

# Using Trial Judgment to Heal: On Crimes Committed by Japanese Forces in China

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## 1. Introduction

Seventy years after World War II ('WWII'), crimes committed by Japanese forces during the War remain a relevant political and legal issue, despite the evidence relied upon by the Trial Judgment of the International Military Tribunal for the Far East ('the Judgment') and the discussions in the process to establish diplomatic relations between China and Japan. It is generally perceived that Japan has not been as repentant for war crimes as Germany. Controversial readings of Japanese attitudes towards the crimes are available, such as that "the younger generation has little knowledge of the recent past",<sup>1</sup> or "opinion polls suggest that most Japanese feel their country did things in Asia for which the country should apologize".<sup>2</sup> The Chinese public still cares about signs of Japanese repentance. While Japanese prime ministers have repeatedly apologized for their country's misdeeds, issues like the absence of nationally sponsored museums in Japan that acknowledge Japanese aggression continue to irritate Chinese observers. The Japanese prime ministers' offerings at the Yasukuni Shrine, which for the Chinese public symbolizes a lack of repentance, enhances an anti-Japan mood in China. The dispute over the Diaoyu or Senkaku Islands in 2012 again provoked many Chinese citizens and confirmed their dissatisfaction with the lack of Japanese repentance, leading to demonstrations against Japan in several cities in China. The crimes committed by Japanese forces in China during WWII remain a trauma that influences the political and diplomatic relations between the two countries.

This brief asks whether the Far East Trial Judgment

1 See ZHU Wenqi, "Prologue by ZHU Wenqi", in Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (editors), *Historical Origins of International Criminal Law: Volume 4*, Torkel Opsahl Academic EPublisher, Brussels, 2015, pp. xiii–xxii.

2 See Kirk Spitzer, "Why Japan Is Still Not Sorry Enough", 2012, available at <http://nation.time.com/2012/12/11/why-japan-is-still-not-sorry-enough/>. The URLs referred to in this brief were last accessed on 1 May 2016.

can be helpful today in healing trauma by documenting and thus making visible crimes committed by Japanese forces. The political significance of this trauma in both domestic governance and foreign relations falls outside the scope of this brief.<sup>3</sup> Rather, the brief compares legal facts recognized in the Judgment – judicial findings – and the general perception of the Chinese public about the crimes. If the general perception in China and the legal facts contained in the Judgment largely overlap, the Judgment could make an important contribution to a process of healing. In answering the question, issues arise concerning individual responsibility for crimes and the significance of war crimes trials. After the comparison of legal facts and public perception in section 2 below, the brief will reflect on such issues in section 3, and conclude by stressing the potential positive role of the Far East Tribunal and its Judgment for trauma healing in China.

## 2. Comparing Legal Facts in the Judgment and Public Perception

### 2.1. Legal Facts

#### 2.2.1. A Historical Line of Invasion

The historical line of invasion is represented in the Judgment in a meticulous and unambiguous way.<sup>4</sup> This captures a broad spectrum of victimization of Chinese people in the affected areas. Details of the invasion were included in the Judgment, including the following facts: The attack at Mukden on 18 September 1931 (p. 91), the murder of marshal CHANG Tso-lin (pp. 527–529), the unilateral establishment of "Manchukuo" by the Japanese Army (p. 569), the invasion of Shanghai starting from

3 For discussions on the political factors contributing to post-WW II relations in Asia, see Thomas U. Berger, *War, Guilt, and World Politics after World War II*, Cambridge University Press, 2012.

4 *Judgment of the International Military Tribunal for the Far East*, p. 521. Another summary is provided on pp. 1139–1140. The entire Judgment and trial transcripts are freely available in the ICC Legal Tools Database.

28 January 1932 (p. 596), the invasion of Jehol Province in 1932 and the subsequent occupation of Jehol (p. 648), the Hopei Incident and North Chahar Incident in May and June 1935, the establishment of an “independent” Mongolian government in 1936 (p. 672), the Fentai Incident in September 1936, the Lukouchiao incident (pp. 682-685), the clash at Langfang (p. 691), the onslaught at Nanyuan (p. 692), the capture of Peiping on 8 August 1937 (p. 693), the attack of Shanghai in August 1937 and planned offensives in Central China (p. 267), the setting up of a Shanghai Ta-Tao City Government in December 1937 (p. 699), the capture of Taiyuan on 9 November 1937 (p. 702), attack on and crimes committed in Nanking which came to be known as the “Rape of Nanking” (pp. 707-708), the establishment of the provisional “Chinese Government” on 14 December 1937 as the government in North China (pp. 714-717), the process of establishing the Renovation Government in Central China (pp. 717-721), military advances in many Chinese towns and villages (p. 268), invasion of several cities (Hsuchow (19 May 1938), Kaifeng (6 June 1938), Matang (27 June 1938), Kiukiang (25 July 1938), Sinyang (12 October 1938), Hankow (25 October 1938) (p. 722), Canton (20 October 1938) (p. 731), Hainan Island (10 February 1939) (p. 732), Nanchang (26 March 1939) (p. 742), the invasion of Lungchow (23 December 1939) and the capture of Nanning (p. 746), the capture of Ichang (12 June 1940) and Kaifeng (30 June 1940), sending troops to Indo-China (p. 750), armed operations against Chungking and bombing of Kunming and Chungking (pp. 754-755), the capture of Lungling and Tengchung in Yunnan Province in May 1942, the capture of Changthe in Hunnan Province in December 1943, the intensification of military operations in the interior of central China by the middle of 1944, the capture of Chengchow (20 April 1944), Loyang (25 May 1944), Changsha (18 June 1944), Hengyang (8 August 1944), Kweilin (10 November 1944), and Liuchow (11 November 1944) (pp. 759-760).

### 2.1.2. Japan’s Military Strategy and Intentions

The commanding organization in Japan during WWII was the Imperial General Headquarters. Set up on 20 November 1937 by the Cabinet, it included “the Emperor, who was its head”. The Judgment recognizes that the Imperial General Headquarters “had a great deal of influence on the Japanese Government prior to the outbreak of the Pacific War” (p. 706).

The Judgment includes several documents revealing the policies of Japan. The “Amau Statement” issued on 17 April 1934 by the Japanese Foreign Office was recognized as the “official declaration by the Foreign Ministry of Japan’s policy toward China” (p. 628). Other official documents of the Japanese Army include the Konoye Declaration of 16 January 1936 which set the stage “for

further invasion and the development of local regimes ultimately for the creation of a ‘new government’ in China” (p. 713); the Japanese “Five Ministers’ Conference” in 1938 which planned “the establishment of a Japanese-dominated or ‘puppet’ government for the whole of China as distinct from the local governments already established” (pp. 724-728). “Konoye’s Three Principles” aimed at creating in China “a complacent Government [...] by Japan, giving the latter complete control of China” (p. 741). These policies were clearly connected with acts of aggression against China based on military strategy. The Judgment recognizes that several key statements like those above were issued by the Japanese Foreign Office.

Furthermore, the Judgment establishes beyond doubt that conflicts were provoked on purpose by the Japanese Army. For example, the so-called Lukouchiao Incident was described by the Tribunal as “the culmination of the Army’s scheme for bringing north China under Japanese rule” (p. 183).

### 2.1.3. Crimes Indicted

It is clearly stated in the Judgment that “the case made against the accused is of waging aggressive war, with the object, *inter alia*, of obtaining economic domination of Manchuria and other parts of China” (p. 761). For the intention of waging war, the Tribunal found that “the conspiracy to wage wars of aggression was already criminal in the highest degree” (p. 1142).

Annex 6 provides the Indictment, charging the military officials with the crime against peace, conventional war crimes, and crimes against humanity. Appendix A of Annex 6 provides the summarized particulars showing the principal matters and events; Appendix B provides the list of articles of treaties violated by Japan; Appendix C provides the list of official assurances violated by Japan; and Appendix D provides the conventions and assurances that, together with the practice of civilized nations, established laws and customs of war.

Annex 6 and the appendices provide summarized lists of crimes, as well as specific bases on which international law was violated. Some detailed descriptions were provided in the Judgment.<sup>5</sup>

5 P. 1001 of the Judgment provides a general description of the “cruelties of the most inhumane and barbarous character practiced by the Japanese Army and Navy”; p. 1002 says that the killing of prisoners, death marches, forced labor, torture and cannibalism were practiced; pp. 1008–1009 state that the practice of machine-gunning of civilians “continued throughout the China War; the worst example of its being the massacre of the inhabitants of Nanking in December 1937”; p. 1010 describes torture of captured Chinese; pp. 1011–1015: details of the rape of Nanking; pp. 1019–1022: the expansion of war and crimes committed by the Japanese Army; pp. 1030–1031: some atrocities committed by the Japanese Army; pp. 1037, 1038 and 1044–1057: crimes, including death marches and massacres of prisoners of war, committed in the Pacific War; pp. 1057–1064: a brief summary of torture and other inhumane treat-

### 2.1.4. Specific Terms Illustrated in the Judgment

The Judgment deals in particular with several terms used by the Japanese Army. It shows that these terms were deliberately used wrongly or without the meaning the terms are normally acknowledged to contain.

The first term is “national defense” which was recognized by the Tribunal as Japan’s argument to justify her own aggressive policies (p. 669). The second is “incident” described as follows by the Judgment: “Japanese Governments refused to acknowledge that the hostilities in China constituted a war. They persistently called it an ‘Incident’” (p. 1003).

### 2.2. Public Perceptions

To compare the legal facts of the Judgment as briefly described above with public perceptions in China on crimes committed by Japanese forces during WWII, let us briefly examine the crimes contained in the following Chinese media: curriculum textbooks, slogans in anti-Japan demonstrations, information available on web sites to memorize WWII, and claims made in law suits for compensation.

First, in the Chinese National History Curriculum for Senior High School published by the People’s Education Press in 2007,<sup>6</sup> a number of events were listed with emphasis on the brutal behaviour of the Japanese Army, including the Machine-Gun Killings in Nanking and Panjiayu, the use of a biological unit in north-east China, the activities of Unit 731, the deployment of a chemical weapons unit in north-east China, and Unit 516 which was involved in raping and killing civilians.

Second, slogans used in anti-Japan demonstrations express public perceptions about the crimes. The demonstrations in 2012 included the slogans “Defend the Diaoyu Islands”, “Smash Japanese Imperialism”, and “Resist Japanese Products”. Another anti-Japanese demonstration happened in 2005. The slogan largely used was “Patriotism is Not a Sin”. The slogan “Face History” was also used in the demonstration.

Third, information on Chinese web sites shows perceptions of crimes committed by Japanese forces during WWII. For example, on the web site [china1931.cn](http://china1931.cn) details of events in WWII are provided under the categories of biological warfare, “comfort women”, and forced labour respectively. Oral statements or memoirs of those invol-

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ment committed by the Japanese Army in China and throughout the Pacific War; and pp. 1067, 1083, 1089 and 1091: certain practices of the Japanese Army including vivisection, forced labour, excessive punishment, mass punishment, and death penalty.

6 See Secondary School Curriculum Research and Development Center (中学课程研究开发中心), *People’s Education Press Version of Normal Senior Secondary School Curriculum Standard Experimental Textbook on History* (人教版普通高中课程标准实验教科书历史课本), People’s Education Press (人民教育出版社), Beijing, 2007.

ved in war at the time and pictures taken as well as diaries of Japanese war criminals are the main sources for the events presented. Under the category of biological warfare, for example, there are 107 articles or news items providing information relating to what happened during WWII as regards biological warfare. The articles include general claims on the use of biological weapons, on which Japanese forces were involved (Units 526, 731 and 1644), and on specific events that occurred in the war that involved the use of biological weapons, together with evidence (including copies of newspaper articles at the time in both China and Japan, memoirs from victims who survived the war, records in archives, books published in China, the United States, and Japan). According to the evidence on the web site, places where biological weapons were used include Beitong, Chongshan, Luxi, Yiwu, Changde, Ningbo, Guangfeng, Shangrao, Nanking, and areas in the provinces of Zhejiang, Jiangxi, Yunnan and Canton.

Fourth, the compensation claims in Japanese lawsuits brought by Chinese victims for crimes committed by Japanese forces reflect some of the perceptions on the crimes. Such lawsuits started from 1995 onwards. Suits against private companies have been mainly about the issue of forced labour. Several cases ended with financial compensation for Chinese victims.<sup>7</sup> As far as lawsuits about the issues of “comfort women” and biological warfare are concerned, state responsibility and corresponding compensation are still being debated.<sup>8</sup>

### 2.3. Comparing Public Perceptions and the Judgment

When comparing public perceptions on crimes committed by Japanese forces during WWII with the legal facts on the crimes established by the Judgment, we notice that some events that are greatly emphasized in China today did not draw much attention in the Judgment, and that differences appear in details of crimes. For example, much public attention has been paid in China to the activities of the Japanese Units 731 and 1644 which were the units committing biological warfare in China, while in the Judgment biological warfare is given only limited attention without much detail being provided. Likewise, the practice of vivisection included in the Judgment does not contain information about Unit 731 which has drawn much attention in China. Another example of the differ-

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7 See M. Cherif Bassiouni, *International Criminal Law, Volume 3: International Enforcement*, Third Edition, Martinus Nijhoff, 2008, pp. 649–650.

8 See William Underwood and KANG Jian, “Japan’s Top Court Poised to Kill Lawsuits by Chinese War Victims”, available at <http://japanfocus.org/-Kang-Jian/2369/article.html>; Sayuri Umeda, “Japan: WWII POW and Forced Labor Compensation Cases”, available at <http://www.loc.gov/law/help/pow-compensation/japan.php>.

ence between publicly perceived crimes and crimes recognized by the judgment are the crimes committed in the Pacific War by Japanese forces outside China. Furthermore, while not much attention was paid by the Chinese public to economic domination, the Judgment recognized the economic domination by Japanese forces during the war in China.

Although these differences exist, a detailed comparison leads to the conclusion that the Judgment provides not only evidence for various public claims made, but also a wider range of crimes than what we see in the public discourse in China. The documentation drawn upon by the Judgment is a foundation for open debate on the construction of the Far East Tribunal, on the evidence collected for the proceedings before the Tribunal, on the facts recognized in the Judgment, and, most importantly, on relevant legal and political issues based on the facts recognized. For these reasons, the Judgment could very well serve as an instrument of healing by documenting the crimes committed by Japanese forces in China in WWII.

### 3. Conclusion: Between ‘Truth’ and Interpretation

The extent of horror in the crimes referred to above leads to the equation of international law and civilization, pursuant to a progressive historiography in which horror is conquered for the “survival of humanity”.<sup>9</sup> The civilization premise perceives law as developing. Thus, although the international law on aggression and criminal responsibility was not yet developed at the outset of WWII, it shall be applied, so the argument goes. The reasoning starts with the premise that the facts were clear, that “all the judges agreed upon these facts”, while the “law [...] was doubtful”.<sup>10</sup> While acknowledging the horror of the crimes, this argument should not neglect the context in which the crimes happened. Interpretation of what happened through the legal arrangement or classification of ‘crimes against humanity’ constructs what had happened, and erases horror during the period of war.<sup>11</sup>

While trials seek to deal with the “truth”, the “truth” is about interpretation. In international criminal justice,

the way the trial is constructed is the beginning of interpretation: the legal arrangements or classifications in the trial will have an impact on the “truth”. The events are interpreted through the lens of the legal arrangements and structuring of the trial. History and memory, meanwhile, are closely linked with future-oriented political interests. Add the fragmented evidence caused by the particularities of war, and we can picture the limits of the trial, as Koskenniemi writes: “The engagement of a court with ‘truth’ and ‘memory’ is thus always an engagement with political antagonism, and nowhere more so than in dealing with events of wide-ranging international and moral significance [...] Much is at stake for the protagonists – that is the nature of the trial – and no truth can remain sacred within it”.<sup>12</sup>

In the course of an international criminal trial, open argumentation takes place, involving conflicts of interpretation. This brief submits that a key value of the trial lies exactly in this conflict. The post-WWII trauma in China has lasted to this day, despite the work of the Far East Tribunal. Controversial arguments have been made about the legitimacy of the Tribunal, in particular that it represented victors’ justice.<sup>13</sup> More conflicts between interpretations at the Tribunal could have prevented this.

As mentioned above, the Far East Judgment could well serve as an instrument to heal the trauma in China. It addresses a broad spectrum of victimization of Chinese by Japanese forces in connection with WWII. Further research on possible conflicts of interpretation in the work of the Tribunal could contribute towards the good purpose of healing.

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9 ZHU Wenqi, *supra* note 1, p. xviii.

10 *Ibid.*, p. xvii.

11 Martti Koskenniemi, “Between Impunity and Show Trials”, in Max Planck Yearbook of United Nations Law, 2002, vol. 6, pp. 1–35.

12 *Ibid.*, p. 25.

13 Richard H. Minear, *Victors’ Justice: The Tokyo War Crimes Trial*, Princeton University Press, 1971.