

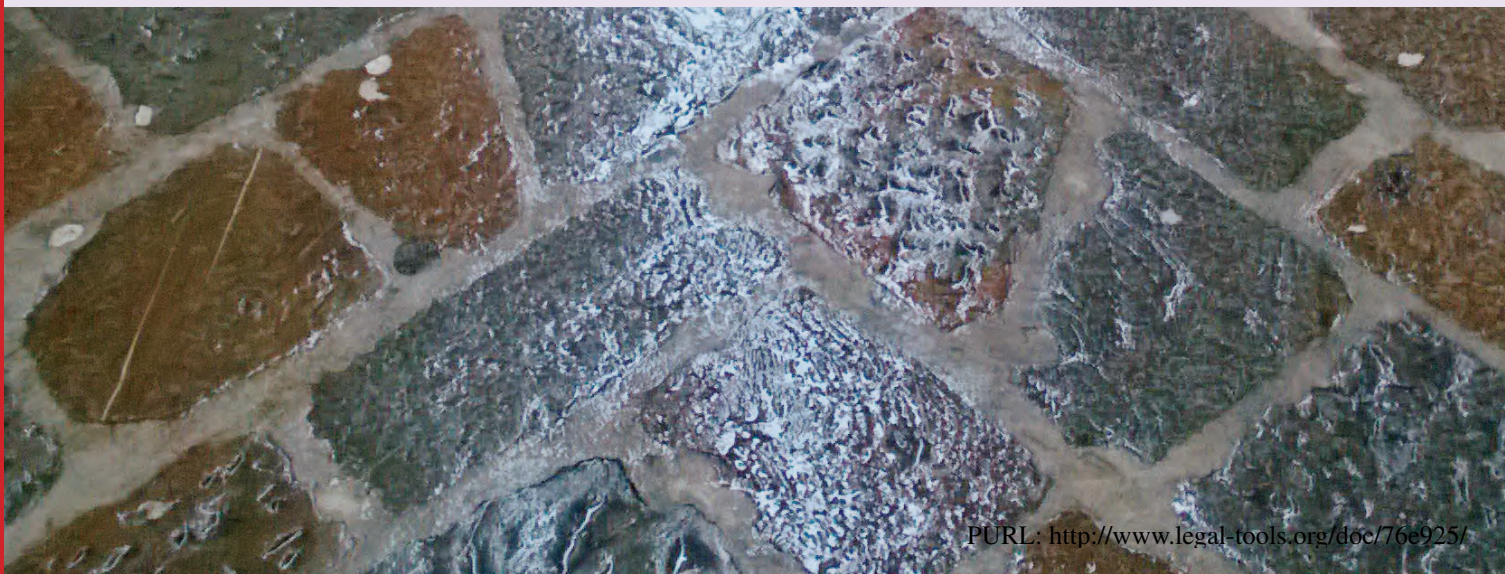
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The Forgotten Legacy: China's Post-Second World War Trials of Japanese War Criminals, 1946–1956

ZHANG Tianshu*

29.1. Introduction

Alongside the trial of the International Military Tribunal for the Far East ('IMTFE') held in Tokyo against Class A war criminals, the national trials involving Class B and C Japanese war criminals were conducted in the territory of states with which Japan had been at war, including China, Korea, the Philippine and others. In 1946 the Nationalist government of the Republic of China ('ROC') held the trials of Japanese war criminals in ten cities. The ROC trials sentenced 145 Japanese war criminals to death and 300 to limited or lifetime imprisonment.¹ Ten years later, the government of the People Republic of China ('PRC') established a Special Military Tribunal to bring detained Japanese prisoners to justice in two separate proceedings held in Shenyang and Taiyuan. This time, no one was sentenced to death or life imprisonment.²

Although two different governments conducted the Chinese war crimes trials, it is worth noting that these trials demonstrated, to some extent, a similar attitude towards international law. This entailed adopting a Chinese approach to deal with the Japanese war criminals, while also embracing international law and principles.

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¹ Chen Jing, "The Trial of Japanese War Criminals in China: The Paradox of Leniency", in *China Information*, 2009, vol. 23, no. 3, pp. 447–48.

² *Ibid.*, p. 448.

Because of the Chinese Civil War – which resumed in 1946 – and the isolation of the PRC government at the international level after it came to power in 1949, the contribution of these Chinese war crimes trials to international criminal law is not well-known in the wider world. Current research concerning these trials mainly discuss them from the perspectives of history and foreign policy. Little attention has been paid to the legal value of the Chinese war crimes trials, in which international law was involved and applied. In attempting to fill this gap, this chapter focuses on the coherence of the applicable law in the war crimes trials and its reflections on the development of international law. It is not the purpose of discussion here to examine every angle of the Chinese war crimes trials, but merely to critically review the laws upon which these trials were based and to analyse how international law was involved in the process and substance of the trials.

The chapter is organised into three parts. The first part addresses the ROC war crimes trials that started in 1946. Three main issues are dealt with in this part: the legality of the ROC national trials against the Japanese war criminals, the applicable law adopted by the ROC war crimes provisions and two most important cases among the pre-1949 trials, namely the Sakai Takashi case and the Tani Hisao case. In the second part, the chapter explores the PRC's war crimes trials held in Shenyang and Taiyuan in 1956. Similarly, this part assesses the PRC trials based on three grounds: the legitimacy of trying the Japanese war criminals, the applicable law invoked by the Special Military Tribunals and the main features of the judgments. Last, there is a comparative discussion on the Chinese war crimes trials and an assessment of their legacy and contribution to international law.

29.2. War Crimes Trials Under the Republic of China

On 14 August 1945 a defeated Japan surrendered to the Allies. The following day the Emperor of Japan delivered a radio broadcast – “the Imperial Rescript on the Termination of the War” – announcing to his people that Japan accepted the Proclamation Defining Terms for Japanese Surrender (‘Potsdam Declaration’) and unconditionally surrendered to the Allied states.³

³ Zhang Xianwen, *A History of Republic of China*, Nanjing University Press, Nanjing, 2006, p. 608.

Before officially processing trials against Japanese war criminals who committed most serious crimes in China, the ROC Supreme National Defence Council, which served as the highest military authority, delivered an Opinion on Dealing with Issues on Japan ('Opinion') on 12 August 1945.⁴ This Opinion consisted of two parts. An emphasis was placed upon the basic principle set out in Article 1, which provided for "[d]ealing with issues on Japan shall be in accordance with the Potsdam Declaration and the principles jointly decided by the Allies". Further, the Opinion pointed out that the purposes of post-war efforts were "to reform Japan, to democratise its system, to make it realise the value of peace, and to understand China and the Allies".⁵

On 6 November 1945 the Chinese Ministry of War, the General Staff, Ministry of Foreign Affairs, Ministry of Justice, the Secretariat of Executive Yuan, and the Far Eastern and Pacific Sub-Commission ('Sub-Commission') of the United Nations War Crimes Commission ('UNWCC') jointly established the Commission on Dealing with War Criminals ('War Criminals Commission') to specifically undertake the war criminals issue.⁶ The War Criminals Commission's mandate was to formulate policies for war crimes trials, to investigate, arrest and extradite war criminals, and to monitor the process of war crimes military tribunals in general. In February 1946 the Supreme National Defence Council enacted the Regulation on Processing the War Criminals, War Crimes Trial Procedure and Detailed Rules of War Crimes Trial Procedure.⁷ These legal documents provided detailed procedure to arrest, try and execute Japanese war criminals.

Realising that the IMTFE was dealing with Class A war criminals who participated in a joint conspiracy to start and wage war, the ROC government targeted war criminals who committed Class B (war crimes)

⁴ Qin Xiaoyi, *Zhonghua Minguo Zhongyao Shiliao Chubian – Dui Kangzhan Shiqi* [Important Documents Collection of the History of the Republic of China: The Period of the Anti-Japanese War], vol. 7(4), Central Committee of Chinese Nationalist Party, Taipei, 1981, pp. 637–40.

⁵ *Ibid.*, p. 638.

⁶ Hu Jurong, *Zhongwai Junshi Fating Shenpan Riben Zhanfan – Guanyu Nanjing Da Tusha* [Trials of Japanese War Criminals in Chinese and Foreign Military Tribunals: About the Nanjing Massacre], Nankai University Press, Tianjin, 1988, p. 112.

⁷ Ren Xiaoguang, *Zhonghua Minguo Shi* [History of the Republic of China], vol. 11, Zhonghua Book Company, Beijing, 2011, p. 232.

Items	Original detainees	Inadmissible	Not to prosecute	Acquitted	Fixed-term imprisonment	Life imprisonment	Death sentence	Sub-total	Non-war criminals (repariated)	Ending cases	Remarks
Ministry of National Defence	8		58	18	12	10	6	102		144	13 unlisted
Northeast Xing Yuan ⁸	329	13	197	72	23	4	9	318	11		
Wuhan Xing Yuan	232	17	75	91	18	5	5	211		21	
Guangzhou Xing Yuan	961		101	39	37	10	38	255	694	9	33 unlisted
Xuzhou HQ, Department of the Army	81		46	3	11	3	8	71	10		
Shanghai Military Tribunal	316		20	12	12	3	4	51	68		Terminated on 30 June 1947
The Second Sui Jing Qu ⁹	137		40	8	5	1	9	63	74		
Taiyuan Sui Jing Gong Shu ¹⁰	15			4	2	3	2	11		4	
Baoding Sui Jing Gong Shu	180		57	23	20	2	8	130	19	40	
Taiwan Garrison Command	121		69	13	27		1	110	11		
Total	2435	30	661	283	167	41	110	1292	878	218	

Table 1: ROC Military Tribunals for Japanese War Criminals (25 December 1947)¹¹

⁸ Xing Yuan [行辕], is also referred to as “Mobile Barracks of High Command”. This is a Chinese term primarily referring to a ROC government Regional Special Office opened on behalf of the military supreme commander in a particular region, where there was a high-ranking government or military official as the regional representative of the supreme commander-in-chief.

⁹ Sui Jing Qu [绥靖区] refers to the district in the conflict zone set by the ROC government for military and political purposes. The ROC government established a command in each Sui Jing Qu in order to control the district. See also *Central Daily News*, “Sui Jing Qu Shi Zheng Gang Ling” [The Administration Programme in Sui Jing Qu], 22 October 1946.

¹⁰ Sui Jing Gong Shu [绥靖公署] refers to the administrative institution located in the principal city of a Sui Jing Qu.

and Class C (crimes against humanity) crimes in the territory of China. These Japanese war criminals were imprisoned in ten war criminal detention facilities run by Ministry of National Defence. According to the War Crimes Trials Procedure, war crimes military tribunals would be established in Beijing, Nanjing, Hankou, Guangzhou, Taiyuan, Xuzhou, Jinan, Taipei and Shenyang.¹²

From the second half of 1945 to the end of May 1947 the ROC war crimes military tribunals processed 1,178 cases in total, of which 281 were sentenced, 275 not prosecuted, 56 sentenced to death, 76 sentenced to fix-term imprisonment and 84 acquitted.¹³ The general data of the detainees and the trials are illustrated in Table 1.

29.3. Legality of the ROC Military Tribunals and the Instrumental Preparation

It is generally recognised that the Potsdam Declaration constituted a solid foundation for the legitimacy of the ROC war crimes trials.¹⁴ Article 10 of the Potsdam Declaration provided that “stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners”.¹⁵ In a parallel way, the IMTFE corresponded with but did not circumscribe national war crimes trials.¹⁶ Article 3 of the Special Proclamation for Establishment of an IMTFE of 19 January 1946 pointed out: “Nothing in this Order shall prejudice the jurisdiction of any other international, national or occupation court, commission or other tribunal established or to be established in Japan or in any territory of a United Nation with which Japan has been at war, for the trial of war criminals”. Pursuant to these articles, it can be concluded that every victim state that suffered from Japan’s invasion and acts of violence

¹¹ Ren, 2011, p. 234, see *supra* note 7. It should be noted that the total number and the number in each list do not match precisely in the original chart. Here it follows the original.

¹² *Ibid.*, p. 233; Hu, 1988, p. 129 see *supra* note 6.

¹³ Hu, 1988, p. 120, see *supra* note 6.

¹⁴ Long Xingang and Sun Jun, “1956 Nian Tebie Junshi Fating Shenyang Taiyuan Shenpan Yanjiu” [On the Special Military Tribunals Trials of Shenyang and Taiyuan in 1956], in *Literature on Party Building*, 2009, vol. 2, p. 10.

¹⁵ Proclamation Defining Terms for Japanese Surrender, Potsdam, 26 July 1945.

¹⁶ Weng Youli, “Guomindang Zhengfu Chuzhi Riben Zhanfan Shuping” [Comments on the National Government’s Disposal of Japanese War Criminals], in *Journal of Southwest China Normal University (Philosophy and Social Sciences Edition)*, 1998, vol. 6, p. 112.

was entitled to exercise jurisdiction over the Japanese war criminals who had participated in atrocities.

As early as 1942 the ROC government had pronounced that Japan would be held responsible for all the crimes committed in China. Initially, it was the Ministry of Foreign Affairs that was responsible for investigating and collecting relevant evidence. However, it did not function as well as expected. In June 1943 the ROC authorities decided to set up a specific commission to investigate all offences perpetrated on Chinese soil. For this purpose, the Executive Yuan, Ministry of Justice, Ministry of Foreign Affairs and Ministry of War drafted the Rules Concerning the Organisation of an Investigation Commission on Crimes of the Enemy, which was adopted by the Assembly of the Executive Yuan and submitted to the Supreme National Defence Council for filing in June 1943.¹⁷ On 23 February 1944 the Investigation Commission on Crimes of the Enemy was officially established in Chungking (Chongqing). Its mandate was to investigate all crimes perpetrated in China or against Chinese people, in relation to violation of the laws and customs of war, including 1) murder and massacres – systematic terrorism; 2) rape or abduction of women for the purposes of enforced prostitution; 3) forced labour of civilians in connection with the military operations of the enemy; 4) pillage; 5) imposition of collective penalties; 6) deliberate bombardment of undefended places or other non-military objects; 7) attacks on merchant ships without warning; 8) deliberate bombardment of hospitals or other charitable, educational and cultural buildings and monuments; 9) breach of rules relating to the Red Cross; 10) use of deleterious and asphyxiating gases; 11) killing prisoners of war and wounded; 12) producing, selling, transporting drugs, forced planting poppies or opening opium dens providing drugs; 13) illegal construction in occupied territory, and other acts of violations of the laws and customs of war.¹⁸

On 5 March 1945 the Investigation Commission on Crimes of the Enemy, together with the Investigation Commission on Damage and Loss of War, was integrated into the Interior Ministry. In addition, after the surrender of Japan, a special Investigation Commission for Crimes Committed in Nanjing (Nanking) was found on 7 November 1945.¹⁹

¹⁷ Hu, 1988, p. 110, see *supra* note 6.

¹⁸ *Ibid.*, p. 111.

¹⁹ *Ibid.*, 1988, p. 112.

On 6 December of 1945, by approval of the Executive Yuan, the War Criminals Commission was eventually set up in Chungking. Not only were municipal departments engaged in preparation of the ROC war crimes trials but also national institutions like the Ministry of War, General Staff, Ministry of Foreign Affairs, Ministry of Justice and the Secretariat of the Executive Yuan, as well as the Sub-Commission of the UNWCC, an international body. The UNWCC had announced the establishment of the Sub-Commission in June 1944, with its site on the territory of China so as to assist the function of the main UNWCC in London. Although China provided the Sub-Commission with premises in Chungking, at that time the provisional capital of China, it had not been incorporated in the municipal law of China but was a truly international body not subject to any specific municipal legal order.²⁰

Under the guidance of the War Criminals Commission, the Ministry of War was designated to issue warrants to arrest war criminals and other general assignments; the Ministry of Justice embarked on investigating and drafting the war criminals list; the Department of Martial Law of the General Staff was assigned to supervise trial proceedings and executions; the Ministry of Foreign Affairs tackled extradition and translation of war criminals lists which were supposed to be submitted to the Sub-Commission for final review.²¹ On 28 February 1946 the Military Affairs Commission reported to the Supreme National Defence Council that the surrender of Japanese armies in conflict zones was complete, and simultaneously submitted drafts of three legal documents with regards to war criminals and the lists of detention facilities for Japanese war criminals and war crimes military tribunals.²² Since Chinese national trials targeted Class B and C Japanese war criminals, much extradition work needed to be done before the commencement of trials. In October 1946 the ROC trials against Japanese war criminals finally entered into the court process stage.²³

²⁰ United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* ("History of the UNWCC"), His Majesty's Stationery Office, London, 1948, pp. 127–29.

²¹ *Ibid.*, p. 131; Hu, 1988, pp. 112–13, see *supra* note 6.

²² Qin, vol. 2(4), 1981, p. 397, see *supra* note 4.

²³ Ren, 2011, p. 232, see *supra* note 7.

29.4. Applicable Law in the ROC War Crimes Trials

The ROC trials were the first time in history that China put foreign war criminals on trial. No precedent could be followed and no municipal law could be relied on. In order to process, adjudicate and detain Japanese war criminals under rule of law, three war crimes provisions were enacted by the Supreme National Defence Council on 28 February 1946, viz. Regulation on Processing the War Criminals (the ‘Regulation’), War Crimes Trial Procedure (the ‘Procedure’), Detailed Rules of the War Crimes Trial Procedure (the ‘Detailed Rules’).²⁴ These three documents have been deemed as the first set of rules governing war crimes process in China.

29.4.1. Initial War Crimes Provisions, February 1946

The Regulation on Processing the War Criminals contained 15 Articles with regard to the process of arrest and detention. Article 1 indicated that arrest was to be directed by the Ministry of War after disarming the Japanese troops and should not disturb the surrender procedure and regional order and peace. Articles 2 and 3 regulated supervision and registration of Japanese prisoners before and after their arrests. From Article 4 to Article 9, the Regulation divided Japanese war criminals into three groups based on which authorities’ control they were under. For instance, pursuant to Article 5, for those under the Japanese government’s control, the War Crimes Commission should notify the ROC Ministry of Foreign Affairs in writing, which would then present a note to the US government without delay, requesting the latter to transmit the note to the Supreme Commander for the Allied Powers (‘SCAP’) in Japan. After arresting the listed war criminals, the SCAP should extradite them to the Chinese authority. Articles 12 and 13 addressed the detention of the convicted war criminals which should be undertaken in the facilities appointed by the Ministry of War. Additionally, Article 14 provided that this Regulation applied to the cases of non-Japanese war criminals as well.²⁵

The subsequent War Crimes Trial Procedure embodied 10 Articles, structuring a framework for applying international law and domestic law together in the trials. Article 1 defined the scope of the accused on trial.

²⁴ Qin, 1981, p. 397, see *supra* note 22.

²⁵ *Ibid.*, pp. 398–99.

With respect to matters not provided for in this Procedure, the tribunal had recourse to the Trials Procedure of the Army, Navy and Air Force and the ROC Criminal Procedural Law. Emphasis should be given to Article 8, which provided the applicable law for the trials, and which explicitly stated: “To convict any war criminal, the tribunal shall apply public international law, international customs, Criminal Law of the Army, Navy and Air Force, other special criminal laws and Chinese Criminal Law”. Although Article 8 did not reveal the hierarchy of the laws, it can be seen from the sequence that international law took precedence over domestic law in this Procedure. In addition, Article 8 also reflected the principle of *lex specialis derogat legi generali*, by putting special criminal laws prior to criminal law in general.²⁶

The Detailed Rules comprised 16 Articles with the purpose of assisting in applying the Procedure. It addressed the recommendation and appointment of judges and prosecutors for each military tribunal, the competence of prosecutors, the right to search of tribunals and its associated agencies, the rights of the defendants and the guarantee of a public hearing.²⁷ However, no provision in the Detailed Rules mentioned the applicable law. It did not interpret what exactly “public international law” or “international customs” contained in Article 8 of the Procedure meant, nor did it refer to any existing international treaties or convention to which China had acceded at that time.

29.4.2. War Crimes Trial Ordinance, October 1946

Acknowledging that the applicable law provided by the Procedure was too broad and ambiguous to implement, the Ministry of National Defence submitted an amendment to the Supreme National Defence Council on 26 August of 1946.²⁸ In its submission, the Ministry of National Defence plainly addressed the following: “Noting that since in our country no appropriate law could be applied for conviction of war criminal, it hence lacks standards for measuring penalty”.²⁹ Therefore, the drafting of a

²⁶ *Ibid.*, p. 399.

²⁷ *Ibid.*, pp. 400–1; Song Zhiyong, “Zhanhou Chuqi Zhongguo De Duiqi Zhengce yu Zhanfan Shenpan” [Chinese Foreign Policy Towards Japan and the Trial of Japanese War Criminals in the Years Immediately after the Second World War], in *Nankai Journal*, 2001, vol. 4, p. 44.

²⁸ Qin, 1981, p. 408, see *supra* note 22.

²⁹ *Ibid.*

more comprehensive war crime provision was imperative. The draft was prepared by the Ministry of National Defence, Ministry of Justice, Ministry of Foreign Affairs and the Secretariat of Executive Yuan, reviewed by legal scholars and experts, and approved by the Legislative Yuan. The final text was eventually named the War Crimes Trial Ordinance (the ‘Ordinance’) and released on 23 October 1946.³⁰

The Ordinance included 40 Articles, four times more than the number of articles in the Procedure. Article 1 directly identified the scope of applicable law: “For conviction and punishment of war criminals, in addition to public international law, the tribunal shall apply the Ordinance. Where matters are not provided in the Ordinance, the criminal law of the Republic of China shall apply”. This Article released a clear signal that public international law had priority over other national laws in the war crimes trials. Taking Article 8 of the Procedure into account, the term “public international law” in the Ordinance should be construed in a broader manner that incorporated “international customs” and even other sources of public international law. Following public international law, the Ordinance would take second place. Failing that, the ROC Criminal Code governed. Observing the language of Article 1, the hierarchy of applicable law for war crimes trials was thus completely clear.

To be more specific, Article 2 provided that when applying the ROC Criminal Code, the tribunals should primarily rely on *lex specialis* regardless of the status of the accused; failing that, general criminal law would apply. Hence, Article 2 not only reflected the principle of *lex specialis* but also ruled out the application of the Criminal Law of the Army, Navy and Air Force. Some commentators have opined that the reason behind this implicit exclusion may mirror the leniency policy adopted by the ROC government.³¹

Compared to the three initial legal instruments mentioned above, the Ordinance improved the practicability and precision of the applicable law in the following aspects. First, Article 3 provided “war criminals” with a definition and divided them into four groups:

- 1) combatants or non-combatants from foreign states who before or during the war conducted the planning, preparation, initiation or waging of war of aggression

³⁰ Song, 2001, p. 45, see *supra* note 27.

³¹ Qin, 1981, p. 393, see *supra* note 22.

against China in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

- 2) who, during the war or hostilities against China, perpetrated crimes directly or indirectly in violation of the laws or customs of war;
- 3) who, before or during the war or hostilities against China, conducted murder, extermination, enslavement, forced labour, deportation, anaesthesia or suppression of free thoughts, forced planting or use of poppies, forced taking or injection of drugs, forced sterilisation, persecutions on political or racial grounds and other inhumane acts committed against Chinese people;
- 4) who, during the war or hostilities against China, committed offences other than 1) to 3), shall be punished according to the ROC Criminal Code.

The identification and clarification of “war criminals” was critical for war crimes trials, as they provided practical scope for the prosecution and enhanced the efficiency of conviction. The characterisation of three groups of war criminals echoed three types of crimes under the IMTFE Charter, namely 1) crimes against peace, 2) conventional war crimes, and 3) crimes against humanity.

Second, the Ordinance listed crimes against humanity with an exhaustive list. Article 4 specified “inhumane acts” incorporated by Article 3(2), which denoted a similar description of crimes against humanity from a contemporary perspective.³² The list of inhumane acts in Article 4 of the Ordinance was as follows:

- i. Murder and massacres – systematic terrorism;
- ii. Putting hostages to death;
- iii. Torture of non-combatants or civilians;
- iv. Deliberate starvation of non-combatants or civilians;
- v. Abduction of women for the purposes of enforced prostitution;³³
- vi. Deportation of non-combatants or civilians;

³² *Ibid.*, pp. 409–11.

³³ It must be noted that Article 4, sub-paragraph 5 was missing in the original text. See *ibid.*, p. 409.

- vii. Internment of non-combatants or civilians under inhumane conditions;
- viii. Forced labour of non-combatants or civilians in connection with the military operations of the enemy;
- ix. Usurpation of sovereignty during military occupation;
- x. Compulsory enlistment of combatants among the inhabitants of occupied territory;
- xi. Attempts to denationalise the inhabitants of occupied territory;
- xii. Pillage;
- xiii. Confiscation of property;
- xiv. Exaction of illegitimate or of exorbitant contributions and requisitions;
- xv. Debasement of the currency an issue of spurious currency;
- xvi. Imposition of collective penalties;
- xvii. Wanton devastation and destruction of property;
- xviii. Deliberate bombardment of undefended places
- xix. Wanton destruction of religious, charitable, educational and historic buildings and monuments;
- xx. Destruction of merchant ships and passenger vessels without warning and without provision for the safety of passengers and crew;
- xxi. Destruction of fishing boats and of relief ships;
- xxii. Deliberate bombardment of hospitals;
- xxiii. Attack or destruction of hospital ships;
- xxiv. Breach other rules relating to the Red Cross;
- xxv. Use of deleterious and asphyxiating gases;
- xxvi. Use of explosive or expanding bullets and other inhuman appliance;
- xxvii. Directions to give no quarter;
- xxviii. Ill-treatment of prisoners of war and wounded;
- xxix. Employment of prisoners of war on unauthorised works;
- xxx. Misuse of flags of truce;
- xxxi. Poisoning of wells and food;

- xxxii. Indiscriminate mass arrests;³⁴
- xxxiii. Malicious assault;
- xxxiv. Forced occupation or extortion of property;
- xxxv. Robbery of historical arts or cultural property;
- xxxvi. Forced conduct on unauthorised works or prohibition exercising of legal rights;
- xxxvii. Other acts in violation of laws and customs of war, and cruel or destructive conducts exceeding military necessity.

Third, the Ordinance delineated the extent and scope of jurisdiction, which had not been mentioned in any of the three initial legal instruments enacted in February 1946. Article 5 articulated temporal jurisdiction according to which the tribunals could only exercise jurisdiction over the offences under Article 3 that had taken place after 18 September 1931 and before 2 September of 1945. However, crimes under Article 3(1) and (3) constituted exceptions. That is to say, even if the crimes under Article 3(1) or (3) were committed before 18 September of 1931, they would fall within the jurisdiction of the ROC tribunals. The second sentence of Article 5 further pointed out that the statute of limitations provided by Article 80 of the Criminal Code did not apply to the case of war criminals. Those who committed the offences under Article 3 after 2 September 1945 would be subject to general military judicial organs according to the ROC Criminal Code. As to personal jurisdiction, Article 7 elucidated that, besides foreign soldiers and non-soldiers perpetrating crimes, the Ordinance also applied to people in Taiwan Province who committed offences under Article 3 before 25 October of 1945.³⁵

Fourth, the Ordinance confirmed superior responsibility and addressed circumstances that could not relieve the accused of criminal responsibility. Article 10 referred to command responsibility: “For the war criminal who was in a position of authority or command and failed to prevent or repress the commission of the said crimes shall be criminally

³⁴ The above-mentioned crimes are almost identical to the list of war crimes drawn up by the Commission on Responsibilities of the Paris Peace Conference in 1919, which was adopted later by the United Nations War Crimes Commission after a discussion on 2 December 1943. See History of the UNWCC, pp. 477–78, see *supra* note 20.

³⁵ 25 October of 1945 is regarded by the ROC government as “Taiwan Retrocession Day”, which signifies the end of 50 years of Japanese colonial rule of Taiwan and the recovery of Chinese authority in Taiwan.

responsible for the crimes”. Pursuant to Article 9, the accused could not invoke the following grounds for excluding criminal responsibility: 1) the commission of the crimes was under orders of the superior; 2) the commission of the crimes was the outcome of performing his or her official duties; 3) the commission of the crimes was carried out in furtherance of a governmental policy; 4) the commission of the crimes was a political conduct.³⁶ The exclusions of exemption of criminal responsibility here appear slightly different from Article 6 of the IMTFE Charter. Only two circumstances in the IMTFE Charter were envisaged to rule out criminal responsibility of the accused: one was the official position and the other were acts under orders of his or her government or of a superior. Nevertheless, the IMTFE Charter allowed these two circumstances to be considered as factors in mitigating measures, “if the Tribunal determines that justice so requires”.³⁷ The Ordinance contained no similar language or indication in this regard.

Fifth, the Ordinance established the parameters for sentencing. Article 11 articulated that for those committing crimes under this Ordinance as well as violations of the ROC Criminal Code, unless otherwise provided, the tribunals would adopt the standard of sentences under the ROC Criminal Code. In cases where the Criminal Code included no relevant provision of the crime, pursuant to Article 12 of the Ordinance, the tribunal would apply the sentencing standard under the similar provisions in the Criminal Code by analogy. Additionally, Article 13 set the death penalty and life imprisonment for those who committed the crimes under Article 3(1) or (3), namely crimes against peace or crimes against humanity, whereas Article 14 noted those who committed conventional war crimes and conducted the offences repeatedly, caused mass victims, resorted to extremely cruel means or other serious circumstances would be sentenced to more than 10 years’ imprisonment or the death penalty, if the most severe sentence was under 10 years’ imprisonment pursuant to the Criminal Code. In particular, Article 16 of the Ordinance ruled out any application of mitigating factors under the ROC Criminal Code.

Sixth, the Ordinance added a review mechanism for judgments. Article 37 provided that a judgment for a convicted accused should be

³⁶ Qin, 1981, p. 412, see *supra* note 22.

³⁷ Charter of International Tribunal for the Far East, 19 January 1946, Tokyo, Article 6.

submitted to the Ministry of National Defence for approval and execution. With respect to cases of life imprisonment or the death penalty, the Ministry of National Defence should submit them to the Chairman of the ROC Government for approval and execution. If the Ministry of National Defence or the Chairman considered the judgment contrary to the law or inappropriate, the judgment should be remanded to the original tribunal for a retrial.³⁸

Interestingly, Article 36 of the Ordinance expressed concern about the judgments themselves. The provision read: “Regarding the main context of the judgment, the tribunal shall act in accordance with principles of public international law”. What does the allusion to “principles of public international law” mean? It certainly does not purport to repeat provisions relating to applicable law in trials or sentence. Therefore, one possibility could be that this article suggested that the tribunals were draft the judgment in consistency with the structure or format of the international tribunals’ judgments, such as those of the IMTFE.

29.5. International Law and Judgments of the ROC Trials: The Sakai Takashi Case and the Tani Hisao Case

As already noted, although the ROC trials were held in 10 cities, the War Crimes Military Tribunal of the Ministry of National Defence (‘Nanjing War Crimes Tribunal’) was nevertheless the most high-profile one.³⁹ The Nanjing War Crimes Tribunal acted in accordance with Article 2 of the Ordinance and was designated to process the cases delivered by various sources: the Ministry of National Defence, the Ministry of Justice, the Administrative Institution of War Criminals, other war crimes military tribunals and the extradited Japanese war criminals from the Chinese Delegation in Japan.⁴⁰ Fifty-two cases in total were presented to the Nanjing War Crimes Tribunal, among which the trials of Sakai Takashi and Tani Hisao were most significant.⁴¹

³⁸ Qin, 1981, p. 415, see *supra* note 22.

³⁹ Ren, 2011, p. 233, see *supra* note 7; Hu, 1988, p. 129, see *supra* note 6.

⁴⁰ Hu, 1988, p. 118, see *supra* note 6.

⁴¹ Luo Junsheng, “Shi Meiyu Yu Zhanhou Nanjing Dui Rijun Zhanfan de Shenpan” [Shi Meiyu and the Post-war Nanjing War Crimes Trials], in *The Scan of the CPC History*, 2006, no. 1, pp. 20–26.

29.5.1. The Sakai Takashi Case

The first case before the Nanjing War Crimes Tribunal was the Sakai Takashi case on 30 May 1946. Known as “Tiger of Hong Kong”, Sakai was a Lieutenant General in the Imperial Japanese Army during the Second World War. In the summary translation of the Sakai Judgment, he was convicted of crimes against peace, war crimes and crimes against humanity. He had been found guilty of participating in the war of aggression and of inciting or permitting his subordinates to murder prisoners of war, wounded combatants or non-combatants; rape, plunder and the forced deportation of civilians; indulging in cruel punishment and torture; and causing destruction of property. For these crimes, he was sentenced to death on 27 August 1946 and subsequently executed on 30 September.⁴²

As for the charges of crimes against peace, the Nanjing War Crimes Tribunal examined various kinds of evidence, including documents submitted by the Administrative Heads of northern China and written orders by Sakai himself to the Chinese authorities in northern China, which had been substantiated by evidence given by the war crimes investigators before the Tribunal and corroborated by the deposition of Major General Tanaka Ryūkichi before the IMTFE, and found that Sakai had violated international law by undermining the territorial and administrative integrity of China. Accordingly, Sakai was held criminally responsible for violating the Nine-Power Treaty of 1922 and the Paris Pact,⁴³ thereby constituting crimes against peace. Moreover, offences against the internal security of China were to be punished in accordance with the ROC Criminal Code.

Regarding the charges of war crimes and crimes against humanity, Sakai asserted that he participated in the war in line with the orders of the Japanese government and that he was not responsible for the acts committed by his subordinates because he was not aware of the

⁴² United Nations War Crimes Commission, Chinese War Crimes Military Tribunal of the Ministry of National Defence: Trial of Takashi Sakai, Summary of the Proceedings (in English and Chinese), 27 August 1946, p. 2 (“Trial of Takashi Sakai”) (<http://www.legal-tools.org/en/go-to-database/record/3789a0/>).

⁴³ Kellogg-Briand Pact, Paris, 27 August 1928. The ROC government had adhered to the Kellogg-Briand Pact after it became effective on 24 July 1929.

occurrences of those acts.⁴⁴ However, the Nanjing War Crimes Tribunal held that: “War of aggression is an act against world peace. Granted that the defendant participated in the war on the order of his Government, a superior order cannot be held to absolve the defendant from liability for the crime”.⁴⁵ Furthermore, the Nanjing War Crimes Tribunal confirmed that “a field Commander must hold himself responsible for the discipline of his subordinates is an accepted principle” and that “in inciting or permitting his subordinates to murder prisoners of war, wounded combatants, nurses and doctors of the Red Cross and other non-combatants, and to commit acts of rape, plunder, deportation, torture and destruction of property, Sakai had violated The Hague Convention, concerning the Law and Customs of War on Land and the Geneva Convention of 1929”.⁴⁶

In the final part of the Judgment, the Tribunal invoked the applicable law as follows: “Article 1 and Article 8 of the Procedure; Article 291 of the ROC Criminal Procedure Law; Article 1 of the Nine-Power Treaty; Article 1 of the Paris Pact; Article 4-7 Sub-sections 3 and 7 of Article 23; Articles 28, 46 and 47 of the Hague Convention;⁴⁷ Articles 1 to 6, 9 and 10 of the Geneva Convention;⁴⁸ Articles 3 and 4 of Criminal Law of the Army, Navy and Air Force; Paragraph 1 of Article 101 and Article 55 of the Criminal Code”. From the sequence of the listing of applicable law, the procedural rules, i.e. the Procedure and the ROC Criminal Procedure Law, were placed in the first place and then followed the substantive law containing public international law and domestic law. In relation to substantive law, international treaties and conventions took precedence over municipal criminal law, within which the *lex specialis* principle applied. This is the precise structure of applicable laws, as indicated in Articles 1 and 8 of the Procedure. Hence, as at most international tribunals, the instruments that established the Nanjing War Crimes Tribunal governed the process in the first place. The reason that it was the Procedure and not the Ordinance that applied in the Sakai case is

⁴⁴ Trial of Takashi Sakai, p. 4, see *supra* note 42.

⁴⁵ *Ibid.*, p. 5.

⁴⁶ *Ibid.*, pp. 5–6.

⁴⁷ Convention Respecting the Laws and Customs of War on Land, Hague, 4 September 1900.

⁴⁸ Convention Relative to the Treatment of Prisoners of War, Geneva, 27 July 1929 (<http://www.legal-tools.org/en/go-to-database/record/1d2cfc/>).

that the trial was conducted on 30 May 1946, whereas the Ordinance, as an amendment of the Procedure, was only adopted in August 1946.

29.5.2. The Tani Hisao Case

Tani Hisao was a Lieutenant General in the Imperial Japanese Army and used to serve as commander of the 6th Division at the time of the Nanjing campaign.⁴⁹ He was arrested by the Allied Powers in Tokyo on 2 February 1946, extradited to China on 1 August 1946 and finally detained in Shanghai for trial.⁵⁰

In the indictment of the Chief Prosecutor Chen on 25 December of 1946, Tani was charged with crimes against peace, war crimes and crimes against humanity.⁵¹ Concerning the charge of crimes against peace, the Prosecutor invoked Article 10 of the Covenant of the League of Nations, Article 1 of the Nine-Power Treaty, the Paris Pact and the 1899 Hague Convention for the Pacific Settlement of International Disputes to determine that Tani violated international law by participating in the Japanese invasion of Shandong and intentionally undermining the territorial and political integrity of China. For war crimes and crimes against humanity, the Prosecutor cited Articles 4–7, 23(3), 23(7), 28, 46 and 47 of the Hague Convention to support the charges. Additionally, the Prosecutor relied on the War Crimes Trial Ordinance, Criminal Code and Criminal Procedural Law to support charges against Tani before the Nanjing War Crimes Tribunal.⁵²

Tani pleaded not guilty and raised several grounds for precluding his criminal responsibility: 1) he claimed that he had never been aware that his subordinates committed the offences of rape, murder and other atrocities; 2) there were many Japanese troops stationed in Nanjing, and the evidence was not sufficient to establish that the alleged crimes were perpetrated by his subordinates; 3) he had strict discipline to control the conduct of his subordinates and repeatedly warned them not to carry out

⁴⁹ Masahiro Yamamoto, *Nanking: Anatomy of an Atrocity*, Praeger, Westport, 2000, p. 194.

⁵⁰ Hu, 1988, p. 147, see *supra* note 6.

⁵¹ Liu Daqun, “Chinese Humanitarian Law and International Humanitarian Law”, in Larissa van den Herik and Carsten Stahn (eds.), *The Diversification and Fragmentation of International Criminal Law*, Martinus Nijhoff, Leiden, 2012, p. 354; Hu, 1988, p. 246, see *supra* note 6.

⁵² Hu, 1988, p. 207, see *supra* note 6.

acts of violence against non-combatants; 4) the “comfort stations” established were under the approval of the local authorities, and the comfort women gave their consent too.⁵³

In the Judgment, the Nanjing War Crimes Tribunal rebutted the defence by introducing the doctrine of individual responsibility in the mode of co-perpetration. The Tribunal held that “if the accused shared a common plan of committing a crime with other perpetrators and intended to utilise the acts of other perpetrators to achieve the purpose, he shall bear criminal responsibility for all acts performed by any person in execution of such plan”. After examining evidence, including films made by the Japanese Army, the Nanjing War Crimes Tribunal found that the defendant was a high-level commander of the Army during the invasion of Nanjing, and having encountered intensive resistance, the defendant’s troops, along with other Japanese armies, carried out, systematically, mass murder, rape, plunder and the destruction of property of civilians. The scale and consequence of such atrocities could not match the defendant’s assertion of “undisciplined accidents”. The Judgment went on:

Based on the common plan with other Japanese commanders in Nanjing, the defendant jointly sent his subordinates to invade and harass civilians, which led to a large-scale mass murder, arson, rape, and plunder. By mutually utilising the co-commanders’ power, the defendant achieved his goal of retaliation against the resistance from China [...]

Furthermore, it is confirmed that the defendant during the war indulged his subordinates to kill prisoners of war and non-combatants, to conduct acts of rape, plunder, destruction of property and other inhumane treatment towards civilians. Accordingly, the defendant shall be held criminally responsible for committing war crimes and crimes against humanity in violation of the Hague Convention respecting the Laws and Customs of War on Land and the Geneva Convention relative to the Treatment of Prisoners of War.⁵⁴

Consequently, the Nanjing War Crimes Tribunal confirmed the charges of war crimes and crimes against humanity and invoked Article 291 of the ROC Criminal Procedure Law; Articles 4(1), 23(c), 23(g), 28, 46 and 47

⁵³ *Ibid.*, p. 205

⁵⁴ *Ibid.*, pp. 213–14.

of the Hague Convention;⁵⁵ Articles 2 and 3 of the Geneva Convention;⁵⁶ Articles 1, 2(2), 3(1), 4, 11, 24 and 27 of the Ordinance; Articles 28, 55, 56 and 57 of the ROC Criminal Code. On 10 March 1947, the Nanjing War Crimes Tribunal sentenced Tani to death.⁵⁷ On 26 April of the same year, he met his death by gunfire at Yuhuatai, or Rain Flower Terrace, located in the south of Nanjing.⁵⁸

In comparison to the Sakai case, the distinctions of the applicable laws in the Tani case were displayed in the following aspects. First, since the Nanjing War Crimes Tribunal dismissed the charge of crimes against peace, the Nine-Power Treaty and the Paris Pact were not mentioned in the Judgment. Second, considering that the Ordinance replaced the Procedure, it served as both procedural and substantive law at the same time, which explains why the Nanjing War Crimes Tribunal cited the Ordinance subsequent to the Hague Convention and the Geneva Convention as a substantive legal basis for vindicating the defendant. Third, the Criminal Law of the Army, Navy and Air Force was not mentioned in the Tani Judgment, because the Ordinance excluded it on the grounds that martial law was too harsh and severe. So if the Nanjing War Crimes Tribunal insisted on applying it in the trials, almost all the Japanese war criminals would have been sentenced to death, which was contrary to the leading policy of leniency and pardon.⁵⁹ It should be borne in mind that, in convicting the accused of war crimes and crimes against humanity, the Nanjing War Crimes Tribunal constantly relied on the Hague Convention IV and the 1929 Geneva Convention, to which China had acceded on 12 June 1907⁶⁰ and on 19 November 1935⁶¹ respectively.

⁵⁵ Convention Respecting the Laws and Customs of War on Land, Hague, 4 September 1900, see *supra* note 47.

⁵⁶ Convention Relative to the Treatment of Prisoners of War, Geneva, see *supra* note 48.

⁵⁷ Fei Fei Li, Robert Sabella and David Liu, *Nanking 1937: Memory and Healing*, M.E. Sharpe, New York, 2002, p. 55

⁵⁸ Iris Chang, *The Rape of Nanking: The Forgotten Holocaust of World War II*, Basic Books, New York, 1997, p. 172.

⁵⁹ Wang Jingsi, “Nanjing Shenpan Huigu” [Reflections on Nanjing Trial], in *Journal of Hunan Radio and Television University*, 2011, no. 1, p. 35; Song, 2001, p. 46, see *supra* note 27.

⁶⁰ International Committee of the Red Cross, *Treaties and States Parties to Such Treaties: China*.

⁶¹ Convention Relative to the Treatment of Prisoners of War, Geneva, see *supra* note 48.

29.6. War Crimes Trials Under the People's Republic of China

After the war crimes trials from 1946 to 1947, the ROC government planned to send the Japanese war criminals who were sentenced to fixed-term or life imprisonment back to Japan to serve their sentences. However, given that China had no military presence in Japan, the ROC government was in no position to supervise these war criminals overseas. Hence, the prisoners were all detained in the War Criminal Prison of the Ministry of National Defence in China. After its defeat and retreat in the Civil War, the ROC government repatriated these war criminals to Japan in February 1949, who were then subjected to the control of the US forces stationed in Japan and the Japanese government.⁶²

Between June and July 1956, the PRC Supreme People's Court established two Special Military Tribunals in Shenyang and Taiyuan. Forty-five Japanese war criminals were prosecuted for supporting the war of aggression and violating international law and humanitarian principles.⁶³ The trials were conducted by the relatively new PRC government. But the Chinese Communist Party's position in trying and punishing Japanese war criminals went back more than ten years to the end of the Second World War.

On 14 September 1945 *Jiefang Daily* released an editorial entitled "Punishing War Criminals Severely" ("Yancheng Zhanzheng Zuifan"), stating that "it [war crimes trials] is not for revenge, but for justice and long-lasting peace in the future".⁶⁴ According to the editorial, the war criminals fell into three groups: first, the military commanders who waged the war of aggression and executed the policy of aggression; second, the conspirators and accomplices of the war; and third, the active supporters and participants of the Japanese Army headquarters. "Those who violated the law and customs of war and crimes against humanity, such as massacre, torture of hostages, killing, enslavement, assault of

⁶² Sui Shuying, "20 Shiji Wushi Niandai Zhongguo Dui Riben Zhanfan De Shenpan Yu Shifang" [On the Trial and Release of the Japanese War Criminals by the Chinese Government in the 1950s], in *Journal of Yantai University (Philosophy and Social Science Edition)*, 2006, vol. 19, no. 4, pp. 459–61.

⁶³ Liu, 2012, p. 355, see *supra* note 51.

⁶⁴ Zhao Shemin and Meng Guoxiang, "Zhonggong Shenpan Riben Zhanfan Gongzuo Shuping" [Comments on the PRC Trials of the Japanese War Criminals], in *Social Science in Nanjing*, 2009, vol. 8, p. 96.

civilians, pillage, destruction of private and public properties, shall be punished by criminal law, regardless of their status”.⁶⁵

The 1,062 Japanese war criminals subject to the 1956 trials came from two different battlefields. One group of 969 war criminals was captured by the Soviet Union in northeast China in 1945 at the end of the war and transferred to China in July 1950. This group of prisoners was held in Fushun and tried in Shenyang. The other group of 140 was captured by the ROC government. They were imprisoned and later tried in Taiyuan. Forty-six prisoners died because of illness during their detention.⁶⁶

29.6.1. Legitimacy of the PRC War Crimes Trials

After the proclamation of the People’s Republic on 1 October 1949, the PRC government has been the sole legitimate representative of China ever since. Under the principle of succession of government in international law, the PRC government had the authority to exercise jurisdiction over Japanese war criminals, especially for those who joined the Army of YAN Xishan after the Second World War⁶⁷ and participated in the Civil War against the PRC regime.⁶⁸ Many observers commented that the ROC war crimes trials did not fully respect the will and expectations of the Chinese people, particularly in the case of Okamura Yasuji.⁶⁹ Hence, the PRC government might be able to enhance its legitimacy with the Chinese people by bringing the unpunished Japanese war criminals to justice. In order to align the war crimes trials with international law and customs, as well as take the basic conditions of China into consideration, the PRC government invited Dr. Mei Ju-ao, who previously served as the Chinese

⁶⁵ *Ibid.*, p. 97.

⁶⁶ Chen, 2009, p. 452, see *supra* note 1; Sui, 2006, p. 460, see *supra* note 62.

⁶⁷ YAN Xishan was a Chinese warlord who served in the government of the Republic of China and effectively controlled the province of Shanxi from 1911 to 1949. After the Second World War, Yan’s troops, including thousands of former Japanese troops, held out against the Communists during the Chinese Civil War for four years. His forces held out until April 1949, after the Nationalist government had lost control of northern China, allowing the PLA to encircle and besiege his forces.

⁶⁸ Long and Sun, 2009, p. 10, see *supra* note 14.

⁶⁹ Wang Heli, Zhang Jia’an and Zhao Xinwen, “Tebie Junshi Fating zai Shenyang Shenpan Riben Zhanfan Shimo” [The Special Military Tribunal’s Trials of Japanese War Criminals in Shenyang], in *Jianghuai Culture-History*, 2001, vol. 1, p. 19.

Judge at the IMTFE, as consultant in preparation of the war crimes trials.⁷⁰

On 25 April 1956 the Standing Committee of the National People's Congress passed the Decision on How to Deal with Japanese War Criminals in Japan's Invasion of China ('War Criminals Decision'), which was regarded as the authoritative legal basis for conducting the entire war crimes trials. Pursuant to the War Criminals Decision, the Supreme People's Procuratorate decided not to impose charges on two groups of Japanese war criminals totalling 335 and 328 in number respectively.⁷¹ With the assistance of the Red Cross Society of China, these detainees were repatriated to Japan in June and July 1956.⁷²

On 9 June 1946 the Special Military Tribunal of the Supreme People's Court heard the first case in Shenyang. The reason that the location was transferred from Fushun, where the Japanese prisoners had been detained, to Shenyang was that Japan had planned and carried out the Mukden Incident in 1931 in Shenyang, which was considered as the start of the Anti-Japanese War of China. On 12 June the other Special Military Tribunal of the Supreme People's Court began to work in Taiyuan.⁷³

29.6.2. Applicable Law in the PRC War Crimes Trials

In contrast to the ROC war crimes trials, the PRC government did not specifically enact any legislation to lay down the normative foundations for trying war criminals. Instead, the only instrument having legal character was the War Criminals Decision adopted at the 34th Meeting of the Standing Committee of the National People's Congress, promulgated

⁷⁰ Jin Hengwei, "Cong Erzhan hou Shenpan Guoji Zhanfan zhong Tanxi Xinzhongguo Zhengfu Shenpan Riben Zhanfan de Tedian" [The Characteristics of the PRC Trials against Japanese War Criminals: From the Perspective of Post-war Trials], in *Education for Chinese After-School*, 2011, vol. 1, p. 21.

⁷¹ Wang Zhanping (ed.), *Zhengyi de Shenpan – Zuigao Renmin Fayuan Tebie Junshi Fating Shenpan Riben Zhanfan Jishi* [Just Trials: Japanese War Crimes Trials by the Special Military Tribunals of the Supreme People's Court], The People's Court Press, 1991, pp. 763–67.

⁷² *Ibid.*, pp. 760–70.

⁷³ Zhao and Meng, 2009, p. 67, see *supra* note 64.

by Order of the President of the People's Republic of China on 25 December 1956, and effective immediately.⁷⁴

The War Criminal Decision stated:

The detained Japanese war criminals committed various crimes against the Chinese people, publicly violating international law and the principle of humanity, and inflicted great pain and suffering on the Chinese people during the invasion of Japan. Judging by the crimes they committed, they deserved severe punishment. Yet, whereas current situations and changes have taken place over the past decade after Japan's surrender; whereas the friendly relations between the peoples of China and Japan have developed; whereas the majority of Japanese war criminals have realised their guilt, the Standing Committee decided to adopt a lenient policy to deal with this issue.⁷⁵

The principles and regulations were illustrated as follows:

- 1) For the war criminals who were lower-ranked or showed repentance and expressed regret for the crimes committed, they may be treated with leniency and be exempted from prosecution; for those who committed serious crimes, they shall be charged magnanimously according to the nature of the crimes and their behaviour in detention; for those who committed other crimes in the territory of China after the surrender of Japan, they shall be given a combined punishment for the crimes committed;
- 2) The Trials against the Japanese war criminals shall be conducted by Special Military Tribunals organised by the Supreme People's Court;
- 3) The language and the documents used in the Special Military Tribunals shall be translated into the language understood by the defendants;
- 4) The defendant can conduct his own defence, or employ lawyers registered in the PRC judicial authority to

⁷⁴ Standing Committee of the National People's Congress, "The Decision on How to Deal with Japanese War Criminals in Japan's Invasion of China" ("Decision"), in Wang, Zhang and Zhao, 1991, p. 1, see *supra* note 69.

⁷⁵ *Ibid.*, p. 2.

defend on his behalf. If necessary, the Special Military Tribunal can assign a lawyer to the defendants;

- 5) The Judgment of the Special Military Tribunal is final and binding;
- 6) If the convicted war criminals behave well in serving their sentences, they may be given early release.⁷⁶

It is clearly articulated in Article 1 of the War Criminals Decision that war criminals with different status and behaviour would be differentiated and treated in a generally lenient manner under the guidance of a magnanimous policy. Unlike the ROC War Crimes Procedure or the War Crimes Ordinance, which precluded any application of mitigating factors under the Criminal Code of Republic of China, the PRC War Criminals Decision plainly incorporated a lenient policy into the sentencing of the accused. In terms of the applicable law, the War Criminals Decision remained silent.

29.7. International Law and Judgments of the PRC War Crimes Trials

The PRC war crimes trials consisted of four trials in total: the case of Takebe Rokuzō and 27 others in Shenyang, the case of Suzuki Keiku and seven others in Shenyang, the case of Jōno Hiroshi and other seven Japanese war criminals, and the case of Tominaga Juntarō. The term “in violation of rules of international law and the principle of humanity” was cited repeatedly in the reasoning of each of the Judgments. Does this therefore mean that international law was a legal source of the PRC war crimes trials?

29.7.1. The War Criminal Trials in Shenyang: The Cases of Takebe Rokuzō, Furumi Tadayuki, Saito Yoshio and Miyake Hideya

In the Shenyang Special Military Tribunal, 36 Japanese war criminals were charged with war crimes in two separate cases, in which several defendants were jointly prosecuted. The first defendant, Takebe, was a Home Ministry bureaucrat in the Japanese government and the Director of

⁷⁶ *Ibid.*

the General Affairs Agency in Manchukuo from 1940 to 1945.⁷⁷ The Special Military Tribunal confirmed:

During the invasion of the Japanese imperialist, the defendant committed crimes by furthering the aggressive policy of the Japanese Government, supporting the war of invasion waged by Japan against China, manipulating the puppet government of Manchukuo so as to undermine the sovereignty of China in violation of rules of international law and the principle of humanity; orchestrating, determining and carrying out a series of policies to suppress, enslave, poison civilians; forced labour and military service, pillage in northeast China; and enforcing the “exploration and immigration” policy so as to seize the farm land.⁷⁸

The second defendant was Furumi, who served as section chief of the Accounting Division and deputy head of the General Affairs Agency of the puppet Manchukuo state council.⁷⁹ The Special Military Tribunal found that during the period of the Japanese invasion of China, Furumi committed crimes by

furthering the aggressive policy of the Japanese government, supporting the war of invasion against China, participating in manipulation of the puppet government of Manchukuo so as to undermine the sovereignty of China in violation of the rules of international law and the principle of humanity; formulating and enforcing a series of policies for plundering China of its wealth, enslaving, poisoning and suppressing Chinese people; and implementing the “exploration and immigration” policy so as to forcibly occupy the farm land in northeast China”.⁸⁰

Third came Saito, who during the period of Japan’s invasion between 1935 and 1945, served as the director of the gendarme command of Japanese Kwantung Army, chief of the public security section, senior

⁷⁷ Chalmers Johnson, *MITI and the Japanese Miracle: The Growth of Industrial Policy, 1925–1975*, Stanford University Press, Stanford, 1982, p. 138.

⁷⁸ *Ibid.*, p. 325.

⁷⁹ China Fushun War Criminals Management Centre, *Riben Zhanfan De Zaisheng Zhidi: Zhongguo Fushun Zhanfan Guanli Suo* [Place of New Life of Japanese War Criminals: China Fushun War Criminals Management Centre], China Intercontinental Press, 2005 (“Place of New Life”), p. 26.

⁸⁰ Wang, 1991, p. 327, see *supra* note 71.

minister, chief of the police section and major general-director of the puppet Manchukuo gendarme training division.⁸¹ The Special Military Tribunal held that he was criminally responsible for “committing crimes of carrying out the aggressive policies of Japanese government, supporting the war of invasion waged by Japan against China in violation of rules of international law and principle of humanity; formulating, determining and implementing policies and measures of suppressing the Chinese people; and directing arrest, interrogation, and massacre of the Chinese people”.⁸²

With regard to the fourth defendant Miyake, who used to serve as chief of Rehe Police Section of Manchukuo, and director of Fengtian Provision Policy Department,⁸³ the Special Military Tribunal considered that he was guilty of “violating rules of international law and the principle of humanity by carrying out a series of policies of suppressing Chinese people, forced labour and plundering food; and directing arrest, interrogation and wilful killing of civilians”.⁸⁴

From the above Judgments, it can be concluded that the Special Military Tribunal convicted the defendants of the crimes in very general terms, lacking the more specific characterisation of crimes as the IMTFE and the ROC military tribunals had. In the context of the Judgments, the PRC Special Military Tribunals chose not to indicate by name any of the crimes established in international law at that time, such as crimes against peace, war crime or crime against humanity. But it seemed not to reject them either. For instance, the titles of the indictments read as follows: “The Indictment of the Supreme People’s Procuratorate of the People’s Republic of China against Takebe Rokuzō and others 27 war criminals concerning *war crimes*”,⁸⁵ “The Indictment of the Supreme People’s Procuratorate of the People’s Republic of China against Jōno Hiroshi and others seven war criminals concerning *war crimes and crime of counterrevolution*”,⁸⁶ and “The Indictment of the Supreme People’s Procuratorate of the People’s Republic of China against Tominaga

⁸¹ Place of New Life, p. 18, see *supra* note 79.

⁸² Wang, 1991, p. 329, see *supra* note 71.

⁸³ Place of New Life, p. 22, see *supra* note 79.

⁸⁴ Wang, 1991, p. 331, see *supra* note 71.

⁸⁵ *Ibid.*, p. 15 (emphasis added).

⁸⁶ *Ibid.*, p. 515 (emphasis added).

Juntarō concerning *war crime and crime of espionage*".⁸⁷ While “crime of counterrevolution” and “crime of espionage” amount to national criminal law, the term “war crimes”, however, definitely subscribes to international criminal law. In so doing, the PRC authority appeared to adopt the incorporation of international law into the war crimes trials in a subtle manner, while at the same time keeping some distance from publicly applying specific treaties or customs of international law as the ROC war crimes trials had done.

29.7.2. The War Criminal Trials in Taiyuan: The Case of Tominaga Juntarō

Similar to the Shenyang war crimes trials, the Taiyuan Special Military Tribunal was established for trying the Japanese war criminals captured in Shanxi Province. During the period of Japan’s occupation of China, Tominaga Juntarō served as the second section chief of the Police Department of the Railway Administration, secretary-general of the Intelligence Department of the North China Transportation Company controlled by Japan and the puppet Manchukuo government, and Vice Captain of Peiping Radio Station of the ROC Ministry of National Defence after the surrender of Japan at the end of the war.⁸⁸ He was the last Japanese war criminal tried in China.⁸⁹

The PRC Supreme People’s Procuratorate charged Tominaga with war crimes and the crime of espionage during the Anti-Japanese War and after. The Special Military Tribunal concluded that during the period of the invasion of the Japanese Imperialists, the defendant

indeed violated rules of international law and the principle of humanity. He shall bear criminal responsibility for implementing the aggressive policy of the Japanese Imperialists; participating in planning, determining and carrying out a series of spy and espionage activities; establishing and expanding police and organisations of spying and espionage; establishing the puppet government; stealing and spying on the intelligence of China; and

⁸⁷ *Ibid.*, p. 683 (emphasis added).

⁸⁸ *Ibid.*

⁸⁹ Lin Xiaoguang, “Zhongguo Gongchandang Dui Qinhua Riben Zhanfan de Shenpan Chuli he Gaizao” [The CCP War Crimes Trials and Rehabilitation of Japanese War Criminals], in *Party History Research and Teaching*, 2004, no. 4, p. 32.

suppressing, enslaving, arresting, torturing and killing Chinese people.

Furthermore, “after the surrender of Japan, the defendant committed crimes by conspiring to revive Japanese Imperialism in China, colluding with Hanjian [traitor to China] and spies, actively directed his agents to steal intelligence of the liberated areas and hence undermining the liberation of Chinese people”. Consequently, the Special Military Tribunal accorded to the spirit of Articles 1(2) and (3) of the War Criminals Decision, and Article 7(3) of Regulations of the People’s Republic of China on Punishing Reactionaries, convicting Tominaga of the crimes.⁹⁰

Although the Special Military Tribunal invoked laws in the Tominaga Judgment, it nonetheless did not refer to international law specifically. But it should be underlined that this was the only Judgment that listed the applicable law amongst all the PRC war crimes trials in 1956.

29.7.3. Implications of Applying International Law

Examining all the above cases, it is beyond doubt that the PRC war crimes trials adopted international law in prosecuting and processing the Japanese war criminals. The most vital evidence was that the Special Military Tribunals constantly and continuously relied on the terms like “‘violating’ or ‘in violation of’ rules of international law and the principle of humanity” as the only legal standard to assess the crimes committed. Such expressions were identical to the language of the War Criminals Decision.⁹¹

Interestingly, the allocation of “‘violating’ or ‘in violation of’ rules of international law and the principle of humanity” appeared not to be fixed. For example, in the Takebe Judgment it was placed after the descriptions of the offence of furthering the Japanese policy of aggression and jeopardising the sovereignty of China, and before those of participating in suppressing, enslaving, torturing and killing Chinese people.⁹² However, in the Miyake Judgment, the Special Military Tribunal primarily pointed out that “the defendant violated rules of

⁹⁰ Wang, 1991, p. 732, see *supra* note 71.

⁹¹ Decision, in Wang, Zhang and Zhao, 1991, p. 1, see *supra* note 74.

⁹² Wang, 1991, p. 325, see *supra* note 71.

international law and the principle of humanity” and then turned to describe the offences such as furthering Japanese policies of suppressing people, forced labour, torture and killing civilians.⁹³

The reason for this distinction between the two Judgments is not the charges for which the war criminals were prosecuted but the actual crimes they committed. From the criminal offence descriptions of the Takebe case, it is not difficult to include “furthering the Japanese policy of aggression and jeopardising the sovereignty of China” in crimes against peace, while “participating in suppressing, enslaving, torturing and killing Chinese people” usually falls into the scope of war crimes or crimes against humanity.⁹⁴ And the phrase “in violation of rules of international law and the principle of humanity” was just allocated in between. By contrast, since Miyake had been convicted of the offences analogous to war crimes and crimes against humanity without any charges of crimes against peace, the expression of “violation of international law and the principle of humanity” went prior to the offence description. This pattern has been demonstrated by other PRC war crimes trials, such as the case of Suzuki and others⁹⁵ and the case of Hiroshi Kino and others, and the case of Tominaga Juntaro⁹⁶.

29.8. Remarks on Chinese War Crimes Trials, 1946–1956

When people look back and review the Chinese war crimes trials after the Second World War, they usually put weight on the policy of magnanimity

⁹³ *Ibid.*, p. 331, see *supra* note 72.

⁹⁴ According to Article 5 of the IMTFE Charter, “crimes against peace” refer to “the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing”; “war crimes” refer to “violation of the laws or customs of war”, and “crimes against humanity” refer to “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial 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. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan”.

⁹⁵ Wang, 1991, pp. 495–506, see *supra* note 71.

⁹⁶ *Ibid.*, pp. 663–76, 732–34.

adopted by both the ROC and the PRC governments in relation to internal and foreign affairs.⁹⁷ The interplay and interrelationship between Chinese war crimes trials and international law are rarely mentioned.

29.8.1. Contributions of Chinese War Crime Trials to International Law

29.8.1.1. The ROC War Crimes Trials: Chinese State Practice of International Criminal Law and International Humanitarian Law

Concerning the pre-1949 war crimes trials, the ROC government conducted and organised a series of steps for preparing the trials: initiating comprehensive investigations, collecting evidence on a large scale, extraditing Japanese war criminals from other states, enacting specific legislation as the applicable law, and finally establishing war crimes military tribunals. The preparatory work of the ROC trials followed the mode of establishing the Nuremberg IMT and the IMTFE.⁹⁸

The enactment of the War Crimes Trial Procedure, Detailed Rules and the later War Crimes Trial Ordinance marked the means for China to incorporate, or at least try to incorporate, international law into municipal legislation and judicial decisions. Considering that the Charter of the Nuremberg IMT⁹⁹ and the Charter of the IMTFE were issued and released on 8 August 1945 and 19 January 1946, the ROC authorities adopted the conception of the classifications of crimes enshrined in these Charters, namely crimes against peace, war crimes and crimes against humanity.¹⁰⁰

Furthermore, the ROC war crimes military tribunals relied on international law, especially international treaties and conventions to

⁹⁷ Adam Cathcart and Patricia Nash, “War Criminals and the Road to Sino-Japanese Normalization: Zhou Enlai and the Shenyang Trials, 1954–1956”, in *Twentieth-Century China*, vol. 34, no. 2, 2008, pp. 89–93.

⁹⁸ Zhao Lang, Liao Xiaoqing and Zhang Qiang, “Shenyang Shenpan Yu Niulunbao Dongjing, Nanjing Shenpan Bijiao Yanjiu” [A Comparative Study of the Trial in Shenyang and the Trials in Nuremberg, Tokyo and Nanjing], in *Journal of Liaoning University (Philosophy and Social Science)*, vol. 37, no. 6, 2009, p. 65.

⁹⁹ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, London, 8 August 1945 (<http://www.legal-tools.org/en/go-to-database/record/844f64/>).

¹⁰⁰ Qin, see *supra* note 22, pp. 408–15.

which China had acceded, like the Nine-Power Treaty, the Paris Pact, the Hague Convention IV and the Geneva Convention III, to convict the accused. The application of these international legal sources even took precedence over that of Chinese domestic law like the ROC Criminal Code and the Criminal Procedural Law. In addition, the military tribunals contemplated crimes and criminal responsibility as separate issues, and confirmed several grounds that could not exempt the accused from criminal responsibility, for instance, superior orders or the execution of a state's policy.¹⁰¹

29.8.1.2. PRC War Crimes Trials: China's Consistent Attitude Towards International Law

Turning to the post-1949 war crimes trials held by the PRC government, a major factor was the limited judicial resources that the PRC government had at its disposal in 1956, when the national legal system and legislation were incomplete, and no criminal code or criminal procedural law were available for application. Under these circumstances, the PRC authority passed the War Criminals Decision to set forth the principles and general procedures for the war crimes trials.

In the War Criminals Decision, the most significant part relating to international law was that the Standing Committee of the National People's Congress deemed that the offences perpetrated by the Japanese war criminals "violated rules of international law and the principle of humanity". Despite the fact that no applicable law relating to international treaties or customs was invoked, it set up a basic standard to evaluate and assess the Japanese war criminals' acts in trials and had served as the applicable law in the final judgments. As Mei Ju-ao commented, though the outcome of the PRC war crimes trials displayed the policy of magnanimity of the PRC government,

the judgments for the Japanese war criminals were solemn and just. Every piece of evidence had been gone through by careful investigation and inquiries, collaborating with each other. The defendants had access to a fair trial, including the right to defence. The procedure of the PRC war crimes trials was consistent with international customs and rules of

¹⁰¹ Trial of Takashi Sakai, p. 4, see *supra* note 42.

international law. It reflected the spirit of humanity as well as the demand of justice.¹⁰²

Taking into account the isolation of the PRC government by the international community in the 1950s, it may be a little bit surprising that the PRC Standing Committee of the National People's Congress and the Special Military Tribunals put much weight on determining whether the Japanese war criminals violated rules of international law and the principle of humanity. It can explain why there was no explicit reference to any existing international treaties or convention, even though the pre-1949 war crimes trials had already put the Hague Convention IV and the Geneva Convention III into practice. Nevertheless, from the title and context of the indictments and the judgments, the PRC war crimes trials actually acknowledged the three-type classification and identification of crimes established in the Nuremberg Charter, Charter of the IMTFE and the ROC War Crimes Ordinance. In this regard, the post-1949 trials presented China's consistent attitude towards international law concerning war criminals.

29.9. The Forgotten Legacy of the Chinese War Crimes Trials

The reasons for the Chinese war crimes trials being neglected or overlooked are complex. The pre-1949 ROC trials were, on the one hand, conducted in parallel to the Tokyo Trial and other national war crimes trials. Given that national trials were designated to deal with Class B and C crimes, they could be easily overshadowed by the international tribunals that tackled Class A war criminals from the scale of the crimes to the impact of the final judgments. On the other hand, the ROC trials did not have enough time to be introduced to the world due to the outbreak of the Chinese Civil War and thus lost an opportunity to enhance China's influence on the international stage.¹⁰³

The PRC government also seemed to overlook the significant meaning of the ROC trials in enhancing the position of China in international affairs. Apart from ideological issues and mutual hostility, it is believed that the legacy of the ROC war crimes trials had been contaminated by the acquittal of Okamura, the commander-in-chief of the China Expeditionary Army of Japan. He was released and immediately

¹⁰² *Renmin Ribao* [People's Daily], 23 June 1956, in Wang, 1991, see *supra* note 71, p. 756.

¹⁰³ Song, 2001, p. 47, see *supra* note 27.

protected by the personal order of Chiang Kai-shek, and later retained as a senior military adviser to the ROC government in Chinese Civil War.¹⁰⁴

According to a telegram sent by the ROC Ministry of National Defence to the war crimes military tribunals on 1 July 1947, “the objective and purpose of punishing the war criminals is to maintain humanity and justice, and to guarantee the dignity of international humanitarian law, rather than revenge”.¹⁰⁵ Admittedly, the ROC war crimes trials essentially punished the major Japanese war criminals and applied both international and domestic law rigidly in trials. For the first time since 1840, the Chinese government had the ability to independently and justly try and punish the Japanese war criminals who had caused atrocities and tremendous suffering to the Chinese people under international law.¹⁰⁶ More importantly, these Chinese trials echoed and corresponded to the development of international criminal law at that time, particularly in confirming the laws and customs of war, crimes against peace, war crimes, crimes against humanity, and individual and command criminal responsibility.

Acknowledging rules of international law and the principle of humanity, the post-1949 trials marked the complete end of the Second World War,¹⁰⁷ and achieved an impossible mission: all the Japanese war criminals confessed and pleaded guilty without any objection. No precedent had ever taken place at the international or domestic level.¹⁰⁸ In the end, regardless of political concerns, the Chinese war crimes trials from 1946 to 1956 no doubt constituted state practices in consolidating the development of international humanitarian law and international criminal law. They showed China’s respect for the principle of humanity and consistent attitude towards international law as an active participant; and eventually they served the ultimate objectives of international peace and justice.

¹⁰⁴ Zhao Lang *et al.*, 2009, p. 65, see *supra* note 98.

¹⁰⁵ Yan Haijian, “Guomin Zhengfu dui Nanjing Datusha An Shenpan de Shehui Yingxiang Lunxi” [On the Social Effect of the Nanking Massacre Trials by the National Government], in *Fujian Tribune (The Humanities and Social Sciences)*, 2011, vol. 4, p. 112.

¹⁰⁶ Jing Shenghong, “Lun Nanjing Shenpan Zhanfan Junshi Fating Dui Nanjing Da Tusha De Shenpan” [On the Trial of Nanjing Massacre Conducted by Nanjing War Crimes Tribunal], in *Social Science in Nanjing*, 2013, vol. 6, p. 150.

¹⁰⁷ Zhao and Meng, 2009, p. 100, see *supra* note 64.

¹⁰⁸ Wang, Zhang and Zhao, 1991, p. 20, see *supra* note 69.

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Historical Origins of International Criminal Law: Volume 2

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

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

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

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

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