

CASE No. 83

TRIAL OF TAKASHI SAKAI

Responsibility for Crimes against Peace and other offences.

CHINESE WAR CRIMES MILITARY TRIBUNAL OF THE MINISTRY OF NATIONAL
DEFENCE, NANKING, 29TH AUGUST, 1946

A. OUTLINE OF THE PROCEEDINGS

The accused, Takashi Sakai, a Japanese, served as a military commander in China during the war of 1939-1945, and also prior to that, during the Sino-Japanese hostilities which followed the Mukden incident of 1931. The charges laid against him were described as constituting crimes against peace, war crimes and crimes against humanity. Some charges were made under the terms of Chinese municipal law and concerned offences against the internal security of the State.

1. FACTS AND EVIDENCE

The findings of the Tribunal concerning the accused's activities in China between 1931 and 1939 were as follows :

Takashi Sakai was one of the leaders who were instrumental in Japan's aggression against China. Soon after the Mukden incident of 1931 he instigated a man by the name of Li Chi Chun and his followers to form a gang for the purpose of creating disturbances in Peking and Tientsin and to organise terrorist activities. As a result the Secretary of the Kuomintang office in Tientsin, Li Min Yueh, and a correspondent of the Shanghai Daily Chu Shao-tien, were assassinated. In February, 1934, attempts were made on the lives of a Chinese General, Ma Chun-shan, and of the Chairman of the Provincial Government of Hopei, Yu Hsueh-chung, in Tientsin. In May, 1934, the accused threatened to attack Peking and Tientsin by artillery and air force, and demanded the dismissal of the heads of the local Chinese authorities in the province of Hopei. He also demanded the withdrawal of Chinese troops from Hopei. As a Commander of the Japanese 23rd Army in Kwantung, which was then operating in South China, he ordered his subordinates to assist in setting up a puppet administration and in organising a so-called "Peace Army," in an effort to overthrow the Chinese Government.

The following was established to have taken place during the period of the Second World War (1939-1945) :

As Regimental Commander of 29 Infantry Brigade in China, the accused incited or permitted his subordinates to indulge in acts of atrocity. Between November, 1941, and March, 1943, in Kwantung and Hainan over one hundred civilians were massacred by shooting or bayoneting ; twenty-two civilians were tortured ; women were drowned after severe beating and one

expectant mother was tortured ; two women were raped and mutilated, and their bodies were fed to dogs ; civilians were evicted from their homes and seven hundred houses were set on fire ; rice, poultry and other foods were plundered. On 17th and 18th December, 1941, in Hongkong, thirty prisoners of war were massacred at Lyumen and twenty-four more prisoners were killed at West Point Fortress. On 19th December, 1941, the personnel of a British medical unit were massacred—twenty persons in all. Between 24th and 26th December, 1941, seven nurses were raped and three mutilated, and sixty to seventy wounded prisoners of war were killed. Valuable collections of books were pillaged from libraries.

2. THE DEFENCE OF THE ACCUSED

The accused pleaded not guilty.

Regarding his demand in 1934 that Chinese troops from Hopei should be withdrawn and that Chinese administrative heads in Hopei should be dismissed, he pleaded that he had acted within the stipulations of the International (Final) Protocol of 1901. The latter constituted a settlement of the rights of eleven foreign Powers in China following incidents in which the German Minister, Baron von Ketteler, was assassinated and a number of Europeans were ill-treated or massacred. The Powers concerned included Japan.⁽¹⁾ They were given the right to keep troops in certain areas in China in order to maintain free communication between Peking and the sea. The areas involved included Tientsin and other places in the province of Hopei. The Chinese Government undertook specific obligations for the maintenance of order in the affected areas. All Chinese local administrative heads were made personally answerable for the order in their districts. If offences against foreigners recurred or other violations of existing treaties were not instantly suppressed and the culprits punished, the heads were to be dismissed by the Chinese Government and could not be appointed to new posts.

The accused's plea to the charge that he had taken part in a war of aggression and had committed a crime against peace, was that he had acted upon the orders of his Government. He also pleaded not guilty to the charges concerning atrocities on the grounds that he was not responsible for the acts of his subordinates as he had no knowledge of them.

3. FINDINGS AND SENTENCES

The accused's pleas were rejected and he was found guilty " of participating in the war of aggression " and " of inciting or permitting his subordinates to murder prisoners of war, wounded soldiers and non-combatants ; to rape, plunder and deport civilians ; to indulge in cruel punishment and torture ; and to cause destruction of property."

For his participation in a war of aggression the accused was found guilty of a crime against peace. In regard to the atrocities he was found guilty of war crimes and crimes against humanity.

He was sentenced to death.

(1) The other Powers were Austria, Hungary, Belgium, France, Germany, Great Britain, Italy, the Netherlands, Spain, Russia and United States of America.

B. NOTES ON THE CASE

1. JURISDICTION OF THE TRIBUNAL

The trial of Takashi Sakai was conducted under the terms of Chinese Rules governing the Trial of War Criminals which were in force at the time of the trial.⁽¹⁾

According to Article 1 of these Rules the primary source of substantive law for Chinese war crimes tribunals is international law. The latter is supplemented by the provisions of the above Rules. In cases not covered by the Rules the law to be applied is that of the Chinese Penal Code. Article 1 reads as follows :

“ In the trial and punishment of war criminals, in addition to rules of international law, the present Rules shall be applied ; in cases not covered by the present Rules, the Criminal Code of the Chinese Republic shall be applied.

“ In applying the Criminal Code of the Chinese Republic, the Special Law shall as far as possible be applied, irrespective of the status of the delinquent.”

The above provision was implemented in the case under review, both with regard to crimes against peace and to war crimes and crimes against humanity.

2. JURISDICTION OVER CRIMES AGAINST PEACE

The Tribunal's verdict on the count of crimes against peace was made with regard, though without express reference, to rules which were explicitly formulated in the latest development of international law in this sphere.

The concept of crimes against peace was first defined in the Charter of the International Military Tribunal at Nuremberg, which was instituted by the London Agreement of 8th August, 1945, for the trial of the Major War Criminals of the European Axis. Article 6 (A) of the Charter contains the following definition :

“ *Crimes against peace* : namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.”

Another definition was given, in almost identical terms, in the Charter of the International Military Tribunal for the Far East, which was instituted by a Proclamation of General MacArthur of 19th January, 1946, for the trial of Japanese Major War Criminals. Article 5 (A) of this Charter reads as follows :

“ *Crimes against peace* : namely, *the* planning, preparation, initiation or waging of a *declared or undeclared* war of aggression, or a war in violation of *international law*, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.”⁽²⁾

(1) The above Rules were later replaced by a Law Governing the Trial of War Criminals of 24th October, 1946, an account of which will be found in the Annex to this Volume.

(2) The words in italics are those not appearing in the Nuremberg Charter.

Finally, a third and also very similar definition is contained in Article II (1) (A) of Law No. 10 of the Allied Control Council for Germany, of 20th December, 1945, which regulates the trial of persons other than major war criminals and is thus a clear indication that responsibility for crimes against peace is not confined to high State administrators, such as heads of State or members of Government, but may include any other person. The definition reads as follows :

“ *Crimes against peace* : Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.”

In its Judgment, the International Military Tribunal at Nuremberg stressed that the punishment of crimes against peace, as provided in the Nuremberg Charter, was only a reflection of the rules that had evolved in international treaties between the First and Second World Wars, and according to which a war of aggression constituted a criminal offence punishable under international law. The treaties referred to included in particular the Paris or Kellogg-Briand Pact of 27th August, 1928, which *condemned* recourse to war for the solution of international controversies, and by which the Signatories *renounced* it as an instrument of national policy. Both Germany and Japan were among the sixty States bound by the Pact.

In the Nuremberg Charter the range of persons liable to prosecution and punishment for crimes against peace is defined in the first and last paragraph of Article 6. It includes *any* person implicated in its commission whether as an individual or a member of organisations, or as a leader, organiser, instigator or accomplice. The same follows from the Far Eastern Charter and Law No. 10.⁽¹⁾

In the light of the foregoing provision it appears that, by trying the accused as a person charged with and prosecuted for crimes against peace, the Chinese War Crimes Military Tribunal at Nanking acted within the competence internationally recognised to courts of law in this sphere.

3. THE ACCUSED'S GUILT AS TO CRIMES AGAINST PEACE

From the wording used in the Judgment, it would appear that the accused was found guilty of crimes against peace for the reason that he had taken part in the war of aggression against China. No further qualifications can be found in the Judgment beyond this point, so that it would seem that, according to the Chinese Tribunal, the accused's liability lay in no other circumstances than in the fact that he had conducted military operations which formed part of a war of aggression.

This would follow from the wording of the formal verdict, which included the following terms :

“ The defendant, Takashi Sakai, having been found guilty of *participating* in the war of aggression. . . .”⁽²⁾

(1) Article II (2) of Law No. 10 includes explicitly “ any person without regard to nationality or the capacity in which he acted.”

(2) Italics inserted.

The same follows from a statement of the Tribunal, in which it dismissed the accused's plea of superior orders:

" . . . Aggressive war is an act against world peace. Granted that the defendant *participated* in the war on the orders of his Government, a superior order cannot be held to absolve the defendant from liability for the crime."⁽¹⁾

The rejection of the plea of superior orders was made on the basis of the generally recognised and already firmly established rule that to commit crimes upon superior orders, including those of a Government, does not relieve the perpetrator from penal responsibility, but may be taken in mitigation of the punishment.⁽²⁾ The latter is left to the discretion of the courts. The above rule was expressed in Article 8 of the Chinese Rules Governing the Trial of War Criminals, whose relevant passages read :

" Criminals are not exempted from responsibility in the following cases :

" 1. If the act was committed in accordance with orders of superior officers.

" . . . "

One point in connection with the Tribunal's findings concerning crimes against peace was not made clear in the Judgment. The Tribunal did not state whether the accused's guilt was determined for taking part in the war of 1939-1945, or whether it included the period of hostilities which had existed between Japan and China between 1931 and 1939. The events in which the accused took part in 1931-1934, in Peking and Tientsin, and in which he was engaged in activities against Chinese local administrative heads, were described in the Judgment immediately after the statement that he was " one of the leaders who were instrumental in Japan's aggression in China." This could be taken to mean that such activities were regarded by the Tribunal as having formed part of the " war of aggression " against China, and that its verdict on this count included this period preceding the outbreak of World War II.

On the other hand, however, there are in the Judgment indications that the Tribunal may have segregated this period from that of World War II and that its verdict was confined to the latter period only. When considering the events of 1931 and 1934 the Tribunal declared that the accused had thereby " violated international law by undermining the territorial and administrative integrity of China."⁽³⁾ Later, however, after referring to the international treaties violated by the accused, the Tribunal added that " offences against the internal security of the State should be punished in accordance with the Criminal Code of the Republic of China." This reference to " offences against the *internal* security of the State " seem to fit the findings concerning the accused's guilt in the events of 1931-1934, where the internal security of the State would appear to have been at stake

(1) Italics inserted.

(2) On this point see *History of the United Nations War Crimes Commission and the Development of the Law of War*, H.M. Stationery Office, London, 1948, Chapter X, pp. 274-288. Compare also Vol. V of these Reports, pp. 13-22, and Vol. VII, p. 65.

(3) This was a reference to the terms of the Nine Power Treaty of 6th February, 1922, concerning the status of China, an account of which will be found later.

due to the accused's activities directed against Chinese local administrative heads and the maintenance of Chinese troops in the province of Hopei. With regard to both the Tribunal stressed that there was "no stipulations in the Final Protocol of 1901 which prohibited the Chinese Government from stationing Chinese troops in Hopei" and that it gave Japan no "right to demand the dismissal of Chinese Administrative Heads in Hopei." In this manner the above reference to offences against the internal security of the Chinese State and to the Chinese Penal Code may mean that, for the events of 1931 and 1934, the accused's guilt was determined under the terms of Chinese municipal law and not under those of international law. This would leave crimes against peace for that period out of the picture.

Irrespective of the above issue, the Tribunal stressed that, in committing crimes against peace for which he was found guilty, the accused had "violated the Nine Power Treaty of 1922 and the Paris Pact" of 1928. The relevant provisions invoked by the Tribunal were Art. 1 of the Nine Power Treaty and Art. 1 of the Paris (Kellogg-Briand) Pact.

The Nine Power Treaty was signed on 6th February, 1922, between the British Empire, the United States, Belgium, China, France, Italy, Japan, the Netherlands and Portugal. As stressed in its Preamble, it was concluded with a view "to stabilise conditions in the Far East, to safeguard the rights and interests of China, and to promote intercourse between China and the other Powers upon the basis of equality of opportunity." The first obligation undertaken by the Powers was to "respect the sovereignty, the independence, and the territorial and administrative integrity of China." It will be remembered that the last terms were invoked by the Tribunal against the accused. The full text of Article 1 of the Nine Power Treaty of 1922 runs as follows :

"The Contracting Powers, other than China, agree :

- "(1) To respect the sovereignty, the independence, and the territorial and administrative integrity of China.
- "(2) To provide the fullest and most unembarrassed opportunity to China to develop and maintain for herself an effective and stable Government.
- "(3) To use their influence for the purpose of effectually establishing and maintaining the principle of equal opportunity for the commerce and industry of all nations throughout the territory of China.
- "(4) To refrain from taking advantage of conditions in China in order to seek special rights or privileges which would abridge the rights of subjects or citizens of friendly States, and from countenancing action inimical to the security of such States."

Article 1 of the Paris Pact runs as follows :

"The High Contracting Parties solemnly declare, in the names of their respective peoples, that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another."

As will be noticed, the combined effect of the above two Articles, which were binding upon Japan, was to make a military aggression against China a violation of the two Treaties.

With regard to the concept of crimes against peace the above references show two important features. The first is that the Tribunal had thereby stressed that the accused had taken part in "a war in violation of international treaties," which is included in the definitions of crimes against peace previously quoted. The second feature is that the Tribunal's verdict on this count was entirely based upon rules of international law, as evidenced by the texts of the Nuremberg and Far Eastern Charters, and of Law No. 10.

4. THE ACCUSED'S GUILT AS TO WAR CRIMES AND CRIMES AGAINST HUMANITY

With reference to offences against civilians and members of the armed forces for which the accused was found guilty, the Tribunal said :

"In inciting or permitting his subordinates to murder prisoners of war, wounded soldiers, nurses and doctors of the Red Cross and other non-combatants, and to commit acts of rape, plunder, deportation, torture and destruction of property, he had violated the Hague Convention concerning the Laws and Customs of War on Land and the Geneva Convention of 1929. These offences are war crimes and crimes against humanity."

The relevant provisions of the above two Conventions which the Tribunal found to have been violated were : Article 28 of the Hague Regulations, forbidding "the giving over to pillage of a town or place, even when taken by assault" ; Article 46 of the same Regulations protecting "family honour and rights, individual life, and private property, as well as religious convictions and worships," and "forbidding confiscation of private property" ; Article 47 of the Hague Regulations declaring any pillage "expressly forbidden" ; Articles 1 to 6, 9 and 10 of the Geneva Convention relative to the Treatment of Prisoners of War, of 1929, which protect prisoners of war from ill-treatment, as well as protecting their lives.

The Tribunal dismissed the accused's plea that he could not be held responsible for the above violations because they were perpetrated by his subordinates and he had no knowledge of them. The Tribunal's findings were as follows :

"... That a field Commander must hold himself responsible for the discipline of his subordinates, is an accepted principle. It is inconceivable that he should not have been aware of the acts of atrocities committed by his subordinates. . . . All the evidence goes to show that the defendant knew of the atrocities committed by his subordinates and deliberately let loose savagery upon civilians and prisoners of war."

The principle that a commander is responsible for the discipline of his subordinates, and that consequently he may be held responsible for their criminal acts if he neglects to undertake appropriate measures or knowingly tolerates the perpetration of offences on their part, is a rule generally accepted by nations and their courts of law in the sphere of the laws and customs of war. The above findings are therefore in line with the jurisprudence created with regard to this rule, in particular on the occasion of war crime trials held after the Second World War.⁽¹⁾

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