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Edited by Kirsten Sellars

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## TRIALS FOR INTERNATIONAL CRIMES IN ASIA

The issue of international crimes is highly topical in Asia, with still-resonant claims against the Japanese for war crimes, and deep schisms resulting from crimes in Bangladesh, Cambodia and East Timor. Over the years, the region has hosted a succession of tribunals, from Manila, Singapore and Tokyo after the Asia-Pacific War to those currently at work in Dhaka and Phnom Penh. This book draws on extensive new research and offers the first comprehensive legal appraisal of the Asian trials. As well as the famous tribunals, it also considers lesser-known examples, 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. It focuses on their approach to the elements of international crimes, and their contribution to general theories of liability. In the process, the book challenges some of the prevailing orthodoxies about the development of international criminal law.

KIRSTEN SELLARS is Assistant Professor at the Faculty of Law, The Chinese University of Hong Kong.

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*The Chinese University of Hong Kong*



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## CONTRIBUTORS

REHAN ABEYRATNE, Associate Professor, Jindal Global Law School, Haryana.

MARK CAMMACK, Professor of Law, Southwestern Law School, Los Angeles.

CHEAH WUI LING, Assistant Professor, Faculty of Law, National University of Singapore.

SIMON CHESTERMAN, Dean and Professor of Law, Faculty of Law, National University of Singapore.

ROBERT CRYER, Professor of International and Criminal Law, Birmingham Law School, University of Birmingham.

TARA H. GUTMAN, ANU College of Law, Australian National University, Canberra.

M. RAFIQUUL ISLAM, Professor of Law, Macquarie Law School, Macquarie University, Sydney.

NEHA JAIN, Associate Professor, University of Minnesota Law School, Minneapolis.

BING BING JIA, Professor of International Law, Law School, Tsinghua University, Beijing.

NINA H.B. JØRGENSEN, Professor, Faculty of Law, The Chinese University of Hong Kong.

ŌSAWA TAKESHI, Associate Professor, Faculty of Foreign Studies, Kumamoto Gakuen University, Kumamoto.

VALENTYNA POLUNINA, Doctoral Candidate, Cluster of Excellence, 'Asia and Europe in a Global Context', University of Heidelberg.

ABDUR RAZZAQ, Senior Advocate, Supreme Court of Bangladesh, and Chief Defence Counsel, International Crimes Tribunal, Dhaka.

LISETTE SCHOUTEN, Doctoral Candidate, Cluster of Excellence, 'Asia and Europe in a Global Context', University of Heidelberg.

KIRSTEN SELLARS, Assistant Professor, Faculty of Law, The Chinese University of Hong Kong.

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## FOREWORD

Some of the earliest rules intended to limit the conduct of hostilities can be traced back two and a half thousand years to Asia. The Chinese general Sun Tzu's *The art of war*, written in the sixth century BC, is now a classic text of military strategy and tactics. But it is more than that. For alongside the discussions of attack and defence, the laying of traps and the burning of arsenals, it also explores commanders' responsibilities to both sovereigns and subordinates when engaged in warfare. Sun placed the onus squarely on the shoulders of commanders to impose discipline on their troops or else take responsibility for their actions, and insisted that they should make the best use of information and resources that came their way, so as not to prolong conflict unnecessarily – for to do otherwise would be inhumane.

Yet despite these antecedents, Asia today is often regarded as the region with the least experience of or respect for international criminal law. The dominant story tends to be a European one, from the trial of the Alsatian Peter von Hagenbach for crimes committed at Breisach; to the Allies' trials of the Germans at Nuremberg, Hamburg, Rastatt and East Berlin; to the ad hoc tribunal trying those responsible for the killing fields in Bosnia; to the Rome Statute of the International Criminal Court, which now sits in The Hague. Other regions do feature, of course. The United States, for example, was instrumental in ensuring that Nazi atrocities were punished in a court of law rather than through summary execution. Latin America contributed much to the development of transitional justice, as did South Africa. Though some African nations now protest at being on the receiving end of a disproportionate amount of international criminal justice, they are without question active participants. Asia, by contrast, is rarely mentioned.

Indeed, it is striking that while two-thirds of African states and three-quarters of other regions have accepted the jurisdiction of the International Criminal Court, less than one-third of the countries in Asia have done so. The reasons for this are complex and linked to a

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more general wariness of accepting international obligations. Nevertheless, it seems probable that part of the hesitation in embracing a permanent tribunal with jurisdiction over war crimes, crimes against humanity, genocide, and, potentially, aggression, can be traced to the region's experience of international criminal law.

As this volume demonstrates, far from being bypassed by international criminal law or ignorant of its content, there is in fact a rich history to be discovered. In the aftermath of the Second World War in particular, around a thousand trials were conducted across Asia. In some cases, the trials were minimally documented; in others, the trial records have only come to light long after the event. Even the 1948 Majority Judgment in the highest profile post-war case in the region – that of Japan's leaders before the International Military Tribunal for the Far East – took time to emerge: it was published in Japanese and Russian at the time, but the English-language version was available only in mimeograph until it was eventually published in 1977. By contrast, the Judgment of the Nuremberg Tribunal was published in English, French, Russian and German within a year of the decision being released.

The relative ignorance about the Tokyo Tribunal was not entirely accidental. Even at the time, it was regarded as being somewhat embarrassing. When the trial opened in 1946, *Time* magazine, while likening the Nuremberg trial to the portentous drama of a Wagnerian opera, contrasted its counterpart in Japan to the 'opéra bouffe' qualities of Gilbert and Sullivan musicals. After the Tokyo Tribunal closed, the international lawyer Georg Schwarzenberger wrote that the 'legal standards – or their absence – of the Tokyo Trial were such as to make lawyers wish to forget all about it at the earliest possible moment'.

In more recent years, legal scholars, not succumbing to the desire to forget, have rightly stressed the Tribunal's many shortcomings, such as its selective focus, retroactive charges, evidentiary failings and other flaws. But there has been less examination – at least outside Japan – of the manner in which colonialism and race figured in this and other post-war trials. Given the fast-changing political environment after the conclusion of hostilities in the Pacific theatre, it is not surprising that the trials quickly became caught up in the liberation struggles around the region – nor that the United States and the European powers preferred to frame the legal proceedings in a manner that emphasised Japanese atrocities rather than colonialism. Race was also a feature, with the Allied powers claiming the right to speak on behalf of 'civilisation' in prosecuting the trials. Though many of those on trial had clearly violated

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the norms of any society calling itself civilised, it was evident that 'civilisation' in this context meant *Western* civilisation.

A further complication with long-term implications was the political decision to protect the Japanese Emperor from prosecution. This assisted the short-term occupation of Japan, but created a more enduring problem bound up with the Japanese failure to accept responsibility for their actions during the fifteen-year war against China and the Allies. The repercussions of that decision continue to be felt today, as China, South Korea and other Asian states call on Japan to apologise for its wartime activities – even as nationalists within Japan press for ritualistic visits to the Yasukuni shrine to Japan's war dead, which include some leading figures convicted of war crimes and crimes against peace at the Tokyo Tribunal.

Given this history, it is not hard to see how international criminal law might come to be seen in Asia as a tool to be used for selected political ends, rather than as a manifestation of the rule of law applicable equally to all. The various trials are interesting not only for their political significance, however. They also offered what Kirsten Sellars rightly describes as a 'proving-ground' for legal innovation. This was especially true in the area of 'common plan or conspiracy' and the doctrine of command responsibility. The innovative approach was in part driven by the facts before the post-war tribunals. In Nuremberg, the Nazi leadership had left behind evidence that clearly documented orders to commit international crimes. Such evidence was not available in Tokyo, meaning that charges could not be based solely on explicit orders. To fill this gap, defendants were charged not only with ordering, authorising and permitting war crimes, but also with participating in a grand conspiracy and failing to prevent violations by the soldiers under their command. The limits of these doctrines continue to be a subject of debate today.

This book also provides an account of other trials that took place after the Second World War, ranging from Singapore and the Dutch East Indies to China and the Soviet Union. In addition it examines the more recent experiments with trials for international crimes in Asia, which can be traced back to events in the 1970s but which often took a generation to reach the courtroom. First in Bangladesh, where the experience of the bloody war of separation from Pakistan in 1971 gave rise to calls for the creation of a domestic 'international crimes tribunal'. These plans were halted by a coup and instability, but revived in 2009. Second in Cambodia, where the Khmer Rouge's reign of terror from 1975 to 1979 became the focus, three decades later, of mixed 'extraordinary chambers'

within the national courts. And finally in Timor-Leste, where Indonesia's occupation, beginning in 1975, was reversed by plebiscite in 1999 amidst violence and destruction, which in turn gave rise to an unusual hybrid court convened in Dili under the auspices of the UN transitional administration.

Some of the issues confronted in these various trials are consistent with experience in other regions, though some appear unique to Asia. This is, perhaps, to be expected. The application of 'universal' principles in specific jurisdictions often highlights the inherent tension between legitimacy and effectiveness in international criminal trials. Such trials must, of course, aspire to a legitimacy that goes beyond the state, particularly when it is the very leaders of that state who may have orchestrated unspeakable acts. At the same time, however, those trials must be sensitive to the local context if their results are to be effective. Unless the population regards the legal process as tailored to their needs and concerns, any resolution they seek to impose is unlikely to endure.

Kirsten Sellars and her contributors bring together a wealth of expertise on these and many other topics. It is hoped that this volume will contribute to a deeper understanding of the significance of international criminal trials for Asia, and of Asia for the future of international criminal law.

*Simon Chesterman*

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*Kirsten Sellars*