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# Historical Origins of International Criminal Law: Volume 2

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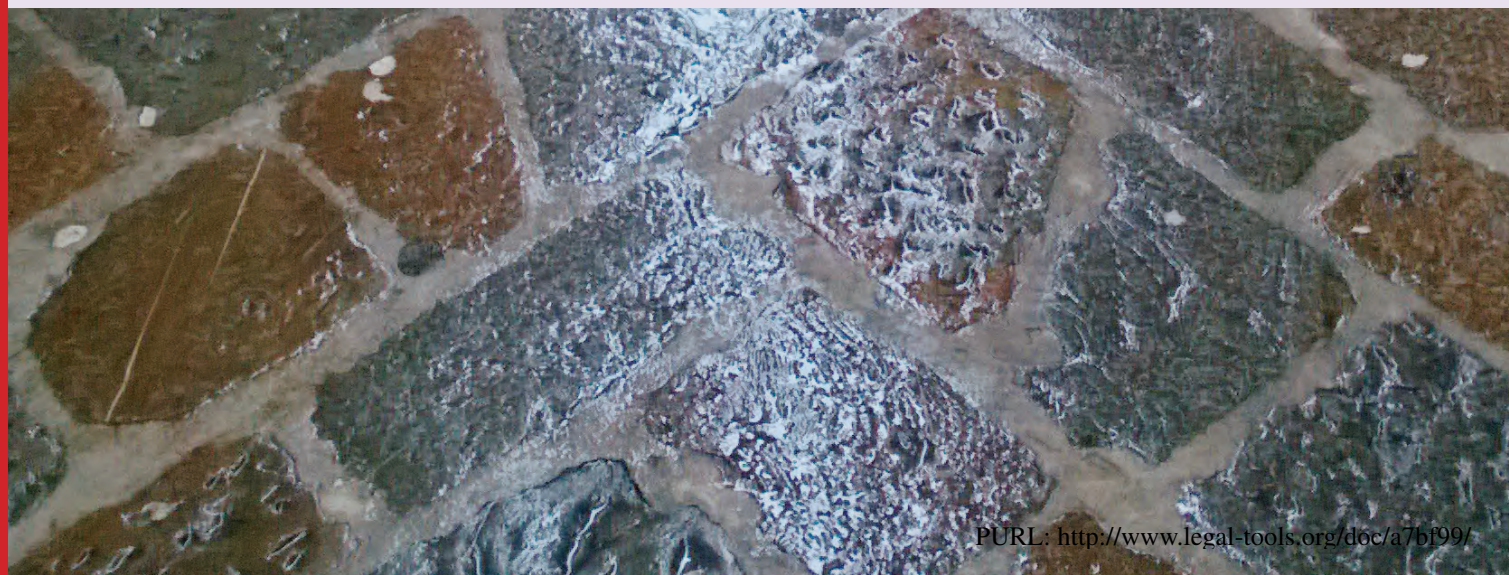

# 24

# The War Court as a Form of State Building: The French Prosecution of Japanese War Crimes at the Saigon and Tokyo Trials

**Ann-Sophie Schoepfel-Aboukrat***

## 24.1. Introduction

In the aftermath of the Second World War, a new Asia emerged from the ashes of war. The end of the war saw a new movement, stressing the creation of a new Asia where all vestiges of colonialism and imperialism would be eliminated. In this context, the Allied prosecution of Japanese war criminals (1945–1951) constituted a resource for overcoming the war and preparing the future world order. Following the guiding principles of the European prosecution of German war criminals, international lawyers had to consider the new political landscape in Southeast Asia that reflected calls for decolonisation. Their reflections contributed to the historical and intellectual foundations of international law.

After the announcement of the Japanese capitulation on 15 August 1945, and before the arrivals of the Allies, revolutionary groups filled the power vacuums in Southeast Asia. The Viet Minh (League for the Independence of Vietnam), the nationalist communist party founded by Ho Chi Minh in 1941 in Vietnam, declared independence on 2 September 1945. French legitimacy as a victorious nation was discussed first in Indochina by independence movements,[1] second by China and the United

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1 David G. Marr, *Vietnam 1945: The Quest for Power*, University of California Press, Berkeley, 1995, pp. 347–540.

States ('US'),[2] and finally by the Japanese occupation. France was accepted as an ally to judge Japanese war criminals at the International Military Tribunal for the Far East ('IMTFE' or 'Tokyo Trial') and at the French Permanent Military Tribunal in Saigon ('FPMTS' or 'Saigon Trials') in Indochina. Its political and legal approach differed from that which it adopted in Europe, as France was faced with the task of managing a profound political change in Indochina and the transformation of the federation's legal framework, and struggled with its own legacy as a colonial power.

The application of substantive principles of criminal justice had an important political connotation, as the disintegration of French Indochina – the federation of colonies comprising three Vietnamese regions, Cambodia and Laos – was bringing to light French imperialism. To restore its sovereignty over Indochina, France indicted Japan at the IMTFE in Tokyo for its Indochinese occupation from 1940 to 1945, and in Saigon for war crimes committed after 9 March 1945. On 9 March 1946 the FPMTS was re-established in Saigon, exactly one year after the Japanese coup d'état in Indochina, which resulted in the complete dismantlement of the French colonial structures.[3] The Japanese occupation of Indochina contributed significantly to the development of decolonisation in the French colonial empire. While France's position in Asia was seriously weakened after the war, the new French state builders had to dim the memory of this period.

According to the most recent research, only 230 Japanese war criminals were tried in Indochina.[4] This is far less significant when

[2] During the Second World War, China and the US were determined to prevent the resumption of French rule in Indochina. See, Gary H. Hess, "Franklin Roosevelt and Indochina", in *The Journal of American History*, 1972, vol. 59, no. 2, pp. 353–68. At the Potsdam Conference in July 1945, the Allied Chiefs of Staff decided to temporarily partition Vietnam at the 17th parallel until the arrival of the French troops in Indochina; British forces would take the surrender of Japanese forces in Saigon for the southern half of Indochina, Chinese troops in the northern half. However, some Americans and Chinese remained against the French presence in Southeast Asia. See Marr, 1995, pp. 241–96, *supra* note 1.

[3] Ralph B. Smith, "The Japanese Period in Indochina and the Coup of 9 March 1945", in *Journal of Southeast Asian Studies*, vol. 9, no. 2, pp. 268–301.

[4] It is essential to exercise caution regarding this information up to this day since such research had not been done on the statistics of judgments against German and Japanese war criminals based on the French military archives. See Chizuru Namba, "第二次世界大戦後におけるフランスのインドシナ復帰：戦時期の清算と対日本人戦犯裁判" [Dainiji

compared to the number of German war criminals prosecuted in France, which totalled 2,345.[5] While these numbers seem to indicate that France had little interest in the prosecution of Japanese defendants, and did not have the machinery in Indochina to prosecute them, this chapter argues that the opposite is true. For France, the trials at Tokyo and Saigon served as an important tool in re-establishing its position as a world power and a victorious nation among the Allies. At the IMTFE, France sent a judge, Henri Bernard, and a prosecutor, Robert L. Oneto, to prosecute major war criminals.[6] The investigation and trials helped strengthen the French rule of law. And it sent a strong signal that such crimes would not be tolerated in the new post-war society.

There is no comprehensive study of the French position at the IMTFE. And the Saigon Trials have received little interest,[7] due to the lack of official, publicly available archival access in France. The research into newly declassified archival material tries to close that gap and addresses the question of French war crimes trials policy in Saigon. The Saigon and Tokyo Trials performed an invaluable social as well as a state-building function for France. They provide us with a better understanding of the different types of post-Second World War prosecutions, which took place in an important period in international criminal law development. The chapter discloses how France related state policies to criminal justice and foreign affairs and how it applied principles of criminal justice. The answers to these questions lie in the trial papers, French national laws, records of the United Nations War Crimes Commission ('UNWCC') and

Sekai taisengo ni okeru Furansu no Indoshina fukki : senjiki no seisan to tai Nihonjin senpan saiban, in 三田学会雑誌 [*Keio Journal of Economics*], 2011, vol. 14, no. 2, p. 181.

5 Henry Rousso, "L'épuration: die politische Säuberung in Frankreich", in Klaus-Dietmar Henke and Hans Woller (eds.), *Politische Säuberung in Europa: die Abrechnung mit Faschismus und Kollaboration nach dem Zweiten Weltkrieg*, Deutscher Taschenbuch Verlag, Munich, 1991, pp. 214–26.

6 See Yves Beigbeder, *Judging War Crimes and Torture: French Justice and International Criminals Tribunals and Commission (1945–2005)*, Martinus Nijoff, Leiden, 2005; Jean Esmein, "Le juge Henri Bernard au procès de Tokyô", in *Vingtième siècle, revue d'histoire*, 1998, no. 59, pp. 3–14.

7 Philip R. Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945–1951*, University of Texas Press, Austin, 1979, pp. 201–8; Namba, 2011, pp. 179–206, see *supra* note 4; Beatrice Trefalt, "Japanese War Crimes in Indochina and the French Pursuit of Justice: Local and International Constraints", in *Journal of Contemporary History*, forthcoming.

the private papers of the French Judge appointed to the IMTFE, Henri Bernard.

The chapter highlights the French historical and intellectual foundations of the enforcement of criminal law at the Saigon Trials and at the IMTFE in the wake of decolonisation. The argument presented is two-fold. On the one hand, France wanted to show with its legal engagement that it resided with the victorious nations. On the other hand, it aimed at sending a message to the world that it had emerged from the war as a new republican power, which was suited to protecting Indochina, thereby trying to erase its colonial past. The chapter is organised in four parts. First, it presents the guiding principles of French criminal law after the Second World War. Second, it demonstrates the French strategy in the struggle for decolonisation in Indochina to investigating war crimes, and third, the criminal proceedings at Saigon. Finally, it analyses the legal interpretation of the French delegation in Tokyo.

## 24.2. New Doctrinal Elements of International Criminal Law: The Guiding Principles of the War Crimes Ordinance

During the Second World War, the German occupation of France had shaken French republican foundations. The exiled government of General Charles de Gaulle wanted to bring back democracy. The national future of the country was bound to the prosecution of its enemies. War crimes trials thus became an element of state building for the French.

The US started to take an active interest in the future of French legal foundations after the French liberation, as they hoped to rely on France as a republican ally in world affairs. In July 1944 the Office of Strategic Services ('OSS') published an information guide about the French administration of justice, which "shares with English common law the distinction of being one of the two legal systems in wide use among modern industrialized nations".[8] The information guide highlighted the legal issues that France would have to face after the war.

After the French defeat in June 1940, the French President Albert Lebrun appointed Marshal Philippe Pétain as Prime Minister. Pétain first made peace with Germany and reorganised the French Third Republic

[8] The Administration of Justice in France, Civil Affairs Guide, "Administration of Justice", Office of Strategic Services, 29 226/54, 7 July 1944 ("Administration of Justice"), p. 2., National Archives and Records Administration, Maryland, USA ('NARA').

into an authoritarian regime. The Vichy regime had defeated the spirit of republican law with the enforcement of totalitarian political control and racial discrimination.[9] In French Indochina, Jean Decoux, who was named the Governor-General, swore allegiance to Pétain's regime and emphasised the totalitarian aspect of the state.[10] According to the Office of Strategic Services,[11] France would have to reform its legal system after, its liberation, in order to appear legitimate:

> The abolition of fascist vestiges must be the immediate goal of any reform of justice. Until the Vichy machinery has been destroyed in fact and removed in form, it will be impossible for the French to believe that freedom has returned to the courts of his land.[12]

The French state builders were aware of the importance of restoring the French republican legal tradition. On 28 August 1944, one month after the publication of the information guide by the OSS, the Provisional Government of the French Republic – the interim government that ruled France from 1944 to 1946 – issued an Ordinance, Concerning the Suppression of War Crimes ('War Crimes Ordinance') in Algiers.[13] This War Crimes Ordinance was the fruit of a long reflection among the jurists who fought against the Pétain regime, and who associated themselves with the Allied war crimes policy. These jurists presented themselves as inheritors of the French republican tradition.

Two vital factors have to be taken into account for the setting up of the War Crimes Ordinance. First, the democratic branch of the Resistance movement issued it, thus inculcating it with Christian values. The communist branch of the Resistance was in no way involved. Second, the interim government refused to hold the prosecution of war crimes before

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9 See Lîmor Yagîl, *"L'homme nouveau" et la révolution nationale de Vichy (1940–1944)*, Presses Universitaires Septentrion, Paris, 1997, p. 56.

10 Eric T. Jennings, *Vichy in the Tropics: Petain's National Revolution in Madagascar, Guadeloupe and Indochina*, Stanford University Press, Stanford, CA, 2004, pp. 162–98.

11 Administration of Justice, p. 19, see *supra* note 8.

12 *Ibid*.

13 Ordonnance du 28 août 1944 relative à la répression des crimes de guerre [Ordinance of 28 August 1944 concerning the Suppression of War Crimes], *Journal Officiel* (Algiers), 30 August 1944, p. 780 ("War Crimes Ordinance"); see also United Nations War Crimes Commission, "French Law Concerning Trials of War Criminals by Military Tribunals and by Military Government Courts in the French Zone of Germany", 1948 (http://www.legal-tools.org/doc/198950/), ("French Law Trials of War Crimes").

civil courts and opted for the military courts instead. A few months after the publication of the French War Crimes Ordinance, the British War Cabinet also decided that "war crimes committed against British subjects or in British territory should be dealt with by military courts set up to try them in Germany".[14]

The atrocities of the Second World War compelled the need for international prosecution after the Allied victory. On 13 January 1942 delegates of the Free French National Committee signed the Inter-Allied Declaration on Punishment for War Crimes in London, better known as the St James's Declaration, establishing the UNWCC. Under the aegis of the Allied powers, the UNWCC was to investigate and obtain evidence of war crimes. Free French representatives took part in the Allied investigation into the perpetration of war crimes in Europe in October 1943, and at the UNWCC's Chungking Sub-Commission ('Sub-Commission') in May 1944. However, the investigative body was subordinated to political considerations. Representatives from the French government in exile possessed only limited powers.[15]

In May 1944 René Cassin, a French jurist, law professor and judge, issued a memorandum for his government in exile in London about the prosecution of war crimes in France.[16] He had significant experience in the area of criminal law. As a French delegate to the League of Nations from 1924 to 1938, Cassin pressed for progress on disarmament and in developing institutions to aid the resolution of international conflicts. In London, he had published the 1940 declaration to demonstrate the unconstitutionality of the Pétain's regime.[17] He also supported the creation of the UNWCC where he was designated as a French representative. According to Cassin, the primary reference for the prosecution of war crimes in France should be the French criminal procedure, namely the Penal Code and the Code of Military Justice.[18]

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14 War Cabinet 131, CAB65/44, National Archives, United Kingdom ('TNA').

15 Cherif Bassiouni, *Introduction to International Criminal Law*, Martinus Nijhoff, Leiden, 2012, p. 549.

16 Rapport du Professor Cassin, 9 May 1944 ("Cassin Report"), BB-30/1785, Archives nationales de France, Paris ('AN').

17 Michèle Cointet and Jean-Paul Cointet, *La France à Londres: renaissance d'un Etat (1940–1943)*, Editions Complexe, Brussels, 1990, p. 52.

18 These legal codes were established in the *longue durée.* The guiding principles of the Penal Code and the Code of Military Justice referred to the legal codification of criminal

Cassin also focused on two new innovative legal principles: the offence of belonging to a criminal association ("*association de malfaiteurs*") and the question of superior orders. Superior orders should under no circumstances be interpreted as a lawful excuse.[19]

As an answer to Cassin, François de Menthon, a French politician and law professor, issued a memorandum in May 1944.[20] The personal experience of Menthon is important for the understanding of this memorandum. Indeed, Menthon studied law in Dijon, where he joined the Association catholique de la Jeunesse française. His Catholic background influenced his legal conception on the prosecution of war crimes.[21] The war experience also influenced Menthon. During the Second World War, he was an active member of the French Resistance in France: he was the founder of the first cell of the Liberté Resistance movement in Annecy in November 1940 and a second one in Lyon shortly afterwards, and the editor of the underground newspaper, *Liberté*. He was captured, interrogated in Marseille and then released. In July 1943 he joined de Gaulle in London and followed him to Algiers. Menthon became Commissioner of Justice in the Comité français de Libération nationale (French Committee of National Liberation) from September 1943 to September 1944. In his memorandum, Menthon suggested that war criminals should be punished in military tribunals composed mostly of Resistance members to replace the military elite in France who had collaborated with the Axis Powers during the Second World War.[22]

Both Menthon and Cassin's ideas for the prosecution of war criminals were considered in the War Crimes Ordinance of 28 August 1944, issued by de Gaulle's government. On the one hand, Menthon suggested war crimes should be prosecuted in Permanent Military

acts and punishment after the French Revolution and under Napoleon at the beginning of the nineteenth century, and their evolution under the positivist school in the 1880s and after the First World War. See Frédéric Debove, François Falleti and Emmanuel Dupic, *Précis de droit pénal et de procédure pénale*, Presses Universitaires de France, Paris, 2013, pp. 23–30.

19 Cassin Report, see *supra* note 16.

20 Note sur la répression des crimes de guerres [Note on the Suppression of War Crimes], 22 May 1944, BB-30/1785, ("Note on Suppression of War Crimes"), AN.

21 Claudia Moisel, *Frankreich und die deutschen Kriegsverbrecher: Politik und Praxis der Strafverfolgung nach dem Zweiten Weltkrieg*, Wallstein Verlag, Göttingen, 2004, p. 66.

22 Note on Suppression of War Crimes, see *supra* note 20.

Tribunals consisting of five military judges, the majority of whom were to be selected "among officers, non-commissioned officers and other ranks belonging to the French Forces of the Interior or a Resistance Group" according to Article 5 of the War Crimes Ordinance. Article 14 of the Code of Military Justice stated that the President of the Tribunal should be a civil magistrate. On the other hand, as Cassin had recommended, the French criminal procedure was to be the main reference for the prosecution of war crimes. Article 1 of the War Crimes Ordinance stated that persons liable to prosecution were:

> Enemy nationals or agents of other than French nationality who are serving the enemy administration […] and who are guilty of crimes or delicts committed since the beginning of hostilities; either in France or in territories under the authority of France, or against a French national, or a person under the French protection […] or against the property of any natural persons enumerated above, and against any French corporate bodies.

The terms "war crimes" and "war criminals" were left undefined, although in Article 2 punishable offences are mentioned:

> (1) The illegal recruitment of armed forces, […]
>
> (2) Criminal association […] organisations or agencies engaged in systematic terrorism; […]
>
> (3) Poisoning […]
>
> (4) Premeditated murder […] shall include killing as a form of reprisal; […]
>
> (5) Illegal restraint […] shall include forced labour of civilians
>
> (6) Illegal restraint […] include the employment on war work of prisoners of war or conscripted civilians;
>
> (7) Illegal restraint […] shall include the employment of prisoners of war or civilians in order to protect the enemy;
>
> (8) Pillage […]

The guidelines of the French criminal law to prosecute war criminals were conditioned by French division during the war between the supporters of the Pétain regime and the French Resistance. The French people had to face a difficult transition between the Vichy authoritarian regime and the new democracy of de Gaulle and the Allied troops. French

supporters of de Gaulle demonstrated the wish for France to return to its democratic and republican tradition by setting up a fair procedure through the War Crimes Ordinance and French criminal law. These jurists contributed to the creation of a legal and judicial precedent in the post-Second World War prosecutions that were decisive for the later creation of other *ad hoc* criminal tribunals.

## 24.3. The French National Strategy to Investigating War Crimes in Indochina

French participation in the German war crimes prosecution had to face structural, judicial and administrative difficulties. These difficulties were even greater for the prosecution of Japanese war criminals and were compounded by political considerations. In Indochina, France still tried to re-establish its sovereignty and to weaken the Indochinese people's fight for independence. The French state builders had to develop in Indochina a national strategy to restore confidence between the French and the Indochinese. The investigation of war crimes was part of a comprehensive recovery strategy for the French colonial empire.

In order to do so, the state builders introduced the guiding principles of the War Crimes Ordinance. The Ordinance was applicable not only to Metropolitan France but also Algeria and other colonies, by virtue of Article 6. The Code of Military Law required the establishment of "at least one Permanent Military Tribunal in each military region […] in time of war" (Article 10). As to the place of this court, the Code further directed, it "shall, in principle, be the capital of the military region". Thus, Saigon became the site of the French war crimes tribunals in Indochina and followed the same procedure as in the Permanent Military Tribunals in France to prosecute German war criminals. But the Saigon Trials could only operate effectively in 1946, when British occupation of Saigon had come to an end.[23]

The final outcome of the French prosecution of Japanese war crimes in Southeast Asia was far less significant than the French prosecution of German war crimes in Europe. At the Sub-Commission in Chungking, the regular changes of the French staff could not provide the same meaningful participation as at the UNWCC's London headquarters.

[23] Joseph Buttinger, *Vietnam: A Dragon Embattled*, Praeger, New York, 1967, p. 244.

At the Sub-Commission, France was represented by six different jurists from 29 November 1944 to 4 April 1947: Achille Clarac, Jean Daridan, M. de Montousse, Jean Brethes, Eric Pelin and Michel Bertin.[24] These representatives held at the same time various functions in the French colonial administration; for example, Clarac was the diplomatic adviser to the French High Commissioner in Indochina.[25] The French prosecutor at the IMTFE, Oneto, met difficulties in filing the French Indictment.[26]

According to Beatrice Trefalt, there were three interrelated reasons explaining the complications the French encountered. First, the perceived collaboration of the French Indochinese government with Japan until March 1945, which complicated the definition of war crimes and the limits of the French prosecution; second, the pursuit of war criminals in Indochina, which was complicated by French military weakness at the time of the Japanese defeat, and the resulting occupation of Indochina on behalf of the Allies by Nationalist Chinese troops above the 16th parallel, and by British troops below the 16th parallel; and third, the Vietnamese declaration of independence and limited international support for (or outright interference in) France's post-war colonial ambitions in the Far East also interfered with the French pursuit of Japanese war criminals.[27]

The Declaration of Independence of the Democratic Republic of Vietnam ('Declaration') on 2 September 1945 played a valuable role in the struggle for independence. It revealed to the French state builders the Vietnamese indignation and their historical interpretation of the French and Japanese collaboration during the Second World War. It states:

> During and throughout the last eighty years, the French imperialists, abusing the principles of "freedom, equality and fraternity", have violated the integrity of our ancestral land and oppressed our countrymen. Their deeds run counter to the ideals of humanity and justice […]
>
> In the autumn of 1940, when the Japanese fascists, in order to fight the Allies, invaded Indochina and set up new

[24] United Nations War Crimes Commission, Far Eastern and Pacific Sub-Commission, Minutes Nos. 1–38, S-1804-0005-15835 (https://www.legal-tools.org/en/go-to-database/ltfolder/0_28557/#results).

[25] Ministère des Affaires Etrangères et Européennes, *Documents diplomatiques français, 1. Juillet–31 Décembre 1947*, P.I.E. Peter Lang, Paris, 2009, p. 1018.

[26] Esmein, 1998, pp. 5–6, see *supra* note 6.

[27] Trefalt, forthcoming, see *supra* note 7.

> bases of war, the French imperialists surrendered on bended knees and handed over our country to the invaders.
>
> Subsequently, under the joint French and Japanese yoke, our people were literally bled white. The consequences were dire in the extreme. From Quảng-Trị up to the North, two millions of our countrymen died from starvation during the first months of this year.
>
> On March 9th, 1945, the Japanese disarmed the French troops. Again the French either fled or surrendered unconditionally. Thus, in no way have they proved capable of protecting us; on the contrary, within five years they have twice sold our country to the Japanese.[28]

This Declaration was widely debated in France and paved the way for very serious preparations for the war crimes trials in Saigon, through which the French wanted to reinstate their authority and show their commitment to the Vietnamese people. Faced with the prospect of decolonisation, France had to reaffirm its sovereignty over Indochina. The French war crimes trials policy in Indochina consequently reflected a new position that France adopted regarding Indochina. France took three decisive steps to deal with this matter.

First, on 27 October 1946 the Constitution of the Fourth Republic created the French Union to replace the old French colonial system and to abolish the "indigenous" status. In 1946 France accepted to give more independence to Vietnam, Laos and Cambodia through a new statute. Vietnam, Laos and Cambodia became associated states in the French Union. However, in December 1946 France resorted to war against the Viet Minh in order to restore colonial rule to Vietnam. But as soon as hostilities began, France concluded an agreement with Bao Dai, the last Emperor of Vietnam. On 5 June 1948 France recognised "the independence of Vietnam, whose responsibility it will be to realise freely its unity". Vietnam, through Bao Dai, proclaimed "its adherence to the French Union as a state associated with France".[29]

Second, France prosecuted collaborators within the context of the legal purge. For example, Decoux, French Governor of Indochina, was arrested and prosecuted after the war.[30] The FPMTS also tried Vietnamese

[28] Vietnamese Declaration of Independence, 1945.

[29] The Ha Long Bay Agreements recognising the independence of Vietnam, 5 June 1948.

[30] Procès en Haute Cour de justice de Decoux, 3-W 150-162, AN.

and French collaborators. On 13 August 1946 Ho Van Minh was sentenced to lifetime forced labour for "participating in an attempt to demoralise the Army or the Nation", with the object of weakening national defence.[31] During the war Ho Van Minh had denounced some French citizens for supporting the Allies. In 1946 the first French citizen to be sentenced was Emile Eychenne, an entrepreneur born in Indochina. Eychenne was charged with "attacks on the state security – friendly and inconvenient agreements with Japanese", because he had supported the Japanese after March 1945.[32]

Third, the French provided a specific definition of war crimes in Indochina with regards to the period covered. Difficulties were present at the onset of the French–Japanese war. There were diverging interpretations as to the exact beginning of the war. When the administration of French Indochina was bequeathed to the Vichy government, it ceded the control of Hanoi and Saigon in 1940 to Japan. A year later Japan extended its control over the whole of French Indochina and both countries ruled Indochina together.[33] In March 1945 the Japanese imprisoned the Vichy French and took direct control of Vietnam until they were defeated by the Allies in August 1945. According to the Federal Counsellor at the Office of Legal Affairs, Albert Torel, the Japanese had engaged in military operations against French troops since March 1945. His suggestion was finally accepted. War crimes to be tried in Saigon were restricted to the period between 9 March 1945 and 15 August 1945.[34]

In spite of the struggle for decolonisation, France adopted a pragmatic approach to the prosecution of war crimes in Indochina. It created a new legal framework with the legal purge, the creation of the French Union, the War Crimes Ordinance of 28 August 1944 and its adaptation to the local context. The French state builders wanted to demonstrate to the Indochinese that the values that the "new" France defended were right, fair and equitable.

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31 French Permanent Military Tribunal in Saigon, *The Case of Ho Van Minh*, Judgment, 13 August 1946.

32 French Permanent Military Tribunal in Saigon, *The Case of Emile Eychenne*, Judgment, 18 September 1946.

33 See Chizuru Namba, *Français et Japonais en Indochine (1940–1945): Colonisation, propagande et rivalité culturelle*, Karthala, Paris, 2012.

34 Note d'Albert Torel, INDO HCI, ConsPol 153, Archives nationales d'Outre-Mer ('ANOM').

## 24.4. A Model of Court Proceedings? The Criminal Proceedings at the War Court in Saigon

France supported the creation of the Nuremberg and Tokyo Tribunals as the first international courts set up to judge individuals at the highest levels of government for grave violations of international criminal law. However, Judge Bernard disapproved the way that investigations were conducted in Tokyo. He considered the French court proceedings as a model. But in reality how did the criminal proceedings take place in Indochina in the context of decolonisation?

According to the specific French legal approach to war crimes, between October 1946 and March 1950 the Saigon Trials heard about 39 cases of accusations of war crimes committed by members of the Imperial Japanese Army. The Japanese were tried on a wide variety of offences. French prosecutors accused Japanese of "mass murder" of French prisoners of war ('POW') by "outright decapitation" or "prolonged torture"; "ill-treatment of POWs and having forced them to do certain work in violation of international conventions"; "mass slaughter" or "assassination" of French POWs, civilians and men and women of the Indochinese Resistance Group.[35] It must be noted, however, that as an archival analysis suggests, no Japanese who stood before a Saigon court was charged with "crimes against peace" or "crimes against humanity", the new charges established at Nuremberg and Tokyo.[36] Japanese suspects who could not be tried accordingly by the French military were subsequently released and returned to Japan. [37]

According to Chizuru Namba, of the overall total of Japanese war criminals judged at the FPMTS, 112 received prison sentences, 63 were executed, 23 received life imprisonment and 31 were acquitted.[38] Before June 1946 France identified more than 933 Japanese suspected of war crimes.[39] It is important to note that most of the victims were French or Indochinese people who usually had a particular status in Indochina; they were "protected" by France. This characteristic of the FPMTS differed

35 Piccigallo, 1979, p. 207, see *supra* note 7.

36 *Ibid.*, p. 204.

37 *Ibid.*, p. 207, see *supra* note 7.

38 Namba, 2011, p. 187, see *supra* note 4.

39 Lettre du Commissaire général à la justice au Garde des Sceaux, Saigon, 13 June 1946, BB-30/1791, AN.

from the other Class B and C war criminal trials conducted in Southeast Asia where violence against native people was indicted. According to Hayashi Hirofumi, the majority of Japanese war criminals brought before British courts in Singapore, Malaya, North Borneo, Burma and Hong Kong faced charges of crimes against Asian civilians, amounting to about 60 per cent of the total case.[40] Namba explains that the Japanese committed crimes against the Viet Minh members who refused to recognise the French legal authority in Saigon to prosecute Japanese war criminals.

The complex and very long French criminal proceedings have been criticised for having insufficient evidence to validate the Judgments. But analysis of documents reveals that this is not the case. To understand the criminal procedure in Saigon from its preparatory stage to the Judgment, we will examine in detail the prosecution of Kyota Katsunami, commander of the Japanese Secret Police ('Kempetai') detachment at Phan Thiet in southeastern Vietnam in 1946.[41] In June 1946 a French priest named Brugidou lodged a complaint against the Kempetai in Phan Thiet for abuse and mistreatment following the Japanese coup on 9 March 1945.[42] During the course of one month, the French and English authorities conducted an investigation. They collected together evidence from intelligence reports and interrogations. The British Army carried out most of the interrogations, assisted by an interpreter. After the investigation, the French authority sent a file document to the UNWCC.[43]

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[40] Hirofumi Hayashi, "British War Crimes Trials of Japanese", in *Nature-People-Society: Science and the Humanities*, no. 31, 2001.

[41] French Permanent Military Tribunal in Saigon, *The Case of Sergent Katsunami*, Judgment 36, 21 October 1946, ("Katsunami Judgment"), Dépôt central d'archives de la justice militaire ('DCAJM').

[42] *Ibid.*, Lettre du Commissaire de la République pour le Sud Annam à Phan Thiet au Délégué des Crimes de Guerre pour le Sud Annam, 6 June 1946, see *supra* note 41.

[43] *Ibid.*, UNWCC file. It states:

> Name of the accused: Kyota Katsunami
>
> Date and place of commission of alleged crimes: March-April 1945 – Phan Thiet Gendarmerie
>
> Number and description of crime in war crime list: Crime No 3 and Crime No 13 / Robbery, ill-treatment of detainees, abuse and torture.
>
> Reference to relevant provisions of national law: Penal Code Art. 302, 303 and 344, Art 400.

The investigation files with intelligence reports, interrogations and the UNWCC documents were forwarded to Saigon to start proceedings on 3 July 1946. From 18 July 1946 to 10 October 1946, an investigating Judge, Jean Pétri, processed the complaint. Pétri questioned witnesses, interrogated suspects and ordered further investigations. His role was not to prosecute the accused, but rather to gather facts, and as such his duty was to look for any evidence available (*à charge et à décharge*), incriminating or exculpatory. On 18 August 1946 Pétri held a cross-examination between the witnesses and the defendant. On this occasion, Katsunami declared:

> Having a very bad memory, I previously declared not to have beaten the R.P. Brugidou. But, during the confrontation tonight, I recognized him. I recognize, indeed, to have beaten him, but I did not kick him.[44]

The scope of the inquiry was limited by the mandate given by the prosecutor's office: the examining judge could not open a criminal investigation *sua sponte*. Hence, Pétri, as the examining Judge, decided there was a valid case against Katsunami. The examining judge asked Katsunami to choose his own attorney. Upon his refusal to do so, Pétri appointed a defence counsel for him. On 17 October 1946 the prosecution notified Katsunami "crimes alleged, the text of the law applicable, and the names of witnesses". Four days later, on 21 October 1946, Katsunami was judged in public proceedings. After all the testimonies had been heard, the accused and his counsel were offered the occasion for final words. Katsunami declared:

> I have been ordered to conduct violent investigations and I have been forced to engage in violence because I wanted the Japanese victory. I have only carried out my duty and without racial hate against the Whites.[45]

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> Particulars of evidence in support: MORIYAMA Yasumasa and NISHIDA Masami
>
> Notes: KYOTA is greatly responsible for all that business - his accomplices, sergent GUNTZI and military police AKAMA who have to bear heavy charges would both be dead, this is? without certainty. Those three men are accused of severe ill-treatment towards French civilians arrested and put in the PHANTHIET military police prison.

44 *Ibid.*, Procès verbal interrogatoire et confrontation, 12 August 1945.

45 *Ibid.*, Audience, 21 October 1946.

Kyota was found guilty and sentenced to forced labour.

Upon a conviction, French Military Tribunals awarded a wide range of punishments under the Penal Code: death; penal servitude for life; deportation; penal servitude for a term; detention and confinement (Penal Code, Article 7). The pronouncement of Judgment took place in open court. Military Tribunals reached all decisions by majority vote. Before awarding sentence, Tribunals considered any possible extenuating circumstances. Under the Code of Military Justice, a convicted accused could register an appeal within 24 hours of the time of Judgment. Review of such petitions by a Military Appeal Tribunal followed. Many Japanese war criminals tried to take advantage of this possibility, as with the example that follows.

The Judgment of the Japanese Colonel Shizume and three Japanese Captains[46] in January 1950 was very well known. They were tried for massacring 300 French prisoners at Lang Son between 9 and 11 March 1945. The evidence showed that Shizume ordered the prisoners to be taken in groups of 20 into a small courtyard where they were shot and bayoneted. Captain Kayakawa was accused of having ordered Japanese soldiers to kill General Emile-René Lemonnier, after his refusal to surrender. Their lawyer, Fujio Sugimatsu, pleaded for clemency and he wrote to the French Judges on 24 January 1950:

> I was in charge of the defence during the judgment pronounced at the English Army Court of Singapore on the WATARI case […] The judgment pronounced in opposition to these 9 accused was as follows: 4 acquitted and 5 sentenced to prison. I can't help being moved to tears by hearing this fair judgment overcoming all feelings of hostility, race or retaliation. Such a trial opens a new era of history and culture and creates also a new indicator on the path of human life.[47]

However, the four Japanese officers were sentenced to death. The Japanese Captain Yoshio Fukuda registered an appeal. To support his pardoning, the mayor and the inhabitants of his Japanese home town, Asada Mura, sent a petition to Douglas MacArthur, the Supreme Allied Commander for the Allied Powers:

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46 French Permanent Military Tribunal in Saigon, *The Case of the Langson Massacre*, Judgment, 25 January 1950 ("Langson Massacre case") (DCAJM).

47 *Ibid.*, Plaidoirie générale, 20 January 1950.

> We all come from the same village, the one of Mr Yoshio FUKUDA. Mr Yoshio FUKUDA was a man whose moral sense was strict; he was born in a family renowned for its thoughtfulness; during his childhood he was nicknamed "the son of God", for he was so fully sensible, sincere and gifted with a strong spirit of justice […] Now Japan is suggesting to move itself towards democracy and in the sight of our country's restoration, only such men are able to achieve this masterpiece.[48]

The court concentrated exclusively on determining whether the decision pronounced thereby constituted a correct application of the law. His application for pardon was rejected and he was executed on 19 March 1951.

War criminals condemned to prison terms were incarcerated in Indochina. In May 1950 they came under US jurisdiction at Sugamo Prison in Tokyo. After the Japanese return to sovereignty on 28 April 1952, the government of Japan administered them. But war criminals' sentences could only be modified with the approval of the French government. [49]

France was faced with rebuilding the country and removing criminals and collaborators from office. In this context, the French Saigon Courts tried Japanese war criminals and collaborators. In the face of the Indochinese struggle for decolonisation, the French pursuit of law and the criminal proceedings tried to prove that they could govern through the rule of law.

This approach was very much in line with other colonial resettling strategies. For example, the British authorities in Singapore saw war crimes trials as a platform to earn credit in the eyes of the decolonisation movement. Just before the end of the war, M.E. Dening, the chief political adviser to Lord Louis Mountbatten, the Supreme Allied Commander South East Asia Command, stated in a letter to the British Foreign Office that it was important "in a manner most calculated to impress the inhabitants with the security we are capable of providing".[50] War crimes trials were thought to present a good opportunity to impress upon the

48 *Ibid.*, Demande de recours en grâce, 31 March 1950.

49 Trefalt, forthcoming, see *supra* note 7.

50 Peter Dennis, *Troubled Days of Peace: Mountbatten and Southeast Asia Command, 1945-1946*, Manchester University Press, Manchester, 1987, pp. 11–12.

local population that Britain had enough power to protect and govern its empire.[51]

The enforcement of domestic criminal law at the FPMTS was a national strategy to preserve and ensure the continuity of the French legal tradition to prosecute criminals in Southeast Asia. The criminal proceedings demonstrated the consistency of the French legal approach and its continuing values for Indochina in the context of demands for decolonisation.

## 24.5. The French Delegation at the IMFTE

> Considering the global impact of these trials, the Allied Nations will choose, to represent them, the best and brightest minds with unchallengeable authority.[52]

This statement highlights the importance that France attributed to be represented by qualified jurists at the IMTFE. The IMTFE was convened from 1946 to 1948 to try the leaders of Japan. Following the surrender on 2 September 1945 and the occupation of Japan, MacArthur ordered the arrest of major war crimes suspects. He proclaimed the creation of the IMTFE on 19 January 1946 for crimes against peace and humanity. However, in January 1946 France still did not have designated jurists because it encountered difficulties in appointing qualified staff. Indeed, in France many jurists, who had not collaborated either with Germany or with Japan during the war, were employed to draft the new constitution and to take part in constructing the foundations of the new French Republic. Britain met the same difficulties in appointing legal staff, which dogged the Class B and C war criminals trials to the end.[53]

France wanted first to appoint as judge, Jean Escarra,[54] a French legal scholar, known for having worked as a legal consultant of the Chinese government between 1921 and 1929. Escarra provided advice in reforming the Chinese legal system and was a key participant in designing the Chinese Civil Code of 1929. With his extensive knowledge of Asia and his network of contacts, he would have been a very good choice for the IMTFE. But Escarra refused the French proposal to work at the Tokyo

[51] Hirofumi, 2001, see *supra* note 40.

[52] Trefalt, forthcoming, see *supra* note 7.

[53] Hirofumi, 2001, see *supra* note 40.

[54] Esmein, 1998, p. 4, see *supra* note 6.

Trials. Both the newly designated Judge, Henri Heimburger, and the designated Prosecutor, Jean Lambert, withdrew. Finally, the French government appointed Bernard as Judge and Oneto as Prosecutor.

Jean Esmein explains that the French overseas officials lobbied for the appointment of a colonial judge who could control the flow of information relating to the French colonial project in Asia, as they were worried about investigations into a "cleansing" policy in Indochina.[55] Bernard was a colonial magistrate who sided with the Free French in August 1940 when the French authorities joined de Gaulle's forces in French Equatorial Africa (Congo). A Military Tribunal convened under the Vichy regime sentenced Bernard to death *in abstentia*.[56] Nevertheless, he became a judicial representative for de Gaulle's government in Beirut in 1944.[57]As Bernard was unable to understand the official languages used – English and Japanese – during the IMTFE, the French Ministry of National Education sent Jacques Gouëlou to assist him.[58] Bernard embodied French republican and colonial values, a fact which was important. His presence at the Tokyo Trial sent a strong message to the world: France had the judicial means to re-establish republican law over its colonies.

On 4 April 1946 the French delegation arrived in Japan. One of its main objectives was first to remove French Indochina from the list of Japanese wartime allies, and to have it listed instead as one of the victims of Japanese aggression. The French Prosecutor considered that such thoughts constituted a disgrace. He wanted to prove that France had been a victim of Japanese aggression "despite the absence of a comprehensive documentation".[59] Oneto, a former member of the Resistance, was determined first to create a clear distinction between the Vichy regime and the new French democratic power, and to demonstrate the French commitment to other Allied Powers at the Tokyo Trial.

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55 *Ibid*., p. 6.

56 French Permanent Military Tribunal in Clermont Ferrand, Judgment of Henri Bernard, 12 September 1941 (DCAJM).

57 Fonds du Juge Henri Bernard: Le proceès de Tokyo, 1946–1949 ("Bernard"), Bibliothèque de documentation internationale contemporaraine ('BDIC').

58 Michaël Ho Foui Sang, "Justice Henri Bernard", in Yuki Tanaka, Tim McCormack and Gerry Simpson (eds.), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited*, Martinus Nijhoff, Leiden, 2011, p. 96.

59 *Ibid*.

Zinovi Pechkoff, the Chief of the French Mission to the occupation government in Japan, supported Oneto. Pechkoff had acquired comprehensive knowledge about the prosecution of Japanese war crimes since he served France as ambassador in Chungking during the Second World War where he took part in the investigation of war crimes of the UNWCC's Sub-Commission.[60] In mid-May 1946 Pechkoff met with MacArthur to strengthen the French position at the Tokyo Trials. He said that he was offended by the suspicions about France at the IMTFE and its collaboration with Japan in Indochina during the war. At the meeting, MacArthur had a sympathetic attitude and showed his support towards the French.[61] Moreover, Oneto managed to change the Indictment with the introduction of offence 33: "Waging aggressive war against French Indochina after 22 September 1940".

Oneto and his assistant, Roger Depo, introduced their evidence about the relations between Japan and France from 30 September to 7 October 1946 and about war crimes committed in Indochina in January 1947. They proved that the state of war between Japan and France started on 22 September 1940 when Japan launched an attack in Lang Son to prevent the Republic of China from importing arms and fuel from the port of Haiphong through French Indochina along the Sino–Vietnamese railway. Oneto avoided speaking about the Japanese support for the independence movement in Indochina and the American anticolonial position:

> If I stress this point, that is unquestionably contrary to the Hague Convention, I would give the defence and a certain part of public opinion in the Far East a pretext for extensive debates, which seem to be right now inappropriate.[62]

The presentation of the French prosecution was much shorter than the presentation of the Philippine prosecution, the US prosecution and the British Commonwealth's prosecution.[63] Pechkoff was relieved that the French prosecution's case had been entirely convincing to the other

[60] United Nations War Crimes Commission, Far Eastern and Pacific Sub-Commission, Minutes No. 15 (http://www.legal-tools.org/doc/bd5bac/).

[61] Memorandum from Pechkoff to President Gouin, 21 May 1946 ("Pechkoff Memorandum"), HCI 124/382 (ANOM).

[62] *Ibid*.

[63] Yuma Totani, *The Tokyo War Crimes Trials: The Pursuit of Justice in the Wake of World War II*, Harvard East Asian Monographs, Cambridge, MA, 2009, p. 111.

members of the Tribunal: "Oneto promoted a favourable impression […] The French position has been here reinforced by the debates 'over the last couple of days'".[64]

This was very important to the French government, which saw the Tokyo Trial as a legitimisation of the new French historical foundations. This comment shows the French approach to post-war prosecutions as exemplified in the Saigon Trials and at Tokyo. The French saw these trials as legitimising the new French government and differentiating it from the Vichy regime. This was especially true of the insistence on fair procedure that demonstrated their commitment to other Allied powers in Tokyo their position as a valuable partner and ally.

The defence mainly argued the stationing of the Japanese troops in Indochina was not a crime against peace. It estimated that this stationing was legitimate as Japan and Vichy-controlled Indochina signed an accord that granted Japan the rights to station troops in Indochina on 22 September 1940. However, the final Judgment rejected the defence's argument by showing, as Oneto did, that Japan applied military pressure by crossing the Chinese border.

Bernard wanted to inform the President of the Tokyo Trial of his strong disagreement with the proceedings before the final position of the Tribunal was decided.[65] When the final Judgment was published, he decided to make his disapproval known in his Dissenting Opinion on 12 November 1948 where he argued that the Tribunal's action was flawed due to Emperor Hirohito's absence and the lack of sufficient deliberation by the Judges. Bernard regretted that the prosecution was conducted in person and not in rem as the failure to indict Emperor Hirohito served as a clear illustration of the selective approach of the Tribunal.[66] Bernard also disapproved of the use of new international law concepts at the Tokyo Trial, such as conspiracy and crimes against peace.[67] In his dissenting Opinion, he stated: "A verdict reached by a Tribunal after a defective procedure cannot be a valid one".[68] Meanwhile, Pechkoff advised, firstly,

64 Lettre de Pechkoff, ambassadeur de France, chef de la mission française au Japon, au Ministre des Affaires étrangères, 9 October 1946, INF 1364, Centre des archives d'Outre-Mer ('CAOM').

65 Sang, 2011, p. 99, see *supra* note 58.

66 Bernard, 1948, see *supra* note 57.

67 *Ibid*.

68 *Ibid*.

"a compassionate approach – both for the sake of the protagonists and for the sake of mankind";[69] and secondly, like Bernard, he argued against the application of the crimes against peace at the Tokyo Trials. In December 1948 Pechkoff sent a note to MacArthur: "Like Justice Bernard, I cannot subscribe to the verdict of the majority of the judges and to the sentences that have been pronounced".[70]

Unlike the Nuremberg Trial, all the defendants at Tokyo were found guilty. Two of the 28 defendants died during the trial, while one had a mental breakdown on the first day of trial. Seven were sentenced to death, 16 to life imprisonment and two to less severe terms.

At the Tokyo Trial, the French commitment to the rule of law was influenced by the French colonial project in Indochina. While the French Judge cared deeply about the principles of impartiality and fair trial, the French Prosecutor focused on proving that the French had been the victims of the Japanese since 1940. The Tokyo Trial played an important role in French state building: France was recognised as an ally while it faced the difficulty of restoring the rule of law in a climate of violence, political and social strife.

## 24.6. Conclusion

The French war crimes trials policy in Asia highlights the historical function of post-Second World War prosecutions. Indeed, the French pursuit of justice in Asia against Japanese war criminals belonged to its own nation-building process. The French representatives at the Saigon and Tokyo Trials participated in the French effort to save its honour and regain a place in the leading international institutions. During the war Vichy France had collaborated with Germany and Japan from 1940 to 1945. Therefore the "new" France had to create new legislation to prosecute war crimes and collaborators in Permanent Military Tribunals. Cassin and Menthon drafted the War Crimes Ordinance to prosecute war crimes. Influenced by democratic and Christians values, its aim were to prosecute war criminals and avoid vengeance. The new guiding principles of the War Crimes Ordinance demonstrated to the world that France had returned to its republican legal tradition.

[69] Kirsten Sellars, *'Crimes Against Peace' and International Law*, Cambridge University Press, Cambridge, 2013, p. 255.

[70] Note of Pechkoff, November 1948, 331/ 337138 (NARA).

The Tokyo Trial represented a stepping stone to the recognition of France as a valued ally. It played a symbolic role, as it affirmed France's legal ability to emerge from the war as an ally on the side of the Free World. The French war crimes trial policy was determined first by Oneto, who wanted to prove that France was not a wartime ally of the Japanese but a victim, and secondly, by Bernard, caring deeply about the principles of impartiality and a fair trial, which made him issue a Dissenting Opinion at Tokyo. Bernard and Pechkoff both regarded the principles of impartiality and a fair trial very highly, and questioned the legal foundations of the Tokyo Trial.

In Indochina, French trials took place in the context of the struggle for decolonisation. France had therefore to adapt the War Crimes Ordinance to the circumstances. The impact of decolonisation in the making of law was very strong. Before the FPMTS, 230 Japanese defendants were tried according to the new legislation created in 1944 to prosecute war criminals. Japanese defendants were judged only for war crimes committed against the French population, while war crimes committed against the Indochinese population were ignored. This suggests that the French war crimes trials policy in Southeast Asia had two aims. First, the French wanted to locate itself on the side of the victims of Japan in the Second World War. Second, the "new" France emerging from the war sent the message to the world that it embodied a new republican power that could protect Indochina. However, the onset of the first Vietnam War would show that these French goals ultimately failed with Vietnamese independence in 1954.

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## Historical Origins of International Criminal Law: Volume 2

Morten Bergsmo, CHEAH Wui Ling and YI Ping (editors)

The historical origins of international criminal law go beyond the key trials of Nuremberg and Tokyo but remain a topic that has not received comprehensive and systematic treatment. This anthology aims to address this lacuna by examining trials, proceedings, legal instruments and publications that may be said to be the building blocks of contemporary international criminal law. It aspires to generate new knowledge, broaden the common hinterland to international criminal law, and further develop this relatively young discipline of international law.

The anthology and research project also seek to question our fundamental assumptions of international criminal law by going beyond the geographical, cultural, and temporal limits set by the traditional narratives of its history, and by questioning the roots of its substance, process, and institutions. Ultimately, the editors hope to raise awareness and generate further discussion about the historical and intellectual origins of international criminal law and its social function.

The contributions to the three volumes of this study bring together experts with different professional and disciplinary expertise, from diverse continents and legal traditions. Volume 2 comprises contributions by prominent international lawyers and researchers including Professor LING Yan, Professor Neil Boister, Professor Nina H.B. Jørgensen, Professor Ditlev Tamm and Professor Mark Drumbl.

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