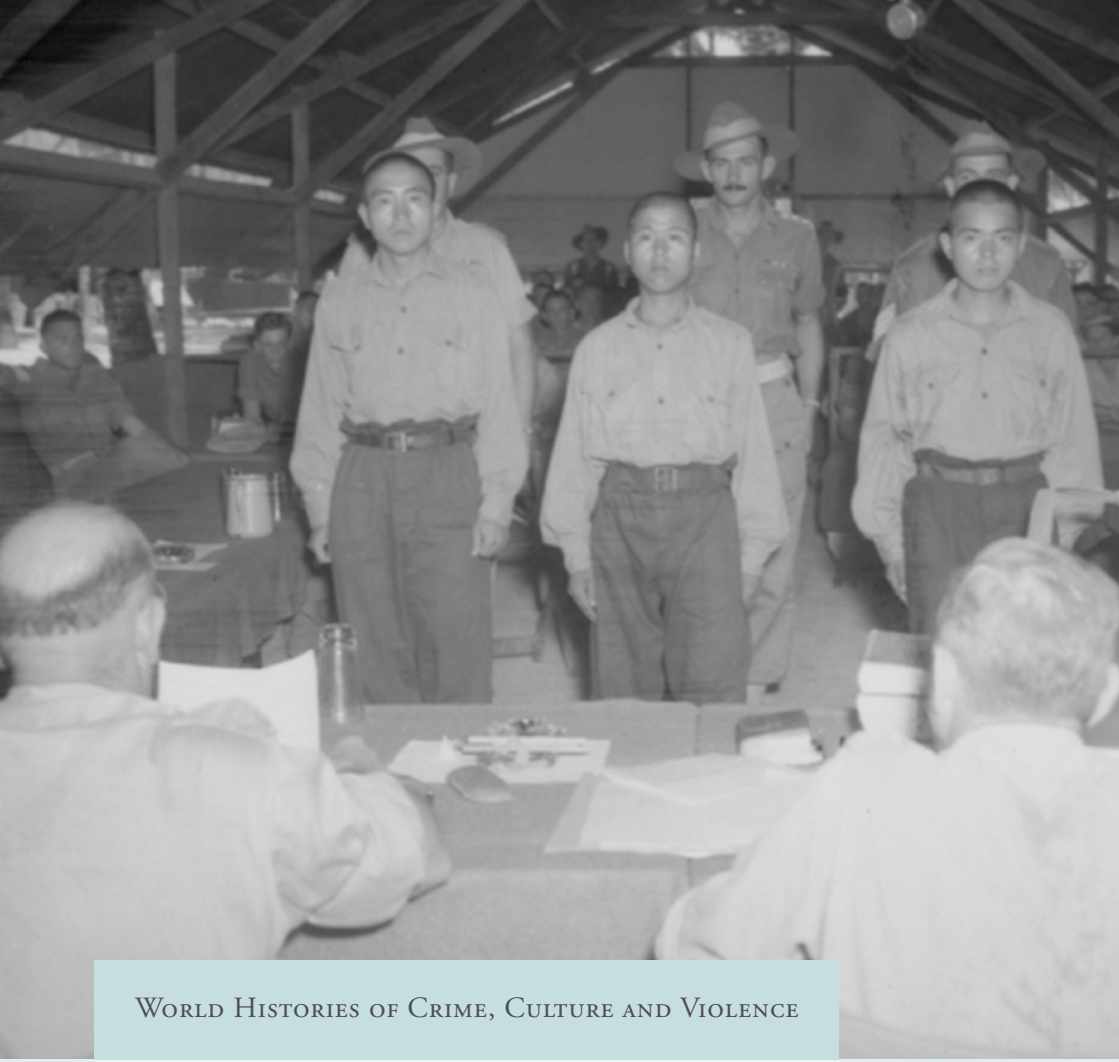

World Histories of Crime, Culture and Violence

WAR CRIMES TRIALS IN THE WAKE OF DECOLONIZATION AND COLD WAR IN ASIA, 1945-1956

Justice in Time of Turmoil

Edited by
Kerstin von Lingen

World Histories of Crime, Culture and Violence

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Kerstin von Lingen
Editor

War Crimes Trials in the Wake of Decolonization and Cold War in Asia, 1945–1956

Justice in Time of Turmoil

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CHAPTER 1

Justice in Time of Turmoil: War Crimes Trials in Asia in the Context of Decolonization and Cold War

Kerstin von Lingen and Robert Cribb

During the half-decade following the end of the Second World War, Allied military tribunals in Asia and the Pacific tried Japanese military personnel for war crimes committed during the hostilities. The trials commenced on the Pacific island of Guam in September 1945 and encompassed over 2,300 proceedings in more than 50 locations in Asia and the Pacific. Australia,

For this chapter, we draw also on results of intensive discussions with 2014's visiting fellows to the Research Group 'Transcultural Justice' on Asian War Crimes trials at the Asia and Europe in a Global Context Cluster of Excellence at Heidelberg University, Sandra Wilson and Kirsten Sellars, whom we would like to thank for their valuable input. Additionally, we thank Beatrice Trefalt and Neil Boister, as well as members of the Heidelberg Research Group Milinda Banerjee, Lisette Schouten, Anja Bihler, Ann-Sophie Schoepfel and Valentyna Polunina, who commented on an earlier draft of the chapter.

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(Nationalist) China, France, the Netherlands Indies, the Philippines, the Soviet Union, the United Kingdom and the USA all convened trials in the period to April 1951. The Communist government of the People's Republic of China, although not one of the wartime Allies, held its own trials in 1956. Around 5,700 people working for the Imperial Japanese armed forces were prosecuted. Approximately 4,500 were found guilty and in the end just over 900 were executed.[1] The remainder of those found guilty were sentenced to prison terms. Alongside the national tribunals that undertook the vast bulk of the trial work, the International Military Tribunal for the Far East (IMTFE, also known as the Tokyo Trial) convened between April 1946 and November 1948 to prosecute 28 senior Japanese political and military figures. None of the accused in this trial was acquitted, but one was found unfit for trial and two died during the proceedings.

These trials occupied a pivotal place in three major historical phenomena of the twentieth century: in the development of international humanitarian law, in the Cold War confrontation between capitalism and communism (and, on a geopolitical scale, between the USA and the Soviet Union) and in the decolonization process that led to the retreat of Western colonial empires and the emergence of new states in Asia. Yet in all three processes, the place of the war crimes trials is ambiguous, even contradictory. The trials were both a dramatic advance in international humanitarian law and an unsatisfactory dead end. They both served and confounded the Cold War interests of the prosecuting powers. And they reinforced the decolonization process in Asia while at the same time they were used to resist the end of colonialism.

These contradictions have been a major obstacle to understanding the historical significance of the trials, but this volume brings together recent research that begins to sort out this complexity.[2] The central conclusion of the book is that the trials cannot be understood simply as confirming or amplifying known historical trends. Rather, on key issues—the development

[1] Philip R. Piccigallo, *The Japanese on trial: Allied war crimes operations in the East, 1945–1951* (Austin, TX: University of Texas Press, 1979), 264–265. For a more recent analysis of the trials, see Sandra Wilson, Robert Cribb, Beatrice Trefalt and Dean Aszkielowicz, *Japanese War Criminals: The Politics of Justice After the Second World War* (New York, NY: Columbia University Press, 2017).

[2] This volume draws on papers presented at the conference 'Rethinking Justice? Decolonization, Cold War and Asian War Crimes Trials,' at Heidelberg University, 26–29 October 2014.

of international law, the resolution of wartime and Cold War rivalries, and the process of decolonization—the trials operated on both sides of the historical ledger.

Drawing on new research, this book demonstrates and debates the ways in which political and ideological considerations emanating from decolonization and the Cold War shaped, and were shaped by, the structure and outcome of the trials as a new post-imperial world gradually began to emerge. It juxtaposes their political and juridical roles in order to show the connections between the two. The war crimes trials in Asia were a watershed moment, coinciding with the demise of an old political-legal international order defined by European hegemony and the advent of a new, putatively anti-imperial one, based on contestations between the American and Soviet blocs and the rise of postcolonial nation-states.

International Humanitarian Law

Although there had been incidental efforts in earlier centuries to limit cruelty in the context of war, the modern construction of international humanitarian law in relation to war began in the mid-nineteenth century.[3] It took serious form in the successive Hague and Geneva conventions. The Geneva Conventions, commencing in 1864, defined the rights of prisoners in wartime. The Hague conventions from 1899 and 1907 set standards which restricted the use of what were seen as barbarous weapons such as expanding bullets and poison gas and set out rules for the treatment of surrendered combatants. There was also some impulse to establish rules that would protect civilians from unnecessary harm in times of war, notably the 1910 convention against the bombardment of civilian settlements from the sea.[4] Although the experience of war atrocities in the First World War in Europe had led to a codification of rules and a clearer definition about the nature of war crimes (the so-called 'Versailles list'), no agreements had been made on setting up an international court to punish these offences. Trials in Leipzig and Constantinople, which dealt

[3] Martti Koskenniemi, *The Gentle Civilizer of Nations: the Rise and Fall of International Law, 1870–1960* (Cambridge: Cambridge University Press, 2002); Mark Lewis: *The Birth of the New Justice: the Internationalization of Crime and Punishment, 1919–1950* (New York: Oxford University Press, 2014); Geoffrey Best, *Humanity in Warfare* (New York: Columbia University Press, 1980).

[4] Antonio Cassese, Guido Acquaviva, Mary Fan and Alex Whiting, *International Criminal Law: Cases and Commentary* (Oxford: Oxford University Press, 2011), 134.

with German and Ottoman war crimes respectively, were deemed a failure because they relied on the courts of the offending nation to prosecute perpetrators.[5] The interwar period was characterized by diplomatic efforts to ban all war, rather than framing legal rules for the next one.[6]

Thus, by the time of the outbreak of the Second World War, the formal legal protections for civilians were meager and there had still been no systemic prosecution of war crimes. The sequence of policy decisions which led to the postwar war crimes trial program began in London in January 1942, when a group of representatives of governments-in-exile from Nazi-occupied countries in Europe met at St James's Palace and declared a principal aim of the war to be 'the punishment, through the channel of organised justice, of those guilty of or responsible for [war] crimes, whether they have ordered them, perpetrated them or participated in them.'[7] Japan had not yet launched its attack on Malaya and Pearl Harbor, but it was at war in China and the representatives of the Chinese Republic declared that China would 'apply the same principles to the Japanese occupying authorities in China when the time comes.'[8] This resolution led in 1943 to the founding of the United Nations War Crimes Commission (UNWCC) with its headquarters in London, which undertook the fundamental work of determining the legal basis for war crimes trials and which also began the task of collecting evidence for postwar tribunals.[9]

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[5] James F. Willis: *Prologue to Nuremberg. The politics and diplomacy of punishing war criminals of the First World War* (Contributions in legal studies no. 20, Westport, CN: Greenwood, 1982); Gerd Hankel, *Die Leipziger Prozesse: Deutsche Kriegsverbrechen und ihre strafrechtliche Verfolgung nach dem Ersten Weltkrieg* (Hamburg: Hamburger Edition, 2003); Vahakn N. Dadrian and Taner Akçam, *Judgment at Istanbul: the Armenian Genocide Trials* (New York: Berghahn, 2011); Michelle Tusan, '"Crimes against Humanity": Human Rights, the British Empire and the Origins of the Response to the Armenian Genocide,' in: *American Historical Review* 119, (1), (2014), 47–77.

[6] M. Cherif Bassiouni, '"Crimes against Humanity": The need for a specialized convention', in: *Columbia Journal of Transnational Law* 31 (1993–1994), 457–494, here 466. Bassiouni underlines that the leading powers allowed the period after the First World War to become a 'bypassed occasion to establish definitive law.'

[7] *Punishment for war crimes: the Inter-Allied Declaration signed at St James's Palace London on 13 January 1942, and relevant documents* (London: HMSO, 1942), 6; Madoka Futamura, *War crimes tribunals and transitional justice: the Tokyo Trial and the Nuremburg legacy* (London: Routledge, 2008), 166.

[8] *Punishment for war crimes*, 16.

[9] Arieh J. Kochavi, *Prelude to Nuremberg. Allied War Crimes Policy and the Question of Punishment* (Chapel Hill: University of North Carolina Press, 1998); Dan Plesch and Shanti Sattler (eds.), 'Symposium: The United Nations War Crimes Commission and the Origins of International Criminal Justice,' *Criminal Law Forum* 25, 1 (June 2014).

These changes in global legal-political norms and institutions were debated in international forums, the most prominent being the Legal Committee of the United Nations War Crimes Commission, also formed in 1943. Although China also took active part in all meetings and pushed for a global rhetoric in UNWCC recommendations, the debate initially was focussed on crimes of Nazi occupation forces in Europe, on the problem of violence among states prior to a state of war, and on the issue of a state's violence against its own nationals, as the murder of European Jewry had shown this was a pressing issue.[10] The Western Allies, or United Nations as they called themselves during wartime, responded to the horrors of the Second World War in two ways: by encouraging states to commit themselves to international law, with the aim of liberating the world from war itself, and second, with the Holocaust crimes in mind, by banning crimes against civilians and developing a system of what we today call international humanitarian law.[11]

The postwar trials represented a dramatic advance both because they involved large numbers of prosecutions for war crimes under the Geneva Conventions and because, in a leap of legal imagination based on the never-ratified third Hague Peace Conference provisions as well as discussions at Versailles in 1919, they interpreted as war crimes a range of actions against civilians that had previously been regarded only as morally reprehensible.[12] The prosecution process confirmed that the provisions of the Geneva Conventions protecting prisoners of war could be enforced in a court of law and it consolidated an expanded definition of war crimes that provided new protection to the inhabitants of occupied territories from

[10] Kerstin von Lingen, 'Setting the Path for the UNWCC: The Representation of European Exile Governments on The London International Assembly and The Commission For Penal Reconstruction and Development, 1941–1944,' in: *International Criminal Law Forum*, 25, 1 (2014), 45–76, here 69; Kerstin von Lingen, 'Defining Crimes against Humanity: The Contribution of the United Nations War Crimes Commission to International Criminal Law, 1944–1947,' in: Morten Bergsmo, Wui Ling CHEAH, Ping YI (eds.), *Historical Origins of International Criminal Law*, (Brussels: Torkel Opsahl, 2014), 475–506, here 481.

[11] Daniel Thürer, *International Humanitarian Law: Theory, Practice, Context*, (The Hague: The Hague Academy of International Law, 2011), 32, quoting preamble of UN Charter 1945.

[12] Arthur Eyffinger, 'A Highly Critical Moment: Role and Record of the 1907 Hague Peace Conference,' in: *Netherlands International Law Review* Vol. 54, 2 (2007), 197–228, refers on pp. 234–235 on the US-led plans for a third Hague conference, envisioned for 1915, as well as on the draft program. On the debates at Versailles, see Beth van Schaack, 'The Definition of Crimes against Humanity: Resolving the Incoherence,' in: *Columbia J Transnational Law*, Vol. 37 (1998–1999), 787–850, here 796.

cruel and arbitrary treatment by those acting on behalf of the occupying power. Piccigallo's 1979 survey of Allied war crimes trials in the Asia-Pacific region pioneered this interpretation of the trials as a major legal advance, albeit one that was subsequently overshadowed by the attention given to trials in Europe.

As well as identifying an expanded range of actions as criminal under international law, the proceedings also consolidated an extended conception of guilt. They affirmed the principle of command responsibility, under which officers bore legal responsibility for the actions of their subordinates, even if they had done no more than shape the circumstances in which atrocities were committed. The proceedings also asserted the inadmissibility of a defense of superior orders, a claim which had still been possible in the trials after the First World War: the accused could not escape culpability by showing that they had merely followed the orders of their commanders. New research continues to draw attention to the hitherto little-recognized legal innovation of the postwar trials. Neil Boister's chapter in this volume, for instance, reveals the role of the IMTFE in extending the scope of international law to regulate the trade in addictive drugs.

As Wolfgang Form and Robert Cribb argue for the Philippines and Burma respectively, and as Lisette Schouten's chapter shows in the case of the Netherlands Indies, the trial process was driven above all by a determination to do justice, rather than out of overt political considerations. The investigators and prosecutors believed that terrible crimes had been committed and they wanted to see the perpetrators—or at least the worst of them—appropriately punished. Their determination reflected the mood expressed by Allied leaders in the Potsdam Declaration of 26 July 1945: 'Stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners.'[13] Indeed, there was competition among the prosecuting powers, not only to indict high profile suspects but also for a general record of prosecution.[14] Each of the prosecuting powers in the Asia-Pacific region conducted its trials under national legislation or regulations, but to varying degrees they cooperated first in the pooling of

[13] 'Proclamation by the heads of governments, United States, China and the United Kingdom,' 26 July 1945, United States Department of State, *Foreign Relations of the United States: Diplomatic Papers: the Conference of Berlin (the Potsdam Conference), 1945*, Vol. II (Washington DC: US Government Printing Office, 1945), 1476.

[14] This argument is raised and discussed in Barak Kushner, *'Men to Devils, Devils to Men': Japanese War Crimes and Chinese Justice*, (Cambridge MA: Harvard University Press, 2015), 39–40 and 155.

evidence and later in the exchange of suspects and witnesses. Judges and prosecutors sometimes sat in other jurisdictions. The prosecuting powers in Asia and Europe moreover watched each other closely, to identify the techniques that might work best in the process of investigation and prosecution, and to test new principles against the practicalities of prosecution. They sought to avoid approaches that might have undesired side-effects and they often tried to remain in step with each other in determining the pace and the scope of the trials. The records of the United Nations War Crimes Commission and of Allied Military Command bodies such as SCAP (Supreme Commander for the Allied Powers) or SEAC (South East Asia Command) thus reveal a transcultural dimension in which the war crimes trials in Europe as in Asia constituted a 'learning system.'

Nonetheless, since the 1970s, there has been growing scholarly attention to procedural shortcomings in the trial process. In particular, inconsistencies in the selection of defendants and inadequacies in the treatment of evidence began to cast a shadow over the quality of the trials. Minear's *Victors' Justice* (1971) focused on the Tokyo trial alone, arguing that the USA's determination to achieve convictions led to serious unfairness.[15] The subsequent work of Totani and of Boister and Cryer on the IMTFE has revealed a legal process that fell short of the expectation of fairness on many fronts, while nonetheless boldly upholding new and higher standards of legal accountability for wartime actions.[16] As several chapters in this book demonstrate, this critique can be applied also to the national trials of Japanese after the war. The prosecuting powers saw the trials as important business that needed to be finished quickly so that the world could move on. Changing political circumstances in many parts of the region strengthened the imperative to wrap up the trials. There was little appetite for making the trial process any longer or more comprehensive than it was; on the contrary, most dissenting voices on the prosecuting side argued for a more expeditious process, closer to summary justice. Lisette Schouten's chapter in this volume shows both the determination of the Dutch colonial authorities to follow a justifiable procedure and

[15] Richard H. Minear, *Victors' Justice; the Tokyo War Crimes Trial* (Princeton, NJ, Princeton University Press, 1971). See also Richard L. Lael, *The Yamashita precedent* (Wilmington, DE.: Scholarly Resources, 1982).

[16] Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: a reappraisal* (New York: Oxford University Press, 2008); Yuma Totani, *The Tokyo war crimes trial: the pursuit of justice in the wake of World War Two* (Cambridge, MA: Harvard University Asia Center, 2008).

their tolerance of irregularities that inevitably arose in the difficult circumstances of the trials.[17]

Decolonization

A powerful nexus also existed between the war crimes trials and the process of decolonization in Asia. Over the period from 1930 to 1960, most of Southeast Asia moved from an unambiguously colonial status to at least formal independence. This transition, defined by Duara as 'the process whereby colonial powers transferred institutional and legal control over their territories and dependencies to indigenously based, formally sovereign, nation states,'[18] profoundly transformed the international order in Asia and prefigured the decolonization of Africa. Japan's imperial expansion in Asia was intimately connected with the decolonization process in several respects. First, Japan's success in modernizing, industrializing and developing serious military capacity after 1868 was a source of inspiration to colonized peoples throughout Asia. Japan's achievement was a potent refutation of racist assumptions of Asian inferiority, offering vivid proof that the West was not all-powerful. Japan's rapid expansion in 1941–42 humiliated the Western powers in Southeast Asia and parts of the Pacific, making it impossible that they could return to the comfortable pre-war assumptions of superiority. Second, the Japanese victories and the destruction and disruption that accompanied the war seriously weakened the military capacity of the Western powers and the direct economic value of the Southeast Asian colonies. The ferocious fighting over Manila, the Allied bombing of cities such as Rangoon and Surabaya, catastrophic famines in northern Vietnam and Java, and the running down and repurposing of colonial infrastructure for the war effort meant that the elaborate apparatus of colonial profit that had been developed in the colonies over several decades could not simply be switched on again after the surrender.

Japan's imperial venture had also had an ideological impact on the people of the region. Japanese imperial expansion after 1931 was embedded

[17] A similar picture emerges in Yuma Totani, *Justice in Asia and the Pacific region, 1945–1952: Allied war crimes prosecutions* (New York, NY: Cambridge University Press, 2015).

[18] Prasenjit Duara, 'Introduction: the Decolonization of Asia and Africa in the 20th century,' in: Prasenjit Duara (ed.), *Decolonization: Perspectives from now and then* (London: Routledge 2004), 1–18, here 2.

in a discourse that blended Pan-Asianism and nationalist specificity.[19] Japan's Pan-Asian propaganda in effect invited all Asian peoples to be part of the Japanese success story on the basis of their shared Asian culture. At the same time, a strong exclusionary strand in Japanese thinking led them to celebrate national difference within Asia and to encourage nationalisms in Mongolia, China, Southeast Asia and India. In the course of their wartime expansion, the Japanese authorities presided over the creation of quasi-independent states in Manchuria, Mongolia, China, the Philippines, Burma, Vietnam, Laos and Cambodia. They created a Provisional Government of Free India in anticipation of conquering the subcontinent, and they were prevented from conferring independence on Indonesia only by the sudden end of the war. Within the territories they occupied, moreover, Japanese forces adopted a very different political style from that of the Western colonial powers. Whereas the West had generally made much use of indirect rule, recruiting the traditional authority of indigenous rulers to mask and to underpin colonial hegemony, the Japanese imperialists preferred to rule directly, recruiting ambitious young men who shared the Japanese sense of mission and urgency. Furthermore, unlike the colonial powers, Japanese authorities spoke directly to the mass of the people, launching sustained propaganda campaigns to win public support. Three quarters of a century later, these propaganda materials look crude and unconvincing, but their effect was electrifying on peoples whose approval for their rulers had never previously been sought.

On the other hand, Japan was itself an imperial power. Prominent Japanese thinkers such as Fukuzawa Yukichi described Japan as 'leaving Asia' and entering the modern world inhabited by the Western powers.[20] Japan's economic vision for its empire, encapsulated in the idea of a Greater East Asia Co-Prosperity Sphere, envisaged a subordinate role for the other parts of Asia as suppliers of raw materials for Japanese industry. When Japan's interests were at stake, Japanese officials could be ruthless in dealing with their fellow Asians. Far more Asian labourers (*rōmusha*) than Western prisoners of war perished on the Thailand–Burma Railway, and

[19] Li Narangoa and Robert Cribb, 'Japan and the transformation of national identities in Asia in the Imperial era,' in: Li Narangoa and Robert Cribb, eds, *Imperial Japan and national identities in Asia, 1895–1945* (London: RoutledgeCurzon, 2003), 1–22.

[20] Urs Matthias Zachmann, 'Blowing up a Double Portrait in Black and White: The Concept of Asia in the Writings of Fukuzawa Yukichi and Okakura Tenshin,' in: *Positions: East Asia Cultures Critique* 15, 2 (Fall 2007), 345–368.

the public rhetoric of Pan-Asian solidarity was qualified by private expressions of deep prejudice.[21]

This ambivalence in Japanese imperialism persisted after the end of the war. On the one hand, Allied officers sometimes recognized in their Japanese counterparts a shared military-imperial culture that facilitated cooperation between the two. In both Vietnam and Indonesia, Japanese troops accepted orders from the Allied commanders to take military action against the local nationalist uprisings. On the other hand, some Japanese officers assisted nationalists in Indonesia by handing over weapons for the future anti-colonial struggle while hundreds of ordinary Japanese soldiers deserted after the surrender and offered their services to the nationalist struggles in the lands they had once occupied. The Dutch colonial authorities were sufficiently concerned by this development to include such actions within their definition of war crimes and they tried at least one Japanese corporal on such charges, as Lisette Schouten's chapter shows.

Korea's decolonization raised a different set of issues. Japan had forcibly annexed the previously independent country in 1910, but Allied planners limited the war crimes investigation process after the Second World War to the period from 1928. In the eyes of the prosecutors, Koreans were thus Japanese subjects and had none of the protections enjoyed under international law by the inhabitants of occupied territories. Japan's efforts to erase Korean culture,[22] therefore, as well as the brutal treatment of Korean labourers and the recruitment of Korean women for enforced prostitution were not addressed by Allied courts, even though they would have constituted war crimes had the status of Koreans been considered to be different in international law. Koreans might have been protected by the new concept of crimes against humanity, which paid no attention to the national status of the victims, but that concept was barely formed and was initially of limited use, as it was bound to the so-called 'war nexus' and could be applied only jointly with other charges, such as war crimes or crimes against peace.[23] Only with time did the concept become tied to Holocaust crimes and is today seen as a tool against genocidal violence. Neither the

[21] See for instance Haruko Taya Cook, 'Japan's war in living memory and beyond,' in: Remco Raben, ed., *Representing the Japanese Occupation of Indonesia: personal testimonies and public images in Indonesia, Japan and the Netherlands* (Zwolle: Waanders, 1999), 53.

[22] Mark Caprio, *Japanese Assimilation Policies in Colonial Korea, 1910–1945* (Seattle, WA: University of Washington Press, 2009).

[23] Beth van Schaack, 'The Definition of Crimes against Humanity: Resolving the Incoherence,' in: *Columbia Journal of Transnational Law* 37 (1998–1999), 787–850, here 791.

USA nor the Soviet Union in their respective occupation zones in postwar Korea saw any political value in prosecuting Japanese for their actions in Korea or against Koreans outside the country.

Under these circumstances, it is hardly surprising that the program of war crimes trials in Western colonies in Southeast Asia had the same ambivalence in relation to the decolonization process as it had to the Cold War and to the development of international humanitarian law.

Incidental comments by Western officials involved in the investigation and prosecution of war crimes make it clear that they believed the trials would contribute to upholding colonial prestige. Public occasions that reaffirmed the restoration of colonial authority—formal local ceremonies to accept the Japanese surrender, for instance—were important symbolic repudiations of Japan's wartime claims to superiority and hegemony. The right to establish courts and to prosecute alleged criminals was central to state authority, in the colonies as much as anywhere else. This authority was especially important in French Indochina, as the chapter by Ann-Sophie Schoepfel explains. French colonial authority was fragile because until March 1945 the colony had been governed by Vichy French authorities, allied with Nazi Germany and thus with Japan. France's status as one of the victorious Allies in Asia was by no means secure. Moreover, responsibility for accepting the Japanese surrender in northern Indochina was allocated to the Nationalist Chinese government. France had wrested hegemony over Vietnam from the Qing rulers of China barely half a century earlier, and it was by no means clear that the Nationalists would willingly restore French authority. In southern Indochina, the British-led South East Asia Command (SEAC) had responsibility for accepting the surrender. The British military authorities were more accommodating to French interests than the Nationalist Chinese forces, but Britain had other, higher priorities in the region than helping the French to regain their colony. In this context, placing Japanese on trial was an important element in French strategy.[24] Beatrice Trefalt's chapter in this volume, too, shows how important it was for France, for the purposes of the IMTFE, to be recognized as a victim of Japanese aggression, rather than as a wartime ally of Japan. To have been held to account for the Vichy administration's collaboration with Japan might have been catastrophic for the French

[24] Beatrice Trefalt, 'Japanese War Criminals in Indochina and the French Pursuit of Justice: Local and International Constraints,' *Journal of Contemporary History* 49, 4 (Oct. 2014), 727–742.

effort to restore colonial authority in Indochina. Yet there is no sign that the Tokyo proceedings delivered France any positive benefits.

In many jurisdictions, moreover, military planners chose as the first trial to be conducted a case involving non-Western victims. British, Dutch and Australian trials, as well as American trials in the Philippines, all regularly prosecuted Japanese for crimes against local people. China and the Philippines prosecuted only crimes against their own nationals. Although the archives do not record any political rationale for the choice of cases to be pursued, it is likely that all the Western powers were conscious that it might be politically damaging if the only prosecutions were for crimes against Westerners. The propaganda value of the trials, however, was limited by the fact they generally did not begin until months after Western authority had been restored.

Amongst all the colonial powers except France, legal responsibility for investigating and prosecuting war crimes lay with the military as part of the effort to defeat Japan. Authorities with responsibility for the long-term future of the colonies were generally not part of the planning or implementation of the trials process. The Netherlands Indies had opted for a hybrid system: although investigation was carried out by military personnel, the courts made wide use of militarized civilians as judges and prosecutors, and the head of the body for the investigation of war crimes was the civil government's attorney general. The language used by military planners, to the extent that it offered any rationale for the trials, often stressed retribution, rather than local political motives.

In important respects, the Japanese occupation had simply accelerated changes that were already under way in the rest of Asia. In 1935, the USA had transferred most internal administrative functions in the Philippines to a commonwealth under a Filipino president, Manuel Quezon. The Act creating the commonwealth foreshadowed the Philippine independence that would come ten years later. The British government granted Burma a high degree of self-rule in 1937 under its own prime minister, Ba Maw. Even the French and Dutch colonial powers, which were much more hesitant to imagine future independence, had made some moves towards popular representation in government in the pre-war period. In the immediate aftermath of the war, all the colonial powers in Southeast Asia, with the insignificant exception of Portugal in East Timor, realized that they would need to shift to a new political format involving much greater participation in government by local leaders. By making this shift, they calculated, they would be able to retain their most important economic interests in

the region. In other words, they aimed to hand as much power as was necessary to modern and friendly local elites who would see their interest as being tied to the continuing economic presence of the West. Karl Hack argues that decolonization 'was, in a sense, a way of maximizing British world power,' because it had the aim of maximizing benefits and minimizing the costs of a continued administration of these territories.[25]

This strategy rested on two pillars. First was the restoration of public order. In the months that followed the Japanese surrender, much of Southeast Asia slipped into chaos or revolution or both. In Burma, Malaya and much of Indonesia, public order disappeared. Nationalist gangs emerged to defend local interests and to take revenge for wartime wrongs. In the Philippines, Vietnam and Malaya, indigenous armies that had emerged to fight the Japanese occupiers (often with some support from the Allies) revealed strong communist inclinations. With military experience and established influence in the countryside, these forces were a serious challenge to the returning colonial authorities and made economic recovery impossible.

The second pillar was the identification of an appropriate 'moderate' local elite which could partner with the colonial power in the decolonization process. The challenge for each colonial power was to decide how accommodating they needed to be in the new political circumstances. The Americans in the Philippines and the British in Burma were willing both to make extensive political concessions to the nationalists—independence in the short term—and to deal in good faith with leaders who had collaborated with the Japanese forces. In doing so, they hoped to marginalize what they regarded as the extreme forces of the left. The British in Malaya as well as the Dutch in Indonesia made fewer concessions but they, too, tried to work with groups they regarded as moderate. The aim, for example, of British forces in Malaya was to create quickly a successor state, in order to end the costly aspects of engagement in the region,[26] and not leave a power vacuum behind, where communist forces or others could take over. Even the French in Indochina tried to find common ground with conservative Vietnamese, though their efforts in the end proved fruitless.[27]

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[25] Karl Hack, 'Screwing Down the People: the Malayan Emergency, Decolonization and Ethnicity,' in: Hans Antlöv and Stein Tønneson (ed.), *Imperial Policy and Southeast Asian Nationalism, 1930–1957* (Richmond: Curzon Press, 1995), 83–109, here 104.

[26] Hack, 'Screwing Down the People,' 100.

[27] Hugues Tertrais: 'France and the Associated States of Indochina,' in Marc Frey, Ronald W. Pruessen and Tan Tai Yong, *The Transformation of Southeast Asia* (Armonk, NY: M. E. Sharpe, 2003), 83–104.

In this postwar colonial strategy, the trials seem to have played an important declarative function by tainting those who had collaborated with Japan. As we have seen, the idea of Japanese national or collective guilt was as central to the Pacific War dimension of the war crimes trials as it was antithetical to their Cold War dimension. In the tangled politics of Southeast Asia, nationalist leaders who had worked most closely with Japanese authorities were often those who most strongly opposed continuing Western influence in the region. Nationalist leaders such as José P. Laurel and Ba Maw, who headed the client states in the Philippines and Burma respectively, as well as Aung San in Burma and Sukarno in Indonesia, were potential candidates for prosecution under treason laws. They represented relatively radical nationalist opposition to continuing colonial influence and were potentially highly vulnerable to prosecution. Aung San had been involved in the murder of a pro-British village headman; Sukarno had used his authority to recruit laborers for Japanese wartime projects, including the Thailand–Burma Railway on which tens of thousands had died. Direct trials of those leaders for collaboration, however, were difficult or impossible, if only because any trial would have provided the nationalist leaders with a public platform for repudiating the colonial claim on their loyalty. But the trial of Japanese personnel for atrocities against local people had at least some potential to undermine the political standing of those who had worked with Japan. Only in China, where such issues did not arise, did treason trials take place on a large scale.

And it was not just those who worked with Japan who were to be tainted. Soiling the reputation of Japan as a whole was a small but significant element in Allied efforts to limit the extent that postwar Japan might recover its influence in Southeast Asia by peaceful means. Japan's economic penetration of the region had been a source of concern to the Western colonial powers well before the outbreak of the Second World War. Japanese shipping and other enterprises had been powerful competitors for Western firms before the war, and the retreating colonial powers worried that military Japan might simply build on its pre-war and wartime links to recreate an informal empire in the region. In this context, the economic interests of the retreating colonial powers meant that affirming the brutality of Japanese rule had an importance that increased, rather than diminished, as the postwar settlement took shape.

A greater problem for the colonial powers, however, was not the difficulty of calibrating the war crimes trials to specific political needs but rather the underlying contradiction between the insistent universalism

of international humanitarian law and the deep-seated legal inequalities of the colonial system. International humanitarian law, of which the laws governing war crimes were a part, involved a partial surrender of the once sacrosanct principle of national sovereignty for the sake of human rights. The colonial territories in which most of the war crimes trials took place were under the sovereignty of Western powers, but they were not part of the system of rule of law that applied in the metropoles. Instead, the colonies existed under separate laws which, as a rule, were more punitive than metropolitan law (more inclined to resort to the death penalty and more inclined to punish minor infractions harshly). Colonial law was also more likely to endorse expedited legal procedures that diminished the protections available to defendants. Colonial law, furthermore, was more inclined than metropolitan law to criminalize political action. In practice, and sometimes in theory, colonial law tended to be plural, applying different laws to different ethnic groups (especially distinguishing Westerners from the rest). The public justification for this pluralism, moreover, tended to be rooted in a notion of decisive cultural difference; in other words, 'natives' could be subject to different laws because those laws were consistent with some construction of traditional culture. This argument presented an obstacle to legal reform because it allowed for no democratic means of achieving legal change. By contrast, war crimes law was vigorously universal. Even if individual judges were inclined at times to blame undesirable characteristics of Japanese culture for Japanese war crimes, that culture was never permitted as a moral excuse or legal defense. The principles of international humanitarian law trumped cultural particularism. Inconveniently for the colonial powers, they thereby trumped also the intellectual basis for colonial legal pluralism. Even with colonialism in formal retreat as the war crimes trials took place, this refutation of an underlying principle of colonial rule was an additional embarrassment.

China, as in other respects, was something of an exception here. Although not formally colonized by western powers, the extraterritoriality enjoyed by Western residents in China and the concession areas in some Chinese ports created a semi-colonial environment. Additionally, the north-eastern provinces had been invaded by Japan in 1931 and ruled as the nominally independent state of Manchukuo. Extraterritoriality had been justified publicly by the claim that China's own legal system was not up to international standards. As Anja Bihler's chapter shows, extraterritoriality was the form that the legal pluralism of the colonial era took in China, allowing Westerners (and those with Western protection) to be

tried in separate courts, immune from the procedural problems of Chinese domestic courts. Participation in war crimes trials therefore helped the Chinese government to establish the validity of its own judicial system in the wake of decades of extraterritoriality, and to establish its ability to follow Western standards in the punishment of wartime atrocities. In this strategy, they followed the earlier approach of Japan in the late nineteenth century, when it had worked hard to align its legal system with Western models in order to remove any pretext for extraterritoriality. For China, the trial of 871 Japanese defendants in Chinese courts represented a triumphant ending of extraterritoriality, though that triumph was qualified by the fact that the USA also held trials in Shanghai.

Milinda Banerjee points out in this volume that the universalist claims of international criminal law remained embedded in an overall Western legal-intellectual hegemony that perturbed Radhabinod Pal, Indian judge in the IMTFE. Pal was deeply uneasy at what he saw as the uncritical imposition of Western assumptions in the Tokyo Trial. For him and for other Indian intellectuals, the Tokyo Trial demanded debate about the implications of decolonization for the transformation of structures and discourses relating to sovereignty and rule of law.

In the colonial context, too, the list of war crimes charges brought against Japanese personnel could make for uncomfortable comparisons with colonial practice. In all the colonial realms in Southeast Asia, the principal charges brought against Japanese defendants—ill-treatment of labourers, summary execution of prisoners, torture of suspected spies and rebels—were part of recent historical memory. Writing in 1949, Alan Gledhill, a British legal official in Burma, considered the charges against the Japanese military personnel in Burma and concluded that Japanese behaviour had remained within the broad limits set by British military law for British forces under normal circumstances. He added that it was unreasonable to expect the Japanese commanders to be milder than their British counterparts.[28]

Pacific War Versus Cold War

Western popular culture is inclined to portray the Japanese attack on Pearl Harbor as a bolt from the blue, an unexpected and unprovoked act of war. In reality, the attack was the culmination of years of rivalry between the

[28] A. Gledhill, 'Some aspects of the operation of international and military law in Burma, 1941–1945,' *Modern Law Review* 12 (1939), 191–204, here 197.

USA and Japan for hegemony in East Asia.[29] From early in the twentieth century, successive Japanese governments had aimed to create a Japanese sphere of influence in the region. This aim had been challenged by the USA, which, having the larger economy, was more likely to succeed in an open economic environment. The competition between the two had sharpened in 1932 when the Japanese Kwantung Army created the client state of Manchukuo in Manchuria in the teeth of US diplomatic opposition. It became still more acute when war broke out between China and Japan in 1937 and Japanese forces seized large areas of China. The Japanese attack on Pearl Harbor came in the context of tightening US economic sanctions against Japan, intended to force it to give up its position in China.

In these circumstances, the war crimes trials of Japanese were a conclusion of the business of war by judicial means. Japan had already been defeated, of course, but the trials were meant to confirm that the victory of the West was not just a matter of superior force but also a moral victory of good over evil. This intention built on the savage racialist propaganda of the USA during the war, in which the Japanese enemy was constructed as bestial and brutal.[30] Despite the formal character of the trials as prosecutions of individual perpetrators, they were also a judgment against Japanese culture. Prosecutors and judges, along with journalists and members of the public in the West used the opportunity of the trials to present an interpretation of the war as a cultural clash. The message was that the core of Japanese culture, usually identified as *bushido*, was primitive, violent and irreconcilable with civilized modernity. In this view, the war crimes trials underpinned the demilitarization of Japan—meaning that it would never again be able to threaten US hegemony—and its democratisation, meaning that it would never again have the will to do so.

This conclusive erasure of Japan's strategic identity, however, was irreconcilable with the increasing urgent imperatives created for the USA by the Cold War. American leaders were in no doubt that the future struggle would be with the Soviet Union and with communism, rather than with Japan. In this global struggle, Japan's role was as a pliant but potent ally,

[29] W. G. Beasley, *Japanese imperialism, 1894–1945* (Oxford: Clarendon Press, 1987); Robyn Lim, *The geopolitics of East Asia: search for equilibrium* (London: RoutledgeCurzon, 2003); Paul R. Schratz, 'The Orient and US Naval Strategy' in Joe C. Dixon, ed., *The American Military in the Far East: Proceedings of the Ninth Military History Symposium* (Washington, DC: Superintendent of Documents, 1980), 127–138.

[30] John W. Dower, *War without Mercy: Race and Power in the Pacific War* (New York: Pantheon Books, 1986).