Nanjing War Crimes Tribunal: Research Memorandum

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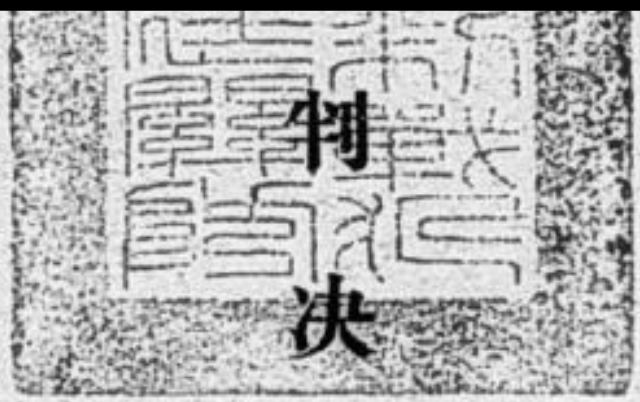

Introduction

This memorandum examines the historical and legal significance of the Nanjing War Crimes Tribunal, which tried Japanese war criminals in the wake of their atrocities during WWII. By examining primary documents that marked the tribunal's establishment and delineated its jurisdiction, my discussion focuses on the statutory and common law sources that the court employed in the trials. While my research was initially driven by broad questions concerning the justice in the trials' procedure and outcome, it also necessitated an in-depth overview of the system of international war crime laws that was developed after WWI. By adopting that system and importing additional provisions from its domestic criminal law, the Republican Chinese government has provided a highly detailed and targeted body of law that never lost sight of the particular criminals they were meant to apply to.

Discussion

1. Jurisdiction and Background

Since the end of WWI, a system of military common law has been applied in military courts to try war criminals. This law of war is international law, and while it is not created and enacted by the legislature of any particular country, it can be administered by courts that are commissioned and equipped to do so. The UNWCC characterizes the international law of war as a "standard certain" similar to the common law.[1] That is, like the common law, it presumably flexible (as in not static) enough to meet the demand of justice. In particular, this body of jurisprudence finds its sources in the Hague and Geneva Conventions, whose written accords are the "nearest approach to legislation possible" in the post-WWII state of international relations. In addition, the United States Supreme Court points out that the principle of individual responsibility is also a necessary condition of the establishment of this system of law, which in turn defines that responsibility.[2] As such, the punishment of individual war criminals for breach of the law of war is supported by both the written and unwritten rules of international law.

A further necessary condition to the operation of this system of military common law is the concept of "universality of jurisdiction," which allows courts of one state to try accused persons who are not nationals of that state for acts not committed within the territorial boundaries of that state.[3] This means a municipal court with a definite local jurisdiction during times of peace might, with the special commission by the UNWCC, obtain special jurisdiction over persons normally outside the custody of the court. In this way, the Nanjing War Crimes Tribunal, like other courts commissioned to try WWII criminals, acquires the jurisdiction to try Japanese war criminals.

On July 3rd, 1946, the Tribunal was established by equipping the former Army Headquarters

[1] *Law Reports of Trials of War Criminals selected and prepared by The United Nations War Crimes Commission*. Vol XV, London: His majesty's Stationery Office, 1949, vii-viii.
[2] *Ibid*, x, xv-xvi.
[3] *Ibid*, 23, 26.

Military Tribunal with broad jurisdiction to try war criminals who committed crimes in China.[4] In an article by the *Central Daily*, the establishment of the Tribunal was mentioned in the same breath with the ongoing effort to extradite the most prominent Japanese war criminals who were responsible for the Nanjing Massacre.[5] In fact, the need to extradite these individuals had been contemplated earlier, in June of 1946, when the Temporary Senate of Nanjing organized the Investigative Commission on the Nanjing Massacre.[6] In a meeting, the Commission decided to apply for extradition of the three major culprits of the Nanjing Massacre to China. On July 26th, an official telegram was sent to the ROC government, to be redirected to the IMTFE to extradite the said criminals. The reasons given for putting them on trial in China instead of in Tokyo was to "symbolically settle the score": "最好的象征请算法，自然无过于公开审讯他们的渠魁，并明证其罪刑，垂为千秋万世的炯戒."[7] The purpose, therefore, of trying the culprits of the Massacre in Nanjing, was not just to sentence them to penal punishment, but also to condemn them morally in the city where they committed the war crimes.

2. Rules and Process

The "Ordinance" issued on October 23rd, 1946 by the ROC government defines both the substantive rules and the procedural basis of the trials.[8] Article I, specifying the applicable rules in the trials, points out that while the rules of international law are the primary basis for trial and punishment of war criminals, "the present law is also applicable, to which the Criminal Code of the ROC is a supplement, to be used in cases not provided for under the former statutes."[9] As such, while international law served as the bedrock of the trials, laws made by the ROC government for the specific purpose of the tribunal, as well as ROC criminal law, were also applicable. This three-tiered structure of legal rules, to me, shows thoroughness in preparation and a determination to offer solid legal grounds for the tribunal's ultimate convictions.

The three main categories of offences identified by the Ordinance and other documents of the Tribunal are i) crimes against peace, ii) war crimes, and iii) crimes against humanity. (The UNWCC report notes that "the Chinese court does not examine how closely an accused must be shown to have been to the planning and waging of aggressive war before he can be held responsible for crimes against peace." It also notes that the Chinese courts mainly tried crimes against peace and not crimes against humanity. I am not sure that this is correct, because in the Indictment Letter of Kenji Doihara, all three categories are mentioned.) Article II of the Code lists 38 specific atrocities as indictable offences under the

[4] 南京大屠杀史料集 24: 南京审判, 胡菊蓉编. 江苏人民出版社，凤凰出版社. (*Historical Documents of the Nanjing Massacre*, Vol. 24: The Nanjing Trials.)
[5] *Ibid*, 46.
[6] *Ibid*, 11.
[7] *Ibid*, 52.
[8] There are some inconsistencies between the primary and secondary sources on the date of the issuance of the law or "Ordinance". In Hu Jurong's compilation of Tribunal documents and the UN WCC report, the only Chinese law mentioned was the "Law governing the Trial of War Criminals", which seems to be the "Ordinance" that Zhang Tianshu referred to in his article, The Forgotten Legacy: China's Post-Second World War Trials of Japanese War Criminals, 1946-56. But the sources are in agreement that this law ("Ordinance") was the one applied in the Tani Hisao trial.
[9] *Law Reports of Trials of War Criminals selected and prepared by The United Nations War Crimes Commission*. Vol XIV, London: His majesty's Stationery Office, 1949, p152. 南京大屠杀史料集 24, *supra* note 4, 30.

Ordinance. They range from offences on the person, such as murder, mass murder, rape, and kidnapping children, as well as offences on property and national sovereignty.

With the procedural rules in place, the next question the Tribunal faces is the gathering and selecting of evidence. To my surprise, the evidence gathering process for the eventual trial of war criminals started in 1943 and gained apparent momentum after Japan's official surrender in 1945.[10] The establishment and operation of the judicial and bureaucratic machinery that investigated incidents of war crimes depended on coordination of local provincial and municipal courts, the Foreign Ministry, the Judiciary, as well as the corporation of the IMFTE. An article by the *Central Daily* on January 6th, 1946, indicates that ROC President Chiang Kai-Shek himself inspected the letters of accusation submitted by the Nanjing people, which were 1036 in total.[11] Moreover, the list of war criminals of the Nanjing Massacre, compiled by the Judicial Ministry lists 83 individuals and groups who were to be tried. The extensive administrative resources dedicated to the process of gathering and studying evidence indicate the ROC government's readiness and devotion to getting a just result and struck me as proportionate response to the historical importance of the trials.

3. Trial and Verdicts: Two Case Studies

The trial Tani Hisao, one of the prime culprits of the Nanjing Massacre, is the most cited case in Chinese sources of the Tribunal, while the only case that made it into the compiled reports of the UNWCC was that of Takashi Sakai.[12]

The Sakai case was tried before the issuing of the October laws (the "Ordinance" referred to above) and the sentence was issued on August 29th. The laws applied in this case were thus not the Ordinance, but an earlier version that has been labelled as the "Procedure" by Zhang Tianshu and "Rules" by the UNWCC. The defence of the accused relied on three main arguments: 1) he was acting within the stipulations of the International Protocol of 1901 where Japan was among the 11 foreign powers that were given the right to keep troops in certain areas in China; 2) he acted upon the orders of his government; 3) he was not responsible for the acts of his subordinates as he had no knowledge of them.[13] The court rejected each argument and found the accused guilty of participating in the war of aggression and four other counts of atrocities under the Procedure. These findings lead to a guilty verdict of a crime against peace, war crimes and crimes against humanity. The sentence was death. Notably, the finding that he had participated in a war of aggression against China lead to an automatic guilty verdict of a crime against peace, as the Charter of the International Military Tribunal at Nuremberg stipulated. Moreover, the Tribunal held that superior orders were not an excuse for the crime. As to the accused's argument that he could not be held responsible for actions of his subordinates, the Tribunal found "that a field Commander must hold himself responsible for the discipline of his subordinates, is an accepted principle." Indeed, this rule, as mentioned above, is internationally accepted as a custom of war. I realize that it is a fundamental rule that the finding of individual liability in any war crime proceeding necessarily depends on. For if a lower-ranking officer

[10] 南京大屠杀史料集 24, *supra* note 4, 10.
[11] *Ibid*, 50.
[12] *Law Reports*, Vol. XIV, 1.
[13] *Ibid*, 2.

could transfer both their *mens rea* and their commission of the prohibited act to either their higher-ranking counterpart or their subordinates, there would be no cognizable way of assigning criminal responsibility.

On October 19th, 1946, the Tribunal began to hear the case against Tani. Perhaps unsurprisingly, the third ground of defence pleaded by Sakai were also used in the defence of Tani, coupled with the new assertions that he was not aware of what his subordinates did and there was no sufficient evidence to incriminate his subordinates. These arguments were again rebutted by the Tribunal's doctrine of individual responsibility. Tani, too, was sentenced to death.[14]

Conclusion & Reflection

In Timothy Brook's work on the Tokyo Judgment and the Rape of Nanjing, he argues that the adequacy of judgment can be measured only in terms of 1) the validity of the laws invoked and 2) the success with which the rights of the defendants were protected. He claims, quoting Justice Radhabinod Pal of the IMFTE, that the number of convictions it produced or the quota of retribution it conferred on behalf of war victims are not suitable yardsticks to accurately measure the adequacy of the judgment.[15] More importantly, he also questions the overall effectiveness of relying on the adversarial process in a courtroom to effectuate "the final moment in a story of war."[16] While I find this criticism reasonable, I also sympathize with those who desire retributive justice against the perpetrators of war crimes. Where, if not a courtroom, shall we settle the score of war? It is true that we should beware of the danger of "victor's justice" overtaking the actual attainment of justice, but I believe that the benefit of a trial outweighs its detrimental effects. Not only does a trial offer an opportunity for personal and collective catharsis to the victims of war crimes, but it is also a publicized event that lays official blame on criminals whose conviction serves a deterrent function for society in general.

Overall, I believe the procedural and substantive rules set out by the Tribunal are valid because they are based on internationally recognized legal norms as well as a nuanced recognition of the actual atrocities that took place on Chinese soil during Japanese invasion. Of course, further inquiry into the trial process would perhaps reveal more insights on the matter.

During the past school year, by examining sources that were available to me online and in the university library, I obtained an introductory view of the Nanjing Trials. I also realized that without the guidance and academic framework of a law school course, it is hard for an individual with a decent historical research skillset to truly appreciate the significance of certain legal and historical issues that the trials give rise to. In the future, I hope to study international criminal law in more depth when I will for certain revisit the questions I considered here.

[14] 南京大屠杀史料集 24, *supra* note 4, 386-395.
[15] Timothy Brook. "The Tokyo Judgment and the Rape of Nanking Author(s)," *The Journal of Asian Studies*, Aug 2001, Vol. 60, No. 3 (Aug, 2001), pp. 673-700.
[16] *Ibid*, 674.

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