

# Criminal Justice for World War II Atrocities in China

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Following World War II ('WWII'), the Allied Powers instigated trials of those responsible for the war and war atrocities both in Europe and in the Asia-Pacific region. Having been one of the main theatres of war and a country that bore the full brunt of Japanese atrocities, China was deeply involved in the Tokyo international crimes process and held many national trials of her own. This policy brief reviews the trials that dealt with WWII atrocities committed on Chinese territory. It points out that criminal justice for mass atrocities has its own limitations; some are inherent in the criminal justice system, while others pertain to the particular post-war context. The brief also examines the public awareness of these trials in China, and calls for wider discussion of jurisprudence and legal documents as well as for more in depth research.

## 1. Trials: Tokyo and National

In January 1946, 11 Allied Powers set up the International Military Tribunal for the Far East ('IMTFE') in Tokyo. It conducted trials of 25 Japanese nationals from 1946 to 1948. It was modelled on the International Military Tribunal ('IMT') at Nuremberg. The crimes covered by the Charter of the IMTFE were thus the same as in Nuremberg, namely crimes against peace, war crimes and crimes against humanity.

Although the IMTFE's jurisdiction covered three crime categories, the Tokyo trials focused on crimes against peace. According to article 5 of the IMTFE Charter, the Tribunal had jurisdiction only over those individuals who were "charged with offences which include Crimes against Peace". Because "crimes against peace" was defined under paragraph (a) of article 5, those charged with these crimes were known as "Class-A War Criminals". Those who were charged solely under article 5(b) (conventional war crimes) and article 5(c) (crimes against humanity) were referred to as "Class-B" and "Class-C" war criminals respectively, and left to national authorities.

National trials against Japanese defendants were car-

ried out throughout the Asia-Pacific region. For the atrocities committed in China, the trials conducted in Mainland China and Hong Kong were particularly relevant.

A point to note is that the preparation for national trials commenced well before the end of WWII. In October 1943, the Allied Powers set up a United Nations War Crimes Commission ('UNWCC') to investigate war crimes.<sup>1</sup> In 1944, a Sub-Commission was established in Chungking to examine evidence for atrocities committed in the Asia-Pacific region. The UNWCC and its Sub-Commission did not themselves carry out investigations; they were done instead by national authorities which reported their findings to the UN commissions. In China, a national office was established to investigate cases, reporting to the Chungking Sub-Commission.

The national office drew up a list of alleged war criminals in 1945 and national trials commenced in December 1945. Military tribunals were established in Peking, Shenyang, Nanking, Guangzhou, Jinan, Hankou, Taiyuan, Shanghai, Xuzhou and Taipei to try war crimes. The trials were based on several pieces of legislation promulgated by the Kuomintang ('KMT') government concerning war crimes trials.<sup>2</sup> From 1945 to 1947, 2,435 Japanese defen-

<sup>1</sup> For a more detailed account on the establishment of the UNWCC, see M. E. Bathurst, 'The United Nations War Crimes Commission', in *The American Journal of International Law*, 1945, Vol. 39, No. 3, p. 565. The entire unrestricted part of the UNWCC archive is available in a designated collection in the ICC Legal Tools Database (<http://www.casematrixnetwork.org/icc-legal-tools-database/>).

<sup>2</sup> These included 《国民政府关于战犯审判条例》 (National Government Regulations on Trials of War Criminals), 《军事委员会关于战犯审判办法》 (Military Commission Rules on Trials of War Criminals), 《军事委员会关于战犯审判办法试行细则》 (Measures for the Implementation of the Military Commission Rules on Trials of War Criminals), all promulgated in 1946, reprinted in 胡菊蓉 (HU Jurong, ed.), 《南京大屠杀史料集24: 南京审判》 (*Collection of Historical Materials on the Nanking Massacre, Vol. 24: The Nanking Trials*), 凤凰出版社 (Phoenix Publishing), 江苏人民出版社 (Jiangsu Renmin Press), 2006, pp. 28-46.

dants were tried before these tribunals, 149 of whom were eventually sentenced to death.<sup>3</sup>

The Hong Kong trials commenced slightly later. They were conducted from March 1946 to December 1948 by British military courts based in Hong Kong. The cases concerned crimes committed in the British colonial territory of Hong Kong, as well as in Taiwan and Mainland China if committed against British or Commonwealth citizens.<sup>4</sup> In total, there were some 46 trials of 123 individuals of whom 14 were acquitted.<sup>5</sup> These cases concerned the maltreatment of persons taken into the custody of the Japanese military police force, the Kempeitai, as well as war crimes committed in Japanese prisoner of war camps.<sup>6</sup>

Perhaps even less known and discussed are the trials conducted by the People's Republic of China (the 'PRC') in 1956. These trials took place in Shenyang and Taiyuan before two *ad hoc* military tribunals of the Supreme People's Court ('SPC'). Altogether 45 Japanese suspects were tried. At that time, there were more than 900 additional Japanese internees in China, transferred from the Soviet Union in 1950 as suspected war criminals. They were announced "exempt from prosecution", released and returned to Japan.

All 45 defendants in the 1956 trials pleaded guilty, were convicted, and then released and returned to Japan (except one who died of illness while in detention).<sup>7</sup> This stands in sharp contrast with the other post-WWII war crimes trials, where most of the defendants, even in the face of irrefutable evidence, denied their guilt. Interestingly, after returning to Japan, the convicted – together with the other internees who were returned to Japan – set up a pacifist organization known as the "Association of Returnees from China" (中国归还者联络会, often abbreviated as "Chukiren" according to its Japanese pronunciation), and devoted the rest of their lives to serving in pacifist movements.

What made this possible was a "re-education" and "reform" process which the former internees underwent while

in the Chinese Management Centre. This involved them receiving "study materials" which denounced the militaristic ideology they had been previously exposed to.<sup>8</sup> They were asked to recall the atrocities they had committed in detail and to show their remorse towards the victims.<sup>9</sup> Thus, before the trials started, the internees were already successfully "reformed". The trials, therefore, served principally as a formal closure of the whole process and a public relations exercise.

From a legal perspective, the 1956 trials were flawed in many ways. For example, the substantive law on which the trials were conducted did not clearly establish the crimes for which the defendants were being tried, let alone provide clear and legally sound definitions.<sup>10</sup> It is clear that the whole process did not aim at administering criminal justice; rather, it was designed with the future in mind. The purpose was to "restore" the humanity of the "war criminals", so that they could become "friends" of the Chinese people and thus help contribute to reconciliation between the perpetrators and victims, and ultimately between the two nations.<sup>11</sup> In many respects, this process could serve as an interesting example of early transitional justice practice.

## 2. Limitations: Criminal Justice for Mass Atrocities

Since its inception, the Tokyo trials were the subject of various criticisms. It is often suggested that Emperor Hirohito, who was not among the accused at Tokyo, should have been held accountable as one of those most responsible for the prosecution of the war. And in terms of atrocities committed on the ground, some of the most appalling crimes were not covered by the charges, for example the experimentation on living human beings conducted by the infamous Unit 731 in Harbin, in northeast China.

The reasons behind this were mainly political. The granting of immunity to Emperor Hirohito served the dual

<sup>3</sup> 刘统 (LIU Tong), "国民政府审判日本战犯概述 (1945–1949)" (Overview of the Trials of Japanese War Criminals by the KMT Government, 1945–1949), in 《民国档案》 (The Republic of China Archives), January 2014, p. 72.

<sup>4</sup> Suzannah Linton, 'Rediscovering the War Crimes Trials in Hong Kong, 1946–48', in *Melbourne Journal of International Law*, 2012, Vol. 13, p. 297.

<sup>5</sup> *Ibid.*, p. 285.

<sup>6</sup> *Ibid.*, pp. 285–286.

<sup>7</sup> 任海生 (REN Haisheng, ed.), 《共和国特赦战犯始末》 (*The Whole Story of PRC's Special Pardon of War Criminals*), 华文出版社 (Sino-Culture Press), 1995, p. 79; 中国归还者联络会 (Association of Returnees from China, or Chukiren, ed.), 《永远的忏悔——归国日本战犯的后半生》 (*Perpetual Repentance: The Later Lives of the Returned Japanese War Criminals*), translated by 周维宏 (ZHOU Weihong), 张兴 (ZHANG Xing), 赵峻 (ZHAO Jun), 解放军出版社 (People's Liberation Army Publishing House), 1999, pp. 52–56.

<sup>8</sup> 中国归还者联络会 (Association of Returnees from China, ed.), 《我们在中国干了些什么——原日本战犯改造回忆录》 (*What Did We Do in China: A Memoir of the Reform of the Former Japanese War Criminals*), translated by 吴浩然 (WU Haoran), 李锡弼 (LI Xibi), proofread by 陈万枫 (CHEN Wanfeng), 中国人民公安大学出版社 (China People's Public Security University Publishing), 1989, pp. 60–61, 70, 149.

<sup>9</sup> *Ibid.*, pp. 94–98.

<sup>10</sup> See 《关于处理在押日本侵略中国战争中战争犯罪分子的决定》 (The Decision on Dealing with the Detained War Criminals during the Japanese Aggressive War against China).

<sup>11</sup> Then Premier ZHOU Enlai indicated on different occasions that the aim of the re-education process was to make the internees "friends", and that they could carry a positive message about China when returning to Japan. See, for example, 李甫山 (LI Fushan), "侦讯、起诉与免诉日本战犯经过" (The process of investigating, prosecuting and exempting from prosecution Japanese war criminals), in 全国政协文史资料委员会 (Committee of Culture and History Data of the CPPCC, ed.), 《战犯改造纪实》 (*Documentary on the reform of war criminals*), 中国文史出版社 (China Culture and History Publishing House), 2000, pp. 173–174.

purposes of preserving public order, and ultimately advancing the United States of America's strategy of converting Japan into an important regional ally.<sup>12</sup> The crimes related to Unit 731 were omitted from indictments in exchange for information.<sup>13</sup> Furthermore, the Tokyo trials only dealt with Class-B and -C crimes if the accused was charged with Class-A crimes at the same time. This led to emphasis being placed on crimes against peace at the expenses of war crimes and crimes against humanity, thereby downplaying the significance of atrocities committed on the ground.

On the other hand, the national trials focused on war crimes. The KMT Law on the Trial of War Criminals listed 38 war crimes, including wilful killing, execution of hostages, rape, collective punishment, targeting hospitals, mistreating prisoners of war, and pillaging cultural property or other artworks. Nationwide investigations were conducted, with considerable testimony collected from victims and witnesses.

However, although the KMT government considered the investigation a task of historical significance and urged the utmost effort on the part of its local organs, the process of investigation remained very difficult and the evidence collected was limited. On the one hand, the political situation at that time prevented the KMT government from moving into many of the rural areas controlled by the Chinese Communist Party ('CCP') where some of the worst atrocities had been committed.<sup>14</sup> On the other, the displacement of civilians during the war made it difficult for local authorities to contact people under their jurisdiction. Further, very often the victims and witnesses were not able to identify the direct perpetrators.<sup>15</sup> Thus, although large amounts of testimony were collected, much of it had limited value as evidence in a criminal trial.

The Hong Kong trials seemed to have been better organised.<sup>16</sup> They completed the picture by providing a helpful record of Japanese atrocities committed in Hong Kong, as per the territorial jurisdiction of the tribunals.

The limitations of, and difficulties encountered by, the aforementioned trials demonstrate the limited scope of criminal justice after mass atrocities. It will often be impossible to cover all the atrocities committed, or to punish all the perpetrators. In fact, compared to the scale and scope of the atrocities in question, only a very small number of perpetrators are often tried and punished.

There are many reasons for this. First, the war left the various national authorities with limited judicial capacity to deal with crimes committed on such a large scale. Second, the chaos of war resulting in the displacement of large numbers of people and difficulties in travelling made it difficult to collect evidence that could meet the strict standard of criminal trials. Third, in a post-war context, seeking criminal justice may not always be the top priority. Decisions are frequently influenced by other concerns, such as the need to re-establish social stability and order, or territorial control. In the post-WWII Sino-Japanese context, such considerations led directly to some of the major decisions that were to have long-term impact, such as the one not to prosecute Emperor Hirohito and the Nanking Tribunal's acquittal of Okamura Yasuji.<sup>17</sup> Finally, some of the limitations are those inherent in criminal proceedings themselves, for example, the invisibility of victims and the temporal and spatial limitations of what the trials could address.

In this connection, the 1956 Chinese trials are of a different nature. As already noted, these trials formed only a small part of the whole process through which China dealt with Japanese war criminals. This process was one that went beyond criminal justice, seeking primarily reconciliation rather than retributive justice. This policy brief suggests that a detailed review of this approach is warranted. In post-mass atrocity situations, criminal justice may not be the only solution, and a stand-alone criminal justice mechanism is often unable to meet the multifarious and competing needs of a war-shattered society.

### 3. Legacy: The Impact of the Trials in China

Mass atrocity trials require significant financial and human investments. They face high expectations, not only to deliver justice in the cases before them, but also to leave some long-term legacy for the future. Despite the investments and high expectations, the post-WWII trials have so far had limited impact in China.

Of the trials discussed above, the Tokyo trials are certainly the most prominent. But for the Chinese public, they only became better known recently, due in large part to a popular movie in 2006.<sup>18</sup> In terms of more serious discussions of the trials or academic research, there were a few books published in the 1940s and 1950s, and later in the 1980s, but all on general aspects of the trials.<sup>19</sup> The trial

<sup>12</sup> Caroline Joan (Kay) S. Picart, 'Attempting to Go beyond Forgetting: The Legacy of the Tokyo IMT and Crimes of Violence against Women', in *East Asia Law Review*, 2012, Vol. 7, pp. 16–17.

<sup>13</sup> See generally, Sheldon Harris, *Factories of Death: Japanese Biological Warfare 1932–45 and the American Cover-up*, Routledge, 1995.

<sup>14</sup> LIU Tong, *supra* note 3, p. 76.

<sup>15</sup> *Ibid.*

<sup>16</sup> See generally, Suzannah Linton, *supra* note 4.

<sup>17</sup> See further discussion in section 3.

<sup>18</sup> Telling enough, if we search "Tokyo Trials" on Baidu, which is the most widely used Internet search engine in China, we would get almost one full page of information on the movie, with only the last entry being about the trials.

<sup>19</sup> For a more detailed overview of the existing literature in China, see 程兆奇 (CHENG Zhaoqi), "中国东京审判研究的新进展" (New Development of the Research on Tokyo Trials in China), in 《民国档案》 (*The Republic of China Archives*), January 2014, pp. 59–60.

records of the Tokyo trials were published in China for the first time in 2013, as a reprint of the originals in English.<sup>20</sup> More research efforts are now being focused on the collecting, translating and editing of relevant documents and materials.<sup>21</sup> This is to be welcomed, although it highlights that research on Tokyo trials in China is still at an early stage.

The publicity received by the national trials has been even worse, especially the KMT trials. A major reason for this is political. The CCP did not recognize the legitimacy of the KMT trials, especially because Okamura Yasuji, then Commander-in-Chief of the Japanese China Expeditionary Army, was declared not guilty by the Nanking Military Tribunal. Okamura was extensively involved in the war and acted as commander in chief in major engagements from 1938 until the end of WWII. While widely believed to be a major war criminal, he acted as KMT's expert military adviser in fighting the CCP. It was thus in the interests of the KMT to have Okamura found not guilty at the Nanking Tribunal.<sup>22</sup> Another reason for the insufficient attention and research into the trials include the lack of first-hand research materials such as trial records.<sup>23</sup>

The Hong Kong trials were conducted in English by British courts and concerned cases that either happened in Hong Kong or were committed against British or Commonwealth citizens. It is thus understandable that there has been little coverage of these trials in Mainland China. Recently, these cases have been made available online.<sup>24</sup> Although the case files are in English, a recent book on these trials is in the process of being translated into Chinese.<sup>25</sup>

The 1956 trials are a different story altogether. In terms

<sup>20</sup> 东京审判文献出版编辑委员会 (Tokyo Trials Documents Publishing and Editing Committee), 《远东国际军事法庭庭审记录》 (*Trial Records of the International Military Tribunal for the Far East*), 国家图书馆出版社 (National Library of China Publishing House), 上海交通大学出版社 (Shanghai Jiaotong University Press), Beijing, Shanghai, 2013. The transcripts are fully available in the ICC Legal Tools Database.

<sup>21</sup> See CHENG Zhaoqi, *supra* note 19, p. 59.

<sup>22</sup> 罗军生 (LUO Junsheng), “石美瑜与战后南京对日军战犯的审判” (SHI Meiyu and the Trials of Japanese War Criminals in Nanking after the War), in 《党史纵览》 (*Overview of Party History*), 2006, Issue 1, p. 26.

<sup>23</sup> LIU Tong, *supra* note 3, p. 73.

<sup>24</sup> Suzannah Linton, *supra* note 4, p. 284.

<sup>25</sup> The Chinese Initiative on International Criminal Justice has undertaken the translation of the book *Hong Kong's War Crimes Trials*, edited by Suzannah Linton, Oxford University Press, 2013.

of documenting the crimes concerned, Chukiren members published many books and delivered public speeches on the atrocities. They offered invaluable first-hand accounts from the perspective of the perpetrators, which is of particular significance as those who experienced the war are ageing and their memory is starting to fade. In terms of public awareness, the trials have received much less attention than the re-education process. The available literature depicts the latter as an act of forgiveness on the part of the Chinese,<sup>26</sup> and as a case study in early works of penology.<sup>27</sup>

Public knowledge and understanding in China of the criminal prosecution of Japanese atrocities committed during WWII are clearly insufficient. This situation only seems to have been gradually changing in recent years, with increasing interest shown in the Tokyo process and other trials. Research institutions on the Tokyo trials are in the process of being established. In the spring of 2014, Fudan University Law School held a seminar on war crimes trials in Asia, and the Centre for International Law Research and Policy has launched a broadly based research project on the historical origins of international criminal law, including conferences in Hong Kong and Delhi.

Hopefully, these will serve as only the start of increased awareness and better understanding of the WWII mass atrocity trials in China, which are not only of significance to the development of international criminal law, but have important implications for our understanding of history and reality.

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<sup>26</sup> See, for example, 叔弓 (SHU Gong), 张巾 (ZHANG Jin), 《灵魂决战：中国改造日本战犯始末》 (*The Final Battle of the Soul: The Process of China's Reform of Japanese War Criminals*), 人民出版社 (People's Publishing House), Beijing, 2010.

<sup>27</sup> See, for example, 许章润 (XU Zhangrun), “改造日本战犯成功实践的法律思索” (Reflections from a Legal Theory Perspective on the Successful Practice of Reforming Japanese War Criminals), in 许章润 (XU Zhangrun), 孙晓雳 (SUN Xiaoli) *et al.*, 《劳改法学理论新探》 (Latest Exploration into the Legal Theory on Labour and Reform), 中国人民公安大学出版社 (Chinese People's Public Security University Press), Beijing, 1991, p. 306.

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