Historical Origins of International Criminal Law: Volume 2

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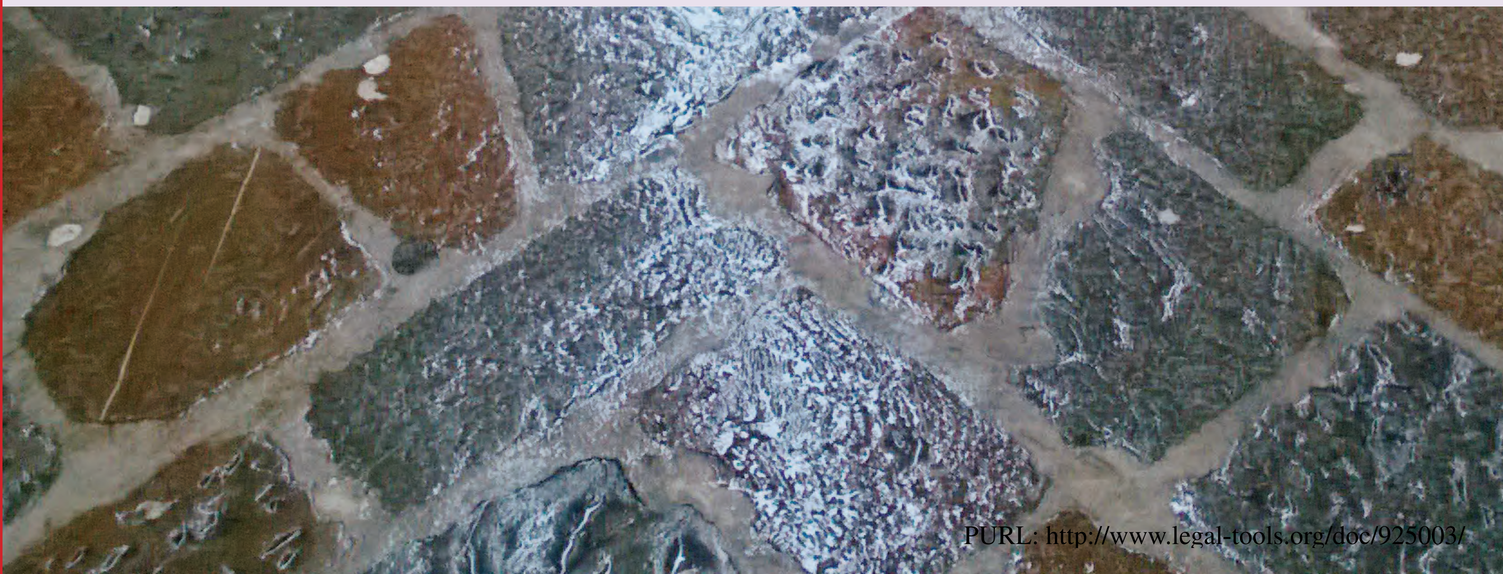

E-Offprint:

Yuma Totani, "International Military Tribunals at Tokyo, 1946–1949: Individual Responsibility for War Crimes", in Morten Bergsmo, CHEAH Wui Ling and YI Ping (editors), *Historical Origins of International Criminal Law: Volume 2*, FICHL Publication Series No. 21 (2014), Torkel Opsahl Academic EPublisher, Brussels, ISBN 978-82-93081-13-5. First published on 12 December 2014.

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International Military Tribunals at Tokyo, 1946–1949: Individual Responsibility for War Crimes

Yuma Totani[*]

22.1. Introduction

About half a year after the establishment of the International Military Tribunal in Nuremberg, the Allied Powers represented by 11 nations set up another one in Tokyo (the 'Tokyo Tribunal' or the 'Tribunal') in order to prosecute Far Eastern major war criminals. The joint trial of 28 wartime leaders of Japan with Tōjō Hideki as chief accused – later reduced to a total of 25 accused – took place between 29 April 1946 and 12 November 1948 (the 'Tokyo Trial'). All but one were found guilty of crimes against peace, and ten, including the one acquitted of crimes against peace, were found guilty of war crimes. Seven of the ten who were convicted of war crimes were sentenced to death by hanging while the rest received life in prison (with two exceptions, who received relatively lenient sentences of seven and twenty years). The seven death sentences were carried out on 23 December 1948.

This particular international criminal proceeding has attracted considerable attention of late, especially among international law scholars with the view to determine its relevance to present-day international criminal trials such as the ones held at The Hague. What has come under far less scrutiny, but by no means less important, is the fact that the Allied authorities established in Tokyo in October 1948 two additional international military tribunals in order to proceed with further cases involving major Japanese war criminals. Each tribunal received evidence of war crimes only, and the accused was limited to one per case: Lieutenant General Tamura Hiroshi (19 October 1948–23 February 1949) and Admiral Toyoda Soemu (19 October 1948–9 September 1949).[1]

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While much smaller in scope than the concurrent international proceedings held at Nuremberg, the Tamura Trial and the Toyoda Trial served as crucial capstone proceedings to bring to completion the trials of major war criminals still in Allied custody. This chapter will shed light on these two trials and compare the prosecutorial efforts with the one at the Tokyo Trial. The goal of the chapter is to assess the cumulative findings of the three tribunals on issues of individual responsibility of highest-ranking Japanese government officials and military commanders for war crimes. For the sake of clarity, the discussion that follows will analyse the three cases separately while highlighting commonalities and differences on points of law as well as fact.

22.2. The Tokyo Trial

The accused in Tokyo jointly faced three counts of war crimes. They were namely participation in a common plan or conspiracy to commit war crimes (count 53); orders, authorisation and permission to the members of the Japanese armed forces, the government, prisoner of war ('POW') camp administration and police organisations "frequently and habitually to commit the breaches of the Laws and Customs of War" (count 54); and deliberate and reckless disregard of one's "legal duty to take adequate steps to secure the observance and prevent breaches" of international conventions, assurances and the laws and customs of war (count 55).[2] Of these three counts, the Tokyo Tribunal threw out the first one on the ground that the Charter of the Tribunal "did not confer any jurisdiction in respect of a conspiracy to commit any crime other than a crime against

the Pacific Region: Allied War Crimes Prosecutions, 1945-1952 (Cambridge University Press, Cambridge, forthcoming 2015).

1 For the circumstances that led to the establishment of two additional international military tribunals at Tokyo, see Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*, Harvard University Asia Center, Cambridge, MA, 2008, chap. 3.

2 "Indictment", in Neil Boister and Robert Cryer (eds.), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments*, Oxford University Press, Oxford, 2008, pp. 32–33. Counts 53–55 subsumed the charges of crimes against humanity, too, but no actual case of crimes against humanity was made at the Tokyo Trial. This was due to the opinion of the International Prosecution Section (the prosecuting agency at the Tokyo Trial) prior to the start of the trial that "actually this Section has no cases falling only under Class C [crimes against humanity]". "Minutes of Fourteenth Meeting of Executive Committee" (April 5, 1946), MSS 78-3, Box 2, Tavenner Papers, Arthur J. Morris Law Library, University of Virginia.

peace".[3] The findings of the Tokyo Tribunal concerning war crimes were therefore limited to counts 54 and 55.

Having thus charged that the Japanese accused ordered, authorised and permitted the commission of war crimes under count 54, and that they deliberately and recklessly disregarded their legal duty to ensure Japan's observance of the laws and customs of war under count 55, the International Prosecution Section appears to have had difficulties securing affirmative evidence to substantiate either allegation. Part of the problem was the policy constraint stemming from the inter-Allied decision at the highest level, made before the start of the trial. The Tokyo Tribunal was designed to serve as a venue to try major war criminals *principally* for crimes against peace, and *secondarily* for charges related to wartime atrocities.[4] In practical terms, the high-level policy decision compelled the International Prosecution Section 1) to prioritise evidence collection relative to crimes against peace but not necessarily war crimes; 2) to grapple with chronic shortage of investigation staff and resources insofar as war crimes were concerned; and 3) to shorten the presentation of evidence concerning war crimes to help expedite the court proceedings. To complicate the matter, the members of the central government of Japan and the Japanese Army and Navy units in theatres of war at the war's end had made concerted efforts to destroy physical and documentary evidence of wartime atrocities, prior to the arrival of Allied war crimes investigators.[5] These obstacles undercut the ability of the prosecuting agency to secure in a timely manner conclusive evidence of individual accused's criminal liability for war crimes. In those circumstances, the prosecuting agency had little choice but to rely mainly on circumstantial evidence to substantiate the charges of war crimes.

The general method of proof that guided the prosecution's work, as agreed during the pre-trial phase, was to focus on presenting "a picture of the widespread area of these actions [acts in violation of laws and customs of war]". Such evidence would make it possible for the Tokyo Tribunal to infer that "they couldn't have come about spontaneously but must have

3 "Majority Judgment", in Boister and Cryer, 2008, p. 85, see *supra* note 2.

4 For more information regarding the Allied prosecutorial priority at the Tokyo Trial, see Totani, 2008, chap. 1, *supra* note 1.

5 The Japanese organised effort in the wake of surrender to conceal evidence of war crimes is discussed in the Tokyo Tribunal's judgment. "Majority Judgment", in Boister and Cryer, 2008, p. 593, see *supra* note 2.

been the result of *some common plan*". Evidence of widespread war crimes aside, the prosecution would also present proof of "protests made [by the Allied Governments and Protecting Powers] directly to the people at the top".[6] These two types of proof together would show not only that the Japanese commission of war crimes was widespread but also that the highly-positioned Japanese in the central government were formally and repeatedly put on notice by the outside Powers about their occurrence, and yet stopped short of taking effective steps to address the problem. The prosecution could argue on the basis of such evidence that instances of atrocity were "not merely a series of independent crimes but *one major war crime*".[7] The lead Australian prosecutor, Alan J. Mansfield, let it be known to the Tokyo Tribunal the prosecution's method of proof while in the courtroom. During the opening statement for the prosecution's phase on war crimes, he made the following remark:

> This similarity of treatment throughout the territories occupied by the Japanese forces will lead to the conclusion that such mistreatment was the result not of the independent acts of the individual Japanese Commanders and soldiers, but of the *general policy of the Japanese forces and of the Japanese Government*.[8]

In other words, the prosecution would document recurrence of similarly patterned war crimes in broad areas of Japanese-occupied territories. Such documentation, in turn, would enable the Tokyo Tribunal to infer policy dimensions in the occurrence of war crimes.

Lieutenant Colonel Thomas F. Mornane – the Australian assistant prosecutor who filled in Mansfield's position after the latter's departure in early 1947 – recapitulated during the summation the argument previously

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6 "Minutes of the Associate Prosecutors' Meeting (March 2, 1946)", in Awaya Kentarō, Nagai Hitoshi and Toyoda Masayuki (eds.), *Tōkyō saiban e no michi: kokusai kensatsu kyoku, seisaku kettei kankai bunsho* [The Road to the Tokyo Trial: Records Relative to the International Prosecution Section's Policy Making], Gendai shiryō shuppan, Tokyo, 1999 (emphasis added).

7 *Ibid*. (emphasis added).

8 "Trial Transcripts" (transcripts of court proceedings at the Tokyo Trial), R12861 (emphasis added). The entire transcripts of the court proceedings of the Tokyo Trial including court exhibits are available online. Visit the digital subfolder titled, "Member Governments, Other National Authorities and Military Tribunals", which appears under the "United Nations War Crimes Commission" digital folder, uploaded on the website of ICC Legal Tools (http://www.legal-tools.org/en/go-to-database/).

made by his Australian colleague. By presenting voluminous evidence "showing a uniform pattern of atrocities and breaches of the laws of war", so he informed the Tokyo Tribunal, the prosecution made the case "that this was part of a *system* of illegal employment, ill-treatment and murder of prisoners of war and civilians for which all the accused in office during the relevant periods are responsible".[9] The prosecution's usage of words such as "plan", "policy" and "system" as if they were interchangeable is somewhat disconcerting. But the bottom line of the prosecution's case would be this: there was sufficient circumstantial evidence to allow an inference that the commission of war crimes was not an aberration but rather an integral part of the Japanese conduct of war and military occupation.

With regard specifically to count 55, the International Prosecution Section went at some length to elucidate on what basis the accused could be considered as having such "legal duty to take adequate steps to secure the observance and prevent breaches" of the laws and customs of war. The theoretical grounding in support of count 55 was sought in the international conventions that predated the outbreak of the Pacific War. One of them was the Hague Convention No. 4 Concerning the Laws and Customs of War on Land (18 October 1907). Article 4 of the Convention read:

> Prisoners of War are *in the power of the hostile Government*, but not of the individuals or corps who capture them.[10]

The same principle was articulated in Article 2 of the International Convention Relative to the Treatment of Prisoners of War (27 July 1929).[11] A stipulation to similar effect was also contained in the International Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (27 July 1929). Article 26 of the Convention read:

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9 *Ibid*., R40113 (emphasis added).

10 "Indictment", in Boister and Cryer, 2008, p. 57, see *supra* note 2 (emphasis added).

11 Article 2 of the Convention reads as follows: "Prisoners of war are in the power of the hostile Power, but not of the individuals or corps who have captured them. They must at all times be humanely treated and protected, particularly against acts of violence, insults and public curiosity. Measures of reprisal against them are prohibited". Leon Friedman (ed.), *The Law of War: A Documentary History – Volume 1*, Random House, New York, 1972, p. 494.

> The Commanders-in-Chief of belligerent armies shall arrange the details for carrying out the preceding articles, as well as for cases not provided for*, in accordance with the instructions of their respective Governments* and in conformity with the general principles of the present Convention.[12]

Based on these stipulations, the International Prosecution Section argued that a hostile government had the legal duty under international law to ensure its own troops' observance of the laws and customs of war and that the accused at Tokyo – most of whom had held high positions in the wartime government of Japan – had a share of responsibility for their government's failure to discharge its legal duty.

The lead Australian prosecutor Mornane articulated the prosecution's position relative to count 55 in some detail during the summation. He argued that it was "in our submission […] clear that it is the Government as a whole which is primarily responsible for the prevention of breaches of these Laws of War". He then continued:

> This casts in the first place a duty upon every member of the cabinet and their advisors, and every high officer in the chain of command directly concerned with these matters to satisfy himself that the Laws are being obeyed. Ordinarily no doubt this duty [to prevent breaches of laws of war] could be discharged by satisfying himself that proper machinery had been established for the purpose. But when information reaches him which raises a doubt as to whether they are being flagrantly disregarded, or shows plainly that they are, then a much higher duty devolves upon him.[13]

In other words, the responsibility to discharge the legal duty of a hostile government regarding the observance of the laws of war fell on those individuals who served the government at high levels, viz. members of the cabinet, their subordinate officials and military commanders. In normal circumstances, each of these individuals could be considered as having fulfilled his or her duty if "proper machinery" had been set in place to ensure the enforcement of the laws and customs of war. However, these individuals would be required to take on a higher duty

[12] "Indictment", in Boister and Cryer, 2008, p. 58 (emphasis added), see *supra* note 2.

[13] "Trial Transcripts", R40111, see *supra* note 8.

when they received information that the laws and customs of war were possibly being disregarded or that they in fact were.

What exactly would be the "higher duty" of those individuals holding various positions in relation to the government? Starting with the members of the cabinet, Mornane explained that there was

> a clear duty upon every official who knew about the commission of any of these war crimes to use such power as he possessed to put the matter right at once, at least to the extent of bringing the outrages to an immediate stop.[14]

The duty of a cabinet member included the duty to resign, too, "unless effective steps [were] taken to prevent their commission".[15] As regards high-ranking officers in the military chain of command, Mornane did not elaborate much but simply stated that those officers "in charge of armies, or holding responsible staff appointments in armies in areas in which war crimes were committed" took on the responsibility "to take proper steps to prevent their commission or continuance in such areas".[16] By so stating, the prosecution seems to invoke some sort of principle of command responsibility although without explaining its theoretical stance in detail. Mornane also offered no more than a curt remark with respect to the higher duty of high-ranking government officials serving the members of the cabinet in advisory capacities. He singled out the second-tier officials in the Army and Navy Ministries alone – or the "bureau chiefs" of the ministries – seemingly because the two ministries functioned as the agencies in charge of military administration in the Army and Navy occupied territories. He stated that the bureau chiefs of the two ministries assumed the duty "to take whatever steps they can to prevent such crimes being committed".[17]

The prosecution's arguments on counts 54 and 55 had a material impact on the Tokyo Tribunal's thinking, as its final decision articulated two sets of criteria of individual responsibility that partly mirrored them. Yet the Tokyo Tribunal brought in its own interpretations, too, to make the two sets of criteria carry new features that had not been suggested in the prosecution's case. Let us analyse the two separately below.

14 *Ibid*., R40112.
15 *Ibid*.
16 *Ibid*., R40112–13.
17 *Ibid*., R40113.

With regard, first, to the prosecution's contention on the policy dimension of war crimes, the Tokyo Tribunal concluded that evidence was indisputable as to the broad geographical distribution and recurrence of similarly patterned war crimes. The Tokyo Tribunal went on to infer from such evidence that criminal orders must have been "secretly" issued or that the commission of atrocity was otherwise "willfully permitted". The logic here seems to be that the orders must have been secret because the International Prosecution Section *was unable to produce actual proof of criminal orders*, or that the commission of atrocity must have been wilfully permitted *in the case of no such orders, in fact, having been ever issued*. The pertinent part in the Tokyo Tribunal's judgment (the 'Judgment') read in full as follows:

> During a period of several months the Tribunal heard evidence, orally or by affidavit, from witnesses who testified in detail to atrocities committed in all theaters of war on a scale so vast, yet following so common a pattern in all theaters, that *only one conclusion is possible* – the atrocities were *either secretly ordered or willfully permitted* by the Japanese Government or individual members thereof and by the leaders of the armed forces.[18]

What to make of the above ruling? Can one agree that the secret orders and wilful permission were the "only one conclusion" to be reached by the Tokyo Tribunal?

In his path-breaking analysis of the jurisprudence of the Tokyo Trial, David Cohen answers this question in the negative.[19] Secret orders could hardly be construed as the only logical conclusion, he argues, given the absence of proof of orders. What is more, "the whole notion of a 'pattern' is inadequately analyzed by the Judgment" to justify the Tribunal's opinion of secret orders. The Tokyo Tribunal had much explaining to do, too, as to the exact meaning of "*willful permission*". Cohen points out that "'[w]illfully permitting' is not an established theory of liability in the criminal law".[20] The Tokyo Tribunal may nevertheless

18 "Majority Judgment", in Boister and Cryer, 2008, p. 531 (emphasis added), see *supra* note 2.

19 David Cohen, "The Jurisprudence of the IMTFE and Its Legacy" (unpublished article). A modified version of this article will be included in David Cohen and Yuma Totani, *The Tokyo War Crimes Tribunal: Law, History, Jurisprudence* (Cambridge University Press, forthcoming).

20 *Ibid*.

justify its ruling of *secret orders* and *wilful permission* by falling back on the controversial decision reached by the US military commission relative to the Trial of General Yamashita Tomoyuki (29 October–7 December 1945).[21] In a separate study of the jurisprudence of post-war war crimes trials, Cohen writes:

> This language repeats almost verbatim the military commission's finding against Yamashita that the evidence introduced by the prosecution showed that the crimes were so extensive and widespread 'that they must have been willfully permitted by the accused, or secretly ordered by the accused'.[22]

If so, the Tokyo Tribunal may have drawn upon the Yamashita precedent in place of the prosecution's theory of liability, possibly because the explanation of widespread war crimes in terms of general war policy failed to convince the judges.

With regards to the criteria of responsibility relative to count 55, the Tokyo Tribunal again followed the prosecution's original argument to some degree but made certain departures. Instead of discussing the legal duty of *ensuring the observance of the laws and customs of war,* the Tribunal concluded that a hostile government had the legal duty to provide "for the care of prisoners of war and civilian internees".[23] It is not entirely clear why the Tribunal should have chosen this particular phrasing in defining the duty of a hostile government, nor is it clear why these two categories of people should be singled out as protected individuals while not mentioning the rest, that is, the non-interned civilian populations in occupied territories.[24] The Tokyo Tribunal possibly believed

21 Case No. 21, Trial of General Tomoyuki Yamashita, United States Military Commission, Manila, 8 October–7 December 1945, Judgments Delivered on 4 February 1946 ("Yamashita Trial") (http://www.legal-tools.org/en/go-to-database/record/c574e3/). The record of the Yamashita Trial is available as microfilm publication at the National Archives and Record Administration, College Park, Maryland, USA. "Records of Trials of Accused Japanese War Criminals Tried at Manila, Philippines, by a Military Commission Convened by the Commanding General of the United States Army in the Western Pacific, 1945–1947", M1727, Rolls 29–33. This microfilm publication includes the transcripts of court proceedings only; court exhibits are not included.

22 David Cohen, "Beyond Nuremberg: Individual Responsibility for War Crimes", in Carla Hesse and Robert Post (eds.), *Human Rights in Political Transition: Gettysburg to Bosnia*, Zone Books, New York, 1999, p. 76.

23 "Majority Judgment", in Boister and Cryer, 2008, p. 82, see *supra* note 2.

24 I am indebted to David Cohen who alerted me to this particular feature in the Judgment.

that a hostile government took on a heightened level of institutional responsibility to care for POWs and civilian internees and that, therefore, there must be a separate ruling on the issues of responsibility regarding their protection. It is still unclear, however, as to why the Tokyo Tribunal should believe so, if it was indeed the judges' thinking.

The Tokyo Tribunal explained further that the foregoing legal duty of a hostile government consisted of the following two concrete duties: 1) maintenance of the care for POWs and civilian internees, and 2) prevention of mistreatment against them.[25] These two duties must be fulfilled in order for a hostile government to be considered as having discharged its legal duty under international law.

The Tokyo Tribunal then turned to the issues of individual responsibility. The judgment read that the duty to care for POWs and civilian internees was "not a meaningless obligation cast upon a political abstraction".[26] Rather, those individuals who constituted a hostile government must take up the burden of discharging the government's legal duty. Mirroring the prosecution's argument but also making some modifications, the Tokyo Tribunal identified the following four categories of individuals as the ones having a share of responsibility:

> 1) Members of the government;
> 2) Military or naval officers in command of formations having prisoners in their possession;
> 3) Officials in these departments which were concerned with the well-being of prisoners;
> 4) Officials, whether civilian, military, or naval, having direct and immediate control of prisoners.[27]

According to the Judgment, those individuals under the four categories above had the responsibility to ensure proper treatment of POWs and civilian internees and prevention of mistreatment "by establishing and securing the continuous and efficient working of a system appropriate for these purposes". None of them would be held liable insofar as the system set in place functioned continuously and efficiently. However, the issues of individual responsibility would arise 1) if they acquired knowledge of

25 "Majority Judgment", in Boister and Cryer, 2008, p. 83, see *supra* note 2

26 *Ibid*., p. 82.

27 *Ibid*., p. 83.

crimes and yet failed to take such steps "as were within their power to prevent the commission of such crimes in the future". Alternatively, they could be held accountable 2) if they were "at fault in having failed to acquire such knowledge".[28] On the latter point, the Tokyo Tribunal made the following explanatory remark:

> If such a person had, or should, *but for negligence or supineness*, have had such knowledge he is not excused for inaction *if his office required or permitted him to take any action to prevent such crimes.*[29]

The above explanation indicates that the Tribunal recognised not only proof of knowledge as a valid ground to convict an accused but also that of negligence. Put differently, members of a hostile government were deemed to have the legal duty not simply to act on the knowledge of atrocity lest they be held criminal liable; they must accept responsibility for the occurrence of atrocity for the reason of negligence.

The Tokyo Tribunal went on to discuss the criteria of responsibility that were applicable to each of the first three categories of persons indicated above. The ones to fall under the first category were the members of the cabinet. The Tokyo Tribunal appeared to consider them as having been vested with uniquely broad authority on account of their service at the highest executive branch of the government. The Judgment thus reads:

> A member of a Cabinet which collectively, as one of the principal organs of the government, is responsible for the care of prisoners is not absolved from responsibility if, having knowledge of the commission of the crime in the sense already discussed, and omitting or failing to secure the taking of measures to prevent the commission of such crimes in future, he elects to continue as a member of the Cabinet.[30]

The Tokyo Tribunal maintained that the same principle would apply to practically all members of the cabinet no matter whether their respective departments were "directly concerned with the care of prisoners". In other words, those serving as Education Minister, Finance Minister, Foreign Minister, and so on, shared the same legal duty *on account of their*

[28] *Ibid*.

[29] *Ibid*.

[30] *Ibid*., pp. 83–84.

membership in the cabinet. A member of the cabinet "may resign", so the Judgment reads, to extricate oneself from responsibility, but one "willingly assumes responsibility for any ill treatment in the future" if one chooses to remain in the cabinet while having knowledge of mistreatment and failing to take such steps to prevent its future occurrence.[31]

The Tokyo Tribunal did not seem to require the same stringent standard of responsibility for those who came under the third category ("officials in these departments which were concerned with the well-being of prisoners"), but there are some ambiguities in the Judgment. The pertinent section reads as follows:

> Department officials having knowledge of ill treatment of prisoners *are not responsible by reason of their failure to resign*; *but if their functions included the administration of the system of protection of prisoners* and if they had or should have had knowledge of crimes and did nothing effective, *to the extent of their powers*, to prevent their occurrence in the future then they are responsible for such future crimes.[32]

In the foregoing paragraph, the Tokyo Tribunal recognised two distinctive types of government officials, namely, those whose "functions included the administration of the system to protect war prisoners" and those without such functions but still were *concerned with the well-being of prisoners* in some ways. The negligence standard presumably applied to the former type of government officials, and possibly the requirement to resign although the Judgment is not clear on this point. The same paragraph contains the qualifier "to the extent of their powers" as if to suggest that the Tokyo Tribunal recognised certain limitations of government officials' authority.

With regards to the second category of persons ("military or naval officers in command of formations having prisoners in their possession"), the Tokyo Tribunal similarly deemed them responsible for proper treatment of those POWs and civilian internees under their control if they "had, or should have had knowledge in advance" that mistreatment was likely to occur. In other words, 1) military commanders had the legal duty to care for war prisoners insofar as they came under their control, and 2)

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31 *Ibid*., p. 84.

32 *Ibid*. (emphasis added).

military commanders were subject to the negligence standard. The Tokyo Tribunal included in this category of persons the Army Minister and the Navy Minister, although the Judgment offers no clear explanations as to why. One can only surmise that the Tokyo Tribunal took into account the evidence of two ministers having formal authority to take control of POW administration in Army and Navy occupied territories.

The Tokyo Tribunal, in this manner, set out in the Judgment theories of liability that grew out of the arguments advanced by the prosecution but that also contained varying degrees of modification based on the Tribunal's own take on points of law. Certain questionable interpretive positions – such as the ruling "secret orders and willful permission" – may put to question their adequacy, but it would be fair to say that the Tokyo Tribunal developed some practical conceptual tools with which to resolve the issues of guilt and innocence of individual accused. A close study of verdicts in the Judgment reveals, however, that the Tokyo Tribunal applied its theories of liability to actual cases inconsistently. To compound the matter, the Tokyo Tribunal would make inculpatory factual findings against individual accused at certain segments of the Judgment, only to disregard or dismiss them when reaching the individual verdicts. The Tokyo Tribunal repeated this type of inconsistency frequently enough to undercut the validity of individual verdicts in several instances.[33] Let us examine some examples of questionable verdicts, especially those that have direct relevance to the Tamura Trial and the Toyoda Trial.

One set of examples that is worthy of attention concerns the Tokyo Tribunal's findings relative to former top officials of the Army Ministry. According to the Judgment, the Military Affairs Bureau in the Army Ministry "retained control of the System set up for enforcement of the Laws of War during the Pacific War".[34] The Military Affairs Bureau exercised control over two POW affairs agencies that were established soon after the outbreak of the Pacific War: the Prisoner of War Information Bureau and the Prisoner of War Administration Section. The former agency was charged with investigation of "internments, removals, release on parole, exchanges, escapes, admissions to hospitals and deaths

[33] I am indebted to David Cohen who alerted me to these features of the Tokyo Tribunal's judgment. Cohen, unpublished article, see *supra* note 19.

[34] "Majority Judgment", in Boister and Cryer, 2008, p. 581, see *supra* note 2.

of prisoners of war" and had the duty "of maintaining records for each prisoner of war and managing the communications and correspondence regarding prisoners of war, and of collecting information pertaining to the condition of prisoner of war".[35] The latter agency was "given authority" to handle all matters pertaining to the management of POWs and civilian internees in the theatre of war. According to the Tokyo Tribunal's findings, the successive directors of the two POW affairs agencies came under control of the chief of the Military Affairs Bureau and they "had no power to take action without the approval of the Chief of the Military Affairs Bureau". All bureau chiefs of the Army Ministry, including the chief of the Military Affairs Bureau, attended bi-weekly conferences where "[m]atters relating to prisoners of war and civilian internees were discussed".[36] The chief of the Military Affairs Bureau, in short, held control over affairs of POWs and received information about the conditions of POW and civilian internment on a regular basis. If so, and in light of the foregoing criteria of responsibility (relative to persons falling under category 3 – "officials in these departments which were concerned with the well-being of prisoners"), the chief of the Military Affairs Bureau could be considered as criminally liable for POW mistreatment. This was not so, however, according to the Judgment.

Two accused, Mutō Akira and Satō Kenryō, successively served as chief of the Military Affairs Bureau (October 1939 to April 1942 and April 1942 to December 1944 respectively).[37] Both were acquitted of POW and civilian mistreatment that occurred during their service as chiefs of the Military Affairs Bureau, *notwithstanding* the Tokyo Tribunal's findings that their office had control over the system of POW administration. Regarding Satō, the Tokyo Tribunal agreed that he "knew of the many protests against the behaviour of Japan's troops, for these protests came to his Bureau and they were discussed at the bi-weekly meetings of Bureau Chiefs in the War [Army] Ministry". But the Tokyo Tribunal acquitted him for the following reason:

> TOJO presided at these meetings and it was he who decided that action or inaction should be taken in regard to the

[35] *Ibid*., p. 580.

[36] *Ibid*., p. 581.

[37] See "Indictment" for biographical information of the accused, in Boister and Cryer, 2008, pp. 67–68, see *supra* note 2.

> protests. SATO, *his subordinate, could not initiate preventive action against the decision of his chief*.[38]

The above passage indicates that the Tokyo Tribunal believed Satō's subordinate position in relation to the Army Minister as constituting a defence. If so, this undercuts the Tribunal's theory of liability discussed earlier. It has been seen that department officials in charge of POW administration *shared* with other members of the government, including the Army Minister, the duty to care for POWs and civilian internees, and that they therefore were criminally liable for the occurrence of POW and civilian mistreatment. The verdict for Satō did not reflect this theory. The verdict for Mutō is even less satisfactory. The Tokyo Tribunal failed to mention in the individual verdict the fact that Mutō had ever served as chief of the Military Affairs Bureau. Consequently, no specific finding of guilt or innocence was made against Mutō on this particular issue.[39]

Another set of examples that help illustrate the Tokyo Tribunal's inconsistency concerns the former high-ranking members of the Navy Ministry. It was established at the Tokyo Trial that administration of POWs and civilian internees was generally the responsibility of the Army Ministry.[40] However, it was also shown that the Navy Ministry was responsible for the care of those enemy nationals who fell in Navy custody. According to the Judgment, the Navy "exercised jurisdiction for administration of occupied areas" such as Borneo, the Celebes, the Moluccas, Timor, and other islands east of a line through Bali and Wake Island. "In those areas occupied by the Navy, the prisoners of war and civilian internees were administered by the Navy Minister and the enforcement of the laws of war in those areas became the responsibility of the Navy, under the directions of SHIMADA and OKA".[41] Vice Admiral Oka Takazumi served as chief of the Navy Affairs Bureau of the Navy Ministry between October 1940 and August 1944, and Admiral Shimada Shigetarō held the position of the Navy Minister between October 1941 and July 1944.[42] Given their many years of service as top officials in the Navy Ministry, given their official duties to care for POWs and civilian

38 "Majority Judgment", in Boister and Cryer, 2008, p. 617 (emphasis added), see *supra* note 2.
39 *Ibid*., p. 614.
40 *Ibid*., pp. 580–82.
41 *Ibid*., p. 583.
42 See "Indictment" for biographical information of the accused, in Boister and Cryer, 2008, pp. 67–68, *supra* note 2.

internees in Navy custody, and given prevalence of naval atrocities in the Navy controlled areas, one would think that the two accused would be convicted. But that was not the conclusion of the Tokyo Tribunal. Both accused were cleared of all charges of war crimes.

The Tokyo Tribunal explained Oka's acquittal as follows:

> There is *some evidence tending to show that OKA knew or ought to have known* that war crimes were being committed by naval personnel against prisoners of war *with whose welfare his department was concerned* but it falls short of the standard of proof which justifies a conviction in criminal case.[43]

In the verdict above, the Tokyo Tribunal readily recognised that there was 1) some proof of knowledge (or "should have known"), and 2) proof of duty to care for POWs. Nevertheless, the Tokyo Tribunal deemed such proof insufficient to convict him, stating "it falls short of the standard of proof which justifies a conviction in criminal case". It is not at all clear which standard of proof, on this occasion, was being referred to.

The verdict for Shimada on war crimes is equally unsatisfactory. The Tokyo Tribunal had already shown that the Navy Minister (as a person falling under category 2 – "military or naval officers in command of formations having prisoners in their possession") had the legal duty to care for POWs and civilian internees in Navy custody and that he was subject to the negligence standard. The Tokyo Tribunal further took note of the fact that the members of the Japanese naval forces committed atrocities and that the ones responsible for the commission of atrocities "ranged in rank from Admirals downwards". Having made these findings, the Tokyo Tribunal acquitted Shimada of all allegations of war crimes. The pertinent part in the Judgment reads as follows:

> The evidence, however, is insufficient to justify a finding that SHIMADA is responsible for these matters, that he ordered, authorized or permitted the commission of war crimes, or that he knew they were being committed and failed to take adequate steps to prevent their commission in the future.

[43] "Majority Judgment", in Boister and Cryer, 2008, p. 615 (emphasis added), see *supra* note 2.

> The Tribunal finds SHIMADA not guilty on Counts 54 and 55.[44]

In the verdict above, the Tokyo Tribunal appeared to require proof of criminal orders, authorisation, or permission, *or* proof of knowledge of the occurrence of naval atrocities in order to convict the accused. If the Tokyo Tribunal did mean so, it would conflict with the theory of liability that it had set out elsewhere in the Judgment. It has been seen that required elements to establish individual guilt are: 1) proof of the accused's legal duty to protect POWs and civilian internees; and 2) proof of disregard of duty, knowingly or by negligence. Shimada's case seemingly met the requirements, but the Tokyo Tribunal ruled against his conviction.

The acquittals of these four individuals arguably was a setback for the International Prosecution Section, since it amounted to failure to establish the guilt of top Army and Navy officials whom it had argued were responsible for taking proper steps to prevent the occurrence of war crimes in areas under their military control. This particular shortcoming was somewhat mitigated in the cases of high-ranking members of the Imperial Japanese Army. The former Army Minister Tōjō, former Vice Army Minister Kimura Heitarō and some other Army men were found guilty of war crimes. Mutō Akira was among the convicted, although his was in connection with the Rape of Manila during which he served as chief of staff of General Yamashita.[45] In the case of the Imperial Japanese Navy, however, not a single officer was found guilty of war crimes at the Tokyo Trial. There were only three Navy men in the group of accused to begin with, and one of them died of illness at an early stage of the court proceedings.[46] The remaining two Navy men were acquitted, as have already been seen.

The Tamura Trial and the Toyoda Trial picked up where the Tokyo Trial left off as if to deal with the unfinished jobs. The Legal Section of the occupation authorities now led the prosecutorial effort. It chose one Army officer (i.e. Tamura) and one Navy officer (i.e. Toyoda) to be

44 *Ibid*., pp. 619–20.

45 *Ibid*., p. 614. The Rape of Manila refers to a series of mass atrocities that were committed by the Japanese ground troops in Manila during the US counter-invasion in February 1945.

46 Admiral Nagano Osami, formerly chief of the Navy General Staff (April 1941–February 1944), died within the first year of the Tokyo Trial.

brought before the newly established international military tribunals on charges of war crimes. The main victim groups would be POWs and civilian internees, but the prosecution's cases also had broad coverage of war crimes involving non-interned civilian populations in Japanese-occupied territories. The prosecuting agencies at the two trials introduced afresh some of the evidentiary materials already used at the Tokyo Trial as well as new ones, so that they could show that the accused authorised the commission of war crimes or disregarded their duties. Were the prosecuting agencies successful this time? Were they able to convince the judges of the guilt of the accused? Let us turn to the trial records of actual cases.

22.3. The Tamura Trial

Lieutenant General Tamura Hiroshi was the last of three career Army officers who successively served as chief of the Prisoner of War Information Bureau and concurrently chief of the Prisoner of War Administration Section of the Army Ministry. While holding these two positions in the last nine months of the war (1 December 1944 to 2 September 1945), Tamura took on an array of bureaucratic responsibilities pertaining to collection, maintenance and transmission of information concerning POWs, and decision-making powers concerning POW internment, transfer and employment, among other matters.[47] The chief of POW affairs agencies has been shown in the Tokyo Tribunal's judgment as a relatively powerless Army Ministry official in relation to the chief of the Military Affairs Bureau. However, the prosecuting agency at the Tamura Trial brought out a different picture. Voluminous oral and documentary evidence was presented to show that the chief of POW affairs agencies was more than a "yes man" of the chief of the Military Affairs Bureau; he rather had the power to make policy decisions and issued orders in the name of the Army Minister.

[47] The full record of the Tamura Trial ('Tamura Trial') is available as microfilm publication at the National Archives and Records Administration, College Park, Maryland, USA. "Records of the Trial of Accused War Criminal Hiroshi Tamura, Tried by a Military Tribunal Appointed by the Supreme Commander of the Allied Powers, Tokyo, Japan, 1948–1949", M1728, 3 rolls; and "Transcripts from the Case of the United States of America vs. Soemu Toyoda and Hiroshi Tamura, 1946–1948", M1661, 4 rolls. The record of the Tamura Trial will be referred to as the Tamura Trial hereafter.

Tamura faced a single charge of war crimes and 11 specifications. Most of the allegations against him were that of "willful and unlawful disregard and failure to discharge his duties [...] by ordering and permitting" the mistreatment of POWs.[48] This phasing appears to be modelled partly on count 55 of the Tokyo Trial ("deliberately and recklessly *disregarded their legal duty*") but probably more so on the case against Yamashita, where the charge read that the accused "*unlawfully disregarded and failed to discharge his duty* as commander to control the operations of the members of his command, permitting them to commit brutal atrocities".[49] The allegations of disregard of duty aside, Tamura also faced those of the *ordering* of war crimes. The relevant specifications partly read that the accused "did willfully and unlawfully *order, direct, cause, incite, advise, and permit* the mistreatment, abuse, torture and killing of Allied POWs".[50] The inclusion of this type of allegation indicates the readiness of the prosecution to take up the burden of proof not only of Tamura's disregard of duties but also of his authority to issue military orders. The latter could be a difficult task, however, since the two POW affairs agencies on their face fell outside the military chain of command and were not vested with command authority. Regardless, a significant portion of the prosecution's case against the accused focused on substantiating command authority he allegedly assumed and exercised over the course of his service as POW affairs chief.

The main evidence against Tamura was taken orally in the courtroom from his former Army colleagues and subordinate officials. One of the key prosecution witnesses was Sanada Jōichirō.[51] He was a colleague of Tamura between December 1944 and March 1945 during which he served as chief of the Military Affairs Bureau of the Army Ministry. His testimony centred on the theory and practice of the power vested in the chief of POW affairs agencies. To begin with, Sanada accepted as factual that the chief of the Prisoner of War Administration Section was essentially a government functionary who served as "a direct assistant staff officer to the [Army] Minister". In his capacity as "the only advisory staff of the Minister" on matters pertaining to POWs, the chief

48 *Ibid.*, Tamura Trial, Charge Sheet.

49 Yamashita Trial, Indictment (emphasis added), see *supra* note 21.

50 Tamura Trial, Charge Sheet, see *supra* note 47.

51 Tamura Trial, "Testimony of Sanada Joichiro", R87–218, see *supra* note 47.

of the Prisoner of War Administration Section assumed broad authority to manage POW affairs. He pointed out that the section chief took charge of 1) carrying out the inspection of POW camps or having his staff do so; 2) assembling and conveying to persons in charge of POW camps "the intention of the central government" under orders of the Army Minister; and 3) "demand[ing] information from the army commanders" regarding POWs, by virtue of his holding concurrently the position of chief of the Prisoner of War Information Bureau.[52] The chief of the Prisoner of War Administration Section did not have the power to issue orders, Sanada readily confirmed, but then he "frequently gathered the prisoner of war camp commanders for a conference and would transmit the opinions of the War [Army] Minister". Above all, this particular section chief was the only Army Ministry official vested with the power to make decisions on matters of POW management. The power vested in chiefs of other bureaus in the Army Ministry was limited to offering "advices [*sic*] and suggestions" within their respective areas of specialisation.[53]

Sanada testified to the similar effect with regard to Tamura's authority as chief of the Prisoner of War Information Bureau. While agreeing that the bureau chief had no authority to take disciplinary action against an Army unit, say, for failing to provide POW information, Sanada pointed out that the chief of the Prisoner of War Information Bureau concurrently held the office of the chief of the Prisoner of War Administration Section and that *in the latter capacity,* he could "request the War [Army] Minister to take appropriate action". The Army Minister in turn would issue orders on behalf of the bureau chief so as to require the Army unit concerned to provide necessary POW information.[54] In other words, the chief of the Prisoner of War Information Bureau could make his demand binding on Army units by having it conveyed through the Army Minister. Imposing disciplinary action, in this regard, may have fallen within his power so long as it would be carried out through the Army Minister. When cross-examining this witness, the defence countered him by putting the following question: "The truth of the matter is, the POW Information Bureau was charged with the collecting of

52 Tamura Trial, "Exhibit 56: Statement of Sanada Joichiro", pp. 4-6, R172, see *supra* note 47.

53 Tamura Trial, "Testimony of Sanada Joichiro", R216, see *supra* note 47.

54 *Ibid*., R175.

information and had absolutely no authority to do anything else, is that not correct?" This question met flat denial, however, as Sanada replied: "Not as you have stated".[55]

Sugai Toshimaro was formerly adjutant of the Army Ministry between February 1943 and February 1945. He took the witness stand also for the prosecution to offer corroborative oral evidence. He confirmed that the chief of the Prisoner of War Administration Section was uniquely vested with decision-making authority on matters of POW management. The section chief would generally make decisions "after consulting with other bureau chiefs concerned" and issue them in the name of either the Army Minister or the Vice Army Minister.[56] But "[i]f it was within his delegated authority, there were cases where he did not [need to] get the approval of the Minister".[57] What was more, the section chief could "*issue instructions and orders* to the camp commanders after having received the orders from the War [Army] Minister". Upon cross-examination by the defence counsel, Sugai revised his testimony by stating that "the word 'order' is not proper". But he still held that it was a matter of little importance as to whether one should call them as *orders* or *instructions*. "In substance they are the same. Both had to be carried out", he testified.[58]

Lieutenant Colonel Hoda Haruo served as the third-ranking official of the two POW affairs agencies and was a former subordinate of three successive POW affairs chiefs. His court testimony generally fell in line with those offered by witnesses Sanada and Sugai. He recalled that the chief of the Prisoner of War Administration Section had the responsibility to report to the Army Minister and to receive the latter's authorisation on "important matters".[59] But the same did not apply when it came to "minor matters", because in late November 1942 the Army Minister delegated part of his decision-making authority to the chief of the Prisoner of War Administration Section. "Minor matters" included issues such as POW and civilian accommodation, allowances, transfer, employment, punishment, correspondence, relief, and the granting to foreign observers entry into

55 *Ibid*., R204.

56 Tamura Trial, "Exhibit 358: Affidavit of Sugai Toshimaro", p. 1, R953, see *supra* note 47.

57 Tamura Trial, "Testimony of Sugai Toshimaro", R960, see *supra* note 47.

58 *Ibid*., R958 (emphasis added).

59 Tamura Trial, "Testimony of Hoda Haruo", R1075, see *supra* note 47.

internment camps for inspection.[60] The section chief thereafter "made decisions and approval[s] on behalf of the War [Army] Minister". Matters thus decided "were looked upon as the decision and approval and orders of the War [Army] Minister and carrying out of those was required".[61] When the defence suggested that the work of the Prisoner of War Administration Section was "merely a clerical duty", Hoda denied it and reiterated that this office "had to make decisions" after consulting various government and military authorities concerned. Given the actual decision-making power, "you cannot say that it was an unimportant clerical duty".[62]

Hoda had additional information against the accused. Tamura was "very strict on the prisoners of war", which Hoda remembered as standing in contrast with Uemura Mikio and Hamada Hiroshi, two Army generals who served in the same posts successively prior to Tamura's appointment.[63] The two predecessors, in Hoda's opinion, were more attentive than Tamura to the welfare of POWs. For instance, the witness could recall an episode in which Hamada had POW labour withdrawn from the Hidachi Production Company upon receipt of an on-site inspection report – presumably an unfavourable one – submitted by his subordinate official.[64] Hoda did not have any personal knowledge of comparable initiatives having been taken by Tamura. "To my knowledge he never sent a notification forbidding and prohibiting personal punishments as did both UEMURA and HAMADA". What the accused did do, according to this witness, was to promote the meting out of harsh treatment against POWs. Specific instructions given out by Tamura included: that POW confinement cells be made small and allow less sunlight; that complaints and petitions from POWs be rejected; that relief goods be placed under strict control of camp commanders; and that Allied airmen be placed in a special compound at the Ōmori POW camp to prevent them from spreading to other prisoners the latest information about the progress of the war.[65]

60 Tamura Trial, "Exhibit 16: Notification from the Adjutant to the Chief of the Prisoner of War Control Bureau (November 22, 1942)", R121, see *supra* note 47.

61 Tamura Trial, "Testimony of Hoda Haruo", R1075–76, see *supra* note 47.

62 *Ibid*., R1089.

63 Tamura Trial, "Exhibit 429: Affidavit of Hoda Haruo", p. 6, R1048, see *supra* note 47.

64 *Ibid*., p. 4.

65 *Ibid*., p. 6.

Lieutenant Colonel Emoto Shigeo, former area commandant of the POW camp group in Hokkaidō between May 1944 and April 1945, also took the witness stand for the prosecution. His testimony centred on his personal experience of being directed by the POW affairs agencies in general and by Tamura in person to increase severity in the handling of POWs.[66] Mirroring the oral evidence offered in Hoda's testimony, this witness related in the courtroom a major shift in POW policy since the time Tamura took up the position of chief of the POW affairs agencies. Emoto could recall, for instance, that when Tamura's immediate predecessor, Hamada, visited the Hokkaidō camps in June 1944, Hamada expressed great satisfaction with the exemplary improvement Emoto had brought about to the POW conditions.[67] But once Tamura was in office, Emoto received instructions that his camps should change course. The altered policy was passed to the witness when Hoda visited him in an official capacity. "The Allies are coming closer to Japan and we, the Japanese people, are not going to shake hands with the enemy after the war is over", he is said to have told Emoto. With this understanding in mind, "you must treat prisoners of war much more strictly". When Emoto countered that these instructions conflicted with the policy previously endorsed by Hamada, he was told that "[n]ow the situation had become different".[68]

The new POW affairs chief, Tamura, made a visit to the Hokkaidō camps shortly after Hoda in February 1945. Emoto attested to receiving various orders and instructions personally from Tamura on this occasion. Their gist was that a far more stringent management system must be imposed. Specifics of Tamura's orders included: that the Red Cross supplies be placed under far stricter control; that the guardhouse cells be modified to make them smaller and afford less sunlight; and that all the posted placards indicating the rules and regulations concerning the proper treatment of POWs, in English, Dutch and Japanese, be removed from POW compounds.[69] The placards in question had been prepared and nailed on the walls of POW barracks because of Emoto's decisions in the preceding months, the purpose being to "enable all the prisoners of war,

66 Tamura Trial, "Testimony of Emoto Shigeo", R443–515, see *supra* note 47.
67 Tamura Trial, "Exhibit 134: Interrogation of Emoto Shigeo", p. 4, R444, see *supra* note 47.
68 *Ibid*., p. 6.
69 *Ibid*., pp. 8–10.

as well as my subordinates in the various prisoner of war camps, to know how prisoners of war should be treated". Tamura disapproved of the display of these placards, however, and told the witness that they "should be taken down and should not be put up thereafter".[70] When Emoto asked if there had been any policy change, Tamura is said to have replied that he would "require us [the Hokkaidō camp authorities] to treat prisoners of war very much more strictly because Maj. Gen. HAMADA's principles were very much too lenient".[71]

During the extensive cross-examination that ensued, the defence interrogated the witness as to what steps he took to implement the orders that he allegedly received from Tamura. It soon became clear that while the witness did make certain changes as ordered, he did not follow through with all of what Tamura had directed him to do. This revelation led the defence to suggest that notwithstanding the frequent use of the word "order", the witness actually never received any orders because Tamura, after all, was not vested with any command authority. Alternatively, would the witness be prepared to accept that the witness disobeyed them because he took light of the fundamental duty of a soldier, viz. to follow superior orders? Emoto's testimony somewhat faltered when confronted with what amounted to personal attacks, but he ultimately summed up his position as follows:

> So I say not all orders but some orders I couldn't obey. Not because of General TAMURA's order. Some of the orders issued by Northern Army Headquarters [the superior army unit of the Hokkaidō POW camps] I could not obey to the letter because the orders are wrong.[72]

By this reply, Emoto made the case of no fundamental difference between orders coming from Tamura and those from other military superiors. He followed some and disobeyed others on the basis of their merit and not on account of who issued the orders.

How did the defence respond to the prosecution's evidence that pointed to the decision-making authority of the POW affairs chief and, moreover, Tamura's personal initiatives in authorising POW mistreatment? The answer to this question is disappointingly straightforward: the defence

70 *Ibid.*, p. 10.

71 *Ibid.*, p. 12.

72 Tamura Trial, "Testimony of Emoto Shigeo", R498, see *supra* note 47.

chose to do little. Shortly after the prosecution's case rested and the defence motion for the finding of not guilty was rejected, the defence announced that it would call to the stand the accused Tamura alone. No other witnesses or court exhibits would be presented. This course of action was being taken as "the most expeditious way of proceeding" and, moreover, it "gives the accused the opportunity to testify to the court on the matters on which the court wants clarification and gives the court the opportunity to go into any phase of the case which they may decide to ask the accused about".[73] The defence then called the accused to the stand and asked him some preliminary questions for the limited purpose of establishing the witness's identity. Without further direct examination, neither the prosecution nor the tribunal could bring much out of examining him. The Tamura Trial came to an end in a short while on 23 February 1949. The verdict was that of guilty, although all allegations relative to the ordering of war crimes were dismissed. Tamura was found guilty of disregard of duty only. No written judgment accompanied the verdict to explain the rationale. Tamura was sentenced to eight years' hard labour.[74]

Why did the defence decide to bring the trial to an abrupt end in this manner? While it cannot be independently verified, the Tamura Trial appears to have ended the way it did because of a plea deal of sorts that was reached between the tribunal and the defence. According to a post-trial interview of a Japanese defence lawyer, the law member of the tribunal approached the defence team in late January or early February of 1949, inquiring into the possibility of bringing the trial to an early conclusion.[75] The reason for the request was purely personal: the law member wanted the trial to end soon enough for him to secure an attractive job offer being made by the occupation authorities. The defence agreed to co-operate although on one condition: the penalty to the accused must be as lenient as the one Shigemitsu Mamoru had received at the Tokyo Trial. A former Foreign Minister during part of the Pacific War, Shigemitsu was convicted of war crimes and crimes against peace but received an unusually light sentence of seven years in prison. The tribunal

[73] Tamura Trial, R1269, see *supra* note 47.

[74] *Ibid*., R1382-83.

[75] "Tonai tō kyojū no sensō saiban jukeisha tō ni taisuru mensetsu chōse hōkokusho, No. 48 (Shōwa 37.3.12–8.17), Shōwa 37-nendo" [Report on Interviews and Investigations of Convicted War Criminals etc. with Residence in Tokyo, No. 48 (March 12–August 17, 1962)], Hōmu-Hei-11-4B-23-6575, National Archives of Japan.

of the Tamura Trial appears to have accepted this condition. The plea deal, if there was one indeed, can explain as to why the tribunal dismissed all the evidence pointing to Tamura's assumption and exercising of *de facto* command authority, found him guilty of disregard of duty only, and handed down the light penalty of eight years' hard labour.

The defence decision to decline the opportunity to rebut the prosecution's case in full was an unfortunate one, as it left a certain sense of incompleteness to the Tamura Trial. The tribunal did reach its conclusion on the issues of accused's guilt or innocence, but on ambiguous grounds of individual responsibility. Whatever may have been the tribunal's legal opinion, this case ended without making any marked contribution to advancing our understanding of criminal liability of high-ranking government officials for war crimes.

22.4. The Toyoda Trial

Admiral Toyoda Soemu had served as a highest-ranking officer of the Imperial Japanese Navy in the last phase of the war. He took charge of all Japanese naval operations in the Pacific theatre from before the Battle of Saipan to the Battle of Okinawa as commander-in-chief of the Combined Fleet (3 May 1944–29 May 1945). He concurrently assumed other command posts, albeit briefly, in May 1945,[76] after which he left them to accept new appointment as chief of the Navy General Staff of the Imperial General Headquarters at Tokyo. He continued to direct the Japanese naval operations as Navy chief until the end of hostilities (30 May–2 September 1945). These top positions aside, Toyoda had held for a year the command of the Yokosuka Naval District (May 1943–May 1944), one of four naval districts that provided coastal defence to the Japanese home islands.[77]

[76] Toyoda was appointed to positions of commander-in-chief of the Combined Naval Forces on 25 April 1945, and also commander-in-chief of the Naval Escort Command on 1 May 1945.

[77] The full record of the Toyoda Trial ('Toyoda Trial') is available as a microfilm publication at the National Archives and Records Administration, College Park, Maryland, USA. "Records of the Trial of Accused War Criminal Soemu Toyoda, Tried by a Military Tribunal Appointed by the Supreme Commander of the Allied Powers, Tokyo, Japan, 1948–1949", M1729, 7 rolls; and "Transcripts from the Case of the United States of America vs. Soemu Toyoda and Hiroshi Tamura, 1946–1948", M1661, 4 rolls.

Toyoda was charged with responsibility for an array of atrocities committed by Navy servicemen over the course of his assumption of these multiple top positions in the Navy. The charge sheet read in the main that he "willfully and unlawfully disregard[ed] and fail[ed] to discharge his duty […] by ordering, directing, inciting, causing, permitting, ratifying and failing to prevent Japanese Naval personnel of units and organizations under his command, control and supervision", who, in turn, committed atrocities against POWs and civilians in Navy-controlled areas.[78] The prosecution's method of proof was a familiar one: to document broad geographical distribution and recurrence of naval atrocities throughout the theatres of war, so that the tribunal could make an inference about the accused's disregard of duty. Evidence of criminal orders or knowledge of naval atrocities, meanwhile, was conspicuously absent.

The prosecution justified the lack of affirmative evidence of Toyoda's issuance of criminal orders or his knowledge of naval atrocities by arguing that the legal doctrine of command responsibility – which it declared to be the theoretical basis of the case against Toyoda – made no requirement of either proof. "The accused has been charged with neglect of duty", Jesse Deitch, serving as lead prosecutor, explained to the tribunal, and made the following statement to clarify the prosecution's position:

> This is significant for it means that the prosecution need not prove that the accused ordered the commission of any of the incidents which resulted from his neglect of duty, and it means that the prosecution need not specifically prove that the accused knew of the impending commission of any incident before it occurred.[79]

Despite the above understanding about the standard method of proof, the defence "has sought to confuse the tribunal into believing that it is necessary to prove, *either directly or circumstantially*, that the accused had *actual or constructive knowledge* of the commission of an incident". Deitch asserted that all the prosecution needed to show, in fact, was merely the accused "neglected the duty to control his subordinates and the duty to protect prisoners of war".[80] With regard to specifics of the

78 Toyoda Trial, Charge Sheet, see *supra* note 77.

79 Toyoda Trial, Prosecution's Summation, R4437, see *supra* note 77.

80 *Ibid*., R4437 (emphasis added).

accused's duty, the prosecution further held that it was entirely unnecessary to inquire into the matter either. "That the accused had the duty as Commander in Chief and as Chief of the Naval General Staff [Navy General Staff] to control his subordinates [...] *is so elementary that it warrants no discussion*".[81]

While crudely put, the foregoing statements can be understood as reflecting an influential strand of legal thinking about command responsibility in the post-war war crimes trials since the time of the Yamashita Trial.[82] In a nutshell, a military commander could be held liable for war crimes committed by subordinate troops on account of his formal position as a commander. To convict an accused, all the prosecution needed to do would be to show the position held by the accused and to document war crimes committed by the members of subordinate armed forces. Alternatively, the prosecution might have considered applying a different theory of liability, namely, by drawing upon the Tokyo Tribunal's judgment. Required proof in the latter case would be 1) that a military commander had the legal duty to care for prisoners of war and civilian internees under his control, and 2) that he knew or should have known the occurrence of mistreatment. The actual case made against Toyoda does not show, however, that the prosecution put to use the theory of liability arising from the legal opinion of the Tokyo Tribunal.[83]

The prosecution's foregoing argument on required proof came under scathing criticism of the defence, since it appeared as amounting to refusal to prove anything at all. The lead defence lawyer, Ben B. Blakeney, summarised the prosecution's case as follows:

> The prosecution, in their view, need prove nothing. No proof of orders is required, no knowledge of the atrocities […] Not that he neglected his duty by issuing orders contrary to duty, not that he neglected his duty by approving the commission

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81 *Ibid*., R4444 (emphasis added).

82 I rely on David Cohen, 1999, see *supra* note 22, and the dissenting opinion of Justice Murphy at the US Supreme Court (In *re Yamashita*, 327 U.S. 1 [1946]) for my understanding of the Yamashita precedent.

83 During its summation, the prosecution did quote pro forma the theories of liability that had been set out in the Tokyo Tribunal's judgment. However, there is no clear indication that the legal opinion of the Tribunal defined the prosecution's case. Toyoda Trial, R4445–47, see *supra* note 77.

> of acts which duty forbids, not that he neglected it by having knowledge of and, knowing, doing nothing to prevent or punish the commission of atrocities.[84]

If so, "What remains?" Blakeney asked. The answer would be this: "Just that he neglected his *duty* by being Commander-in-Chief of the Yokosuka Naval District, Commander-in-Chief of the Combined Fleet, Chief of the Navy General Staff, or occupant of other high office".[85] What sort of *duty* did Toyoda have, then, which he allegedly neglected? The prosecution never gave a satisfactory explanation on this point either. It simply stated that the accused's duty to control subordinate Navy units was "so elementary" as to require no proof. Consequently, the tribunal was left "to guess what power of command Admiral Toyoda possessed".[86]

The defence went on to argue that the precedents on command responsibility to date were "mutually inconsistent and mutually contradictory". If one were to point out a common thread, however, the defence had the following to be said: to convict a person under the doctrine of command responsibility, the prosecution must at minimum take the burden of 1) proof of "orders for or at the least of the possession of knowledge of the atrocities", and 2) proof of "the power of command".[87]

The defence illustrated its position by way of the trials of Yamashita Tomoyuki and of Honma Masaharu, both held before the US Military Commission in Manila in previous years. The pertinent section in the defence summation read as follows:

> General Yamashita was convicted of responsibility for the acts of the troops *under his command* as general officer commanding in the Philippines, [...] acts of which the Tribunal trying him found that he *must have had knowledge*. Lieutenant-General Homma [Honma] was convicted of responsibility for the acts of the troops *under his command* when he occupied the same position, [...] acts of which the report of his trial shows that he *had personal knowledge* and for which he *had given orders*.[88]

84 Toyoda Trial, Defence Summation, R4639, see *supra* note 77.

85 *Ibid*. (emphasis added).

86 *Ibid*., R4646.

87 *Ibid*., R4640.

88 *Ibid*., R4641 (emphasis added).

In other words, the accused in both cases were convicted on the findings 1) that they *knew or must have known* of atrocities committed by Army servicemen, and 2) that the perpetrators of atrocities fell under the accused's *command*. Blakeney was quick to add that with both trials, "there was sufficient doubt" about knowledge of the accused, so much so that two of the justices at the US Supreme Court produced dissenting opinions when considering *habeas corpus* petitions.[89] But setting aside this particular controversy and limiting the discussion at a moment to purely theoretical issues, the guilty verdicts in both instances required 1) proof of knowledge, and 2) proof of command authority. In the defence's opinion, these were the standards by which the case against Toyoda must be judged.

With the foregoing theoretical considerations in mind, the defence presented during the court proceedings voluminous oral and documentary evidence in rebuttal of the prosecution's case. The defence evidence showed 1) that the accused did not know of the occurrence of documented instances of naval atrocities; 2) that he lacked the means to acquire such knowledge; 3) that the prosecution's evidence in support of the alleged broad geographical distribution and recurrence of naval atrocities was too spotty to warrant the imputing of knowledge to the accused; and 4) that regardless of the prosecution's assertion, this accused was vested with little or no command authority in relation to those Navy servicemen directly responsible for committing atrocities. On the last point, the defence evidence brought to light a unique organisational structure of the Imperial Japanese Navy that limited command authority of Toyoda as operational commander on matters of navy administration.[90]

The defence case was well documented and thoroughly researched, so much so that it had a tremendous impact on the tribunal's thinking. The defence case actually constituted the exact legal and factual grounds on which the tribunal reached its final decision. On 7 September 1949 the tribunal read out in the open court its judgment, pronounced to Toyoda the verdict of not guilty of the charge and of all specifications, and set him free upon the court's adjournment.[91] The last of the three international

[89] *Ibid*. (emphasis added).

[90] For the entirety of the Defence Summation on legal and factual findings, see Toyoda Trial, R4614–4943, *supra* note 77.

[91] Toyoda Trial, R5021, see *supra* note 77.

criminal trials at Tokyo thus came to an end with dramatic victory for the accused. The long-standing effort by the Allied prosecutors to hold a top Japanese Navy man accountable for war crimes, meanwhile, failed once again. No additional Navy high command cases followed thereafter.

The tribunal for the Toyoda Trial itself appeared quite surprised by its own conclusion. "In its initial stages", the judgment read, "this case appeared to be but a simple one involving only direct command responsibility". But the facts revealed by the defence about the unique structure and workings of the Imperial Japanese Navy command taught the tribunal that neither could the accused person's command authority nor his duty to control the subordinate Navy units be taken for granted. The pertinent part in the judgment reads as follows:

> When the enquiry reached into the highest strats [*sic*] of the Japanese Navy, it became all-too-clear that *here was something that had little parallel to the systems of command familiar to Occidentals* and that the applications of such principles of command to the case was impracticable. A study had then to be made of what are, to Western mentalities, amazingly complex and, at times, almost unbelievable principles of technical administration, authority and direction of a war effort. *This Japanese propensity for divided authority and control, for piecemeal responsibility and decision* has added tremendously to the task of this Tribunal in ascertaining the hidden truth.[92]

By the "Japanese propensity for divided authority and control, for piecemeal responsibility and decision", the tribunal was referring to the defence evidence documenting the byzantine structure of the Imperial Japanese Navy's command. It was shown, for instance, that the commander-in-chief of the Combined Fleet did assume "command authority" in relation to subordinate fleet organisations but only insofar as *tactical* aspects of naval operations were concerned. As for matters of naval administration including military discipline, the chief of the Combined Fleet had no authority. The chiefs of constituent fleets that fell under the umbrella of the Combined Fleet *bypassed* the chief of the Combined Fleet and made reports on administrative issues directly to the Navy Minister. The Navy Minister, in turn, exercised command authority

[92] Toyoda Trial, Judgment, R5002, see *supra* note 77.

in relation to individual fleet chiefs, that is, insofar as matters of Navy administration were concerned, including military discipline. The chief of the Combined Fleet, too, was subject to command of the Navy Minister in the area of Navy administration.[93] Some variations of the principle of divided command applied to other posts that Toyoda held during the war. As regards the chief of the Navy General Staff, the defence evidence showed that the Navy chief was strictly the Emperor's advisory organ and that he was vested with no command authority whatsoever. The Navy chief did take charge of planning naval operations and issuing naval orders and directives, but only *in the name of the Emperor* in whom the ultimate power to command rested.[94] All in all, the defence case showed that Toyoda assumed limited kinds of command authority and that he could not be held individually or criminally liable for the documented instances of atrocity.[95]

The tribunal of the Toyoda Trial also followed closely the defence argument when writing out its decision on criteria of responsibility. The tribunal began by briefly referring to the Yamashita Trial and the Honma Trial. It was "not within the province of this Tribunal" to comment on the decisions of the US Supreme Court, so the judgment read, but "[t]heir lives were not forfeited because their forces had been vanquished on the field of battle but because they did not attempt to prevent, even to the extent of issuing orders, the actions of *their subordinates*, of which actions the commanders *must have had knowledge*".[96] The tribunal thus recapitulated the defence argument, concurring that Yamashita and Honma were convicted essentially on 1) proof of knowledge (or "must have had known") and 2) proof of command authority. The tribunal then segued to setting out its own criteria of responsibility.

Having "carefully studied" the findings made at Yamashita, Honma and other contemporaneous war crimes trials, the tribunal ruled that the required elements to convict a military commander for war crimes would boil down to the following two sets, which are quoted in full. First:

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93 Toyoda Trial, Defence Summation, R4648–52, see *supra* note 77.

94 *Ibid*., R4653–56.

95 Toyoda Trial, For the Tribunal's summary of factual findings, see Judgment, R5010–19, *supra* note 77.

96 *Ibid*., R5005 (emphasis added).

1. That offenses, commonly recognized as atrocities, were committed by troops of his command;
2. The ordering of such atrocities.[97]

In the case that proof of orders could not be produced, a military commander may be still held liable for occurrence of war crimes under the second set of criteria of responsibility:

1. As before, that 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;
   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 violation[s] of the laws of war.
5. Failure to punish offenders.[98]

There are two notable aspects in the tribunal's foregoing criteria of responsibility. First, the tribunal rejected the prosecution's contention that no proof of knowledge, either actual or constructive, was required to convict an accused under the doctrine of command responsibility. The tribunal instead required proof of knowledge, namely 1) proof that the accused was informed of atrocity or 2) proof that given a great number of offences within his command, "a reasonable man could come to no other conclusion than that the accused must have known of the offenses or of

[97] *Ibid*.

[98] *Ibid*., R5005–6 (emphasis added).

the existence of an understood and acknowledged routine for their commission". Second, the tribunal similarly rejected the prosecution's contention that the power to command was inherent in any military commander and therefore needed no proof. The tribunal held that, to convict an accused under command responsibility, he must be shown to have had the "power to command" and more specifically, "actual authority over the offenders to issue orders to them not to commit illegal acts, *and* to punish offenders".

The tribunal, in this manner, built on the defence's argument and carefully delineated its positions on command responsibility. In so doing, the tribunal was quite self-conscious about the historical significance of its decision. The Toyoda Trial was "a Trial of Review", the judgment read, where the tribunal analysed the charges, decisions, and evidence of as many as 32 preceding trials. The tribunal expressed satisfaction that its final decision by and large was "not inconsistent with the findings in those cases in so far as they are co-related".[99] This statement points to the tribunal's confidence that its judgment articulated the distillation of legal thinking that grew out of contemporaneous war crimes trials. The validity of this view is open to scholarly scrutiny, but the tribunal for the Toyoda Trial may be credited for articulating clearly its interpretive position concerning the evolving case law literature on command responsibility in the post-Second World War Allied war crimes programme.

22.5. Concluding Remarks

This chapter has explored from a comparative perspective the three international criminal trials that were held in Tokyo in the wake of the Pacific War. The main goal has been to bring to light the two underexplored proceedings and assess how they relate to the Tokyo Trial from the standpoints of both law and fact. In lieu of a conclusion, the findings of this chapter may be summarised into the following three points.

First, it has been shown that while evidentiary materials often overlapped, the three trials brought out contrasting understandings about the distribution of power, authority, and duty in the Japanese government and military organisations. The Tamura Trial, for instance, put to question

[99] *Ibid.*, R5004.

the validity of the Judgment of the Tokyo Tribunal about the supposed limited power of the POW affairs chief in relation to the chief of the Military Affairs Bureau in the Army Ministry. The Toyoda Trial, for its part, raised new questions about the culpability of those serving the Navy high command and, more specifically, the adequacy of acquittals at the Tokyo Trial of Oka and Shimada, two top Navy Ministry officials. Second, the three trials generated dissimilar theories of liability about the members of government and military even though they apparently built on shared precedents. The contrast is particularly great between the Tokyo Trial and the Toyoda Trial. The former adopted from the Yamashita Trial the problematic ruling of "secretly ordered or willfully permitted", while the latter referred to the same trial only to come up with its own distinct theory of command responsibility, *which effectively repudiated the validity of the Yamashita decision*. Third and finally, the three trials together may still be considered as landmark cases precisely because of the diversity of the tribunals' decisions. They represent broad-ranging legal thinking that materialised in the minds of the judges at the three historic international trials in this theatre in the wake of the Second World War. Exploring the jurisprudential legacy of these cases – however contradictory they may have been – is key to deepening our understanding of the historical origins of international criminal law and their relevance to international criminal trials of the twenty-first century.

FICHL Publication Series No. 21 (2014):

Historical Origins of International Criminal Law: Volume 2

Morten Bergsmo, CHEAH Wui Ling and YI Ping (editors)

The historical origins of international criminal law go beyond the key trials of Nuremberg and Tokyo but remain a topic that has not received comprehensive and systematic treatment. This anthology aims to address this lacuna by examining trials, proceedings, legal instruments and publications that may be said to be the building blocks of contemporary international criminal law. It aspires to generate new knowledge, broaden the common hinterland to international criminal law, and further develop this relatively young discipline of international law.

The anthology and research project also seek to question our fundamental assumptions of international criminal law by going beyond the geographical, cultural, and temporal limits set by the traditional narratives of its history, and by questioning the roots of its substance, process, and institutions. Ultimately, the editors hope to raise awareness and generate further discussion about the historical and intellectual origins of international criminal law and its social function.

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ISBN 978-82-93081-13-5

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