Leiden Journal of International Law (2024), pp. 1–23
doi:10.1017/S0922156524000232

ORIGINAL ARTICLE

INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

Competing interpretations of international law: Law and politics in the war crimes trials of Nationalist China, 1946–1949

Ming-hsi Chu*

Department of History, Northwestern University, United States of America
Email: mhchu@u.northwestern.edu

Abstract

This article challenges the prevailing view that after the Second World War, the war crime trials of Nationalist China were guided by the principle of 'leniency and promptness'. This study reveals that the Ministry of National Defense (MND), the entity responsible for formulating war crime laws, had a desire for vengeance and sought to appropriate international law to bolster China's hegemonic position. In contrast, the Chinese Supreme Court judges, influenced by their commitment to fostering a civilized state, interpreted the law in alignment with international norms, thereby curbing the MND's vindictive intentions. As a result, the MND and the judiciary emerged as competing interpreters of international law.

The study compares China's War Criminal Trial Act of 1946 (WCTA) with the Nuremberg Charter, the Hague Conventions, and the legislation of other Allied states. When compared to similar legislative texts, the WCTA has the following distinctions: 1) it has an expansive scope, 2) it adopts a stricter liability, 3) it asserts extraterritorial rights for overseas Chinese, and 4) it promotes Chinese nationalism by encompassing racially Chinese as eligible victims of crimes against humanity.

In contrast, the Judicial Yuan, which was responsible for unifying legal interpretation, limited the scope of the WCTA, hindered its promotion of Chinese nationalism, and restrained the political revenge on Taiwanese people by interpreting the WCTA per international law. This article traces the background of the Supreme Court judges making these decisions and demonstrates how their vision of 'pursuing a civilized state' triumphed over the MND's impetus for vengeance.

Keywords: Chinese approach to international law; civilized state; history of international law; Japanese war crimes trials; War Crime Trial Act of 1946

1. Introduction

After the Second World War ended in 1945, in addition to the well-known International Military Tribunal for the Far East (Tokyo Trial), national military tribunals held by Allied states

*I substantially revised my LL.M. thesis at National Taiwan University into this article. I am grateful for the invaluable insights provided by the editors, reviewers, Professors Wen-Chen Chang (thesis advisor), Chiyun Chang, Mara Yue Du, Cheng-Yi Huang, Jau-Yuan Hwang, Barak Kushner, Mike Shi-Chi Lan, Teng Li, Melissa Macauley, Xin Nie, Max Oidtmann, and Tay-sheng Wang. I extend my appreciation to my colleagues, Mike Banerjee, Dr. Che-Wei Chang, Dr. Guanhong Chen, Mian Chen, Haris Durrani, Dr. Feng-Zhao Jiang, Aoi Saito, Eunike Setiadarma, Weiliang Song, Dr. Jing-wei Yuan, and Lijun Zhang, for their unwavering support throughout the various stages of manuscript preparation. Special thanks go to Dr. Han-Wei Ho, Shao-Kai Yang, and Hou-Kit Cheang for their generous assistance in obtaining archival copies for this research.

© The Author(s), 2024. Published by Cambridge University Press on behalf of The Foundation of the Leiden Journal of International Law in association with the Grotius Centre for International Law, Leiden University. This is an Open Access article, distributed under the terms of the Creative Commons Attribution-NonCommercial licence (http://creativecommons.org/licenses/by-nc/4.0/), which permits non-commercial re-use, distribution, and reproduction in any medium, provided the original article is properly cited. The written permission of Cambridge University Press must be obtained prior to any commercial use.

https://doi.org/10.1017/S0922156524000232 Published online by Cambridge University Press

adjudicated approximately 5,700 Japanese B/C class war criminals.[1] Instead of implementing summary execution, Nationalist China stayed in line with Western powers to punish war criminals following legal procedures.[2]

In his victory speech, Chiang Kai-shek announced that China would hold Japanese military personnel responsible but would not take revenge on them.[3] As a rising power that had just abolished extraterritoriality, China was eager to demonstrate its 'civilized' legal system to the world by adjudicating war criminals pursuant to international legal tenets. Nationalist China's War Criminal Trial Act (WCTA) of 24 October 1946 thus incorporated international law as one of its sources of law, providing legal grounds for holding war crimes trials.[4]

Nationalist China's war crime trial policy appears to chime with that of Henry L. Stimson, the U.S. Secretary of War, who argued that the Nuremberg Trial was 'a landmark in the history of international law' because the law was used to 'insure fair judgment', which was 'in no sense an instrument of vengeance'.[5] Existing scholarly works have emphasized Nationalist China's internationalist and legalist approach to post-war policies.[6] In contrast, this article suggests that the Second Bureau of the Ministry of National Defense (MND), which was responsible for intelligence affairs and war crime trial law drafting,[7] appropriated international law to serve its political ends of taking revenge on Japanese soldiers, claiming extraterritoriality for overseas Chinese, and promoting Chinese nationalism.

Compared with the Nuremberg Charter, the Hague Conventions, and legislation from Allied states, the WCTA has four major features. First, it has an expansive scope. The WCTA set a broader timeline that allowed China to prosecute actions that occurred as early as 18 September 1931, ten years before China formally declared war against Japan in 1941. It also specified a wider variety of war crimes, including malicious insults. Second, the WCTA adopted a stricter liability. While the Nuremberg Charter and other national jurisdictions in Asia (Australia, the Philippines, the Netherlands Indies in Indonesia, and British, French, and US military tribunals in their colonies) allowed judges to decide any just punishment, including short-term imprisonment, the WCTA limited judges' discretion to the death penalty, life imprisonment, and imprisonment over seven years. It also intentionally omitted a mitigation clause when considering superior order

[1]Nationalist China tried 883 out of the 5,700 war criminals in ten major Chinese cities. Although the exact number is disputed, historians estimated that Nationalist China executed 149 war criminals and sentenced 355 to prison. B. Kushner, *Men to Devils, Devils to Men: Japanese War Crimes and Chinese Justice* (2015), 9; H. Hayashi, *BC-Kyu Senpan Saiban* [BC Class War Criminal Trial] (2005), 34–5.

[2]If not otherwise specified, this article refers 'China' to 'Nationalist China'.

[3]K. Chiang, 'Shugao: Zhonghuaminguo Sanshisinian' [Announcement in 1945], in X. Qin (ed.), *Zongtongjianggong Sixiangyanlun Zongji* [Collections of President Chiang's Thoughts and Speeches] (1984), vol. 32, 121, at 122.

[4]The United Nations War Crimes Commission translated the name of the code into 'Law governing the Trial of War Criminals'. This article uses a more straightforward translation – the War Criminal Trial Act, which reflects the original Chinese wording better. WCTA Art. 1, para. 1 states that 'In addition to the Rules of International Law, the present Law is applicable to the trial and punishment of War Criminals. Cases not provided for under the present Law are governed by the Criminal Code of the Republic of China'. If not noted otherwise, all English translation of the WCTA in this article is quoted from The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals Volume XIV* (1949), 152–60.

[5]H. L. Stimson, 'The Nuremberg Trial: Landmark in Law', (1947) 25(2) *Foreign Affairs* 179, at 179–80.

[6]B. Kushner, 'Chinese War Crimes Trials of Japanese, 1945–1956: A Historical Summary', in M. Bergsmo, W. L. Cheah and P. Yi (eds.), *Historical Origins of International Criminal Law* (2014), vol. 2, 243; A. Bihler, 'The Legacy of Extraterritoriality and the Trial of Japanese War Criminals in the Republic of China', in K. von Lingen (ed.), *War Crimes Trials in the Wake of Decolonization and Cold War in Asia 1945–1956: Justice in Time of Turmoil* (2016), 93. For the legalist approach to war criminal trials see G. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (2000), 14–26.

[7]War Criminals Treatment Commission, 'Zhanfanchuliweiyuanhui duirizhanfanyindu zhengce huiyijilu' [Minute of the War Criminals Treatment Commission's Extradition Policy Meeting on Japanese War Criminals], *Xingzhengyuan Dangan* [Administrative Yuan archive], Academia Historica Archive No. 014-020600-0008 (1947) (During the meeting, an MND official reviewed functions and powers of each government unit regarding the trial of war crimes since 1945: 'MND's Second Bureau is responsible for the overall policy planning, promulgating laws and regulations to arrest war criminals, and all comprehensive aspects of this commission.').

https://doi.org/10.1017/S0922156524000232 Published online by Cambridge University Press

pleas. Third, the WCTA intended to claim extraterritorial rights for Chinese in Hong Kong and Southeast Asia, aiming to obtain jurisdiction over foreigners committing crimes against Chinese nationals. Fourth, the MND intended to promote Chinese nationalism by using the term 'Chinese race' (*Zhonghua Minzu*) when defining the victims of crimes against humanity, which was the first time *Zhonghua Minzu* became a legal term.[8] In addition, archives documenting the drafting process also show that the MND had animosity towards the Taiwanese, who were subjects of the Japanese Empire due to colonial rule from 1895 to 1945.[9]

The MND's approach towards war crime policies is revealed by the discrepancies between the WCTA, international law, and the war crime trial laws of Allied states. When drafting the WCTA in 1946, the MND requested the Ministry of Foreign Affairs (MOFA) for assistance in collecting and translating '1) the Nuremberg Charter, Tokyo Charter, and laws and regulations for the trials of war criminals in Southeast Asia, 2) international treaties regarding war crimes, and 3) international case laws on war criminal trials'.[10] As a result, documents related to the Nuremberg Charter, Tokyo Charter, Hague Conventions, Geneva Conventions, lists of war crimes from the United Nations War Crimes Commission (UNWCC),[11] and war crime laws of Allied states, can all be found in the files of the drafters of the WCTA.[12]

Despite acknowledging these international and national norms, the drafters of the WCTA consciously departed from them. In addition, the Chinese legislature did not revise the WCTA draft submitted by the administration.[13] As the legislative archives from 1944 to 1947 have been lost,[14] we can infer the political agenda of the MND by analysing the legal nuances between the WCTA, international law, and the war crime trial laws of Allied states.

The intention of the Second Bureau of MND is also revealed in its interaction with other ministries. Kawashima Shin finds that, when dealing with the case of Sakai Takashi, the first Governor of Hong Kong under Japanese Occupation, the MOFA wanted to follow international standards, which was to execute him after all tribunals from involved countries had delivered verdicts on him. Nevertheless, the MND executed Sakai regardless of MOFA's request.[15] Section 2.2 will show more cases to demonstrate that the MND intended to depart from international law to punish Japanese war criminals more severely, including Taiwanese under colonial rule.

That said, the judiciary's interpretation of the WCTA is a different story. In response to the MND, the judiciary limited the scope of the WCTA, hindered the MND's agenda to promote Chinese nationalism, and restrained the MND's revenge on the Taiwanese people by interpreting

[8]The Chinese concept of *minzu* mixes the meaning of race, nation, people, ethnicity, and nationality. The author uses 'race' in this article because race is a crucial factor in crimes against humanity prescribed in the Nuremberg Charter. The WCTA drafters thus referred *minzu* as an equivalent of race. For the Chinese concept of *minzu* see J. Leibold, *Reconfiguring Chinese Nationalism: How the Qing Frontier and its Indigenes Became Chinese* (2007), 8.

[9]Cf. Section 2, *infra*.

[10]MND, 'Weihanqinghuici youguan chulizhanfan zhi zhongyaoziliao yigongcankaoyou' [Letter to request to provide important information on treating war criminals for reference], *Waijiao Dangan* [MOFA archive], Academia Historica Archive No. 020-010117-0041 (1946).

[11]The UNWCC was established in 1943 in London by 17 Allied states, including China, for the purpose of investigating and recording war crimes in both Europe and Asia and providing legal advice to assist national war criminal trials. UNWCC, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1947), 113–18.

[12]MND, 'Yugezhong zhanzuiyouguan zhi zhanzhengfagui ji guanli' [Laws and customs of war relating to various war crimes], *Waijiao Dangan* [MOFA archive], Academia Historica Archive No. 020-010117-0041 (1946); MND, 'Chulizhanfananjian cankaoziliaoji' [War Crimes Cases Reference Series], *Guofangbu Dangan* [MND archive], National Archives (Taiwan) No. B5018230601/0035/011.4/2124/1/001 (1946); T. Liu, *Dashenpan: Guominzhengfu Chuzhi Ribenzhanfan Shilu* [Grand Trials: Records of the National Government's Actions against Japanese War Criminals] (2020), 50–64.

[13]Nationalist Government, 'Zhanzhengzuifan shenpanbanfa' [Regulations on War Criminal Trials], *Xingzhengyuan Dangan* [Administrative Yuan archive], Academia Historica Archive No. 014-060100-0162 (1946).

[14]The Database of Legislative Gazettes, available at ppg.ly.gov.tw/ppg/#section-3.

[15]S. Kawashima, 'Sengo Taiwan Gaikou No Syuppatuten: Chukamingoku Tosite No Tainichi Sengo Shuri Gaikou' [Departures of R.O.C. Diplomacy in Post-War Era], (2000) 51(4) *Hokudai Hougaku Ronsyuu* 280, at 287–8.

https://doi.org/10.1017/S0922156524000232 Published online by Cambridge University Press

the WCTA according to international law. In essence, the MND and the judiciary were competing interpreters of international law.

The Judicial Yuan's interpretation represents the views of the top legal professionals in China. From 1928 to 1947, when government authorities were uncertain about a law, they could request the Judicial Yuan to hold a meeting, during which senior Supreme Court judges would unify legal interpretation. Between 1945 and 1947, the Judicial Yuan made 17 interpretations regarding war crime trial matters. According to these decisions, Chinese judicial elites believed that war crime trials should adhere to international law; hence, the WCTA needed to be interpreted according to international law.

The rationale underlying the legal interpretations of the Judicial Yuan is the belief in pursuing a 'civilized' state since the late nineteenth century. From 1840 to 1943, Westerners justified their extraterritorial rights in China on the grounds that Chinese law was brutal and the judiciary was not independent of the other branches.[16] In response to these accusations, China started a series of legal reforms, making Western-style codes and listing international law as a compulsory subject at all colleges and a mandatory subject in bar and diplomatic exams in the early twentieth century.[17] Chinese lawyers were thus eager to prove that they met the standard of a 'civilized' state to justify their endeavour to participate in making international norms.[18] While the standard of 'civilization' as a legal concept was ambiguous and Eurocentric, Chinese lawyers clearly acknowledged that protecting basic legal rights, maintaining an independent judiciary, and adhering to international law and customs would contribute to China's progression towards a 'civilized' state.[19] While existing historiography on China and international law focuses mainly on Chinese international lawyers in the MOFA,[20] this article further examines how international norms shaped China's policy-making across ministries and courts.

Section 2 reviews the scholarship of war crime trials, international law, imperialism, and China, arguing that China used international law to support its hegemonic status in post-war Asia. Simply put, existing historiography on China's magnanimous policies does not explain the MND's approach to war crime trials and WCTA stipulations. Section 3 compares the WCTA with international law and war crime laws of Allied states, and Section 4 investigates how senior Supreme Court judges substantially altered the application of the WCTA by interpretations based on international legal tenets. Section 5 concludes.

2. Nationalist China's war crimes trials in context

2.1 International law, war crime trials, imperialism, and China

Although national military courts adjudicated most war criminals after the Second World War, international law played a role in these domestic trials. As both Allied states and Japan were signatories to the Hague Conventions, most Geneva Conventions, and the 1928 Kellogg-Briand Pact, the Allied states argued that in prosecuting Japanese war criminals, they were enforcing

[16] L. Chen, *Chinese Law in Imperial Eyes: Sovereignty, Justice, and Transcultural Politics* (2018), 206–7; G. W. Gong, *The Standard of 'Civilization' in International Society* (1984), 158–60.

[17] 1903 Treaty between the United States and China for the Extension of the Commercial Relations between Them, Art. 15: 'The Government of China having expressed a strong desire to reform its judicial system and to bring it into accord with that of Western nations, the United States agrees to give every assistance to such reform and will also be prepared to relinquish extraterritorial rights when satisfied that the state of the Chinese laws, the arrangements for their administration, and other considerations warrant it in so doing'. See also G. Li, *1902: Zhongguofa de Zhuanxing* [1902: The Transformation of Chinese Law] (2018). P. L. Hsieh, 'The Discipline of International Law in Republican China and Contemporary Taiwan', (2015) 14 *Washington University Global Studies Law Review* 87, at 94–5.

[18] See A. Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842-1933* (2014), 4–5.

[19] See Gong, *supra* note 16, at 25–8, 158–60.

[20] See generally, Hsieh, *supra* note 17; Becker Lorca, *supra* note 18; R. Mitchell, *Recentering the World: China and the Transformation of International Law* (2022); M. Carrai, *Sovereignty in China: A Genealogy of a Concept since 1840* (2019).

https://doi.org/10.1017/S0922156524000232 Published online by Cambridge University Press

existing international laws that Japan had already agreed to, rather than creating new *ex post facto* laws. This subsection will show how the use of international law in war crimes trials in Asia provided Euro-American powers and China chances to reassert their regional authority.

Although international law fundamentally changed in the twentieth century, Ruti Teitel argues that after a great war, 'international law offers a degree of continuity in law and, in particular, in standards of accountability'.[21] Liu Daqun posits that 'the law that the Hong Kong tribunals would apply was not an arbitrary exercise of power on the part of the victorious nations, but rather an expression of the principles of International Law prevailing when the courts were created'.[22] Cheah W. L. and Moritz Vormbaum find the same rationale under British trials in Singapore while noticing the legal challenges, including that Japan had signed but not ratified the 1929 Geneva Convention relative to the Treatment of Prisoners of War.[23]

On the other hand, international law has been proven to be a tool supporting imperialism,[24] as well as post-world-war international arrangements, including war crime trials. Mark Mazower argues that the United Nations was initially an imperial project through which empires attempted to reestablish their imperial authority after the Second World War.[25] Barak Kushner points out that, except for China and the Philippines, war crimes '[t]rials in all other venues throughout Asia … were conducted by colonial empires reasserting their authority'.[26] Kerstin von Lingen and Robert Cribb also find that 'Western officials involved in the investigation and prosecution of war crimes … believed the trials would contribute to upholding colonial prestige'.[27]

While China was not a Euro-American type colonizer, this article suggests that in three aspects, China intended to use war crime laws to bolster its hegemonic status in post-war Asia. First, since prosecution and adjudication are embodiments of state authority, China aspired to undermine the colonial sovereignty of Western empires in Asia by expanding war criminal jurisdiction. Historians have learned that, in the 1940s, China desired to reclaim the sovereignty of Hong Kong and supported the independence of Vietnam and other Southeast Asian colonies.[28] In an attempt to claim territorial jurisdiction over Hong Kong, Chinese prosecutors argued that Sakai Takashi, the first Governor of Hong Kong under Japanese Occupation, committed 22 offences against both foreigners and Chinese.[29] In addition, China denied the legitimacy of French colonial rule and France's authority to try war criminals in Indochina.[30] Chinese military authorities thus transported 185 Japanese war criminals and POWs in North Vietnam to Guangzhou in 1946 and prosecuted them in China's war crime trial court in Guangzhou.[31]

Second, China wanted to uphold criminal justice for overseas Chinese nationals by claiming extraterritoriality via the WCTA. As Section 3.1 will demonstrate, WCTA Article 2 sub-paragraph

[21]R. Teitel, *Transitional Justice* (2002), 21.

[22]D. Liu, 'Foreword', in S. Linton (ed.), *Hong Kong's War Crime Trials* (2013), v, at vi.

[23]W. L. Cheah and M. Vormbaum, 'British War Crimes Trials in Europe and Asia, 1945–1949: A Comparative Study', (2018) 31 *Leiden Journal of International Law* 669, at 681–2.

[24]A. Anghie, *Imperialism, Sovereignty, and the Making of International Law* (2005), 2–3.

[25]M. Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (2009), 21–7.

[26]See Kushner, *supra* note 1, at 8.

[27]K. von Lingen and R. Cribb, 'Justice in Time of Turmoil: War Crimes Trials in Asia in the Context of Decolonization and Cold War', in von Lingen, *supra* note 6, at 11.

[28]Y. Sun, *Wuguoerzhong: Zhanhou Zhongying Xianggangwenti Jiaoshe 1945–1949* [Sino-British Negotiations on the Hong Kong Issue, 1945–1949] (2014), 3; K. C. Chen, *Vietnam and China, 1938–1954* (1969), 112–15; M. Luo, *Zhongguo Guomindang yu Yuenan Duli Yundong* [The Kuomintang and the Vietnamese Independence Movement] (2015), 4–5.

[29]War Crimes Military Tribunal of the MND, 'Jiujinglong zhanfanan panjueshu zhi fujian' [Appendix to the Judgement on the Trial of Takashi Sakai], *UNWCC Archives PAG-3*, United Nations Microfilm Reel no. 61 (1946).

[30]A-S. Schoepfel, 'Justice and Decolonization: War Crimes on Trial in Saigon, 1946–1950', in von Lingen, *supra* note 6, at 180.

[31]Ibid., at 181; MND, 'Weijiansong zi yuebei jie yueyou zuizheng ji wuzuizheng zhi rixianbingmingce' [Letter to MOFA regarding the list of Japanese military police, including guilty and innocent officers, delivered from North Vietnam to Guangdong], *Waijiao Dangan* [MOFA archive], Academia Historica Archive No. 020-010117-0040 (1946).

https://doi.org/10.1017/S0922156524000232 Published online by Cambridge University Press

4 stipulated that any foreigner who committed offences defined in Chinese Criminal Law against any Chinese citizens shall fall within the jurisdiction of China's war crime court.[32] In terms of criminal law, this clause was precisely claiming extraterritorial rights for Chinese citizens overseas.[33] The Chinese government took action in collecting evidence and witnesses from overseas Chinese living in Indonesia, Burma, Malaya, the Philippines, Singapore, Vietnam, and Hong Kong.[34] It was an attempt to increase the influence of China in these countries because, as Melissa Macauley suggests, Chinese nationals had 'dominate[d] the process of resource extraction and commerce in food, lumber, rubber, tin, gold, and other commodities' in Southeast Asia since the nineteenth century.[35]

Third, the WCTA embodied Chinese imperialism in relation to Taiwan. Emma Teng regards the Qing dynasty's conquest of Taiwan in 1683 as an imperial expansion and argues that 'because contemporary China claims sovereignty over virtually all the territory acquired by the last dynasty, the impact of Qing expansionism continues to be felt by the people of Tibet, Xinjiang, Taiwan, and other former frontier regions'.[36] In the same way, China saw Japanese colonial rule in Taiwan as an illegitimate occupation and thus wanted to 'remold Taiwanese into patriotic Chinese citizens' after the war, which Seiji Shirane coins China's 'recolonization of Taiwan'.[37] WCTA Article 6 provided that 'even if war criminals regained citizenship of the Republic of China after 25 October 1945, this Act shall apply *mutatis mutandis*'.[38] This clause was designed for Taiwanese people because all Taiwanese automatically 'regained', not obtained, Chinese citizenship on 25 October 1945, according to the Ministry of Interior.[39] Although Taiwanese were of Japanese nationality, and they were either conscripted or recruited by Japan to take part in the Second World War, the WCTA could only apply *mutatis mutandis*.

To sum up, while Western empires resorted to international law to reclaim authority in Asian colonies, China used war crime trial laws to claim its hegemonic status in post-war Hong Kong, Taiwan, and Southeast Asia.

2.2 The MND's approach to war crime trials and Chiang Kai-shek's magnanimous policy

This article challenges the current scholarly consensus that post-war China implemented a 'magnanimous policy' concerning war criminals. This subsection will demonstrate that the 'magnanimous speech' of Chinese politicians was at odds with the MND's approach to war crimes. In addition, although high-level military officers urged to end the investigation and repatriate

[32]WCTA, Art. 2: 'A person who commits an offence which falls under any one of the following categories shall be considered a war criminal: … 4. Alien combatants or non-combatants who during the war with or a period of hostilities against the Republic of China, commit acts other than those mentioned in the three previous sections but punishable according to Chinese Criminal Law *against the Republic of China or its nationals*' (emphasis added). The underlined part is translated by the author because the UNWCC Law Reports translation omitted the underlined wording.

[33]The author thanks the reviewer for pointing out this critical figure of the clause.

[34]MOFA, 'Rijun zhanzui diaocha (1)' [Investigation on Japanese war crimes (1)], *Waijiao Dangan* [MOFA archive], Academia Historica Archive No. 020-010117-0005 (1946); MOFA, 'Rijun zhanzui diaocha (6)' [Investigation on Japanese war crimes (6)], *Waijiao Dangan* [MOFA archive], Academia Historica Archive No. 020-010117-0010 (1946). It is worth noting that the geographic scopes of these terms shifted several times during the 1940s, yet the fact remains that the Chinese government intended to expand its influence abroad. The terms for the regions listed here are the terms used by documents used in the archives.

[35]M. Macauley, *Distant Shores: Colonial Encounters on China's Maritime Frontier* (2021), 11.

[36]E. J. Teng, *Taiwan's Imagined Geography: Chinese Colonial Travel Writing and Pictures, 1683–1895* (2004), 6.

[37]S. Shirane, *Imperial Gateway: Colonial Taiwan and Japan's Expansion in South China and Southeast Asia, 1895–1945* (2022), 161–3.

[38]Translated by the author.

[39]Ministry of Interior, 'Weizhundian yiaiwan guangfuyishi lulieyouguanriqiao ji taibaoguojisanxiang' [Based on the beginning of Taiwan's retrocession, three items concerning the nationality of overseas Japanese and Taiwanese compatriots], *Taiwansheng wenxian weiyuanhui dangan* [Historical Research Committee of Taiwan Province archive], National Archives (Taiwan) No. 0035/065.2/6/1/002 (1946).

https://doi.org/10.1017/S0922156524000232 Published online by Cambridge University Press

guilty defendants back to Japan at the end of 1946, it was due to the catalytic Chinese Civil War, not because of their magnanimity.

From 1937 to 1945, China was defending itself from Japan. During this period, it is estimated that 15 to 20 million Chinese people died, while 80 to 100 million became refugees.[40] Despite these losses, Chiang Kai-shek, in his victory speech, expressed magnanimity towards Japan, stating that the Chinese people shall not 'hold any grudge against old wrongs' and shall 'be kind to others'. China 'does not intend to revenge and shall not humiliate innocent [Japanese] people'.[41] Barak Kushner, Huang Tzu-chin, and Wada Hideo have indicated that China had no choice but to be magnanimous because the Chinese military could not control the Japanese troops remaining in China and needed Japan's support to fight against the Chinese Communist Party.[42] Regarding war criminals, Kushner and Wada stated that, to be magnanimous, China adopted 'leniency and promptness' as the guiding principle on Japanese war crime trials, except for the most heinous ones.[43]

Although the literature above supported the view that the Chinese administration did not want to take punitive measures on Japanese war criminals, that is not the case. Chiang did not deny the adjudication of Japanese war criminals. In his victory speech, Chiang also stated that China 'shall strictly enjoin Japan to obey all the surrender terms faithfully'.[44] The Potsdam Declaration Article 10, one of the surrender terms, explicitly stated that 'stern justice shall be meted out to all war criminals'.[45] Liu Ping thus argues that current scholarly works mainly emphasize the aspect of leniency while neglecting the aspect of punishment.[46] In addition, Huang Tzu-chin finds that Chiang's 'magnanimity was the declaration of philosophy rather than a framework for specific policies'.[47]

After eight years of fighting against Japan since the 1937 Marco Polo Bridge Incident, the MND desired to punish war criminals as harshly as possible. The MND's attitude can be drawn from the War Criminals Treatment Commission (*Zhanzheng Zuifan Chuli Weiyuanhui*) records. Chiang Kai-shek ordered to establish the Commission on 6 November 1945, of which the goal was to convey regular meetings to co-ordinate among military authorities, the MOFA, the Ministry of Judicial Administration (MOJA), and any administrations involved in war criminal affairs. The Commission did not have any formal power or jurisdiction over war criminals.[48] Before the MND sent the WCTA draft to the legislation on 28 August 1946,[49] Navy General Tang Jinghai proposed to the Commission that 'the [Japanese] Military Police Corps (*Kempeitai*) did all kinds of evil in China; every one of them shall be listed as war

[40]R. Mitter, *Forgotten Ally: China's World War II, 1937-1945* (2013), 378. Mitter argues that China's resistance limited Japan's military expansion in Southeast Asia and contributed to Allied states' victory at the end.

[41]See Chiang, *supra* note 3, at 122.

[42]See Kushner, *supra* note 1, at 89, 137–8; T. C. Huang, 'Kangzhan Jieshuqianhou Jiang Jieshi de Duiritaidu: "Yidebaoyuan" Zhenxiang de Tantao' [Chiang Kai-shek in the East Asia: The Origins of the Policy of Magnanimity Toward Japan after World War II], (2004) 45 *Jindaishi Yanjiusuo Jikan* 143, at 172–4, 178–80; H. Wada, 'Kokuminseifu no Tainichi Sengoshyori Houshin no Zissai: Senpan Mondai to Baishyo Mondai' [The Postwar Policy of the Nationalist Government against Japan: War criminal and Compensation issues], in M. Kagami (ed.), *Wakate Kenkyusha Kenkyuuseika Houkokushuu No. 1* (2006), 123, at 124–5.

[43]See Wada, ibid., at 124; Kushner, *supra* note 1, at 102.

[44]See Chiang, *supra* note 3, at 122.

[45]1945 Proclamation Defining Terms for Japanese Surrender.

[46]P. Liu, 'Cong "Kuanerbuzong" Dao Chedifangqi: Guominzhengfu Chuzhi Ribenzhanfan Zhengce Zaijiantao' [From 'Lenient but not Indulgence' to Complete Abandonment: Re-Examination of the Nationalist Government's Policy on Japanese War Criminals], (2020) 1 *Minguo Dangan* 132, at 143.

[47]See Huang, *supra* note 42, at 147; Liu, ibid., at 135–6.

[48]War Criminals Treatment Commission, 'Zhanzhengzuifan chuliweiyuanhui chenglihuiyijilu' [Meeting minute for the establishment of the War Criminals Treatment Commission], *Waijiao Dangan* [MOFA archive], Academia Historica Archive No. 020-010117-0042 (1945).

[49]KMT Party History Commission, *Guofangzuigao Weiyuanhui changwuhuiyijilu* [Meeting Minutes for Regular Meetings of the National Defense Supreme Commission] (1995), vol. 8, 455, 464.

https://doi.org/10.1017/S0922156524000232 Published online by Cambridge University Press

criminals'.[50] In May 1946, Department of Command Military Staff Deng Shiliang conveyed a firm request from local elites in the Provinces of Hunan and Guangxi 'to severely punish war criminals' because Japanese soldiers had 'killed people and destroyed resources, villages, and farms, resulting in famine in central and southern China'.[51] When dealing with the Taiwan Reconstruction Association in Shanghai's petition for 'leniency toward Taiwanese war criminals', the MND Second Bureau replied 'impossible' on 20 August 1946.[52] In addition, in June 1946, the MND wrote a letter in the name of Minister Bai Chongxi to Premier Soong Tse-ven, requesting to set up a permanent war criminal investigation institution while mentioning 'severely punishing war criminals' three times.[53]

When it comes to the principle of 'leniency and promptness', English, Chinese, and Japanese scholars all refer to Minister of Defence Bai Chongxi's announcement on 25 October 1946.[54] Bai stated that China's war crime policy should follow Chiang Kai-shek's magnanimous approach mentioned in his victory speech, which was consistent with 'the United Nations' treatment of major war criminals in Nuremberg . . . and General MacArthur's emphasis on winning the hearts of Japanese people when occupying Japan'. In the same meeting, the War Criminals Treatment Commission made three resolutions: 1) Investigations for war criminals under detention shall be finished by the end of 1946. If no substantial evidence could be found by then, the defendants should not be prosecuted and should be released and repatriated to Japan; 2) regarding those who had been sentenced to jail, the Chinese government should repatriate them to Japan and request the Japanese government to implement the verdicts; 3) for the other cases, all translation and review processes shall end by June 1947.[55]

Bai's announcement does not change this article's analysis. First, the three resolutions did not affect the legal substance of the trials. In fact, as the subsequent sections will show, they were irrelevant to legislation, legal interpretation, and court proceedings.

Second, the impact of the principle of leniency and promptness on the MND bureaucracy is questionable. In December 1947, the MND wrote a letter to the MOFA to reiterate that even though the 'reporting war criminal' policy was suspended, it only meant that the authorities should not accept reports from citizens; it shall not affect the state's power to prosecute war criminals.[56] In January 1948, the MND still requested the MOJA to assist in extraditing

[50]War Criminals Treatment Commission, 'Zhanzhengzuifan chuliweiyuanhui disicichanghuijilu' [Meeting minute for the fourth regular meeting of the War Criminals Treatment Commission], *Waijiao Dangan* [MOFA archive], Academia Historica Archive No. 020-010117-0042 (1945). The Kempeitai were deeply involved in Japanese atrocities during the war. The British War Office directed the arrest of all Kempeitia personnel on 7 September 1945, and the Netherlands East Indies prosecuted the Kempeitai as 'a group collectively responsible for a war crime'. R. Lamont-Brown, *Kempeitai: Japan's Dreaded Military Police* (1998), 152–3; F. L. Borch, *Military Trials of War Criminals in the Netherlands East Indies 1946-1949* (2017), 155–6.

[51]War Criminals Treatment Commission, 'Zhanzhengzuifan chuliweiyuanhui diershiliucihuiyijilu' [Meeting minute for the twenty-sixth meeting of the War Criminals Treatment Commission], *Waijiao Dangan* [MOFA archive], Academia Historica Archive No. 020-010117-0043 (1946).

[52]War Criminals Treatment Commission, 'Zhanzhengzuifan chuliweiyuanhui di sanshibacichanghuijilu' [Meeting minute for the thirty-eighth regular meeting of the War Criminals Treatment Commission], *Waijiao Dangan* [MOFA archive], Academia Historica Archive No. 020-010117-0043 (1946).

[53]MND, 'Guofangbu daidian wei xingzhengyuan zhanfan zuizheng diaocha xiaozu baogao' [MND's letter regarding the Executive Yuan war criminal investigation working group report], *Xingzhengyuan Dangan* [Administrative Yuan archive], Academia Historica Archive No. 014-020600-0007 (1946).

[54]J.Y. Song, 'Zhanhou Chuqi Zhongguo de Duiri Zhengce yu Zhanfan Shenpan' [China's Policy towards Japan and the Trial of War Criminals in the Early Postwar Period], (2001) 4 *Nankai Xuebao* 40, at 46–7; see Liu, *supra* note 46, at 135; Kushner, *supra* note 1, at 102; Wada, *supra* note 42, at 124.

[55]L. M. Liao (ed.), 'Zhanzhengzuifan Chuliweiyuanhui Duiri Zhanfanchuli Zhengcehuiyijilu' [Minutes for War Criminal Affairs Commission's Meeting on Japanese War Criminal Policy], (2020) 4 *Minguo Dangan* 17, at 19.

[56]MND, 'Jieshi dingqi jiezhi jianjuzhanfan' [Interpreting regular deadlines for reporting war criminals], *Waijiao Dangan* [MOFA archive], Academia Historica Archive No. 020-010117-0039 (1947).

https://doi.org/10.1017/S0922156524000232 Published online by Cambridge University Press

79 Japanese war criminals from overseas.[57] These cases show that the principle of 'leniency and promptness' might not be fully applicable to the whole ministry.

Lastly, the WCTA was submitted by the administration to the legislature on 28 August, passed on 15 October, and promulgated on 24 October 1946,[58] which was earlier than Bai's announcement. There is no evidence showing that the drafters knew of the principle of 'leniency and promptness' when drafting the WCTA.[59]

In summary, the fact that Chiang championed a magnanimous policy does not mean that the MND adopted a more lenient position when drafting and implementing the WCTA. In the following section, we will look at the details of the WCTA to show how the MND attempted to judge Japanese war criminals more harshly than international law and jurisdictions from the Allies.

3. The normative features of the WCTA

3.1 Broader timeline and broader definition of war crimes

Compared with international law, the WCTA set a broader timeline and broader definition of war crimes. WCTA Article 4 stipulated that war crimes would be prosecuted if they were committed between 18 September 1931 and 2 September 1945. The time scope sheds light on the legal definition of war from WCTA drafters because war crimes can only be committed in a state of war. Accordingly, for China, the war started with the Japanese invasion of Manchuria on 18 September 1931 and ended on 2 September 1945, when Japan signed the Instrument of Surrender.

The Chinese government strategically circumvented international law in defining the time scope of the WCTA. Article 1 of the Hague Convention Relative to the Opening of Hostilities (Hague III) of 1907 indicated that a state of war does not begin without 'a reasoned declaration of war or of an ultimatum with conditional declaration of war'.[60] China had not declared war and had retained a formal diplomatic relationship with Japan until 9 December 1941. WCTA drafters had known the law. At the UNWCC, the Chinese representative and diplomat King Wunz proposed that the war crimes investigation should start on 18 September 1931, but it was opposed by other member states.[61] MOFA's internal report on war crime matters, including the time scope issue, also provided that 'although we should have our own attitude and stance, we should keep in close contact with other Allied states and follow majority opinion if necessary'.[62]

In addition, the WCTA defined war crimes in broader categories. The Nuremberg Charter identified three broadly defined war crimes: 1) crimes against peace, 2) conventional war crimes, and 3) crimes against humanity. Article 2 of the WCTA expanded the scope of conventional war crimes, as well as defined a fourth type of war criminal:

[57]MOJA, 'Guanyu yindu ribenzhanfan yingxian huitongshencha' [Regarding the extradition of Japanese war criminals and joint review], *Xingzhengyuan Dangan* [Administrative Yuan archive], Academia Historica Archive No. 014-020600-0008 (1948).

[58]Legislative Yuan, 'Zhanzheng Zuifan Shenpan Tiaoli' [War Crime Trial Act], *The Law Database of Legislative Yuan (Taiwan)*, available at lis.ly.gov.tw/lglawc/lglawkm.

[59]Though most guilty war criminals have not completed their imprisonment in the end and thus appeared to have had lenient outcomes, it does not reduce the academic value of looking into the legal substantive of war crime matters. Scholars have recognized the value of researching the Tokyo Trial as a judicial process regardless of the fact that all imprisoned defendants were released in the period between 1955 and 1956. See D. Cohen and Y. Totani, *The Tokyo War Crimes Tribunal: Law, History, and Jurisprudence* (2018), 2–3, 53.

[60]1907 Hague Convention Relative to the Opening of Hostilities, 205 C.T.S. 263.

[61]W. King, 'Di 131 hao' [Letter to the MOFA no. 131], *Waijiao Dangan* [MOFA archive], Academia Historica Archive No. 020-010117-0055 (1946); A. Bihler, 'Late Republican China and the Development of International Criminal Law: China's Role in the United Nations War Crimes Commission in London and Chungking', in Bergsmo, Cheah and Yi, *supra* note 6, at 527.

[62]S. Gao, 'Chengzhirikou zuixingfangan' [Plans to Punish the Crimes of the Japanese Aggressors], *Waijiao Dangan* [MOFA archive], Academia Historica Archive No. 020-010117-0055 (year unknown).

https://doi.org/10.1017/S0922156524000232 Published online by Cambridge University Press

> Alien combatants or non-combatants who during the war with or a period of hostilities against the Republic of China, commit acts other than those mentioned in the three previous subparagraphs [i.e., crimes against peace, conventional war crimes, and crimes against humanity] but punishable according to Chinese Criminal Law against the Republic of China or its nationals.[63]

It is similar to Article 229, paragraph 1 of the Treaty of Versailles: 'Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power'.[64]

From a legal perspective, it was a stipulation claiming extraterritoriality for criminal cases in essence, aiming to obtain jurisdiction over foreigners if the victim was a Chinese national. It echoed modern China's long pursuit of forming alliances with overseas Chinese. Albert Chen has indicated that the Chinese nationality law adopted the *jus sanguinis* principle, according to which any person whose father is Chinese (*Zhongguo ren*) has a Chinese nationality. Such law 'would enable the regime to continue to claim the allegiance of the large population of overseas Chinese'.[65] Taomo Zhou further characterizes the law as '[the] Chinese Nationalist government's effort to prolong the ROC's jurisdiction over the ethnic Chinese'.[66]

The Enemy War Crime Investigation Regulation of 29 July 1944 Article 7 stipulated that Chinese officials should investigate Japanese war crimes against Chinese victims in Hong Kong and Southeast Asia (*Nanyang*).[67] As mentioned in Section 2.1, China had collected evidence and witnesses of Japanese war crimes from overseas Chinese living in Burma, Hong Kong, Indonesia, Malaya, the Philippines, Singapore, and Vietnam. This fourth type of war crime manifests China's post-war intention to reestablish itself as a regional hegemon in Asia.

In its definition of conventional war crimes, the WCTA stipulated that 'alien combatants or non-combatants' – in other words, all foreigners – could be prosecuted for this offence. In contrast, the Convention with Respect to the Laws and Customs of War on Land (Hague II) limited the prosecution of conventional war crimes to foreigners who are nationals of enemy states.[68]

WCTA Article 3 further provided 38 types of conventional war crimes,[69] of which 33 were roughly the same as the list made by the Commission on the Responsibility of the Authors of the

[63]WCTA, Art. 2, sub-para. 4.

[64]1919 Treaty of Peace between the Allied and Associated Powers and Germany.

[65]A. H. Y. Chen, 'The Evolution of Modern Chinese Nationality Law: A Historical Perspective', (2023) 23(2) *China Review* 123, at 130.

[66]T. Zhou, *Migration in the Time of Revolution: China, Indonesia, and the Cold War* (2019), 25.

[67]Enemy War Crime Investigation Regulation, Art. 7: 'Regarding enemy's criminal offenses over Chinese victims in Hong Kong and Nanyang, the Central Investigation Statistics Bureau and Military Affairs Commission's Investigation Statistics Bureau shall investigate and send investigation forms and evidence to Enemy War Crime Investigation Executive Yuan to processing'.

[68]Convention with Respect to the Laws and Customs of War on Land (Hague II), Art. 2, para. 1: 'The provisions contained in the Regulations mentioned in Article 1 are only binding on the Contracting Powers, in case of war between two or more of them'.

[69]WCTA, Art. 3: '(1) Planned slaughter, murder or other terrorist action. (2) Killing hostages. (3) Malicious killing of non-combatants by starvation. (4) Rape. (5) Kidnapping children. (6) Enforcing collective torture. (7) Deliberate bombing of non-defended areas. (8) Destroying freighters or passenger boats without previous warning and without regard to the safety of passengers and crew. (9) Destroying fishing boats and relief ships. (10) Deliberate bombing of hospitals. (11) Attack or sinking of hospital ships. (12) Use of poison gas or bacteriological warfare. (13) Employment of inhuman weapons. (14) Ordering wholesale slaughter. (15) Putting poison on food or drinking water. (16) Torturing of non-combatants. (17) Kidnapping females and forcing them to become prostitutes. (18) Mass deportation of non-combatants. (19) Internment of non-combatants and inflicting on them inhuman treatment. (20) Forcing non-combatants to engage in military activities with the enemy. (21) Usurpation of the sovereignty of the occupied territory. (22) Conscription by force of inhabitants in the occupied territory. (23) Scheming to enslave the inhabitants of occupied country or to deprive them of their status and rights as nationals of the occupied country. (24) Robbing. (25) Unlawful extortion or demanding of contributions or requisitions. (26) Depreciating the value of currency or issuing unlawful currency notes. (27) Indiscriminate destruction of property. (28) Violating Red Cross regulations. (29) Ill-treating prisoners of war or wounded persons. (30) Forcing prisoners of war to engage in work not allowed by the International Convention. (31) Indiscriminate use of the Armistice Flags. (32) Making

https://doi.org/10.1017/S0922156524000232 Published online by Cambridge University Press

War and the Enforcement of Penalties at the Paris Peace Conference in 1919,[70] which was also adopted by the UNWCC in 1943.[71] The five additional types of war crimes stipulated by the WCTA were: 1) kidnapping children; 2) making indiscriminate mass arrests; 3) malicious insult; 4) taking money or property by force or extortion; and 5) plundering of historical, artistic or other cultural treasures.

The expanded crime list invited judges to decide cases beyond international law. On 25 October 1946, the meeting minutes of the War Criminals Treatment Commission explicitly stated that 'this is the first time for China to deal with war criminals, but very few [military] judges know international law well. Therefore, most of them are not familiar with the process and all treatment of war criminal matters'.[72] This list helped judges apply international law conveniently because judges could cite the WCTA without needing to search for legal bases from other treaties.

However, it is clear that WCTA drafters did not merely cite international law but created their own stipulations. For instance, defining insult as a type of war crime was a dramatic broadening of international law. In April 1947, a military prosecutor in Taiwan accused defendants of malicious insult during the war because they 'celebrated a victory by parading around the city in the disguise of our head of state and his wife, displaying grotesqueness of the highest order'.[73]

It is thus not surprising that the UNWCC Law Report commented that 'the Chinese legislation has adopted the concept of war crimes in a wider, non-technical sense, as a common denominator for types of offences which are, otherwise, distinct one from the other within the body of international law'.[74]

3.2 Stricter liability

The WCTA adopted stricter criminal liability with respect to penalties. As Table 1 below shows, WCTA Articles 10, 11, and 12 gave adjudicators narrow discretion to determine punishment.

In other words, except for the extraterritoriality clause, every war criminal, including those who insulted the Chinese leader, would be sentenced to at least seven years of imprisonment.

---

indiscriminate mass arrests. (33) Confiscation of property. (34) Destroying religious, charity, educational, historical constructions or memorials. (35) Malicious insult. (36) Taking money or property by force or extortion. (37) Plundering of historical, artistic or other cultural treasures. (38) Other acts violating the law or usages of war, or acts whose cruelty or destructiveness exceeds their military necessity, forcing people to do things beyond their obligation, or acts hampering the exercise of legal rights'.

[70](1) Murders and massacres; systematic terrorism. (2) Putting hostages to death. (3) Torture of civilians. (4) Deliberate starvation of civilians. (5) Rape. (6) Abduction of girls and women for the purpose of enforced prostitution. (7) Deportation of civilians. (8) Internment of civilians under inhuman conditions. (9) Forced labour of civilians in connection with the military operations of the enemy. (10) Usurpation of sovereignty during military occupation. (11) Compulsory enlistment of soldiers among the inhabitants of occupied territory. (12) Attempts to denationalize the inhabitants of occupied territory. (13) Pillage. (14) Confiscation of property. (15) Exaction of illegitimate or of exorbitant contributions and requisitions. (16) Debasement of the currency, and issue of spurious currency. (17) Imposition of collective penalties. (18) Wanton devastation and destruction of property. (19) Deliberate bombardment of undefended places. (20) Wanton destruction of religious, charitable, educational, and historic buildings and monuments. (21) Destruction of merchant ships and passenger vessels without warning and without provision for the safety of passengers or crew. (22) Destruction of fishing boats and of relief ships. (23) Deliberate bombardment of hospitals. (24) Attack on and destruction of hospital ships. (25) Breach of other rules relating to the Red Cross. (26) Use of deleterious and asphyxiating gases. (27) Use of explosive or expanding bullets, and other inhuman appliances. (28) Directions to give no quarter. (29) Ill-treatment of wounded and prisoners of war. (30) Employment-of prisoners of war on unauthorized works. (31) Misuse of flags of truce. (32) Poisoning of wells. Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 'Report Presented to the Preliminary Peace Conference', (1920) 14(1) *American Journal of International Law* 95, at 114–15.

[71]D. Piesch and S. Sattler, 'Before Nuremberg: Considering the Work of the United Nations War Crime Commission of 1943–1948', in Bergsmo, Cheah and Yi, *supra* note 6, at 443.

[72]See Liao, *supra* note 55, at 19.

[73]MND, 'Diren zai zuozhanqijian duiwoyuanshou zhi wuruxingwei' [Insults to our head of state by the enemy during the war], *Shifayuan Dangan* [Judicial Yuan archive], Academia Historica Archive No. 015-010311-0093 (1946).

[74]See UNWCC, *supra* note 4, at 155.

https://doi.org/10.1017/S0922156524000232 Published online by Cambridge University Press

Table 1. Punishment prescribed by the WCTA

Grounds	Offences	Punishment
WCTA Article 10	Crime against peace	Death or life imprisonment
	Crime against humanity	Death or life imprisonment
WCTA Article 11	WCTA War crime list items 1-15	Death or life imprisonment
	WCTA War crime list items 16-24	Death, life imprisonment, or imprisonment for a period of ten years
	WCTA War crime list items 25-37	Life imprisonment or imprisonment for no less than seven years
	WCTA War crime list item 38	Death, life imprisonment, or imprisonment for no less than seven years
WCTA Article 12	Offences punishable according to Chinese Criminal Law against China or its nationals	Respective punishments of the Criminal Law

In contrast, the Nuremberg Charter, Tokyo Charter, and other Allied legislation on war crimes gave judges full discretion to determine punishment. Nuremberg Charter Article 27 provided that 'The Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just'.[75] Tokyo Charter Article 16 had the same stipulation.[76] The British Royal Warrant and its annexed Regulations for the Trial of War Criminals, promulgated on 18 June 1945, Article 9 provided that:

> A person found guilty … of a war crime may be sentenced to … any one or more of the following punishment, namely: (i) Death (either by hanging or by shooting); (ii) Imprisonment for life or for any less term; (iii) Confiscation; (iv) A fine.[77]

The Statute Book of the Netherlands Indies, no. 45 of 1946 Article 4, provided that war criminals 'shall be sentenced to death, life imprisonment, or imprisonment for not less than one day but not more than twenty years'.[78] The US Regulation Governing the Trial of War Criminals, promulgated 24 September 1945, Article 20 also stated that 'The commission may sentence an accused, upon conviction, to death by hanging or shooting, imprisonment for life or for any less term, fine, or such other punishment as the commission shall determine to be proper'.[79] The Philippines' Establishing a National War Crimes Office and Prescribing Rules and Regulations Governing the Trial of Accused War Criminals Article V paragraph g[80] and the Australian War Crimes Act 1945 Article 11[81] have the same stipulation.

In addition, the WCTA intentionally omitted a mitigation clause for war criminals obeying superior orders. Article 8 of the WCTA stipulated that:

[75]Houmu Daizin Kanbou Sihou Housei Chyousa Bu, *Sensou Hanzai Saiban Kankei Hourei Syuu* [Laws and Regulations Related to War Crimes Trials] (1963), vol. 1, 29.

[76]Ibid., at 69.

[77]Ibid., at 95.

[78]Houmu Daizin Kanbou Sihou Housei Chyousa Bu, *Sensou Hanzai Saiban Kankei Hourei Syuu* [Laws and Regulations Related to War Crimes Trials] (1965), vol. 2, 10. The text is translated by the author into English from its Japanese version.

[79]Houmu Daizin Kanbou Sihou Housei Chyousa Bu, *Sensou Hanzai Saiban Kankei Hourei Syuu* [Laws and Regulations Related to War Crimes Trials] (1965), vol. 3, 38–40.

[80]Ibid., at 176.

[81]Ibid., at 190.

https://doi.org/10.1017/S0922156524000232 Published online by Cambridge University Press

> A war criminal would not be exempted from his responsibility due to any of the following reasons: 1) that their crimes were committed by obeying the orders of superior officers; 2) that crimes were committed as a result of official duty; 3) that crimes were committed in pursuance of the policy of the offender's government; 4) that crimes were committed out of political necessity.

Article 8 of the Nuremberg Charter and Article 6 of the Tokyo Charter likewise provided that these situations shall not free the accused person from legal responsibilities. However, the two charters state that the accused 'may be considered in mitigation of the punishment if the Tribunal determines the justice so requires'. Since the WCTA drafters had the two charters on file, their omission must have been intentional. Although the WCTA did not prohibit judges from considering mitigation if a defendant was performing his duty, this omission implied that the WCTA drafters did not want to make an impression of leniency.

In short, the WCTA prescribed harsher punishments.

3.3 Promoting Chinese Nationalism

The crimes against humanity defined by the WCTA reinforced the distinction between the Chinese race (*Zhonghua Minzu*) and aliens, manifesting China's intention to promote Chinese nationalism through war crime trials. Nuremberg Charter Article 6 defines crimes against humanity as:

> murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

The Holocaust in Nazi Germany was covered by this article, where offenders and victims might be of the same nationality.

The WCTA defined crimes against humanity differently. It provided that an 'alien combatant or non-combatant' would constitute this offence if he:

> nourishes intentions of enslaving, crippling, or annihilating the Chinese *Race* and endeavours to carry out their intentions by such methods as (a) killing, starving, massacring, enslaving, or mass deportation of its nationals; (b) stupefying the mind and controlling the thought of its nationals, (c) distributing, spreading, or forcing people to consume, narcotic drugs or forcing them to cultivate plants for making such drugs; (d) forcing people to consume or be innoculated with poison, or destroying their power of procreation, or oppressing and tyrannising them under racial or religious pretext, or treating them inhumanly.[82]

Compared with the Nuremberg Charter, the WCTA's definition ignored the nationalities of victims. Simply put, from the Chinese government's perspective, this clause applies as long as the offender is a foreigner and the victim is racially Chinese, regardless of the latter's nationality. The concept of the Chinese race in WCTA was intended by the legislators to be applied regardless of the presence of Chinese citizenship.

It should be noted that in sub-paragraph 3 of Article 2, the WCTA used the term 'the Chinese race' in its attempt to define the scope of victims who suffered from crimes against humanity. Subsequently, in sub-paragraph 4 of Article 2, the WCTA used the term 'the Republic of China and its citizens' when it was defining the scope of extraterritoriality. For example, the War

[82]Emphasis added. I changed the word 'nation' in the UNWCC translation to 'race'.

https://doi.org/10.1017/S0922156524000232 Published online by Cambridge University Press

Criminals Treatment Commission had once decided to include 'Japanese officials, military police, and police officers who committed inhumane acts against Taiwanese people during the Japanese colonial era' as war criminals, just as 'German [war criminals] committed crimes against Jewish people with a German nationality'.[83] Even though Taiwanese people were of Japanese nationality during the colonial period (1895-1945), Chinese war crime tribunals still claimed jurisdiction in cases where a Taiwanese was a victim because the Taiwanese people belonged to the Chinese race.

The Chinese race has been a highly politicized concept associated with modern Chinese nationalism. China is a polyethnic regime. However, Chinese intellectuals invented the encompassing concept of the 'Chinese race' to claim the polyethnic empire as a nation-state. They asserted that the 'Chinese race' included various ethnic groups such as Han, Manchus, Mongols, Hui, and Tibetans, because these peoples allegedly shared the same ancestor, the Yellow Emperor. As a result, the territory of the Chinese state should cover not only China proper but also the borderlands. Any attempt to colonize, exploit, or control any portion of the territory was regarded as an attempt to humiliate the Chinese race.[84]

The Second World War gave rise to the modern concept of the 'Chinese race' and consolidated Chinese nationalism. In contrast, to dismantle China, the Japanese Empire emphasized China's poly-ethnicity by advocating self-determination and independence in Xinjiang, Mongolia, Manchuria, and Southwestern China.[85] In response, Chinese historians reiterated the concept of the 'Chinese race'. In 1939, Gu Jiegang published an article, 'The Chinese Race Is One', calling for all Chinese people to unite.[86] Ma Yi responded to Gu in the same year, stating that 'the perspective of "The Chinese Races Are Always One" not only helps China fight against Japan but is also consistent with historical facts in China'.[87]

The WCTA's reinforcement of the concept of the 'Chinese race' could help China to reaffirm its sovereignty in borderlands and colonies. As discussed in Section 2.1, while Euro-American empires used war crime trials to claim colonial prestige, the Chinese government extended its definition of crimes against humanity to facilitate Chinese imperialism in relation to Taiwan and, in theory, Mongolia, Tibet, and Xinjiang.

In sum, the WCTA departed from international law by stipulating a broader scope, adopting a stricter liability, and intending to promote Chinese nationalism. The legal analysis above shows that the MND, the drafter of the WCTA, intended to punish Japanese war criminals more severely in the disguise of adherence to international law.

4. The Judicial Yuan's unifying interpretation of the WCTA

4.1 The institution and implication of Judicial Yuan interpretations

The Judicial Yuan, or 'the grand institution of the judicial authority', has been responsible for unifying legal interpretations in China since 1928. It is a unique institution without an exact

[83] War Criminals Treatment Commission, 'Zhanzhengzuifan chuliweiyuanhui dinianyici changhuijilu' [Meeting minute for the twenty-first regular meeting of the War Criminals Treatment Commission], *Waijiao Dangan* [MOFA archive], Academia Historica Archive No. 020-010117-0042 (1946).

[84] Y. Xia, *Down with Traitors: Justice and Nationalism in Wartime China* (2017), 19; T. Mullaney, *Coming to Terms with the Nation: Ethnic Classification in Modern China* (2010), 42–3. Regarding how the Chinese government uses the concept of 'Chinese race' to promote nationalism in the late twentieth century, see P. H. Gries, *China's New Nationalism: Pride, Politics, and Diplomacy* (2004).

[85] K. Wang, *Yishiyiyouyidi: Minzuzhuyi Yu Jindai Zhongriguanxi* [Mentorship, Friends, and Foes: Nationalism and Modern Sino-Japanese Relations] (2020), 360, 430; L. Narangoa, 'Japanese Geopolitics and the Mongol Lands, 1915-1945', (2004) 3(1) *European Journal of East Asian Studies* 45, at 63; P. Duara, *Sovereignty and Authenticity: Manchukuo and the East Asian Modern* (2003), 53–6; Y. Chan, 'Ethnicity and Frontier Studies in Southwest China: Pan-Thai Nationalism and the Wartime Debate on National Identity, 1932–1945', (2019) 44(3) *Twentieth-Century China* 324, 329–32.

[86] J. Gu, 'Zhonghuaminzu Shi Yige' [Chinese Race Is One], *Yishibao Bianjiang Zhoukan*, 13 February 1939.

[87] Y. Ma, 'Jianqiang "Zhonghuaminzu Shiyige" de Xinnian' [Strengthen the belief that 'Chinese race is one'], *Yishi Bao Xingqi Pinglun*, 7 May 1939.

https://doi.org/10.1017/S0922156524000232 Published online by Cambridge University Press

equivalent in Western court systems. When administrations or courts encounter legal interpretation problems, such as when the wording of a law is not clear or there are multiple ways to explain the same law, they can request the Judicial Yuan to unify the interpretation. Nonetheless, the Judicial Yuan was only able to explain the law abstractly: it could not decide on concrete cases based on specific facts.[88]

Regarding the process of unifying legal interpretations, upon receiving a request, the President of the Judicial Yuan would chair a meeting consisting of the chief judges of each chamber of the Supreme Court. Only when at least two-thirds of the judges in the meeting agreed could a Judicial Yuan Interpretation (JYI) be adopted.[89]

The Chinese legal professional community had a strong belief in building China into a modern state with 'civilized' laws and courts. China's judicial sovereignty suffered from extraterritoriality from 1842 to 1943. Eighteen countries once exempted their citizens from Chinese jurisdiction according to the unequal treaties due to China's 'uncivilized' legal system that failed to protect basic legal rights of foreigners by impartial courts.[90] Inspired by the fact that Japan managed to abolish extraterritoriality in 1899, Chinese lawyers endeavoured to prove that China, having established Western-styled legal and court systems, was also ready to abolish extraterritoriality.[91]

In addition to reforming domestic law, adhering to international law was seen as another indication of a 'civilized' state.[92] The fourth edition of Henry Wheaton's *The Elements of International Law* recognized Japan as a 'civilized' state because it signed the 1866 Geneva Convention and the Hague Convention and complied with the laws of war in the First Sino-Japanese War in 1894 and the 1900 Boxer uprising in China.[93] In contrast, the same book, citing Professor Holland's words, suggested that 'The Chinese adopted only the rudimentary and inevitable conceptions of international law ... To a respect for the laws of war they have not yet attained'.[94] The war crimes trials after the Second World War provided Chinese courts a perfect moment to demonstrate its 'civilization' to the world.[95]

Because the Supreme Court was at the top of the court system, JYIs manifested the opinions of judicial elites in China. Table 2 below lists the education and career backgrounds of Supreme Court judges participating in the JYIs discussed in this article. All of them had an abundance of practical experience despite regime changes. They had also served on the Supreme Court for at least ten years. Because public international law has been a compulsory subject in law schools and bar exams in China since the 1910s, we can assume that these judges had at least basic knowledge of international law.[96]

The cases in the next sub-sections are those involved in interpretation disputes related to international law. They demonstrate that senior judges limited the application of the WCTA by citing international law. More importantly, they also demonstrate how Chinese legal professionals, in their attempt to make China a 'civilized' state, prevailed over the ruling party, which sought to exact revenge.

Some archives cited below show that the MND was the one that requested the Judicial Yuan to offer legal interpretations regarding war crime trials. One might argue that if the MND intended to depart from international law, the MND would never have submitted interpretation requests to

[88] M. W. Chang, *Xianzhengxia de Xunzheng* [The Party-State Ruling under the Constitution] (2017), 15.

[89] Ibid.

[90] See Gong, *supra* note 16, at 158–60.

[91] W. H. Wu, 'Kuaguoshi Shiye Xia Zhongguo Feichu Zhiwaifaquan De Licheng (1919 – 1931)' [The Process of Abolishing Extraterritoriality in China from the Perspective of Transnational History, 1919–1931], (2020) 2020(2) *Jindaishi Yanjiu* 117, at 121–4.

[92] See Gong, *supra* note 16, at 24.

[93] H. Wheaton and J. B. Atlay, *The Elements of International Law* (1904), 23–4.

[94] Ibid., at 23.

[95] See Bihler, *supra* note 6, at 99–100.

[96] See Hsieh, *supra* note 17, at 94–5.

https://doi.org/10.1017/S0922156524000232 Published online by Cambridge University Press

Table 2. Backgrounds of Supreme Court Judges and the JYI decisions they participated in (marked by V)

Judges' name	Education and Career Background	JYI# 3628	JYI# 3562	JYI# 3563	JYI# 3676	JYI# 3191	JYI# 3314	JYI# 3078	JYI# 3313	JYI# 3222
Xia Qin	Xia graduated from Peking College of Law and Politics and studied at Chuo University and Tokyo Imperial University in Japan. He became a Supreme Court judge in 1928.	V	V	V	V	V	V	V	V	V
He Wei	He graduated from the Tokyo Imperial University and became a Supreme Court judge for the Guangdong Military Government in 1922 and a judge of the Supreme Court in Nanjing in 1928.	V	V	V	V	V		V		V
Zhang Jian	Zhang was a Judge at the Fujian High Court and became a judge at the Supreme Court Northeast Branch in 1931.	V	V	V	V		V		V	
Cao Fengxiao	Cao was a judge of the Yin County District Court in Zhejiang. He became a Supreme Court judge in Nanjing in 1930.	V	V	V	V	V	V		V	V
Guo Xiuru	Guo graduated from Hosei University in Tokyo. He was a judge in Zhangjiako District Court and the Chief Prosecutor in Changchun, and he became a Supreme Court judge in 1928.	V	V	V	V					
Liu Zhongying	Liu graduated from Peking College of Law and Politics and was a Supreme Court (*Daliyuan*) judge during the Beiyang period (1912–1928). He became a Supreme Court judge in Nanjing in 1928.	V	V	V	V					
Yang Tianshou	Yang graduated from Peking College of Law and Politics and was a prosecutor in Peking. He became a Supreme Court judge in 1930.	V			V	V	V	V	V	V
Zhang Shiyi	Zhang graduated from Zhili Law School and taught law at the Henan Public Law School. He was a judge at the Liaoyang District Court and Peking High Court. Records show that he had been a Supreme Court judge in 1931.	V	V	V	V		V	V	V	
Hong Wenlan	He became a Supreme Court judge in Nanjing in 1928.	V	V	V	V	V	V		V	V
Jiang Fukun	He became a Supreme Court (*Daliyuan*) judge during the Beiyang period in 1925. He became a Supreme Court judge in Nanjing in 1928.	V	V	V	V	V	V	V	V	V
Ye Zaijun	Ye graduated from Peking College of Law and Politics and was a judge at the Peking District Court and High Court. He became a Supreme Court judge in 1928.				V	V	V		V	V
Zhang Yuxun	Zhang graduated from Tokyo Shinbu Military Preparatory School and studied at the University of Paris Faculty of Law. He became a Supreme Court judge in 1930.	V			V	V	V	V	V	V

(*Continued*)

https://doi.org/10.1017/S0922156524000232 Published online by Cambridge University Press

Table 2. (*Continued*)

Judges' name	Education and Career Background	JYI# 3628	JYI# 3562	JYI# 3563	JYI# 3676	JYI# 3191	JYI# 3314	JYI# 3078	JYI# 3313	JYI# 3222
Zhu Desen	Zhu graduated from Peking College of Law and Politics and was a Supreme Court (*Daliyuan*) judge during the Beiyang period (1912–1928). He became a Supreme Court judge in Nanjing in 1928.	V	V	V	V		V		V	
Gao Xi	Gao graduated from the Peking College of Law and Politics. He became a Supreme Court judge in Nanjing in 1929.	V	V	V	V					
Zhang Fujia	Zhang graduated from Peking College of Law and Politics and was the chief judge at the Jiangxi and Hubei High Court. Records show that he had been a Supreme Court judge in 1931.	V	V	V	V			V		
Wang Zhennan	Wang became a judge at the Peking High Court in 1925 and a Supreme Court judge in 1936.	V	V	V	V					
Sun Zuxian	Sun had been a judge at the Hubei High Court and became a Supreme Court judge in 1932.	V	V	V	V					
Lin Shangbin	Lin was a judge at the Jiangsu High Court and became a Supreme Court judge in 1936.				V					
Chen Maoxian	Chen became a Supreme Court judge in 1928.	V	V	V	V		V		V	
Zhou Yunhui	Zhou became a judge at the Supreme Court Northeast Branch in 1931.	V	V	V	V					
Lin Zusheng	Lin became a judge at the Supreme Court Northeast Branch in 1931 and a judge at the Supreme Court in Nanjing in 1933.	V	V	V	V	V	V	V	V	V
Song Runzhi	Song was a Supreme Court (*Daliyuan*) judge during the Beiyang period in 1925. He became a Supreme Court judge in Nanjing in 1928.						V	V	V	V
Sun Lu	Sun was a judge at the Jiangsu High Court and became a Supreme Court judge in Nanjing in 1930.							V		

Sources: Y. N. Fan, *Dangdai Zhongguo Mingren Lu* (1931); *Sifa Gongbao* [The Judicial Gazette] (1936); MOJA, 'Zuigao fayuan faguan ce' [Name list of the Supreme Court judges], *Shifaxingzhengbu Dangan* [MOJA archive], National Archives (Taiwan) No. A311000000F/0017/609.1/0001 (1944).

https://doi.org/10.1017/S0922156524000232 Published online by Cambridge University Press

the Judicial Yuan, which gave senior judges opportunities to interpret the WCTA per international law. However, the MND and the MOJA requested the Judicial Yuan to unify the interpretation because Chinese prosecutors and judges in the war crime trials were uncertain whether they should apply a law that might depart from international law or not. According to the WCTA, all war criminal courts were affiliated with the MND because they were military tribunals. If war criminal courts intended to request the Judicial Yuan to unify the interpretation of the WCTA, their requests must be under the name of the MND. In addition, the MOJA, responsible for the administrative matters of prosecutors and judges in districts and high courts since 1943, needed to select high court judges and prosecutors to work with MND judge advocates to try war criminals. As a result, the MOJA was also eligible to file interpretation requests to the Judicial Yuan.

4.2 Constraining the definition of foreigners

As mentioned above, the WCTA expanded the application of war crimes to all aliens, while international law limited the scope of war crimes to foreigners from warring states. On 7 April 1947, the MOJA considered the wording 'alien combatant or non-combatant' ambiguous and requested the Judicial Yuan to provide a unified interpretation of the wording. The MOJA argued that there were three ways to understand 'alien combatant or non-combatant' in practice:[97]

The first opinion suggested that 'alien combatant or non-combatant' should be limited to foreigners from a state at war with China: since war crime trials originated from concepts of international law, foreigners from states not at war with China were not liable to be considered war criminals.[98]

The second opinion suggested that the ordinary meaning of the wording: 'alien combatant or non-combatant', should encompass all aliens. It was unreasonable that an alien could be exempted from accusations of war crimes if he was not a national of one of the states at war. In addition, it was not uncommon for a foreigner from a third party to commit war crimes.[99]

The last opinion was that the definition of 'alien' varied in different situations: all foreigners could be charged with crimes against peace, conventional war crimes, and crimes against humanity because they were universal crimes recognized internationally and because people from third-party states could also commit these crimes. Thus, the application of laws should not differ by nationality. However, because the fourth war crime or crimes against citizens of China was a special stipulation under the WCTA, not a war crime in a strict sense, the fourth war crime could only apply to foreigners from states at war with China. The MOJA noticed that the wording, 'alien combatant or non-combatant', in sub-paragraphs 1–4 was identical, raising the question of whether it was possible to interpret them differently or not.[100]

The legal interpretation of 'alien combatant or non-combatant' is significant because some war crimes against Chinese people were committed by local collaborators working with Japan. For example, the MOJA had sought the MOFA's assistance in investigating cases in which Malay (*wuren*) collaborators tortured and killed overseas Chinese.[101] Malay people, however, were British subjects. Britain was an ally of China and did not adjudicate collaborators as war criminals.[102] Encompassing all aliens would expand Chinese war crime jurisdiction to include these cases and would potentially infringe the sovereignty of other Allied states.

[97]MOJA, 'Sifayuanyuanjiezi di 3628 Haojieshi Shengqingshu' [The Written Submission for JYI No. 3628], *Shifayuan Dangan* [Judicial Yuan archive], Academia Historica Archive No. 015-010311-0095 (1947).

[98]Ibid.

[99]Ibid.

[100]Ibid. The WCTA defined the fourth type of war criminals. Cf. Section 3.1, *supra*.

[101]MOFA, 'Rijun zhanzui diaocha (6)' [Investigation on Japanese war crimes (6)], *Waijiao Dangan* [MOFA archive], Academia Historica Archive No. 020-010117-0010 (1946).

[102]K. Lawson, *Wartime Atrocities and the Politics of Treason in the Ruins of the Japanese Empire, 1937-1953* (2012), Doctoral dissertation, Harvard University, 105, 110.

https://doi.org/10.1017/S0922156524000232 Published online by Cambridge University Press

On 28 October 1947, the Judicial Yuan delivered JYI No. 3628, defining the wording 'alien combatant or non-combatant' as 'limited to foreigners from the state in war or hostilities against our nation'. In other words, the judiciary adopted the first opinion in keeping with international law.[103]

4.3 Constraining the definition of conventional war crimes

Six JYIs addressed questions of whether a specific act constituted a conventional war crime or not. Three of the cases elaborated on the international law they cited. These three cases are significant because they narrowed the scope of war crimes, leaving fewer Japanese people to be prosecuted in Chinese military courts.

The first case was requested by the MND regarding the definition of 'forcing people to do things beyond their obligations' (WCTA Article 3, sub-paragraph 38). The MND asked whether a foreigner who forced a citizen to move wounded soldiers in a military-occupied zone would violate the laws of war. The MND stated that there were two possible interpretations. According to the Regulations Respecting the Laws and Customs of War on Land (the Annex of Hague Convention IV, hereafter 'the Hague War Regulation') Article 52, it is legal if the requisitions in kind or service did not oblige the inhabitants to take part in military operations against their own country. The MND further cited a work of Lassa Oppenheim to support this opinion. In this case, the foreigner did not commit the offence. The second interpretation suggested that if the requisitions in kind or service occurred without any regulations, orders, or command in advance, it constituted the stated offence.[104] JYI No. 3562 adopted the first opinion, which was in accordance with the Hague War Regulation.[105]

The second case was about 'forcing non-combatants to engage in military activities with the enemy' (WCTA, Article 3, sub-paragraph 20). The MND asked whether a foreigner was guilty of this crime if he requested the citizens of an occupied territory to fell trees for the army to build an air-raid shelter or other military facilities. Again, the MND stated that there were two possible interpretations: 1) 'military activities' are limited to directly enforcing civilians to attend to frontline affairs, e.g., carrying bullets. One international law scholar argued that requiring supporting actions behind the lines does not fall within the scope of this crime; on the contrary, others argued that 2) according to the wording of the conventions, all acts connected with military operations, whether directly or indirectly, constitute crimes.[106]

The scope of military activities is a debatable topic in war crimes courts. In the well-known Burma-Siam Railway case at the British military court in Singapore, the Japanese defendants argued that the railway initially built for commercial purposes happened to have some military uses. It was, therefore, legal to involve POWs in construction. However, the court found that the construction of the railroad was a military operation to begin with because it was built to meet 'the need for a supply line to the Japanese fighting forces in Burma'.[107]

[103]Judicial Yuan, 'Yuanjiezijieshi di 3628 hao' [Judicial Interpretation No. 3628], *Shifayuan Dangan* [Judicial Yuan archive], Academia Historica Archive No. 015-010311-0095 (1947).

[104]MND, 'Sifayuanyuanjiezi di 3562 Hao Jieshishengqingshu' [The Written Submission for JYI No. 3562], *Shifayuan Dangan* [Judicial Yuan archive], Academia Historica Archive No. 015-010311-0087 (1947).

[105]Judicial Yuan, 'Yuanjiezijieshi di 3562 hao' [Judicial Interpretation No. 3562], *Shifayuan Dangan* [Judicial Yuan archive], Academia Historica Archive No. 015-010311-0087 (1947).

[106]MND, 'Sifayuanyuanjiezi di 3563 Hao Jieshishengqingshu' [The Written Submission for JYI No. 3563], *Shifayuan Dangan* [Judicial Yuan archive], Academia Historica Archive No. 015-010311-0088 (1947).

[107]United Kingdom Military jurisdiction, *United Kingdom v. Eiguma Ishida et al.*, National Archives Kew WO 00235 No. 00963, JAG No. 65149.

https://doi.org/10.1017/S0922156524000232 Published online by Cambridge University Press

JYI No. 3563 adopted the first opinion 'to be in accordance with the laws and customs of war', which was more limited and consistent with international law.[108]

The last case was about the legality of economic control in Manchuria. The MND stated that during the war, Japan implemented economic control in Manchuria, such as prohibiting people from hoarding goods and spiking prices. The MND asked two questions: 1) Did this economic control violate the Hague War Regulation Article 43 (the occupant 'shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety')? And 2) did the person (whether Japanese, Taiwanese, or Korean) who conducted the seizure of these goods and presented them to the court for confiscation violate Article 3, item 33 of the WCTA (confiscation of property)?[109] JYI No. 3676 ruled that the stated policy had nothing to do with Article 43 of the Hague War Regulations. In addition, the scenario did not constitute a confiscation of property under the WCTA.[110] Once again, the JYI did not expand the definition of war crimes.

From the three cases above, it is clear that when dealing with conventional war crimes, the Judicial Yuan considered not only the stipulation of the WCTA but also the counter-stipulations in international law. More importantly, when there was a dispute on legal interpretations, the Judicial Yuan tended to choose the ones endorsed by international law and international legal scholars.

4.4 Hindering the WCTA's intention to promote Chinese nationalism

As demonstrated in Section 3.3, the WCTA's definition of crimes against humanity disregards the Nuremberg and Tokyo Charters concerning the nationality of victims. As long as victims were racially Chinese, regardless of their citizenship, the WCTA could consider hurting them a crime against humanity. In this way, the government incorporated the concept of the 'Chinese race' in WCTA to promote Chinese nationalism.

The drafters of the WCTA also intended to apply this law to cases involving Taiwanese victims. China ceded Taiwan to Japan in 1895 after the First Sino-Japanese War. During the Second World War, Taiwanese people were of Japanese nationality. China's intention, however, was to claim its motherland status over the Taiwanese, even under Japanese colonial rule.

The JYIs emphasized the importance of nationality before and after the promulgation of the WCTA. Before the WCTA took effect on 24 October 1946, there were cases of ethnically Japanese nationals torturing ethnically Japanese citizens or Taiwanese people with Japanese nationality. The MND requested the Judicial Yuan to interpret whether these cases would fall under the jurisdiction of war crimes trials or the normal criminal court or not.[111] On 20 August 1946, JYI No. 3191 ruled that in such situations, these cases should be tried in ordinary criminal courts according to the Criminal Procedure Code instead of under war crime jurisdictions.[112] In other words, the law should treat Japanese and Taiwanese in the same way. On 7 December 1946, regardless of the promulgation of the WCTA, JYI No. 3314 ruled again that if a Japanese citizen tortured a citizen from his country or a Taiwanese person, it should not fall into the

[108]Judicial Yuan, 'Yuanjiezijieshi di 3563 hao' [Judicial Interpretation No. 3563], *Shifayuan Dangan* [Judicial Yuan archive], Academia Historica Archive No. 015-010311-0088 (1947).

[109]MND, 'Sifayuanyuanjiezi di 3676 Hao Jieshishengqingshu' [The Written Submission for JYI No. 3676], *Shifayuan Dangan* [Judicial Yuan archive], Academia Historica Archive No. 015-010311-0098 (1947).

[110]Judicial Yuan, 'Yuanjiezijieshi di 3676 hao' [Judicial Interpretation No. 3676], *Shifayuan Dangan* [Judicial Yuan archive], Academia Historica Archive No. 015-010311-0098 (1947).

[111]MND, 'Sifayuanyuanjiezi di 3191 Hao Jieshishengqingshu' [The Written Submission for JYI No. 3191], *Shifayuan Dangan* [Judicial Yuan archive], Academia Historica Archive No. 015-010311-0040 (1946).

[112]Judicial Yuan, 'Yuanjiezijieshi di 3191 hao' [Judicial Interpretation No. 3191], *Shifayuan Dangan* [Judicial Yuan archive], Academia Historica Archive No. 015-010311-0040 (1946).

https://doi.org/10.1017/S0922156524000232 Published online by Cambridge University Press

jurisdiction of war crime courts. JYI No. 3314 also reiterated that JYI No. 3191 was still a binding interpretation.[113]

These two cases show that senior Chinese judges recognize the legality of the Japanese nationality of Taiwanese persons. After all, in 1895, Japan acquired Taiwan according to the Treaty of Shimonoseki, which was signed and ratified by both China and Japan. Despite the fact that the MND attempted to include Taiwanese people in the Chinese race, it could not ignore the legal fact that the Taiwanese people were of Japanese nationality during the war.

4.5 JYIs restrained the MND's revenge on Taiwanese people

After the war, China claimed that all Taiwanese people 'regained' Chinese nationality.[114] This situation provoked a controversy in post-war China: were Taiwanese people domestic traitors (*hanjian*) or war criminals?[115] These two were mutually exclusive dichotomies. Only Chinese citizens could be traitors, while war criminals were confined to 'alien combatants and non-combatants'. An MND report to the Executive Yuan in 1948 gave two examples. First, although Chen Xingcun donated a significant amount of money to the Japanese Navy and a few fighter aircraft for them to bomb China, he was not guilty as a traitor because he had Japanese nationality. Second, Xie Luxi manipulated the financial market in Tianjin in co-operation with the Japanese and purchased a great amount of food for the Japanese, but he was not prosecuted as a traitor because he was not with Chinese citizenship.[116]

The Chinese government officials clearly acknowledged the distinction. In August 1942, when negotiating the establishment of the UNWCC, the UK suggested that the treatment of domestic traitors should be distinguished from that of enemy war criminals: the former should be tried by domestic criminal law – international treaties or agreements should not apply.[117] In 1944, Liang Yuen-li, a Chinese representative, defined traitors as:

> Persons, nationals, or former nationals, of the requesting State who is charged with or convicted of giving aid or comfort to the enemy or of an offense committed with the intent to further the cause of the enemy or of an offense committed by means of the power or opportunity afforded by a state of war or armed hostilities or by the hostile occupation of the territory of the requesting State.[118]

This definition was adopted by the UNWCC on 29 August.[119]

The legal consequences of traitors and war criminals were different. In 1938, the Nationalist government ordained the Traitor Punishment Act. This act defined a traitor as a person who communicates with a foreign enemy state, induces a person in the armed services to surrender, or works as supporting staff for an enemy. The Judicial Yuan once held that the Traitor Punishment

[113]Judicial Yuan, 'Yuanjiezijieshi di 3314 hao' [Judicial Interpretation No. 3314], *Shifayuan Dangan* [Judicial Yuan archive], Academia Historica Archive No. 015-010311-0058 (1946).

[114]See Ministry of Interior, *supra* note 39. S. Y. Tang, 'Huifuguoji de Zhengyi: Zhanhou Luwaitaiwanren de Fujiwenti (1945-1947)' [Establishing of Nationality of Overseas Formosans and Their Problems, 1945–1947], (2005) 17(2) *Renwen ji Shehui kexuejikan*, 393.

[115]S. Lan, '(Re-)Writing History of the Second World War: Forgetting and Remembering the Taiwanese-native Japanese Soldiers in Postwar Taiwan', (2013) 21(4) *Positions: East Asia cultures critique* 801, at 808.

[116]MND, 'Wei chengfu taiwan guodadaibiao' [In order to prepare a rely to the National Congress Representative from Taiwan], *Xingzhengyuan Dangan* [Administrative Yuan archive], Academia Historica Archive No. 014-060100-0162 (1948).

[117]MOFA, 'Zhuying Shiguan zhi Waijiaobu Daidian Lunzi di 3514 Hao' [Chinese Embassy in the UK to Ministry of Foreign Affairs File Number: Lunzi 3514], *Waijiao Dangan* [MOFA archive], Academia Historica Archive No. 172-1/0905 (1942).

[118]As cited in W. Lai, 'Forgiven and Forgotten: The Republic of China in the United Nations War Crimes Commission', (2012) 25(2) *Columbia Journal of Asian Law* 306, at 322.

[119]Ibid.

https://doi.org/10.1017/S0922156524000232 Published online by Cambridge University Press

Act was the *lex specialis* of treason under Chinese Criminal Law.[120] In addition to the possibility of the death penalty or a lengthy prison sentence, if a person was sentenced as a traitor, the government was entitled to confiscate all of his property. Furthermore, the Traitor Punishment Act stipulated that a person who worked for the Japanese military or Japanese political organizations would be barred from running for office or public service in China. If the traitor was an attorney, his bar admission would be suspended. In other words, a guilty traitor would not only be executed or sent to jail but also be deprived of property and some rights to work. The MND 1948 Report also pointed out that the punishment prescribed in the WCTA was 'much milder' than the Traitor Punishment Act.[121]

Many Taiwanese men would be traitors under the Traitor Punishment Act because they were conscripted by Japan and were more likely to have assisted the Japanese army. The MND 1948 Report indicated that, right after the end of the war, it received many private reports accusing Taiwanese people of being traitors. These reports did not end until the Judicial Yuan delivered JYI. 3078 on 25 January 1946,[122] which established that since Taiwanese people were Japanese nationals and thus were conscripted to join the Japanese armed forces, they should be treated in accordance with international law rather than the Traitor Punishment Act;[123] the WCTA of 24 October 1946 also followed the JYI's decision on this issue.[124]

Despite JYI 3078, the Shanghai High Prosecutor's Office vehemently argued in July 1946 that some Taiwanese should be treated as traitors rather than war criminals, assuming that the Taiwanese had been Chinese citizens working for the enemy. Shanghai High Prosecutors argued in a submission to the Judicial Yuan that during the war, some Taiwanese people bullied Chinese people by relying on the power of the enemy. Some Taiwanese were even crueller than the Japanese. Furthermore, Chiang Kai-shek had once indicated that 'during the war, if Taiwanese people committed crimes harming the citizens, they should be accused as traitors and should not be magnanimously treated'.[125]

Even with Chiang Kai-shek's guidelines, the Judicial Yuan rejected the prosecutors' submission twice. In JYI No. 3313, the Judicial Yuan once again emphasized that if Taiwanese people were Japanese citizens, they should be treated pursuant to international law.[126]

In addition, the MND requested the Judicial Yuan to interpret whether the war crimes tribunal had the authority to impose ancillary punishment, which includes depriving the defendants of the right to vote, the right to be a candidate in an election, and the right to be a public servant. JYI No. 3222 ruled that ancillary punishment did not apply to war criminals.[127] Given that Taiwanese people could not be treated as traitors, but only as war criminals, they were not subject to ancillary punishment. As a result, the Taiwanese people retained a chance to serve the government. In short, the Judicial Yuan invoked international law to prevent Taiwanese people from being declared traitors.

In most cases, the Judicial Yuan limited the scope of the WCTA, hindered the intent to promote Chinese nationalism, and restrained the MND's revenge on Taiwanese people by interpreting the WCTA per international law. Since Judicial Yuan meetings comprised senior

[120]Judicial Yuan, 'Yuanjiezi jieshi di 3078 hao' [Judicial Interpretation No. 3078], *Shifayuan Dangan* [Judicial Yuan archive], Academia Historica Archive No. 015-010311-0024 (1946).

[121]See MND, *supra* note 116.

[122]Ibid.

[123]See Judicial Yuan, *supra* note 120.

[124]See MND, *supra* note 116.

[125]Shanghai High Prosecutor's Office, 'Sifayuanyuanjiezi di 3313 hao jieshishengqingshu' [The Written Submission for JYI No. 3313], *Shifayuan Dangan* [Judicial Yuan archive], Academia Historica Archive No. 015-010311-0057 (1946).

[126]Judicial Yuan, 'Yuanjiezijieshi di 3313 hao' [Judicial Interpretation No. 3313], *Shifayuan Dangan* [Judicial Yuan archive], Academia Historica Archive No. 015-010311-0057 (1946).

[127]Judicial Yuan, 'Yuanjiezijieshi di 3222 hao' [Judicial Interpretation No. 3222], *Shifayuan Dangan* [Judicial Yuan archive], Academia Historica Archive No. 015-010311-0044 (1946).

https://doi.org/10.1017/S0922156524000232 Published online by Cambridge University Press

Supreme Court judges, their interpretations embodied the endeavours of judicial elites to comply with international law.

5. Conclusion

International law played a prominent role in providing a modern legal basis to the Republic of China for trying foreigners, as well as shaping the politics of war crime trials. While existing historiography suggests that the political leaders of Republican China adopted a lenient approach to war crime trials, this article reveals that the MND intended to punish Japanese war criminals and Taiwanese defendants more severely, as well as use war crime trial laws to support China's hegemonic status in post-war Asia. Invoking international law to provide the basis for the trials, the drafters of the WCTA attempted to claim extraterritorial rights for overseas Chinese and attempted to extend Chinese imperialism to Taiwan, Hong Kong, and potentially other borderlands. The WCTA also departed from international law in stipulating a broader scope, adopting stricter liability, and promoting Chinese nationalism. However, the Judicial Yuan limited the scope of the WCTA, hindered the government's intent to promote Chinese nationalism, and restrained the MND's revenge on Taiwanese people by interpreting the WCTA per international law.

In contrast, Communist China adopted a less legalist approach to war criminal trials. The new government established in 1949 detained 1,109 Japanese citizens.[128] In April 1956, the National People's Congress passed the 'Decision on Dealing with Japanese War Criminals Who Invaded China', which served as the legal ground for war criminal trials in Communist China. The Decision, comprised of only six points within one page, had no stipulations on the definition of war crimes, no source of law, nor any punishments the court could select from.[129] In the end, only 45 defendants were sentenced to eight to 18 years of imprisonment with no death penalty verdict at all. The others were all pardoned.[130]

Kirsten Sellars argues that 'the trials in Asia have operated as laboratories for international law. Under their auspices, legal cultures – both local and imported – have cross-fertilised and mutated'.[131] Although, as of today, Asia has relatively fewer states parties to the Rome Statute of the International Criminal Court, Nationalist China, which adopted the legalist approach and where legal elites resorted to international law to prevent the regime from seeking revenge, serves as a case in which international law shaped national laws, policies, and court decisions, thereby contributing to the broader field of international criminal jurisprudence.

[128]O. Takeshi, 'The People's Republic of China's "Lenient Treatment" Policy towards Japanese War Criminals', in K. Sellars (ed.), *Trials for International Crimes in Asia* (2016), 145, at 152.

[129]Ibid., at 163.

[130]Ibid., at 164–5.

[131]K. Sellars, 'Introduction', in Sellars, *supra* note 128, at 24.

Cite this article: Chu M (2024). Competing interpretations of international law: Law and politics in the war crimes trials of Nationalist China, 1946–1949. *Leiden Journal of International Law*. https://doi.org/10.1017/S0922156524000232

https://doi.org/10.1017/S0922156524000232 Published online by Cambridge University Press