

ANNEX

CHINESE LAW

CONCERNING TRIALS OF WAR CRIMINALS

I. INTRODUCTORY NOTES

The trial of war criminals before Chinese courts is regulated by a " Law governing the Trial of War Criminals " of 24th October, 1946. The latter deals with questions of both substantive and procedural law. It defines the rules which are applicable to offences tried as war crimes, and lays down provisions as to the jurisdiction of the competent courts over these offences and the individuals liable to prosecution and punishment for their commission.

The legal basis provided is very wide as it includes, simultaneously and in a given order of precedence, international law, special war crimes rules, and provisions of Chinese common penal law.

The Law of 24th October, 1946, is in many respects guided by circumstances which are peculiar to China and the events she has gone through during the last two decades. It reflects in particular great care on the part of the legislator to provide retribution for a wide range of offences, spread over a long period of time during which the Chinese people had been subjected to an uninterrupted series of atrocities and other crimes at the hands of the Japanese invader.

II. SOURCES OF RELEVANT PROVISIONS

Art. I of the Law of 24th October, 1946, lays down the following rule as to the provisions applicable to war crime trials :

" In addition to the Rules of International Law, the present Law is applicable to the trial and punishment of War Criminals. Cases not provided for under the present Law are governed by the Criminal Code of the Republic of China.

" In applying the Criminal Law of the Republic of China, this Law shall first be applied, irrespective of the status of the offender."

In this manner rules of international law were recognised as the primary source for the trial of war criminals. They are supplemented by the special provisions of the Law of 24th October, 1946, which are valid as " additional " to rules of international law. On the other hand and as a subsidiary source, provisions of the Chinese Penal Code are relevant in cases not covered by the Law of 24th October, 1946, or by rules of international law.

III. DEFINITION OF A WAR CRIMINAL AND A WAR CRIME

Article II of the Law of 24th October, 1946, contains a combined definition of individuals treated as war criminals and of offences falling within the notion of war crimes according to Chinese legislation. It reads as follows :

" A person who commits an offence which falls under any one of the following categories shall be considered a war criminal :

1. Alien combatants or non-combatants who, prior to or during

the war, violate an International Treaty, International Convention or International Guarantee by planning, conspiring for, preparing to start or supporting, an aggression against the Republic of China, or doing the same in an unlawful war.

2. Alien combatants, or non-combatants who during the war or a period of hostilities against the Republic of China, violate the Laws and Usages of War by directly or indirectly having recourse to acts of cruelty.

3. Alien combatants or non-combatants who during the war or a period of hostilities against the Republic of China or prior to the occurrence of such circumstances, nourish intentions of enslaving, crippling, or annihilating the Chinese Nation and endeavour to carry out their intentions by such methods as (a) killing, starving, massacring, enslaving, or mass deportation of its nationals, (b) stupefying the mind and controlling the thought of its nationals, (c) distributing, spreading, or forcing people to consume, narcotic drugs or forcing them to cultivate plants for making such drugs, (d) forcing people to consume or be inoculated with poison, or destroying their power of procreation, or oppressing and tyrannising them under racial or religious pretext, or treating them inhumanly.

4. Alien combatants or non-combatants who during the war with or a period of hostilities against the Republic of China, commit acts other than those mentioned in the three previous sections but punishable according to Chinese Criminal Law.”

Paragraph 1 of the above Article covers the field of offences known as *crimes against peace* under the rules of international law as expressed in the most recent documents embodying such rules : Article 6 (a) of the Charter of the International Military Tribunal at Nuremberg ; Article 5 (a) of the Charter of the International Military Tribunal for the Far East ; and Article II (1) (a) of Law No. 10 of the Allied Control Council for Germany.⁽¹⁾

Paragraph 2 covers the field of *war crimes* in the narrower sense, that is of violations of the laws and customs of war. The latter are explicitly provided against in Article 6 (b) of the Nuremberg Charter, Article 5 (b) of the Far Eastern Charter, and in Article II (1) (b) of Law No. 10. Following the practice of some other countries,⁽²⁾ the Chinese Law of 24th October, 1946, contains an elaborate list of offences regarded as constituting war crimes in the narrower sense, similar to that which was drawn up by the 1919 “ Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties.” The list is given in Article III of the Law of 24th October, 1946, and runs as follows :

1. Planned slaughter, murder or other terrorist action.
2. Killing Hostages.
3. Malicious killing of non-combatants by starvation.
4. Rape.
5. Kidnapping children.

(1) For the text of the definitions of crime against peace in the above provisions, see *Trial of Takashi Sakai* in this Volume, pp. 3-4.

(2) See for instance *Netherlands Law Concerning Trials of War Criminals* in the *Annex* to Vol. XI of this series, pp. 93-94, and the *Annex* concerning Australian war crimes laws in Vol. V, pp. 95-96.

6. Enforcing collective torture.
7. Deliberate bombing of non-defended areas.
8. Destroying freighters or passenger boats without previous warning and without regard to the safety of passengers and crew.
9. Destroying fishing boats and relief ships.
10. Deliberate bombing of Hospitals.
11. Attack or sinking of Hospital Ships.
12. Use of poison gas or bacteriological warfare.
13. Employment of inhuman weapons.
14. Ordering wholesale slaughter.
15. Putting poison on food or drinking water.
16. Torturing of non-combatants.
17. Kidnapping females and forcing them to become prostitutes.
18. Mass deportation of non-combatants.
19. Internment of non-combatants and inflicting on them inhuman treatment.
20. Forcing non-combatants to engage in military activities with the enemy.
21. Usurpation of the sovereignty of the occupied territory.
22. Conscription by force of inhabitants in the occupied territory.
23. Scheming to enslave the inhabitants of occupied country or to deprive them of their status and rights as nationals of the occupied country.
24. Robbing.
25. Unlawful extortion or demanding of contributions or requisitions.
26. Depreciating the value of currency or issuing unlawful currency notes.
27. Indiscriminate destruction of property.
28. Violating Red Cross regulations.
29. Ill-treating prisoners of war or wounded persons.
30. Forcing prisoners of war to engage in work not allowed by the International Convention.
31. Indiscriminate use of the Armistice Flags.
32. Making indiscriminate mass arrests.
33. Confiscation of property.
34. Destroying religious, charity, educational, historical constructions or memorials.
35. Malicious insults.
36. Taking money or property by force or extortion.
37. Plundering of historical, artistic or other cultural treasures.
38. Other acts violating the law or usages of war, or acts whose cruelty or destructiveness exceeds their military necessity, forcing people to do things beyond their obligation, or acts hampering the exercise of legal rights.

It should be observed that this list is in many respects wider in scope than the terms used in the 1919 list of war crimes.

Offences included in Article II, paragraph 3, of the Chinese Law of 24th October, 1946, correspond in spirit with the concept of *crimes against humanity* as it evolved in the definitions of Article 6 (c) of the Nuremberg Charter, Article 5 (c) of the Far Eastern Charter, and Article II (1) (c) of

Law No. 10. These provisions cover a field of acts which do not or may not constitute war crimes in the narrower sense, but are similar to them on account of their inhumane nature. They are generally understood to be acts committed systematically, repeatedly and on a vast scale against the civilian population, in pursuance of purposes ranging from the forcible denationalisation of the population to its biological extermination. A notable feature of the Chinese definition is the emphasis on and express reference to narcotic drugs and poisons which are of especial importance in Far Eastern countries. Another emphasis is that put on "stupefying the mind and controlling the thought" of the Chinese population. This, in contradistinction to drugs and poisons which are mentioned separately, would seem to include psychological means of action.

Finally, offences provided against in paragraph 4 are those of Chinese common penal law when committed during the war with or a period of hostilities against China and which, at the same time, constitute neither a crime against peace, nor a war crime in the narrower sense, nor a crime against humanity, as covered by the other paragraphs of Art. II.

From the above classification it appears that the Chinese legislation has adopted the concept of war crimes in a wider, non-technical sense, as a common denominator for types of offences which are, otherwise, distinct one from the other within the body of international law.

IV. PERPETRATORS AND RELEVANT PERIODS OF TIME

According to the above-cited Article II individuals liable to punishment for any of the above types of offences are "alien combatants or non-combatants." This is in accord with the legislation of most countries as well as with rules of international law, according to which the notion of a war criminal is in general limited to subjects of a foreign nation. Subjects of the country whose nationals were victimised, if guilty of one of the above offences, are tried as traitors, quislings or ordinary criminals, as the case may be, under the rules of their country's common law.

This difference is, indirectly, stressed in Article VI of the Law of 24th October, 1946. The latter makes the rules of the Law of 24th October, 1946, applicable "also to war criminals who may have regained Chinese citizenship after 25th October, 1945." The effect is that a former Chinese subject, who had become an alien but had regained his original nationality after the said date, is tried according to his previous alien status, and not as a Chinese citizen.

In the paragraphs of Art. II dealing with the various offences stress was laid on different periods of time relevant for holding the perpetrators guilty under the terms of the Law of 24th October, 1946.

For crimes against peace the period mentioned is that running "prior to or during the war." The time preceding a war relates to "planning, conspiring or preparing" a war of aggression and may therefore go far back in the past according to the case. The same is implied in the definitions of crimes against peace contained in the international documents previously referred to.

For war crimes in the narrower sense the relevant period is that running "during the war or a period of hostilities" against China. It should be

noted that the "period of hostilities," as distinct from that of the war, was inserted with regard to and in order to cover the period during which China and Japan were in a state of *de facto* belligerency before the outbreak of World War II. According to Art. IV of the Law of 24th October, 1946, this state started on 18th September, 1931, that is on the invasion of Manchuria by Japan. The same period was made relevant for crimes punishable under the Chinese Penal Code, as provided by Art. II, para. 4, of the Law of 24th October, 1946.

Finally, the period relevant for crimes against humanity is that running "during the war or a period of hostilities against the Republic of China or prior to the occurrence of such circumstances." The latter part of the provision makes crimes against humanity, as covered by Art. II, para. 3, of the above Law, punishable even when committed before 18th September, 1931. Under the terms of Art. IV the same applies to crimes against peace, as acts undertaken with a view to planning, conspiring for, or preparing a war of aggression, which form part of the concept of crimes against peace, do not lend themselves to be circumscribed by any specific date limit preceding the outbreak of actual hostilities. By providing for the punishment of acts constituting crimes against humanity which were committed before the war,—in China before 18th September, 1931,—the Chinese Law of 24th October, 1946, followed the lines of the Nuremberg and Far Eastern Charters. Both Charters explicitly refer to inhumane acts committed against civilian populations "before or during the war." Under both Charters the proviso is that such acts have been committed "in execution of or in connection with" crimes against peace or war crimes. The position would seem to be similar under the terms of Art. II, para. 3 of the Chinese Law of 24th October, 1946. The latter speaks of acts committed by "alien combatants or non-combatants" pursuant to "intentions of enslaving, crippling, or annihilating the Chinese Nation." The context is that this is done "during the war or a period of hostilities" or "prior to the occurrence of such circumstances." There is little doubt that this phraseology describes in fact acts which include crimes against peace.

According to Art. IV of the Law of 24th October, 1946, the end of the war in China is set at 2nd September, 1945. The same Article specifies that all provisions of Art. II are applicable to offences committed between 18th September, 1931, and 2nd September, 1945, with the exception of acts punishable under para. 1 (crimes against peace) and para. 2 (crimes against humanity) which remain subject to prosecution if committed before 18th September, 1931.

In order to give clear guidance for the trial of offences committed after September, 1945, Art. V of the Chinese Law specifies that such offences, when committed by aliens before their being interned but after 3rd September, 1945, are not tried under the rules of the Law of 24th October, 1946, but under those of Chinese Penal Law and before ordinary military tribunals.

V. STATUS OF THE VICTIMS

The offences tried under the terms of the Chinese Law of 24th October, 1946, are those committed against victims of Chinese nationality. Special provision was, however, made to the effect that offences committed against Allied nations or their nationals, or against aliens under the protection of

the Chinese Government, were also subject to prosecution and trial before Chinese courts. Art. VII of the Chinese Law, which contains the above rule, does not say whether such offences need be committed on Chinese territory or on territory under Chinese control, or whether they include as well offences perpetrated outside Chinese territory. In the former case the rule would be an application of the territorial principle which is at the basis of most penal law systems. In the latter case, the competence of Chinese courts would be based on the principle of the universality of jurisdiction of municipal courts in the sphere of war crimes, as practised by courts of certain countries, such as the United States.

VI. CIRCUMSTANCES NOT EXONERATING WAR CRIMINALS

Art. VIII of the Law of 24th October, 1946, lays down the rule that the following circumstances do not in themselves relieve the perpetrator from penal liability for war crimes :

- (1) that crimes were committed by order of superior officers ;
- (2) that crimes were committed as a result of official duty ;
- (3) that crimes were committed in pursuance of the policy of the offender's government ;
- (4) that crimes were committed out of political necessity.

The above rule follows the lines adopted on the subject in the Nuremberg and Far Eastern Charters, and also in Law No. 10 of the Allied Control Council for Germany. So, for instance, the commission of crimes upon superior orders is dealt with in Art. 8 of the Nuremberg Charter, in the following terms :

“ The fact that the Defendant acted pursuant to order of his government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.”

A similar rule on superior orders appears in the Far Eastern Charter and in Law No. 10. The wording of the Chinese Law concerning crimes perpetrated pursuant to one's Government's policy would seem to be covered by the above provision of the Nuremberg Charter where it refers to acts undertaken upon governmental orders. It may well be, however, that the Chinese rule has on this point a wider meaning than that expressed in the concept of an order, and that it includes cases where a governmental policy is carried out without specific orders from superiors, upon the offender's own initiative.

The Chinese rule does not specify the effect of the irrelevance of superior orders, and as a consequence does not expressly provide for mitigation of punishment if the court so sees fit. It is, however, safe to assume that Chinese courts have in this sphere powers similar to those of other courts, both international and municipal, and are therefore entitled to pronounce milder sentences according to the merits of each case.

In addition to superior orders and to acts undertaken pursuant to governmental policy, the Chinese rule refers also to crimes committed as a result of “ official duty,” and to those perpetrated out of “ political necessity.” The connotation of both these concepts is that an offence was committed by

individuals holding official positions and acting on behalf of the State or Government. The irrelevance of the offender's official position for his penal responsibility for war crimes is also prescribed by rules of international law, such as, for instance, by Art. 7 of the Nuremberg Charter :

“ The official position of defendant's whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.”

Similar rules are contained in the Far Eastern Charter and in Law No. 10.

VII. RESPONSIBILITY OF PERSONS IN AUTHORITY

Art. IX of the Law of 24th October, 1946, provides the following :

“ Persons who occupy a supervisory or commanding position in relation to war criminals and in this capacity have not fulfilled their duty to prevent crimes from being committed by their subordinates shall be treated as accomplices of the war criminals.”

The effect of this provision is that not only superiors who issue orders, but also those who tolerate criminal acts of their subordinates without undertaking appropriate measures with a view to preventing such acts from occurring, are held penally responsible in the same manner as the perpetrators themselves. This rule was recognised by the law of other nations as well and applied in a number of important trials.⁽¹⁾

VIII. PUNISHMENT

The Law of 24th October, 1946, prescribes penalties according to the different types or classes of offences covered by its Art. II.

Art. X contains the following rule :

“ War criminals who are guilty of offences provided against under paragraph 1 and paragraph 3 of Art. II shall be sentenced to death or life imprisonment.”

The offences concerned in this provision are those constituting crimes against peace and crimes against humanity. It will be noticed that in these cases the choice is left only between the two severest punishments in criminal law.

Art. XI prescribes penalties for offences constituting war crimes in the narrower sense. Penalties are laid down according to the list of offences given in Art. III, and are as follows :

(a) The penalties for offences provided against under items 1-15 of Art. III are death or life imprisonment.

(b) The penalties for offences provided against under items 16-24 of Art. III are, alternatively, death, life imprisonment, or imprisonment for a period of 10 years.

(c) Offences provided against under items 25-37 of Art. III are

⁽¹⁾ See *Trial of Tomoyuki Yamashita*, Vol. IV of this series, pp. 83-96 ; *Trial of Erhard Milch*, Vol. VII of this series, pp. 61-64 ; *Trial of General Wilhelm List and others*, Vol. VIII of this series, pp. 88-9 ; *Trial of Wilhelm von Leeb and 13 others* (High Command Trial), Vol. XII of this series, pp. 105-12.

punishable by life imprisonment or imprisonment for not less than 7 years.

(d) Offences provided against under item 38 of Art. III are punishable by life imprisonment or imprisonment for not less than 7 years, with the proviso that offences of a more serious nature are punishable by death.

Offences covered by paragraph 4 of Art. II, that is those provided against by the Chinese Penal Code, entail the respective punishments of the Code.

IX. RULES CONCERNING PRESCRIPTION AND REDUCTION OF PUNISHMENT

The effect of certain rules of Chinese common penal law was suspended in the case of war crimes.

Under the terms of Art. IV of the Law of 24th October, 1946, the prosecution of war crimes is not subject to prescription as provided by Art. 80 of the Chinese Penal Code. The latter lays down various periods of time, ranging from one to twenty years, after the expiry of which the prosecution of the offences concerned becomes extinct.

On the other hand, a law of 17th June, 1944, provided for the reduction of punishments in certain cases. Art. XIII of the Law of 24th October, 1946, made such reduction inoperative in war crimes cases.

X. COURTS TRYING WAR CRIMINALS

Individuals guilty of offences under Art. II and III of the Law of 24th October, 1946, are tried by special "Military Tribunals for the Trial of War Criminals." These Tribunals are attached to various military organisations by decision of the Chinese Ministry of Defence. The establishment and powers of such Tribunals are determined by the Chinese War Crimes Commission after approval by the Ministry of Defence and the Ministry of Justice.

According to Art. XVII of the Law of 24th October, 1946, a Military Tribunal for the Trial of War Criminals is composed of 5 military judges and 1 to 3 military prosecutors. The number of both may be increased when necessary. According to Art. XVIII three of the five judges are selected from various military organisations. The remaining two are selected by the Ministry of Justice from provincial or municipal higher courts. A similar selection is made of the prosecutors; one comes from military ranks, and one or two are chosen by the Ministry of Justice from the ranks of prosecutors of provincial or municipal higher courts.

Cases are, as a rule, heard in the seat of the Tribunal. Wherever the case so requires, however, the Tribunal may designate three judges and one prosecutor to hold the trial at the place of the crime.

XI. JUDGMENT, CONFIRMATION OF SENTENCE AND RE-TRIAL

When a trial ends with a verdict of "not guilty" or when the prosecutor deems a prosecution unnecessary or unwarranted, the case is submitted to the Ministry of Defence for confirmation within one week of the pronouncement of the judgment or of the decision not to resume the prosecution. If

the case gives rise to doubts, the Ministry may refer the case back for re-trial on further investigation.

Trials ending in conviction are transmitted to the Ministry of Defence for confirmation. Cases involving death sentences or life imprisonment are further submitted by the Ministry to the President of the Republic for a fiat of execution. If the Ministry or the President consider the judgment to be faulty or improper, they may return the case for re-trial. Every case re-tried is subject to the same procedure as above.

The accused is entitled to appeal for a re-trial under the rules of Chinese military penal law, within 10 days of the judgment.