

Exploring Peace Through Justice Should Be An Essential Element of China's Anti-Fascist War Memorialisation

By LIU Yiqiang

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1. China's 2015 Anti-Fascist War Memorialisation

When meeting with his Russian counterpart at the 2013 Asia-Pacific Economic Cooperation ('APEC') Summit in Bali, Indonesia, China's President XI Jinping announced that his country would like to celebrate the 70th anniversary of victory in the "world anti-fascist war" in 2015 together with Russia.¹ This would not be just a solemn commemoration, he said, rather China and Russia should host a "grand style" celebration.²

It did not take long before the Russians officially took up the offer. President Putin pledged his support when meeting President XI in Shanghai at the Fourth Summit of the Conference on Interaction and Confidence-Building Measures in Asia in 2014.³ Beijing also sought to include Mongolia, Korea and various South East Asian and Latin American countries in the commemoration.⁴ With Chinese leadership and with Russia's active support, this memorialisation will most likely become a world event, yet, at the time of writing, not so much is known about it.

¹ The original remark having been made in Chinese, a courtesy translation was provided by the Kremlin's note 'Meeting with President of China Xi Jinping' (<http://eng.kremlin.ru/news/6089>, last accessed on 19 August 2014). While I rarely see the term 'anti-fascist' used in the 'West', in the Chinese context the notion 'fascist' has been used to refer to Germany and Japan who waged World War II ('WWII'). The term 'world anti-fascist war' would denote WWII.

² "Da qing" or 大庆 in Chinese.

³ The English translation is available on the web site of the Ministry of Foreign Affairs of China, 'Xi Jinping Holds Talks with President Vladimir Putin of Russia, Stressing to Expand and Deepen Practical Cooperation, Promoting China-Russia Comprehensive Strategic Partnership of Coordination to Higher Level' (http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1158516.shtml, last accessed on 19 August 2014).

⁴ China co-operated with South Korea to open a memorial hall in Harbin in honour of Ahn Jung-geun, the independence activist who in 1909 assassinated Hirobumi Ito, Japanese colonial governor of Korea (then a Japanese protectorate). This may illustrate China's intention to awaken the common historical heritage, and growing collaboration with respect to Japan.

It is fair to assume that Japan has played a role in China's attempt to remember the past in terms of "anti-fascist memorialisation". The tensions between China and Japan in the East China Sea escalated in the period after September 2010, with relations between the two countries reaching their lowest point in recent history. When Japan reinterpreted its Constitution to allow exercise of the right of collective self-defence, a Chinese Ministry of Foreign Affairs spokesperson urged Japan "to earnestly respect legitimate security concerns of its Asian neighbours, deal with relevant issues with discretion, not to harm the national sovereignty and security interests of China and not to undermine regional peace and stability".⁵

On the Russian side, the growing split between Russia and the United States and, to a certain extent with Western Europe, has been exacerbated by the crisis in the Ukraine. Mid-2014, Moscow claimed that Ukraine had been taken over by extremists, and that Russia was respecting the democratic wishes of the Russian minority in Ukraine and its right to self-determination.⁶ How does this language of Russia square with China's national interests?

There is no doubt that the momentous WWII victory over fascism is an occasion that should be honoured by China and Russia and even by the whole world. China and Russia suffered immense losses at the hands of respectively Japanese and German fascist forces. The human losses in Russia (then the Soviet Union) and China were the highest among all countries during WWII.

As such, one could argue that no nation has a greater stake in WWII-victimisation, and the subsequent reform

⁵ 'China urges Japan not to harm its sovereignty, security interests', *Xinhua News* (http://news.xinhuanet.com/english/china/2014-07/01/c_133452808.htm, last accessed on 19 August 2014).

⁶ Thomas De Waal, 'Anti-fascism and its discontents' (<http://carnegie.ru/eurasiaoutlook/?fa=55659>, last accessed on 19 August 2014).

of international law that it led to, than China and Russia. The Janus-like identity of, on the one hand, the catastrophic victimisation occurring on an unprecedented scale on Chinese and Russian soil during WWII, and, on the other, the decisive upgrading of the international legal order that it caused within a mere four years – including the 1945 United Nations Charter, the birth of international criminal law through the Nuremberg and Tokyo trials, the 1948 Genocide Convention, and the 1949 Geneva Conventions – forms a noble legacy that speaks as much to the future as to the past. It also represents a political capital of China which should be well maintained for coming generations of descendants of those who perished during WWII. Against this background, the memorialisation should be made as effective as possible, helping new generations to honour the suffering of past victims, and increasing the general awareness of the chief principles and laws that were born out of suffering which should not be belittled.

2. From the Psychology of Victimisation to the Principles Born Out of the Victimisation

As an old and still popular Chinese saying goes: “the winner is the King, the loser the outlaw” (胜者为王、败者为寇). It would be too simplistic to suggest that the anti-fascist memorialisation in 2015 could become Beijing’s reminder to Japan that China triumphed in WWII and is therefore, in the minds of some individuals, the “King”, and should be respected as such. Such a view would of course not be synonymous with Beijing ultimately seeking supremacy over Japan or in the region. China has been advocating for peace and responsible leadership for many years,⁷ and has not been aggressive, confrontational or interfering in the internal affairs of other States. Indeed, the historical evidence suggests that China is peace-loving, even as she continues to rise in power. However, her approach to achieving this end might be potentially challenging.

To many Chinese who are familiar with the saying “you will be beaten if left behind” (落后就要挨打), China was invaded by Japan – and, before that, subjected to western humiliation over many decades – because she was backward.⁸ To these Chinese, it is essential to ensure that China has sufficient strength not to be “left behind” again, and never be beaten through a new war of aggression. This line of reasoning could be considered a “vic-

tim syndrome”. The approach may both be true and quite limited in its ability to serve long-term national interests. For one, China would never be able to rest in peace with others if they lived by the same principle, as one side would always face the danger of being “left behind”. As such, the principle nourishes perpetual suspicion and instability.

While the “victim syndrome” is by nature backward-looking, it would be unfair to describe it as inherently weak. But the victimisation approach does contrast with the strength and clarity of the international law principles and rules that were born out of the immense Chinese suffering during WWII.

China should rely as much on these fundamental principles of world order, as she does on the psychology of victimisation. One WWII lesson that stands out in the conceptualisation of the historic victory against Fascism is that genuine peace is born through justice. Punishing wrongdoers is fundamental to a lasting peace. Individual criminal responsibility under international criminal law – a principle born out of WWII atrocities, through the Nuremberg and Tokyo trials – contributes to the individualisation of responsibility, by that undermining destabilising notions of collective responsibility and the cycles of fear and revenge. This cardinal principle has been integral to the design and evolution of the post-WWII world order since 1945.

3. Peace Through Justice – a Necessary Element to Ensure Stable Peace

The fateful year 1945 not only marked the victory of the Allied Powers against fascism, it was also a milestone in the history of international peace and justice as the victorious States put on trial those responsible for the atrocities committed in the name of fascism. In appraising the significance of the legacy of the Nuremberg trials, the first Prosecutor at the International Criminal Tribunal for Former Yugoslavia (‘ICTY’), Justice Richard J. Goldstone, observed that the legacy of the Nuremberg trial is “the wide realization that the global community is competent to arrange its affairs under an international rule of law”.⁹ For the first time in history, international courts held that representatives of a sovereign country were guilty of criminal conduct in waging an aggressive war. Indeed, it was the first charge contained in the Nuremberg indictment and one in respect of which a number of death sentences were imposed.¹⁰

The logic underpinning this momentous development still animates today’s memorialisation of WWII victimisation. The anti-fascist victorious States shared the con-

⁷ See, for example, LIU Xiaoming (Chinese Ambassador to the United Kingdom), ‘Political and Security Challenges in Asia: A Chinese Perspective’, talk at Chatham House, 5 February 2014, p. 11; and HU Jintao, ‘Report at 18th Party Congress’, *Xinhua News*, 8 November 2012 (text issued on 17 November) (http://news.xinhuanet.com/english/special/18cpcnc/2012-11/17/c_131981259.htm, last accessed on 19 August 2014).

⁸ The provenance of this motto seems inconclusive. Some say it comes from Stalin on the Soviet reconstruction, others source it to a comment from MAO Zedong on international relations.

⁹ Justice Richard J. Goldstone, ‘World Peace Through Justice Lecture’, *Washington University Global Studies Law Review* Vol. 8 No. 4, 2009, pp. 619–622.

¹⁰ *Ibid.*

viction that Nazi German and Imperialist Japanese aggression and atrocities resulted from political philosophies that utterly disregarded the dignity of human beings and the rule of international law. In response, the victors set out to fashion principles of international criminal law necessary and sufficient to meet the immediate need of punishing the German and Japanese aggressors so as to bring justice to all and equally to prevent the recurrence of similar acts in the future by setting standards to be observed even in peacetime.¹¹

The same, painfully earned resolve of the victorious States was reflected in the UN Charter, which outlaws the use of military force or even the threat of the use of such force unless it is in self-defence or expressly authorised by the UN Security Council. It is fitting that the anti-fascist memorialisation in 2015 will coincide with the 70th anniversary of the founding of the United Nations, which represents the most important outcome of the catastrophe of WWII.

The primary objective of the United Nations Organisation is to prevent wars and atrocities like those that took place during WWII. The UN has done much to further this objective, including the establishment of the International Court of Justice as one of its principal organs and the *ad hoc* international tribunals of the 1990s such as the ICTY and the International Criminal Tribunal for Rwanda. It has also promoted the establishment of the International Criminal Court ('ICC'), the first permanent international criminal tribunal. The preamble of the ICC Statute declares that nations recognise that grave crimes threaten the peace, security and well-being of the world.

The foundation of the world order that was born out of the suffering of WWII assumes that genuine peace is secured through justice. Our common future depends on the extent to which we respect the strength of this global principle. Neglecting this principle would dishonour the sacrifices made by millions of victims of WWII.

4. Consistent Recognition of the Fundamentals of International Criminal Law

China was an integral member of the group of anti-fascist victorious States. It was the largest country in Asia and large parts of her territory had been occupied and her people brutalized. Unsurprisingly, the headquarters of the United Nations War Crimes Commission in the Far East was in Chongqing (Chungking), the wartime capital of China. China held her own trials of Japanese war criminals. The nationalist Chinese government was invited to participate in several major events that established the basis of the post-WWII order. China came to be the only Asian country with a permanent seat on the United Nations Security Council. She had a Chinese

judge and prosecutor at the Tokyo tribunal. Since the International Court of Justice came into being, she has had a Chinese judge most of the time. The Chinese language is one of six official languages of the United Nations. Despite the fact that China was ambivalent to the establishment of the ICTY, a Chinese judge always served on this body. Chinese is also one of the official languages of the ICC, a judicial body outside of the UN family and of which China is not a member.

Yet, no matter how much China's state representatives in diplomatic settings have claimed that China "has always been supportive" of international justice, they have also at times demonstrated a certain scepticism in the development of international criminal justice since the mid-1990s.¹² For example, on three occasions when the UN Security Council was asked to refer situations to the ICC, China voted in favour once (Libya), abstained once (Sudan) and voted against once (Syria). These decisions do not necessarily depend on the gravity of situation on the ground or the need for the ICC's intervention in that situation.

Yet, there seems to be one grand exception. China lends firm support to international justice whenever Japan enters the equation. In recent years, Chinese authorities have reaffirmed the Tokyo trial as a model for justice and defended against criticism of the trial from the Japanese side.¹³ A state sponsored research institute has been established to meticulously study details of the trial.

This inconsistency between China's acceptance of international enforcement of individual criminal responsibility for WWII-style crimes in some cases, and her reluctance in others could undermine the perception of China's support for key principles resulting from WWII victimisation. It is hard to see how this could be in China's national interest. The legacy of the Tokyo trial should be maintained and strengthened, not weakened. International efforts to keep this legacy alive through contemporary international criminal jurisdictions become more effective when they enjoy China's support. Consistent recognition of the Tokyo trial's principle of individual criminal responsibility in international criminal law would seem to serve both Chinese and common international interests.

Such support does not mean that China should be naive in protecting herself against political, frivolous or

¹² XUE Ru chronicles the positions of China in various UN Security Council contexts in 'China's Policy Towards the ICC Seen Through the Lens of the UN Security Council', Torkel Opsahl Academic EPublisher, Brussels, 2014 (FICHL Policy Brief Series No. 27 (2014)).

¹³ *Guangming Daily*, 'The sense of justice of the Tokyo Trial cannot be challenged', 9 September 2005. This article was published in connection with the 60th anniversary of anti-fascist war memorialisation.

¹¹ Antonio Cassese, *International Law*, Oxford University Press, 2004, pp. 333–339.

manifestly unfounded attempts to use international criminal justice against her. It is China's sovereign right to remain a non-State Party of the ICC, in particular until such time as that institution has properly proven itself in practice.¹⁴ But that does not mean that China should not be actively supporting the ICC as a non-State Party. She is more than strong enough to withstand external pressures to prematurely accede to the ICC Statute. Likewise, as a permanent member of the UN Security Council, China can protect herself against hypothetical future attempts to use Council-backed international judicial intervention against her. But that does not mean that China should not actively support necessary action by the UN Security Council to uphold basic respect for fundamental Tokyo trial principles born out of WWII victimisation.

Chinese statesmen seem to have realized the challenges ahead in the delicate and fragile balance of peace and justice. This is evidenced by China's statement in the 2013 Session of the Assembly of State Parties of the ICC that: "The Court should pay equal attention to peace and justice. As the core values pursued by the Court, peace and justice complement each other, and should be given equal importance".¹⁵ The representative of China, while challenging the Prosecutor's wisdom on prosecutorial discretion, commented that,

the Court should serve as an effective mechanism to promote justice and secure peace and stability. To equate punishing crimes with justice, sometimes even at the expense of national reconciliation process and regional peace and stability, certainly goes against the purposes and principles of the Rome Statute. At the same time, regarding the relation between peace and justice, especially when the two contradict each other, we should not rigidly insist on the absolute priority of one or the other, but take into consideration the practical needs of relevant states and achieve both peace and justice to the maximum.

¹⁴ See the pertinent analyses of problematic aspects of the ICC's preliminary examination practice to date in CHAN James, 'Judicial Oversight over Article 12(3) of the ICC Statute', Torkel Opsahl Academic EPublisher, Oslo, 2013 (FICHL Policy Brief Series No. 11 (2013)); and XIAO Jingren and ZHANG Xin, 'A Realist Perspective on China and the International Criminal Court', Torkel Opsahl Academic EPublisher, Beijing, 2013, (FICHL Policy Brief Series No. 13 (2013)).

¹⁵ Available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/GenDeba/ICC-ASP12-GenDeba-China-ENG.pdf

Only in this way, will the fundamental goal of the Court be achieved.¹⁶

5. Conclusion

To ensure that the 2015 anti-fascist war memorialisation is as effective as possible, and serves to advance the long term goals of deterring future wars and ensuring a lasting peace, it should explore peace through justice as a part of the Tokyo trial legacy. It should take the Nuremberg and Tokyo trial principles as seriously as the commemoration of the catastrophic victimisation caused by WWII. Such an approach looks both to the past, and shows strength by reminding all States and peoples of the unique international law heritage that came out of WWII. It honours the victims and their descendants, and it reassures future generations that the mechanisms put in place at the end of WWII to prevent such wars and atrocities are as strong and vibrant as ever.

LIU Yiqiang is the founder and Secretary-General of the Chinese Initiative on International Criminal Justice (CIICJ), an NGO whose mandate is to promote a better understanding of international justice in the Chinese context and in the greater China region. He also works as a civil party lawyer at the Extraordinary Chambers in the Courts of Cambodia and teaches at the Royal University of Law and Economics (Cambodia). He has previous work experience from Fangda Partners, International Committee of the Red Cross East Asia Delegation, ICC, and ECCC. He holds LL.B. and LL.M. degrees from Renmin University of China. The author thanks Professors Suzannah Linton, Yi Ping and Hope May for their valuable comments. Work on this Policy Brief was completed on 12 October 2014. TOAEP thanks the anonymous peer reviewers. ISBN 978-82-93081-34-0.

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¹⁶ *Ibid.* (italics added).