

Justice and not retribution marked the end of the second world war. With four former prime ministers on trial, the judgement at Tokyo was unequivocal: impunity had no place in the modern world.

Liu Daqun

2006 marks the 60th anniversary of the Tokyo war crimes trials. On 3 May 1946, the International Military Tribunal for the Far East (IMTFE) opened its case against 28 Class A Japanese defendants. General Douglas MacArthur, Supreme Commander for the Allied Powers in Japan, described the trials as 'epochal' – the proceedings were designed to do nothing less than 'formulate and codify standards of international morality.'¹

The IMTFE's jurisdiction covered three classes of crimes – conventional war crimes, crimes against humanity, and crimes against peace. Only persons charged with offences which included crimes against peace were actually brought before the tribunal.² The accused included four former prime ministers, 11 former ministers, two former ambassadors and eight high-ranking military officials. The most famous among the accused was Tojo Hideki, acting prime minister during the attack on Pearl Harbor.

Justice and politics

The decision not to try emperor Hirohito is now generally considered to be one of political expediency. Fear of chaos and the threat of communism almost certainly determined US policy on this point, and it is perhaps with some justification that the other prevailing criticism of the Tokyo trials remains American domination of the whole process. The facts bear this out: the charter was drafted exclusively by Americans and General MacArthur appointed the judges, while the chief prosecutor, Joseph B. Keenan, was widely regarded as a political nomination. The distinctly American tone of the proceedings has led critics to denounce the trials as a vehicle for American revenge for Pearl Harbor. Another, no less popular interpretation holds that the whole judicial process was a means of assuaging American guilt over the use of atomic bombs. Criticisms of 'victor's justice' have echoed along various proverbial corridors ever since. Prominent among the critics was the judge from India, Justice Pal, who decided from the outset to acquit all of the accused of all charges.

Justice Pal's objections to the IMTFE proceedings were ostensibly legal. He concurred with the defense's contention that the tribunal had no right to try the defendants for crimes against peace and crimes against humanity since these legal categories did not exist prior to 1945. This was, he contended, a violation of the legal principle *nullum crimen sine lege, nulla poena sine lege*.³ The majority judges maintained that pre-existing treaties – most notably the 1928 Pact of Paris, to which Japan was

a signatory – outlawed war as an instrument of public policy.

Legacy for international law

The above controversy notwithstanding, the Tokyo trials left their imprint on subsequent legal thought. Even detractors from the majority judgement such as Judge Röling conceded that the jurisprudence that emerged from the tribunal contributed positively to the development of international criminal law. No defendant after 1945 could credibly answer charges of crimes against humanity with the protestation that it violated the principle of *nullum crimen sine lege*. The Tokyo trials, together with those at Nuremberg, ensured that crimes against humanity and crimes against peace became embedded in international customary law.

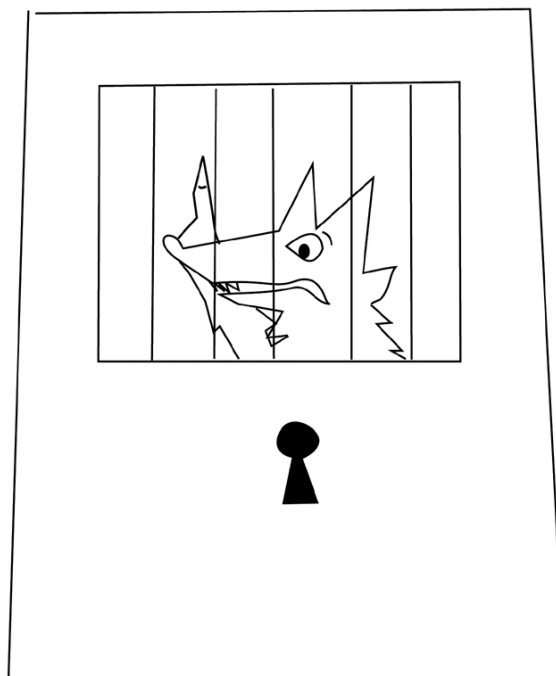
The Tokyo tribunal further set a jurisprudential precedent in its definition of command responsibility, which it developed as a concept and a crime. While judges in Nuremberg were preoccupied with prosecuting commanders who had actively promoted and encouraged the perpetration of atrocities, the justices in Tokyo went further and established individual criminal liability for permitting – as distinct from ordering – atrocities. As a direct result of the Tokyo judgement, the principle of 'command responsibility' is now enshrined in the statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone as well as that of the International Criminal Court.

The scope of the 'command responsibility' doctrine has recently been examined by the ICTY in the *Celebici* judgement. Both the Trial and Appeal Chambers took the Tokyo judgements into consideration in reaching their conclusions. The question confronting the court in *Celebici* was whether command responsibility could only be applied to *de jure* military commanders or whether the duty could be extended to encompass *de facto* civilian or political leaders. In its deliberations, the *Celebici* Trial Chamber recognized that: 'the International Military Tribunal for the Far East... relied on this principle [of command responsibility] in making findings of guilt against a number of civilian political leaders charged with having deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance of the laws and customs of war and to prevent their breach.'

A mixed legacy?

While the legacy of the IMTFE is reflected in both statute and international

From Tokyo to The Hague



From Tokyo to The Hague

The legacy of the IMTFE has often been described as 'mixed'. This view, however, fails to fully appreciate the historical and legal significance of the tribunal. The Tokyo trials broke the vicious cycle of reprisal and recrimination perpetuated by protracted wars in Asia; the verdict against the defeated enemy was delivered through the due process of law. Justice and not retribution marked the end of the second world war: for the first time in Asia's history, the perpetrators of international crimes were put in the dock and held to account. With four former prime ministers on trial, the judgement at Tokyo was unequivocal: impunity had no place in the modern world.

The lasting impact of the Tokyo tribunal lies in its contribution to international jurisprudence. The ICTY, the ICTR and the International Criminal Court have all inherited the legal principles set out in Tokyo and learnt lessons from the court's shortcomings. The IMTFE contributed to the development of new legal norms and standards of responsibility which advanced international criminal law, developing the notion of individual responsibility, command responsibility, crimes against humanity and crimes against peace, which have since formed the bedrock of international criminal law and the cornerstone of the jurisdiction of the newly-established International Criminal Court.

On the eve of the 60th anniversary of the Tokyo trials the symbolic significance of the tribunal should not be underestimated. The very existence of such a court to try such crimes by a panel of international judges has its own moral legacy and has been a beacon to those seeking protection under the rule of law in an effective system of international justice. ◀

Liu Daqun is a judge in the Appeals Chamber of the International Criminal Tribunal for former Yugoslavia.

jurisprudence, its impact on politics and public memory has been more ambiguous. The crimes that led to the Tokyo trials are in danger of being forgotten. Approximately 20 million civilians lost their lives to Japanese aggression – more than all military and civilian casualties on all sides in the first world war. While the Tokyo prosecution served the historical purpose of collecting hard documentary evidence of systematic atrocities, the records themselves are incomplete. The trials overlooked the 200,000 'comfort women' who were raped and often murdered by the imperial army. The activities of biological warfare Unit 731 were also never entered into evidence. Arguably the worst of Japanese crimes were kept from the tribunal, and 60 years on the question remains whether justice was done in Tokyo.

Significantly, a growing Japanese public – including many of its top officials – see Japan as the victim, and not villain, of the postwar trials. This may partially be explained by the crimes committed by the wartime victors (above all the atomic bombs) and their continued impunity. It may also be attributed to failure to try the emperor – the wartime head of state and commander in chief of the armed forces – and to systematically purge the bureaucracy. Shigemitsu Mamoru, the foreign minister (1943-45) convicted of waging an aggressive war and sentenced to seven years in prison, was paroled in 1950 and went on to serve again as

foreign minister in the Hatoyama cabinet. Japanese generals executed by the IMTFE came to be seen, by some, as patriotic heroes who had fought to liberate Asia from western imperialists.

Those who criticize the equity of proceedings fail to note that at Tokyo, the defendants received relatively fair trials compared to those at Nuremberg. There was no right of appeal to a higher court, but General MacArthur had the power to review and reduce sentences. Unlike the defendants at Nuremberg, all of the accused at Tokyo had access to both American and Japanese lawyers. The process was not perfect but the proceedings marked a credible attempt by the international community to try and develop a nascent system of international justice.

Notes

1. Minear, R.H. 1973. *Victor's Justice – The Tokyo War Crimes Trial*. Princeton: Princeton University Press, p.166.
2. In this respect the Tokyo Tribunal differed from the Nuremberg Trials. At Tokyo, crimes against peace were classified as a 'Class A' offences, while war crimes and crimes against humanity were respectively classified as 'Class B' and 'Class C' offences.
3. The principle that there can be 'No crime and no punishment without a (pre-existing) law' is enshrined in the ICC Statute in Article 22(1) which stipulates that: 'A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.'
4. *Celebici*, Trial Chamber para.377