Introduction

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The issue of international crimes is highly topical in Asia today, and it is likely to remain so, given the still-resonant claims against the Japanese for crimes committed in the 1930s and 1940s, and the deep political schisms caused by later crimes carried out in Bangladesh, Cambodia and East Timor. Over the years, the region has hosted a succession of tribunals for such crimes, from those established in Manila, Singapore and Tokyo just after the Asia-Pacific War to those currently hearing cases in Dhaka and Phnom Penh. Some of these tribunals were established at the behest of Asian governments, and others by non-Asian states or international organisations. Some are well known, while others – such as the Dutch and Soviet trials of the Japanese, the Cambodian trial of the Khmer Rouge and the Indonesians' trials of their own military personnel – are less frequently discussed. This book assesses these tribunals' approach to international crimes: crimes against peace, war crimes, crimes against humanity and genocide. And it considers the development of general theories of liability, to which the Asian trials have made especially important contributions.

As the low take-up of International Criminal Court membership demonstrates, many Asian states are wary about bringing cases before international or hybrid courts, not least because of the accompanying loss of control over the process. They have, however, been willing to mount trials themselves. The Indonesian authorities charged their own military personnel for crimes committed in East Timor rather than hand them over to a proposed UN-mandated tribunal, and the Bangladeshi authorities have pushed ahead with the current trials, despite these provoking lethal clashes on the streets and widespread criticism from international observers.

When examining trials across the decades since 1945, some intriguing themes emerge. Consider, for example, the reasons for establishing trials in Asia. These were usually justified as a means to punish, deter and leave

an official record. They might in addition have had the benefit of reassuring the public that they had fought a good war or that an enemy had been expelled for good. But the trials were also motivated by unheralded agendas, such as underwriting the *status quo*, justifying violence, winning allies and silencing critics. These more political functions bore down heavily on the proceedings, and prosecution and defence lawyers occasionally accommodated to them. At Khabarovsk, for example, both sides strove to establish the Japanese defendants' guilt, while at Jakarta, both sides sought to demonstrate the Indonesian defendants' innocence.

The sponsoring powers' approaches to indictments also reveal interesting patterns. Some trials were as notable for who they omitted as for who they included. The Tokyo prosecution declined to indict the Emperor Shōwa (who, under American tutelage, had been transformed into an obliging constitutional monarch); and the People's Revolutionary Tribunal decided not to charge Khmer Rouge leaders Khieu Samphan and Nuon Chea (in the hope that they would participate in a post-Kampuchea settlement). Sometimes potential prosecution targets escaped the net: the Japanese biological warfare chiefs who fled to the Americans after the Second World War, the Pakistani generals who fled to the Indians after the secession of Bangladesh and, famously, Pol Pot, who long evaded capture, and then, days before he was due to be arrested, made the ultimate escape, through death.

The Asian trials have seen both judicial activism and judicial restraint – often in counterpoint to concurrent trial programmes in Europe. At the Tokyo Tribunal, for example, prosecutors relied more heavily on 'common plan or conspiracy' than did their opposite numbers at Nuremberg, alleging, among other things, that the Japanese conspired to dominate not just East Asia but all the states within and bordering the Pacific and Indian oceans.[1] In recent decades, European jurists dealing with cases arising from the war in Bosnia have adopted a more sweeping approach to modes of liability: the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, in *Prosecutor* v. *Tadić*, advanced a highly innovative approach to joint criminal enterprise (JCE), while the Extraordinary Chambers in the Courts of Cambodia exercised greater caution, declining to apply the 'extended' third form of the doctrine to cases dating back to the 1970s.

[1] International Military Tribunal for the Far East, *The Tokyo major war crimes trial*, R.J. Pritchard (ed.), 124 vols. (Lewiston: Edwin Mellen Press, 1998), Indictment, vol. 2, p. 2.

Finally, the prosecuting powers' policies towards the punishment of those convicted have thrown up exceptions – but exceptions that prove the rule. Most have publicly adopted a 'firm but fair' position, up to and including the death penalty. The Allies executed Japanese war criminals in Singapore, Batavia, Saigon, Yokohama, Rabaul, Manila and scores of other places after the war, and the Bangladesh authorities are executing people to this day. But some powers have on occasion played the magnanimity card. The Chinese, for example, stressing the leniency of their policies, declined to execute those Japanese convicted at Shenyang and Taiyuan. This 'leniency' was relative, of course, as some of the accused had been held without trial for as long as a decade. During their incarceration the Chinese took steps to 're-educate' the Japanese with the aim of inculcating remorse and encouraging the prisoners to spread the word about Chinese benevolence on their return to Japan. Examples such as this are unusual, though, and talk of any kind of rehabilitation, whether politically motivated or not, is still extremely rare.

The problem of legitimacy

The origins of the charges brought at the Asian trials can be traced back to the late nineteenth and early twentieth century. As this author argues in her opening chapter about treasonable conspiracies, the formation of international criminal law was driven by concerns about security rather than justice. Just as national security law dealt with assaults on the integrity of the state, so international criminal law (which drew heavily on national security law) was designed to deal with assaults on the integrity of the society of states. These ideas bore fruit after the Second World War. The International Military Tribunal for the Far East was thus established primarily to underwrite the post-war *status quo* in Asia, and its central charge – 'crimes against peace' – was presented as a form of treason against the international order.

Ironically, the charges of 'crimes against peace' against Japan's former leaders were framed just as the prosecuting powers were themselves fighting their way back into their old colonial possessions. In a few places, such as Indo-China, the Europeans were even assisted by the departing Japanese – a baton-change from one occupying power to another. When French colonial officials (ousted by the Japanese in 1941) returned to Hanoi in August 1945, they were greeted by violent anti-French demonstrations, which were held back by Japanese troops.[2]

[2] R.J. Aldrich, *Intelligence and the war against Japan: Britain, America and the politics of secret service* (Cambridge University Press, 2000), p. 345.

The following month, American war crimes investigators, who had arrived in Saigon with the intention of arresting members of the Japanese *Kempeitai* for war crimes, postponed their plans when they discovered that the French, British and Indian forces occupying the country had given the *Kempeitai* their guns back so that they could help fight a common enemy: the Viet Minh.[3]

A similar thing happened in Netherlands East Indies. At the end of the war, the invading British used the retreating Japanese troops to protect oil installations against a new military threat: the Indonesian nationalist forces.[4] When the Dutch returned to reclaim their old colony, the British withdrew, leaving them to fight the Indonesians and try the Japanese for crimes committed during the occupation. But convening war crimes trials in the midst of a colonial insurgency raised significant problems, the greatest of which was the legitimacy of the trials themselves. As Lisette Schouten shows in her chapter, the Dutch attempted, among other things, to use the trials to present themselves as liberators of the colony, and to positively contrast their 'lawful' colonialism with the 'criminal' variety previously imposed by the Japanese. This message may have reassured the Dutch, but it made little impact on Indonesians, who, notwithstanding their experiences at the hands of the Japanese, had no desire to be liberated by anyone but themselves. In the event, on 26 December 1949, the Dutch escorted the remaining Japanese accused and convicted onto the M.S. *Tjisadane*, bound for Japan. The following day, they ceded power to the Republic of Indonesia, and departed their former colony for good.

Half a century later, it was the turn of the Indonesians to be ejected from part of the archipelago. In 1999, in response to East Timorese demands for independence, the Indonesians and their paramilitary proxies pursued a campaign of terror in the province. In 2002, the ad hoc Human Rights Court in Jakarta (convened to pre-empt the threat of an international tribunal) began to hear the cases of eighteen defendants accused of coordinating the violence. All the indictments alleged crimes against humanity and charged the defendants on the basis of command

[3] Ibid., p. 347.

[4] See, for example, Mountbatten's telegram to London, requesting guidance over whether he should use Japanese troops to guard the oil refineries at Palembang in light of American press complaints about the British use of Japanese forces. (Chiefs of Staff Committee Joint Planning Staff (14 December 1945), p. 227: CAB 79/42, TNA.) It was agreed he could use Japanese troops if none other were available. (Chiefs of Staff Committee Joint Planning Staff (23 December 1945), Annex 2, p. 332: CAB 79/42, TNA.)

responsibility for acts committed by subordinates. Six defendants were convicted; all were acquitted on appeal.

As Mark Cammack shows in his chapter, the ad hoc Court, operating under the nose of the powerful Indonesian military, was engaged in an exceptionally delicate task. The prosecutors were expected to bring cases against still-serving Army officers who enjoyed the support of not only their military superiors but also the uniformed cadres packed into the Court's public gallery. In the event, they constructed a weak case on grounds of crimes against humanity, and did what they could to minimise the likelihood of defendants being found guilty. Legal slips, calculated or otherwise, abounded: in the *Eurico Guterres* case, the accused was charged on grounds of command responsibility although he held no formal position of power, and in *Timbul Silaen* case, the prosecutors treated the *mens rea* and *actus reus* requirements as independent crimes. At times, prosecutors and defence lawyers put forward similar arguments, both of which were favourable to the accused. It took the intervention of some of the judges to bring more incriminating testimony and evidence to light.

The command responsibility doctrine

The trials in the region have contributed greatly to the evolution of the general principles of law, and particularly to the theory of command responsibility, a doctrine developed to settle accounts for wars in Asia. It first emerged at the trials of Yamashita Tomoyuki, Toyoda Soemu and the Tokyo Tribunal defendants after the Asia-Pacific War. It was redeployed at the American *Medina* case in the wake of the My Lai massacre, then inserted into Additional Protocol I of the Geneva Conventions after the Vietnam War, and finally deployed at the recent trials at Jakarta, Dili, Phnom Penh and Dhaka to deal with violence of a non-international character.

The first post-war development occurred at the 1945 trial, conducted under American auspices in Manila, of General Yamashita for failing to control the troops under his command. A defence appeal to the US Supreme Court produced a majority opinion upholding the Judgment and two famous dissents from Justices Wiley Rutledge and Frank Murphy, who described its deployment of the doctrine as vacuous and without precedent.[5] Robert Jackson, a fellow Supreme Court judge who

[5] *In re Yamashita*, 327 US 1 (1946), 51, 40.

had served as American Chief Prosecutor at the Nuremberg Tribunal, later made reference to the law and politics of the *Yamashita* case. He wrote, 'Of course, the charges against Yamashita that he failed to prevent atrocities went somewhat beyond our Nurnberg precedent, in which we prosecuted only those who had affirmatively ordered or incited atrocities.'[6] Then, in political mode, he added, 'I have always thought it a very unfortunate thing for the United States that members of the [Supreme] Court saw fit to write as they did in the Yamashita case, for it has provided most damaging propaganda against our entire policy in the orient.'[7]

As Rehan Abeyratne explains in his chapter, the trial of Admiral Toyoda Soemu further clarified the concept of command responsibility. The Judgment stated that in a case where a commander had ordered crimes to be carried out, a court would have to establish, first, that the crimes had been committed by troops under the accused's command and, second, that the accused had ordered their commission. Where there was no proof beyond reasonable doubt that the accused had issued such orders, the court set out five criteria for a finding of command responsibility, and this represented an important step towards the modern concept of 'effective control'. The criteria were:

1. [T]hat atrocities were actually committed;
2. Notice of the commission thereof. This notice may be either:
   a. Actual, as in the case of an accused who sees their commission or who is informed thereof shortly thereafter; or
   b. Constructive. That is, the commission of such a great number of offenses within his command that a reasonable man could come to no other conclusion than that the accused must have known of the offenses or of the existence of an understood and acknowledged routine for their commission.
3. Power of command. That is, the accused must be proved to have had actual authority over the offenders to issue orders to them not to commit illegal acts, and to punish offenders.
4. Failure to take such appropriate measures as are within his power to control the troops under his command and to prevent acts which are [in] violation of the laws of war.
5. Failure to punish offenders.[8]

[6] Jackson to Lyon (11 July 1950): Box 113, Jackson Papers, Library of Congress. [7] Ibid.
[8] 'Judgement of the GHQ War Crimes Tribunal in the Case of U.S.A. v. Toyoda Soemu' (Tokyo: General Headquarters, Supreme Commander for the Allied Powers, 1949), pp. 5005–5006.

Setting aside command responsibility for the moment, the *Toyoda* trial also demonstrated how the Allies saw 'civilised' values as being integral to the rule of law. As the judges stated, 'When some of the participants in war, whether in high or low places, violate those principles of decency, honor, fair play, and humanity which we have come to know as "civilized," they must be punished.'[9] The concept of 'civilisation' is necessarily exclusive, however, and undermines the law's pretention to universal application. Radhabinod Pal, the Indian judge at the Tokyo Tribunal, made precisely this point when he questioned the existence of a genuine international community, and posited instead a world divided into dominating and dominated states.[10] He questioned the Allies' motives for advancing the crimes against peace charge – which effectively froze the post-war international *status quo* and potentially criminalised struggles for independence – and concluded that colonies could not be compelled 'to submit to eternal domination only in the name of peace'.[11]

Even when Allied jurists strained towards the idea of common humanity governed by universal precepts, they fell short. The *Toyoda* judges did manage to evoke commonality, but only on the grounds of shared 'civilisation'. They observed,

> [T]he accused is a Japanese. As a result of its almost daily observations of him during the long course of the trial, the Tribunal has little hesitation in accepting him as an advanced embodiment of the results of the development of Japanese culture and character from its very beginning to the present time. This development proceeded separately and unrelated to parallel growth in Western civilization, except during the recent decades. It is but natural that such separation should have produced a national character and culture that shows considerable differences from what we, as Occidentals, are familiar. But the accused is not being tried as a Japanese nor because he is a Japanese. He is being tried only on grounds that are common to the two civilizations.[12]

It might further be noted that as soon as the Allied powers encountered problems in the application of justice in Asia, they reverted back to the old idea of 'the West'. Informed of the split on the Tokyo Tribunal bench over the validity of some of the charges, the British Foreign Office Assistant Under-Secretary Esler Dening wrote: 'If the tribunal fails to fulfil its task, Western justice will become the laughing-stock not only of

[9] Ibid., p. 5004. [10] IMTFE, Pal Dissent, vol. 105, p. 103. [11] Ibid., p. 239.
[12] 'Judgement of the GHQ War Crimes Tribunal in the Case of *U.S.A.* v. *Toyoda Soemu*' (Tokyo: General Headquarters, Supreme Commander for the Allied Powers, 1949), pp. 5008–5009.

Japan but of the Far East in general.'[13] His colleague Frederick Garner agreed: the trial's failure would be 'a shattering blow to European prestige'.[14] In short, the Tribunal, convened to deal with two earlier crises of Western authority – Pearl Harbor and the fall of Singapore – would, if it collapsed, create another crisis of Western authority.

Returning to the issue of command responsibility, lawyers for the now-deceased Ieng Sary, one of the accused in Case 002 before the Extraordinary Chambers in the Courts of Cambodia, claimed in 2011 that command responsibility was not customarily recognised as a basis of liability in the late 1970s, and that holding him responsible for his subordinates' actions during this period was therefore a retroactive enactment. 'The concept of command responsibility was not defined with sufficient clarity in 1975–79 for liability to be foreseeable to Mr. Ieng Sary,' they wrote. 'This is evident from the lack of clarity with regard to the requisite *mens rea* and whether it may apply to non-international conflicts and to civilian superiors.'[15] The Pre-Trial Chamber rejected their argument, relying, among other things, on the *Yamashita*, *Toyoda*, and Tokyo judgments.[16]

These are important sources, but as Robert Cryer shows in his chapter, there are equally significant, but overlooked, appraisals of the command responsibility doctrine to be found within the dissenting judgments at the Tokyo Tribunal. These address, among other things, the problem of the various gradations of liability implicit within the doctrine. The Dutch judge Bernard Röling tackled the distinction between 'permitted', as set out in Count 54, and 'deliberately and recklessly disregarded', as set out in Count 55,[17] while his French colleague Henri Bernard attempted to draw a line between intentional, and reckless or negligent, manifestations of command responsibility.[18] (Some six decades before the contemporary discussion, Bernard also touched on the different facets of command responsibility, as a form of liability and as a separate offence.)

Judges at the current ad hoc tribunals have paid no attention to these sources, despite their having been easily accessible for decades. (Röling

[13] Dening to Sargent (30 April 1947): FO 371/66552, TNA.
[14] Garner (20 May 1947): FO 371/66553, TNA.
[15] *Nuon et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 75), Ieng Sary's Appeal against the Closing Order (25 October 2010), par. 134.
[16] *Nuon et al.*, 002/19-09-2007-ECCC/OCIJ (PTC75), Decision on Ieng Sary's Appeal against the Closing Order (11 April 2011), par. 460.
[17] IMTFE, vol. 109, Röling Dissent, p. 56.
[18] IMTFE, vol. 105, Bernard Dissent, pp. 16–17.

and Bernard's dissents were published in 1977, and Pal's dissent was published even earlier, in 1953.)[19] Perhaps the many criticisms of Tokyo Tribunal – for example, for its self-serving imperial predilections, its slipshod approach to individual liability and its failure to adhere to fair trial principles – have counted against it in other areas as well. If this is the case, then the other post-war touchstones for the doctrine – *Yamashita*, with its nebulous approach to *mens rea*, and *Toyoda*, with its jarring invocations of 'civilisation' – are scarcely an improvement. None had impeccable credentials, and none provided all the answers, but modern jurisprudence is impoverished by its failure to engage with some of the doctrinal contributions made in the past.

Legal remedies in China

The literature on international criminal law has tended to focus on Western, or international, contributions to jurisprudence in the Asian context; but what of local, or intra-regional justice? In early 1947, a Chinese military tribunal in Shanghai found Yonemura Haruchi guilty of burying Chinese victims alive, and Shimoto Jiro guilty of torture, rape and plunder. Both were sentenced to death. Six months later, they were driven along the Bund and Nanking Road in open-backed vehicles before being shot at the Kiangwan Execution Ground in front of a vast crowd. It was the first public execution of Japanese war criminals to take place in the city.

The British Consul-General in Shanghai, A.G.N. Ogden, reported all this to the British Ambassador in Nanking:

> It had been announced that the two Japanese were to be paraded in Chinese carts, but possibly owing to a delay in the start, the procession actually consisted of military motor vehicles, with the Japanese in an open truck under a heavy armed-guard. Crowds estimated at about 150,000 in all shouted and cheered as the parade passed and it is said that at some points stones were thrown at the condemned men, who preserved a stolid and unmoved attitude throughout, although they had refused a narcotic injection offered to them before the procession set out.[20]

[19] B.V.A. Röling and C.F. Rüter (eds.), *The Tokyo judgment: the International Military Tribunal for the Far East*, 2 vols. (University Press Amsterdam BV, 1977); R. Pal, *International Military Tribunal for the Far East: dissentient judgment of Justice R.B. Pal* (Calcutta: Sanyal, 1953).

[20] Ogden (Shanghai) to UK Mission (Nanking) (25 June 1947): FO 371/66554, TNA. See also, K. Sellars, *The rise and rise of human rights* (Stroud: Sutton, 2002), pp. 47–48.

Shanghai's English-language newspapers condemned this public spectacle, expressing surprise that the Chinese authorities still regarded such exhibitions as acceptable.[21] Ogden was himself critical of a perceived double standard in the Chinese treatment of former enemies: 'It is interesting to compare the relentless attitude of the Chinese authorities towards Japanese accused of war crimes and Chinese "traitors" . . . with their complacency regarding the continued presence in this country of certain Germans who, although objectionable on political grounds, were granted exemption from deportation presumably because they were regarded as being useful in post-war trade activity.'[22]

Yet when Ogden's report was forwarded to London, it elicited a sharp retort from the aforementioned Frederick Garner in the Foreign Office's War Crimes Section:

> As a matter of fact the Chinese have been quite moderate about Japanese war criminals. Considering the immense number of crimes committed they have executed very few. They have preferred to make a public example of notorious cases rather than execute large numbers privately. I do not consider that the Chinese have behaved any worse than many European countries – in fact they have I think behaved better. The Pacific Sub-Commission of the United Nations War Crimes Commission was able to wind up in March last but the parent body still drags on. As regards letting useful Germans stay on in China, what about von Paulus in Russia and the German 'rocket' scientists in the USA and in this country?[23]

The Kuomintang were not the only ones to try and punish the Japanese for crimes committed during the occupation of China. After the Tokyo Tribunal, the Soviet Union convened a trial at Khabarovsk in 1949 to try defendants who had previously run the biological warfare research centres, and the People's Republic convened trials at Shenyang and Taiyuan in 1956 to try defendants accused of war crimes. Both the Soviet and Chinese initiatives were carefully calibrated to emphasise communist magnanimity towards a former enemy, in contrast to the brute force exercised by the Americans and their Western acolytes.

The trial at Khabarovsk could reasonably be described as the first revisionist response to the Tokyo Tribunal. Many have claimed that the Tokyo Tribunal went too far – especially with its catch-all 'common plan or conspiracy' and 'murder' charges. But the Soviets were the first to claim that the Tribunal *did not go far enough* – in this case, for failing to target the orchestrators of Japan's bacteriological warfare programme in

[21] Ibid. [22] Ibid. [23] Garner (31 July 1947): FO 371/66554, TNA.