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.

China. These Japanese germ warriors, like the German rocket scientists, had escaped into the arms of the Americans at the end of the war; the latter, after striking information-for-amnesty deals, shielded them from prosecution. The Soviets decided to convene the trial of the less senior figures – mostly military and medical personnel who had served at the Japanese human experimentation facilities at Harbin and Shanghai – after the Tribunal handed down its Majority Judgment. This served several purposes: as a riposte to Tokyo's equivocal judgment on Japan's crimes against the Soviets, as a gesture of goodwill to Mao's new government, and as a poke in the eye to Washington. If Tokyo was for the Allies, their logic ran, then Khabarovsk was for the true 'peace-loving peoples'.

At the trial itself, the Japanese defendants were charged with: 'Formation of special units for the preparation and prosecution of bacteriological warfare', 'Criminal experiments on human beings', 'Employment of the bacteriological weapon in the war against China' and 'Intensification of preparations for bacteriological warfare against the U.S.S.R'.[24] The first and fourth counts thus dealt with crimes that had been planned but not executed; the second and third with those that had actually been carried out.

Under the international jurisprudence of the time, 'criminal experiments on human brings' resulting in death were unlawful under the 1907 Hague Convention, which set out the duties of occupying armies, including the preservation of life, and under the 1929 Geneva Convention, which set out the duties of states towards prisoners of war. The charge of *employment* of bacteriological weapons against China was less clear-cut, however. While the 1925 'Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare' dealt with their use, neither Japan nor China were parties to it.[25] The charges dealing with the *preparation* for bacteriological warfare against the Soviet Union had even less basis in international law: the 1925 Geneva Protocol did not address research on, or the development or stockpiling of, biological weapons. Furthermore, the Protocol, which had attracted reservations from the Soviet Union and British Commonwealth to the effect that they would not apply it against

[24] *Materials on the trial of former servicemen of the Japanese Army charged with manufacturing and employing bacteriological weapons* (Moscow: Foreign Languages Publishing House, 1950), pp. 9, 15, 22, 25.

[25] Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed 17 June 1925, entered into force on 8 February 1928, 94 LNTS, 65.

non-ratifiers, had prevented it from acquiring the status of customary international law.[26]

From the Soviets' point of view, the legal irregularities could not be allowed to undermine the purpose of the trial, which was to draw attention to those who were *not* standing in the dock. The prosecution stressed that the defendants in Khabarovsk, though entirely deserving of punishment, were not the most important players in the conspiracy to unleash a bacteriological cataclysm against the world. Those most responsible, they argued, were the leaders of Japan's biological warfare programme, and their political master, the Emperor Shōwa – all of whom had been rendered untouchable by the Americans. The defence, assisted by the defendants themselves, embellished the prosecutors' arguments, suggesting that they had merely been following the orders of their superiors, who, in a chain of command leading right up to the Imperial Throne, had been the true instigators and organisers of the conspiracy. These ostensibly legal arguments, advanced in the Khabarovsk courtroom, acquired political form a month later, when the Soviets proposed to their former Western allies that they jointly convene an international tribunal to try the Emperor and four leading figures in the biological warfare programme for crimes against humanity. As Alvary Gascoigne, the British Ambassador in Tokyo, suggested, the Soviets' motives were

> First and foremost to distract the attention of the Japanese people from the much publicised action of the Allied Council for Japan calling for the repatriation of some 375,000 Japanese prisoners from Siberia . . . Secondly to make the United States and Great Britain unpopular in the eyes of the Chinese Communists by reason of the former's refusal to comply with the Russian request [to indict the Emperor and others] . . . Thirdly to give the Japanese Communist party something to bite on, and further to test their allegiance to Moscow.[27]

The trials convened in China some seven years later were also designed to send signals to Japan. As Ōsawa Takeshi explains in his chapter, the People's Republic's 'lenient treatment' policy towards alleged Japanese war criminals drew inspiration from earlier policies, dating back to the 1920s, of magnanimity towards captured Kuomintang troops, and acquired its most developed form in the mid-1950s, when Zhou Enlai began to court Tokyo with the aim of pulling Japan out of the embrace of

[26] See, for example, New Zealand Department of External Affairs, 'Note concerning Soviet request for International Military Tribunal' (28 April 1950), p. 2: EA W2619 106/3/37 Pt. 1, National Archives of New Zealand (NANZ).

[27] Gascoigne to Foreign Office (6 February 1950), pp. 1–2: EA W2619 106/3/37 Pt. 1, NANZ.

the United States. Many of the Japanese prisoners were Kwantung Army officers and senior officials who had been swept up by the Soviet forces in Manchuria in 1945 and held in the Soviet Far East before being sent back to China in 1950. Other Japanese remnants had fought on in China as members of anti-communist militias during the civil war period ending in 1949. The Chinese held them for years without charge or trial, before finally deciding to use them to prop open the door to dialogue with Japan.

There was disagreement within the top echelons of the Chinese Communist Party and government about how many people to indict, and what prison terms to dispense (this before any case was brought to court). Some officials were also concerned that the prisoners' confessions alone might not provide sufficient basis for prosecution. It was then that Mei Ru'ao, the former Chinese judge at the Tokyo Tribunal, stepped into the debate. His advice was to avoid getting tied up by the legal technicalities, and to simply declare that Beijing was releasing most of the prisoners as a grand political gesture. (One cannot help but be reminded of Philander Knox's response to Teddy Roosevelt's attempts to justify irregularities over the Panama Canal: 'Oh, Mr. President, do not let so great an achievement suffer from any taint of legality!')[28]

After some senior officials raised the possibility that the Chinese public might be hostile to the 'lenient treatment' of their former tormentors, the Japanese prisoners were paraded around the countryside to sell the policy. Unsurprisingly, these prisoners apologised profusely for their actions. They also offered up an explanation that accorded conveniently with the Chinese government's propagandist priorities: that they had been raised in a culture of militarism, but had seen the error of their ways and would now campaign against the vestiges of that culture in their homeland. Many of the prisoners were consequently released and repatriated, but despite the efforts of the Chinese authorities to nurture better relations with Japan, the rapprochement lasted barely a year longer, and was eventually swept away by Kishi Nobusuke and the Great Leap Forward.

The superior orders defence

The most common defence raised in war crimes trials convened at the end of the Asia-Pacific War was obedience to superior orders. Before the

[28] D. McCullough, *The path between the seas: the creation of the Panama Canal, 1870–1914* (New York: Simon and Schuster, 1977), p. 383.

war, the traditional doctrinal emphasis had been on *respondeat superior* – 'let the master answer' – which, by imposing responsibility on the commander, had the effect of screening the subordinate from responsibility. But from 1942 onwards, as German and Japanese atrocities escalated, the Allies began to consider trying subordinates as well. The initial impetus for the recasting of the doctrine seems to have come from the United States. In February 1943, the American Judge Advocate General for the European Theatre Colonel Edward C. Betts sounded out the British Judge Advocate General Sir Henry MacGeagh about the possibility of amending their respective military manuals. MacGeagh's view, shared by the other departments' Law Officers, was that superior orders were no longer a defence, 'except possibly where an accused was a mere automaton such as a member of a firing squad who really had no discretion and would himself probably be shot if he disobeyed the order'.[29]

The Moscow Declaration of November 1943, and the opening of the trial against three German defendants and a local collaborator in the city of Kharkov the following month, were further spurs to action. When dealing with their own military personnel, the Soviets adhered to a strictly orthodox line: orders were orders. As Section 8 of the Disciplinary Code of the Red Army (1940) stated, 'The order of the commander and the superior is law for the subordinate. He must execute it without reservation, precisely and in time. Failure to execute the order is a crime.'[30] But when prosecuting the German defendants at the Kharkov trial, they expressly excluded the superior orders defence from consideration. As the jurist Aron Trainin explained, criminal orders, unlike military orders, were not to be obeyed: 'An order to cast women and children into the fire . . . is essentially *not a military order*; it is an *instigation to evil-doing*.'[31]

The British and Americans followed suit. As MacGeagh wrote to the British Solicitor-General David Maxwell Fyfe in December 1943, 'I am bring pressed now from various quarters for the Manual to be appropriately amended . . . Sorry to be a nuisance, but in view of the Kharkov

[29] MacGeagh to Betts (22 February 1943): LCO 53/78, TNA.

[30] Section 8 of the Disciplinary Code of the Red Army (1940), stated, 'The order of the commander and the superior is law for the subordinate. He must execute it without reservation, precisely and in time. Failure to execute the order is a crime.' Quoted in: Office of Strategic Services Research and Analysis Branch, 'Soviet intentions to punish war criminals' (30 April 1945), p. 49: William J. Donovan Papers, Cornell Law Library's Donovan Nuremberg Trials Collection.

[31] Ibid. Original emphasis.

trials I think it is quite time we got this matter put right.'[32] Hersch Lauterpacht was asked to draft an amendment to Paragraph 443, which was inserted into the British *Manual of military law* in April 1944. As Cheah Wui Ling explains in her chapter on the British-run trials in Singapore, this amendment was the touchstone for the debates about criminal liability of the low- and middle-ranking Japanese personnel accused of committing war crimes in Burma, Borneo, Malaya, Singapore, the Andaman and Nicobar islands and other parts of Southeast Asia.

The recalibration of 'superior orders' also led to the revision in November 1944 of Article 347 in the American *Basic field manual: rules of land warfare*. This Article had previously stated: 'Individuals of the armed forces will not be punished for these offences [war crimes] in case they are committed under the orders or sanction of their government or commanders.'[33] This was rescinded and replaced with Article 345.1, which stated,

> Individuals and organizations who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment. The person giving such orders may also be punished.[34]

Thereafter, as Bing Bing Jia explains in his chapter on superior orders, the doctrine has developed along two different lines within international criminal law. One of these, arising out of the Nuremberg Charter and later endorsed by the ad hoc tribunals on former Yugoslavia and Rwanda, upheld the idea that superior orders could not be considered as a defence, but only as a mitigating factor in sentencing. The other, revived by the International Criminal Court, readmitted the idea that superior orders might be considered a defence in some circumstances.

Whichever line was pursued, the delegates at the negotiations that created the founding charters of these courts, from the 1945 London Conference to the 1998 Rome Conference, were compelled to acknowledge three overlapping concerns on the issue of superior orders: the obligation to uphold the laws of war, the desire to maintain military

[32] MacGeagh to Maxwell Fyfe (21 December 1943): LCO 53/78, TNA.
[33] Rule 347 in War Department, *Basic field manual: rules of land warfare* (Washington, DC: US Government Printing Office, 1940).
[34] Rule 345.1 (15 November 1944), ibid.

discipline through obedience to orders, and the need to avoid injustice to the accused. Sometimes the task of striking a balance between these considerations proved too great. Just after the Vietnam War, for example, delegates drafting the Additional Protocols to the Geneva Conventions – while recognising that an international standard on superior orders would be an improvement on the vagaries of the domestic penal laws of a detaining power – were still unable to agree a suitable formula. They eventually voted out the article dealing with superior orders, leaving a gaping hole in the laws of war concerning the liability of subordinates.

Trying Khmer Rouge leaders

While the Geneva negotiations were in progress, the Khmer Rouge took power in Democratic Kampuchea. The Vietnamese ousted them in January 1979, and eight months later the new Cambodian government convened the People's Revolutionary Tribunal to try Pol Pot and Ieng Sary *in absentia* for crimes committed by the regime. Genocide charges were still exceedingly rare at the time, making the trial a highly unusual event. Despite this, the Tribunal has been almost completely overlooked in the legal literature (in marked contrast to the much-discussed first genocide trial, of Adolf Eichmann in 1961).

The two Khmer Rouge leaders were charged with instigating and committing genocide, but, as Tara Gutman argues in her chapter, the case against them was not as straightforward as it might seem, because the regime's crimes did not fit neatly into the genocide mould.[35] Although Buddhist, Muslim, and Vietnamese and Chinese communities suffered greatly from their actions, the Khmer Rouge tended to prioritise the elimination of *social classes* over the 'national, ethnical, racial or religious' groups specified by the 1948 Genocide Convention.[36] Why, then, did the prosecution focus on genocide rather than on crimes against humanity, which was a more capacious charge with a lower threshold of intent? The most likely explanation is that genocide was codified by the aforementioned Convention, which, crucially, applied to crimes carried out 'in time of peace'.[37] By contrast, crimes against humanity had, at the

[35] Indictment, H.J. De Nike, J. Quigley and K.J. Robinson (eds.), *Genocide in Cambodia: documents from the trial of Pol Pot and Ieng Sary* (*Documents*) (Philadelphia: University of Pennsylvania Press, 2000), pp. 463–488.

[36] Article 1, Convention on the Prevention and Punishment of the Crime of Genocide: treaties.un.org.

[37] Ibid., Article 2.

Nuremberg and Tokyo tribunals, been explicitly linked with armed conflict. When the People's Revolutionary Tribunal was conceived in 1979 it was far from clear whether crimes against humanity had acquired the status of customary international law, and if it had, whether this 'war nexus' still existed. The latter question was no clearer more than a decade later, when both the Statute of the International Criminal Tribunal for former Yugloslavia and the *Tadić* Judgment suggested that the connection with armed conflict was still extant.[38] It was only when the ICTY Appeals Chamber disagreed that the link was broken.[39]

The People's Revolutionary Tribunal clearly denied the defendants a fair trial – there was, for example, no presumption of innocence and few of the usual protections. Even so, some of the criticisms of the proceedings have been superficial. Common law commentators, for example, have fixed on the defendants' absence from court,[40] while failing to acknowledge that French civil law, from which Cambodian law is derived, admits *in absentia* trials. Others drew attention to the weakness of the defence, citing in particular the speech of the American defence lawyer Hope R. Stevens (not, as they assume, a female advocate, but the New York–based pan-Africanist lawyer, well known for taking on civil rights cases, who originally hailed from the West Indies).[41] Whatever the flaws of the speech, the defence had little, if any, exculpatory material to work with: the defendants were absent and their crimes were all too present. Given this, they might have challenged the jurisdiction of the court, challenged the genocide charge or attempted to mitigate punishment on grounds of superior orders. In the event, they admitted the accused's responsibility for genocide but tilted towards the last strategy

[38] Article 5, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, September 2009 (originally adopted by Security Council Resolution 827 on 25 May 1993), stating with respect to crimes against humanity that the Tribunal 'shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict'; *Prosecutor* v. *Tadić*, IT-94-1-T, Trial Chamber Judgment (7 May 1997), par. 659, stating, 'the act [crimes against humanity] must not be taken for purely personal reasons unrelated to the armed conflict'.

[39] *Prosecutor* v. *Tadić*, IT-94-1-A, Appeals Chamber Judgment (15 July 1999), par. 251: 'A nexus between the accused's acts and the armed conflict is not required, as is instead suggested by the Judgement.'

[40] See, for example, S. Luftglass, 'Crossroads in Cambodia: the United Nation's responsibility to withdraw involvement from the establishment of a Cambodian tribunal to prosecute the Khmer Rouge', *Virginia Law Review* 90 (2004), 902.

[41] See, for example, C. Etcheson, *After the Killing Fields: lessons from the Cambodian genocide* (Praeger: Westport, CT, 2005), p. 14; P.H. Maguire, *Facing death in Cambodia* (New York: Columbia University Press, 2013), p. 66.

by trying to portray the defendants as dancing to the tune of 'the false socialist leaders of fascist China'.[42] Perhaps, as one commentator has speculated, they were following the brief of an East German advisor to the Cambodian government.[43]

If the People's Revolutionary Tribunal was the unsound sequel to the Eichmann trial, it was also the overlooked prequel to the Extraordinary Chambers in the Courts of Cambodia (ECCC). This latter court, established in 2006 at the behest of the United Nations and the Cambodian government, was intended to call to account Khmer Rouge leaders and those most responsible for the atrocities committed under the regime. A central plank of the prosecution's strategy was joint criminal enterprise – the mode of liability *de nos jours*. Deriving from common law, and first articulated in *Prosecutor* v. *Tadić*, this doctrine assumes three forms, which have the same *actus reus* elements but different *mens rea* requirements. It was the third form of joint criminal enterprise that aroused particular concern at the ECCC. In this, the *mens rea* requirement is satisfied if the accused not only intended to participate in and further the group's criminal purpose but did so despite having *foreseen* that further crimes would be committed beyond the scope of the common plan. As Neha Jain explains in her analysis of the JCE jurisprudence at the ECCC, the Pre-Trial Chamber concluded that the sources relied on by *Tadić* were insufficient to establish its existence in customary international law at the time the crimes were committed in the late 1970s.[44]

This repudiation of the third form was grist to the mill of those who have questioned the efficacy of the joint criminal enterprise doctrine in capturing the conduct and intent of those who commit collective crimes. As Nina Jørgensen indicates in her chapter about the deployment of latter-day modes of liability in Asia, some have suggested that a better approach might be co-perpetratorship – another method for ascribing liability when more than one person commits a crime. As well as its intrinsic merits, co-perpetratorship, which arises out of civil law (unlike JCE, which draws on common law traditions), is particularly useful in jurisdictions such as Cambodia, where it is already available under domestic law.

[42] Closing Argument of Hope R. Stevens, *Documents*, p. 507.

[43] H. De Nike, 'East Germany's legal advisor to the 1979 tribunal in Cambodia', *Searching for the Truth* (Phnom Penh: Documentation Center of Cambodia, 2nd quarter, 2008), 43.

[44] *Nuon et al.*, 002/19-09-2007-ECCC-OCIJ, Pre-Trial Chamber Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE) (20 May 2010), par. 83.

The Bangladesh experience

The trials in Bangladesh grew out of the poisoned soil of the 1971 war of independence, when Pakistan attempted to prevent the secession of its eastern province, and millions were killed or displaced. Once the Pakistan Army had surrendered to Indian forces in December, the new leader of Bangladesh, Mujibur Rahman, hoping to stop the bloodshed and prevent further communal violence, proposed two sets of trials: one to deal with Pakistanis accused of committing international crimes, and the other to deal with local collaborators. Bangladesh eventually yielded to international pressure to forego the trials of Pakistanis in return for Pakistan's recognition of Bangladesh, but the trials of collaborators went ahead. The current trials, which deal with citizens of Bangladesh accused of orchestrating international crimes at the behest of the Pakistani forces in 1971, can be seen as the completion of the earlier project.

As early as February 1972, just a month or so after Pakistan's surrender, the provisional government in Bangladesh was already planning to establish an international tribunal to try leading Pakistani figures. They envisaged genocide charges (although Bangladesh was not yet a signatory of the Genocide Convention), and *in absentia* trials of, for example, former Pakistani President Yahya Khan and General Tikka Khan.[45] The following month it approached, among others, Niall MacDermot, the British Secretary-General of the International Commission of Jurists, for further advice. In a meeting with the Minister of Law Kamal Hossein, and in a memorandum produced by the Commission, MacDermot urged the establishment of an international court loosely modelled on the Nuremberg Tribunal, which he thought would carry greater authority than a domestic one.[46] Yet he cautioned against following Nuremberg too closely by allowing *in absentia* proceedings, which he thought would deter foreign lawyers from taking part.[47] In reality, the formation of the court, which would have been established by Presidential decree, would have more closely resembled the Tokyo Tribunal (decreed by Douglas MacArthur) than Nuremberg (convened jointly by the four Allies). But MacDermot's general advice appeared to

[45] Walker to Davidson, 'International Commission of Jurists' (22 February 1972): FCO 37/1056, TNA.

[46] Garvey (Delhi) (16 March 1972): FCO 37/1056, TNA; International Commission of Jurists, 'Memorandum on the trial of war criminals in Bangladesh' (c. March 1972), pp. 1, 2: FCO 37/1056, TNA.

[47] Ibid., p. 3.

have been heeded, and Dhaka moved towards what one British official dubbed the 'Asian Nuremberg'.[48]

The first step was to draw up the court's charter, entitled 'War Crimes Tribunal Order, 1972'. This was designed to provide the legal framework for the trials of Pakistani civilian and military officials in the custody of Bangladesh, plus another 1,500 or so Pakistani officers and men in the custody of India (including two leading figures: Major-General Rao Farman Ali and Lieutenant-General Abdullah Khan Niazi).[49] Draft Article 2 stated that the government would appoint five judges – it was intended, though not stated within, that two would be from Bangladesh, and three from elsewhere.[50] Thereafter, the Order followed the template set down at Nuremberg, by, for example, denying state immunity and superior orders as defences, encompassing organisations as well as individuals, and allowing for trials *in absentia* and the death penalty. The charges set out in Article 6 of the Nuremberg Charter – namely, crimes against peace, war crimes, crimes against humanity and 'common plan or conspiracy' – were transferred wholesale into draft Article 10, with a few tweaks to bring them in line with the Bangladesh situation. Additional paragraphs were inserted into the draft Article after 'crimes against humanity', which read, verbatim:

> (d) Genocide namely, offences committed in violation of the provisions of the Convention on the Prevention and punishment of the Crime of Genocide (1948) and also in violation of the United Nations Human Rights, 1946.[51]
> (e) Wilful destruction of public and private property, wanton destruction of cities, towns, and villages, and any other acts of destruction and devastation aimed at crippling the economy of Bangladesh.[52]

In May 1972, the Bangladeshi barrister M.S. Ali gave a copy of the draft charter to Gerald Draper, a British specialist in humanitarian law, who had previously advised the independence movement on Mujibur Rahman's imprisonment in Pakistan. While Draper was willing to comment on legal questions arising from the draft, he was prepared to offer

[48] Sutherland, 'Bangladesh war crimes' (29 March 1972): FCO 37/1056, TNA.
[49] The 1,500 figure, later much reduced, appears in Garvey (Delhi) (30 March 1972): FCO 37/1056, TNA.
[50] Draft 'Order for constitution of war crimes tribunal' (c. May 1972): FO 37/1056, TNA; Doble (16 June 1972): FO 37/1056, TNA.
[51] This may refer to the 1948 Universal Declaration of Human Rights.
[52] Draft 'Order for constitution of war crimes tribunal' (c. May 1972): FO 37/1056, TNA.

strategic advice to Bangladesh only in so far as it accorded with Foreign Office policy. (Because of its own role at Nuremberg, the United Kingdom could not publicly oppose a tribunal, but was privately opposed to Bangladesh's convening one because it would impose more strain on relations with Pakistan.)[53] Draper thus advised Ali that convening a tribunal would be 'unwise'.[54] On legal questions, he cautioned that the cases must be watertight, and that, given that the war was not of an international character, charges of international crimes might not be sustained.[55] Another relevant question was whether the crimes of genocide and crimes against humanity, which would be heard before a hybrid court rather than a domestic one, had acquired the status of customary international law by the time the alleged offences were committed in 1971. (As we have seen, this question continues to exercise legal minds at the ECCC, which addresses crimes committed a few years later.)

While this discussion was in progress the other trial programme, dealing with collaborators, was being put into place. These trials played an important role in establishing the credentials of the provisional government led by the Awami League, but they also attracted international criticism on legal grounds. Seventy-three 'special tribunals' were set up to try those who had collaborated with the old regime or had, in support of it, perpetrated crimes such as murder, rape and arson. Their operation was governed by the 'Bangladesh Collaborators (Special Tribunal) Order, 1972' (decreed by the President on 24 January 1972, but backdated to 26 March 1971). The Collaborators Order, like the aforementioned 'War Crimes Tribunal Order, 1972', seemed to be inspired by the Nuremberg Charter. The Preamble made explicit reference to international crimes, including crimes against humanity and the crime of 'waging war' (a component of the 'crimes against peace' charge), as well as to the accused's liability as an individual or as a member of an organisation:

> Whereas certain persons, *individually or as members of organisations* directly or indirectly, have been collaborators of the Pakistan Armed forces . . . and have aided or abetted the Pakistan Armed forces of occupation *in committing genocide and crimes against humanity and in committing atrocities* . . . and have otherwise aided or co-operated with or acted in the interest of the Pakistan Armed forces of occupation or contributed by any act, word or sign towards maintaining, sustaining, strengthening,

[53] 'War crimes in Bangladesh' (20 June 1972): FCO 37/1056, TNA.
[54] Draper to Ellison (29 May 1972): FCO 37/1056, TNA.
[55] Draper to Ali, 'Bangladesh war crimes trials' (c. May 1972), pp. 2, 3: FCO 37/1056, TNA.

> supporting or furthering the illegal occupation of Bangladesh by the Pakistan Armed forces or have *waged war or aided or abetted in waging war* against the People's Republic of Bangladesh.[56]

While the figures differ, an authoritative source, Justice F.K.M. Abdul Munim, indicated that from 24 January to 13 December 1972, forty thousand people were investigated, twenty thousand were charged and taken into custody and less than a thousand people were convicted (with the right of appeal).[57] As a British diplomat reported on 7 December, 'The sentences so far hav[e] not been savage. Not one execution has yet taken place.'[58] Some trials involved very senior figures. On 20 November, for example, Abdul Motaleb Malik, the former civilian Governor of East Pakistan, and his Minister of Law, Jasmuddin Ahmed, were both sentenced to 'transportation' for life. Malik was indicted for waging war against Bangladesh, collaborating with the Pakistan Army and 'creating hatred and disaffection'.[59] The Judge, Abdul Hannan Chowdhury, was persuaded neither by his claim that, like other officials, he had been operating under compelling circumstances, nor by his argument that he had resigned his post and fled to the 'neutral' Hotel Continental, and was thus protected by the Geneva Conventions.[60] Malik was found guilty on all charges, but he was spared the death penalty on grounds of advanced age and his past service. As he was convicted under Article 2(b)(iii) of the amended Collaborators Order, criminalising those who 'waged war or abetted in waging war against the People's Republic of Bangladesh',[61] his case provides a rare post-Tokyo example of someone sentenced for what was in effect a 'crime against peace'.

Most of the other defendants were (according to Justice Munim) members of paramilitary groups such as the Razakars, Al-Badr or Al-Shams – which the acting British Ambassador James Davidson described as 'the local equivalent to SS auxiliaries'.[62] This appeared to be borne out by the first 'collaborator' case to be heard. On 8 June 1972, Chikon Ali was accused of enlisting as a Razakar and was sentenced to death for his part in murder, looting, arson and rape.[63] As this case demonstrates,

[56] Bangladesh Collaborators (Special Tribunal) Order, 1972, p. 1: FCO 37/1058, TNA.
[57] Golds (Dhaka) (13 December 1972): FCO 37/1057, TNA.
[58] Golds (Dhaka) (7 December 1972): FCO 37/1057, TNA.
[59] For slightly differing accounts, see 'Time of trials', *Economist* (25 November 1972), p. 51; and Cumming to Millington (21 November 1972): FO 37/1057, TNA.
[60] Cumming to Millington (21 November 1972): FO 37/1057, TNA.
[61] Bangladesh Collaborators (Special Tribunal) Order, 1972, p. 2: FCO 37/1058, TNA.
[62] Davidson to Sutherland (11 December 1972): FO 370/1058, TNA.
[63] Golds (Dhaka) (12 June 1972): FCO 37/1056, TNA.

these special tribunals played an anomalous role: on the one hand, the 'collaborator' label did not fully convey the magnitude of the crimes committed by those on trial; but on the other hand, without the 'collaborator' label, it was not clear why the accused were not simply charged in ordinary criminal courts under the Bangladesh Penal Code.

At the time, the Awami League provisional government was reluctant to allow the defendants to be represented by foreign counsel, on the ostensible grounds that membership of the Bar in Bangladesh was restricted to nationals. On 17 November 1972, the British MP Dingle Foot, apparently instructed by a Pakistani organisation to defend Malik, arrived in Dhaka without a visa, and instead of being admitted (as he clearly expected), was sent on his way.[64] Foot's junior, Robert Maclennan MP, was admitted, but not allowed to represent Malik. It was Maclennan who sounded an early warning about the legal status of the proceedings, reporting to the British Foreign Office that there was 'little law in these trials' and that the local Bar was 'rightly agitated about them'.[65] Of the Collaborators Order, Maclennan declared

> a) that it was retrospective; b) that the burden of proof in many cases was on the accused; c) that rules of evidence were very sketchy; d) that it was all-embracing, eg: even a speech in support of the Pakistan government constituted an offence leading to a minimum of three years imprisonment.[66]

The following year, the government passed the 'International Crimes (Tribunals) Act, 1973'. This too bore the hallmarks of the Nuremberg Charter: it covered crimes against peace, war crimes and crimes against humanity (as well as genocide and the all-embracing 'any other crimes under international law').[67] This law is the basis upon which the current tribunals have been constituted – the purest modern manifestation of the Nuremberg project. As Rafiqul Islam points out in his chapter, in 2008 the Awami League campaigned on and later won an election on the promise to convene trials against prominent Bangladeshis implicated in the 1971 bloodbath. While acknowledging that delayed justice is better than no justice at all, the League is nevertheless clearly attempting to use the trials to enhance its own legitimacy. Domestic critics point out that many of the present-day defendants are prominent members of

[64] 'War crimes in Bangladesh' (c. November 1972): FCO 37/1057, TNA.
[65] Maclennnan to Douglas-Home (23 November 1972): FCO 37/1057, TNA.
[66] Green to Stuart (17 October 1972), p. 2: FCO 37/1057, TNA.
[67] The International Crimes (Tribunals) Act, 1973: bdlaws.minlaw.gov.bd.

conservative Islamist parties, which suggests that the government might be motivated as much by a desire to silence its political opponents as by concern to right previous wrongs.

The Bangladesh trials have also attracted international criticism on legal grounds from both foreign governments and non-governmental organisations. Embellishing themes raised earlier by Robert Maclennan, these critics point out the shortcomings of the 1973 Act, the procedural inadequacies of the courts, and the detrimental effect on the rights of the accused. In his chapter, Abdur Razzaq, the senior defence counsel for some of the defendants, describes some of the other twists and turns, touching on issues such as 'effective control' in command responsibility doctrine, 'significant' contribution to joint criminal enterprise, and the relationship between customary international law and local statutes.

For better or worse, the trials in Asia have operated as laboratories for international law. Under their auspices, legal cultures – both local and imported – have cross-fertilised and mutated. Some, such as Tokyo's charge of 'murder', immediately expired. Others, such as 'conspiracy' and 'being concerned with', evolved into new forms. And a few, such as 'command responsibility', grew and prospered. Although most Asian states remain unenthusiastic about international, hybrid or regional tribunals, they look set to carry on convening their own trials on their own terms. In the process, new legal ideas will emerge and enter the bloodstream of international criminal law.