Post-World War II British 'Hell-ship' Trials in Singapore

Omissions and the Attribution of Responsibility

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Abstract

At the end of World War II, the Allied Powers tried numerous Japanese defendants in locally based war crime trials across Asia. This article examines a particular set of British trials conducted in Singapore against Japanese defendants accused of POW abuse onboard Japanese 'hell-ships'. These cases address issues of omission and attribution, which continue to be relevant and much debated. First, the defendants were held reponsible for failures to act rather than for any positive acts of cruelty. Second, these cases considered different arguments linking the mid-ranking defendants to the crimes of POW ill-treatment. This article will analyse the 'hell-ship' cases against the prism of contemporary jurisprudence with the aim of identifying possible lessons as we continue to deal with issues of omissions and attribution in international criminal law today.

1. Introduction

As the Japanese army made its way across South-east Asia during World War II (WWII), it left in its wake the massacre and summary execution of civilians and enemy soldiers. Those taken alive by the Japanese military suffered an equally terrifying fate. Prisoners of war (POWs) and civilian detainees were tortured and starved in camps, herded into 'death marches', crammed into the holds of unmarked prison ships, and forced to work under inhumane conditions for the benefit for the Japanese military. POWs held by the German

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military had a higher survival rate than POWs held by the Japanese military. While about 4% of Allied POWs died under German or Italian control, 27% of Allied POWs died in Japanese captivity.[1] Among the many horrifying experiences inflicted upon POWs under Japanese control were journeys made onboard Japanese prison ships, which came to be referred to by POWs as 'hell-ships'.[2]

Following the end of WWII, the victorious Allied Powers held war crime trials throughout Europe and Asia. From 1945 to 1951, Allied military courts conducted some 2200 trials in Asia which sentenced 3000 Japanese to imprisonment and 920 others to death.[3] These trials, like most locally based post-WWII trials, have been largely forgotten and eclipsed by the more famous Nuremburg and Tokyo trials. By revisiting the 'hell-ship' trials held by the British in Singapore after WWII, this article intends to highlight the continuing relevance of these historical records. Post-WWII Allied trials of Japanese war criminals have at times been criticized and dismissed as instances of 'victor's justice'. I hope to demonstrate that not all Allied trials deserve this reputation.[4] In addition to demonstrating a good faith commitment to fairness and due process, the 'hell-ship' cases provide valuable historical and legal insight into WWII crimes. While the Tokyo Trial focused on higher-ranking individuals, the Singapore trials tried mid-ranking and lower-ranking individuals.[5] They thus provide us with a more holistic understanding of

1 G.F. Michno, *Death on the Hellships: Prisoners at Sea in the Pacific War* (Annapolis, MD: Naval Institute Press, 2001), at 281–282

2 Van Waterford [Willem Wanrooy], *Prisoners of the Japanese in World War II: Statistical History, Personal Narratives, and Memorials Concerning POWs in Camps and on Hellships, Civilian Internees, Asian Slave Laborers, and Others Captured in the Pacific Theater* (Jefferson, NC: McFarland, 1994), at 149.

3 P.R. Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945–1951* (Austin: University of Texas Press, 1979), at xi, xiv.

4 This has particularly been so with respect to the Tokyo Trial which tried high-ranking Japanese military and political leaders. For the full Tokyo Trial judgment, see R. John Pritchard (ed.), *The Tokyo Major War Crimes Trial: The Judgment, Separate Opinions, Proceedings in Chambers, Appeals and Reviews of The International Military Tribunal for the Far East* (Lewiston, Lampeter, Queenston: The Edwin Mellen Press, 1973–1987), Vol. 101. For a brief account of criticisms relating to due process concerns and political factors affecting the Tokyo Trials, see Madoka Futamura, *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremburg Legacy* (London and New York: Routledge, 2008), at 60–66. See also, Totani's study and critical analysis of popular criticisms levelled against the Tokyo Trials including the latter's pro-Western bias and selectivity. Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (Cambridge and London: Harvard University Press, 2008), at 1–7, 246–262.

5 Totani notes how the Tokyo Trial's prosecutorial strategy targeted high-ranking individuals who represented 'more than one key office of the government'. Totani, *ibid.*, at 63. The Tokyo Trial judgment addressed the criminality of the Japanese military's 'unlawful and inhumane' transport of POWs in 'prison ships', see Pritchard, *ibid.*, at 49675–49681. It dismissed the Japanese argument that transport conditions could not be helped due to a 'shortage of tonnage possessed by Japan', specifically noting that the Japanese authorities were not 'entitled to move prisoners if it was unable to do so under the conditions prescribed by the laws of war', see Pritchard, *ibid.*, at 49676. The judgment also referred to the responsibility of its high-ranking defendants for the 'hell-ship' system. For example, it referred to policies issued by the Vice-Minister of War, *ibid.*, at 49680. One of the key defendants before the Tokyo Tribunal was

institutional crimes committed by the Japanese. The 'hell-ship' cases also raise interesting legal questions concerning the criminalization of omissions and the attribution of criminal responsibility among mid-ranking defendants.[6]

Crimes perpetrated in an institutional context are facilitated by numerous individuals playing different roles within the institution concerned. Responsibility for such institutional crimes, in a moral or ordinary sense, is thus distributed among a wide range of individuals. At which point does an individual's moral responsibility translate into individual criminal responsibility? Present-day international criminal tribunals have focused on prosecuting individuals in positions of leadership or authority. Lower-ranking physical perpetrators remain easy targets for the prosecution. The criminal responsibility of mid-ranking individuals is less often addressed. Mid-ranking individuals are seldom involved in the direction or physical perpetration of the crime charged and may not have intended and known about the crime's commission. Nevertheless, they may play crucial institutional roles that enable the perpetration of international crimes

While a number of the 'hell-ship' defendants were accused of physically abusing POWs, most POW deaths occurred due to a severe shortage of food and water, cramped and unhygienic accommodation, and the spread of diseases. The 'hell-ship' defendants all held mid-ranking positions within the 'hell-ship' system and had no control over the allocation of provisions or accommodation to POWs. However, they were accused of failing to secure minimal living conditions for POWs placed under their care. Interestingly, the defendants were not portrayed as intentionally or knowingly ill-treating POWs. Rather, they were depicted as having been 'grossly negligent' or 'callously indifferent' to the plight of POWs. In other words, the culpability of these mid-ranking defendants lay in their unintentional or unknowing failures to act, rather than in their active and intentional abuse of POWs.

My article first describes the POW abuse that took place onboard Japanese 'hell-ships'. I then set out the institutional and normative framework governing the British 'hell-ship' trials. By closely examining the 'hell-ship' trial records, I identify and assess arguments made regarding the defendants' omissions and liability for POW ill-treatment. I compare the arguments made in these cases against contemporary case law, highlighting their similarities and differences. I also identify possible lessons as we continue to deal with questions of omission and the attribution of responsibility in international criminal law today.

Tojo Hideki, the Japanese Minister of War. The judgment also noted that '[m]embers of the Government and many government officials' were aware of this abuse and failed to take adequate remedial measures, *ibid.*, at 49680.

6 Piccigallo notes how British authorities adopted a fairer and less harsh attitude towards lower ranking Japanese officers, in contrast with higher ranking Japanese military and civilian leaders. The British intended these trials of lower ranking officers to demonstrate British standards of fairness and they were widely publicized. Piccigallo, *supra* note 3, at 97, 104.

2. POW Neglect and Abuse Onboard WWII 'Hell-ships'

Throughout WWII, POWs were frequently transferred by sea. In the beginning, the Japanese transported POWs out of the war zone to prevent them from escaping and assisting the enemy.[7] However, the Japanese military soon started transporting POWs to work camps, using them as forced labour to further Japanese war efforts.[8] Others were shipped to Japanese-occupied territories where they were publicly paraded and abused before locals as a demonstration of Japanese superiority.[9]

The 'hell-ship' transport system was organized and administered from Japan. Japanese military commanders made requests for POW transport to central administrative authorities located in Japan. These central authorities were referred to in the 'hell-ship' cases as 'Anchorage'. The central authorities would identify the ships to be used and the number of POWs to be transported on each ship. Markings were made on these ships to indicate the number of POWs to be placed in each hold. The central authorities would decide on the amount of food, water, and medical supplies to be assigned to each ship. These provisions would be handed over to the ship's master, who would in turn distribute these to the military crew and POWs based on rations set by the central authorities. POWs were each given specific amounts of medication before boarding the 'hell-ships'. The central authorities also provided the ship's master with medical supplies. During the journey, the ship's master would make these available to the Japanese commanding officer at the latter's request.

Most ships used by the Japanese military to transport POWs were not marked as POW transport.[10] As a consequence, many were mistaken as military ships and sunk by Allied fire. Attempts by the Red Cross to mediate between both Allied and Axis Powers to ensure the safe transport of POWs were ignored by both sides.[11] Altogether, the Japanese military used 56 'hell-ships' to transport more than 62 000 POWs during WWII.[12] Of these, 19 were sunk by Allied fire. About one in three POWs transported on these ships died from the journey.[13] Onboard these 'hell-ships', POWs were forced into holds so overcrowded that each had to take turns lying down to sleep. They were starved and dehydrated throughout the journey, resulting in severe malnutrition and illnesses. The ships were equipped with inadequate latrine facilities and diseases such as dysentery rapidly spread among POWs. Close to the end of WWII, conditions onboard the 'hell-ships' deteriorated to such an extent that

7 Michno, *supra* note 1, at 2.
8 *Ibid.*, at 21.
9 *Ibid.*, at 23.
10 Waterford, *supra* note 2, at 150.
11 Michno, *supra* note 1, at 87.
12 Waterford, *supra* note 2, at 151.
13 *Ibid.*

POWs reportedly succumbed to madness, committed suicide, and killed each other.[14]

A. Post-WWII Trials by the British Authorities: An Institutional Overview

The Pacific War officially ended on 2 September 1945. According to the terms of surrender agreed to by Japan, the Allied Powers would deliver 'stern justice' 'to all war criminals'.[15] To facilitate this, the Allied Powers agreed to a scheme of prosecution, whereby they would jointly try Axis leaders while lower-ranking war criminals would be prosecuted before national courts where the crime took place.[16] Accordingly, 'major war criminals in the Far East' were tried before the International Military Tribunal for the Far East (IMTFE) that saw the joint participation of several Allied Powers. Lower-ranking Japanese were tried before locally-based courts individually established by the Allied powers throughout the Pacific.[17]

These locally-based trials were conducted according to a variety of institutional arrangements.[18] For example, the USA established military commissions following US congressional authorization.[19] In Australia and Canada, domestic legislation was passed authorizing the convening of military courts.[20] China adopted legislation empowering the Chinese War Crimes Commission to convene military tribunals.[21] The Dutch colonial authorities enacted special decrees that authorized the establishment of temporary court-martials and war-crime courts.[22]

This article focuses on trials conducted by the British authorities in Singapore pursuant to powers conferred by the 1945 Royal Warrant.[23] In 1945, the UK War Office issued a 'Special Army Order' or Royal Warrant under British common law prerogative powers.[24] The Royal Warrant authorized the

14 Michno, *supra* note 1, at 288–289.

15 Instrument of Surrender, 2 September 1945; Potsdam Declaration, 26 July 1945.

16 Statement on Atrocities, 1943 Moscow Declaration (otherwise known as Joint Four-Nation Declaration); Preamble, 1945 London Agreement.

17 Art. 1 IMTF Charter

18 *Ibid.*

19 Piccigallo, *supra* note 3, at 34–67.

20 *Ibid.*, at 121–142.

21 *Ibid.*, at 68–95.

22 *Ibid.*, at 174–184.

23 The British established altogether 12 military tribunals in Singapore, Rangoon, Hong Kong, Malaya and British North Borneo. Courts in Malaya and North Borneo travelled the circuit. Piccigallo, *supra* note 3, at 103–104. Altogether British authorities tried 306 cases and 920 individuals. *Ibid.*, at 120. For other accounts of post-WWII British Trials, see, A.P.V. Rogers, 'War Crime Trials under the Royal Warrant: British Practice 1945–1949', 39 *International and Comparative Law Quarterly* (1990) at 780; W.B. Cowles, 'Trials of War Criminals (Non-Nuremburg)', 42 *American Journal of International Law* (1948) at 299.

24 The Royal Warrant was signed on 14 June 1945 and promulgated on 18 June 1945 in Army Order 81/1945.

establishment of military tribunals by the British military and set out the institutional structure and jurisdiction of these tribunals. Each tribunal was to comprise of at least two officers and one president. These tribunals were empowered to request legal advice from Judge Advocates (hereinafter JAG officers), who were to be independent and neutral. In terms of procedure, the tribunals were to follow rules of procedure applicable to British court-martials as set out in the British Army Act. These tribunals were also subject to an appeals procedure. Those found guilty had the right to request reviews from confirming officers, who would decide to confirm the sentence or to acquit the accused person.

With respect to the applicable substantive law, the Royal Warrant authorized these British military tribunals to try individuals for any 'violation of the laws and usages of war'.[25] Apart from customary international law, a possible source of such 'laws and usages of war' related to POW ill-treatment would be the 1907 Hague Convention (IV) and the 1929 POW Geneva Convention.[26] Interestingly, arguments made in the 'hell-ship' cases generally did not refer to any customary law or treaty framework. Instead, there seemed to be an assumption that POW ill-treatment was clearly a war crime. This may have been due to the fact that the Tokyo Tribunal had earlier decided on the criminality of POW ill-treatment. The Tokyo Trial's defendants had argued that Japan and its agents were not bound by the 1929 POW Geneva Convention, which Japan had not yet ratified. The Tokyo Tribunal held this to be irrelevant as customary international law, which applied to all states including Japan, prohibited the inhumane treatment of POWs.[27]

Unlike their US and French counterparts, post-WWII British military tribunals did not issue comprehensive or reasoned decisions.[28] Even so, the British authorities kept meticulous records of the entire trial process. These records include complete transcripts of in-court statements, witness examinations, and arguments. They also include statements by witnesses and documents filed by both the prosecution and defence. In addition, the JAG reports set out relatively comprehensive factual and legal findings. With these records, we are able to identify, albeit inconclusively, the arguments considered by the British military tribunals in reaching their decisions.

25 *Ibid.*, Art. 1.

26 The Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (hereinafter 1907 Hague Convention], 18 October 1907. Chapter II of the Annex specifically addresses POWs. It is less detailed than the 1929 Geneva Convention. Japan had ratified the convention on 13 December 1911. See also, Convention relative to the Treatment of Prisoners of War (hereinafter 1929 POW Geneva Convention), 27 July 1929. Japan had signed this convention on 27 July 1929. However, Japan never ratified the convention. For the full text of these conventions and their ratification status, see www.icrc.org.

27 Pritchard, *supra* note 4, at 49720. Specifically, the judgment notes that 'customary law', as set out in the 1907 Hague Convention and 1929 POW Geneva Convention, place an obligation on detaining governments to maintain and prevent the mistreatment of POWs. Pritchard, *supra* note 4, at 48442, Totani, *supra* note 4, at 98–100.

28 Piccigallo, *supra* note 3, at 100.

B. The 'Hell-ship' Cases: the Singapore Maru, the Asaka Maru, the Takan Maru and the Hofuku Maru

This article analyses the trial records of four 'hell-ship' cases: the *Singapore Maru*, the *Asaka Maru*, the *Takan Maru* and the *Hofuku Maru*.[29] The defendants held mid-ranking positions of responsibility and were charged with POW ill-treatment.

The first of these cases was the *Hofuku Maru* case that concerned the death of 98 POWs.[30] The accused, Kitaichi Jotani, was the Japanese POW draft conducting officer and was sentenced to death by hanging. The case of the *Singapore Maru* was slightly different, resulting in the death of 60 POWs.[31] The case had four defendants: Yoshinari Nishimi, the ship's captain; Makoto Ogasawara, the Japanese commanding officer; Naosuke Maruyama, the POW draft conducting officer; and Yoichi Uchida, a sergeant in charge of POWs. All were found guilty and sentenced from 6 months to 3 years of imprisonment. POWs onboard the *Takan Maru* were ill-treated, but the trial records do not indicate any POW deaths. The defendant, Haruyoshi Nakanishi, the Japanese POW draft conducting officer, was sentenced to 2 years of imprisonment.[32] The last 'hell-ship' case considered here is the *Asaka Maru*. While trial records

29 Those tried included the ship's master, commanding officer, the POW draft conducting officer and other soldiers put in charge of the POWs. Based on the trial transcripts, onboard the 'hell-ships', the ship's master was generally responsible for the crew while the commanding officer would be responsible for Japanese soldiers onboard the ship. The POW draft commanding officer was directly in charge of the POWs and was assisted by soldiers of lower rank (e.g. Sergeant in charge of POWs). *Prosecutor v. Haruyoshi Nakanishi*, Military Court for the Trial of War Criminals, convened by Commander of the Singapore District, trial dates 14, 15, 16, 19 and 20 May 1947, Case No. 65207 JAG, WO 235/1006 (hereinafter *Takan Maru trial*); *Prosecutor v. Kitaichi Jotani*, Military Court for the Trial of War Criminals, convened by G.O.C Singapore District, trial dates 25, 26, 27, 28 and 31 March 1947, Case No. 65197 JAG, WO 235/995 (hereinafter *Hofuku Maru trial*); *Prosecutor v. Yoshinari Nishimi, Makoto Ogasawara, Naosuke Maruyama, Yoichi Uchida*, Military Court for the Trial of War Criminals, convened by Commander of Singapore District, trial dates 1 and 2 May and 16, 17, 18 and 20 September 1947, Case No. 65257 JAG, WO 235/1043 (hereinafter *Singapore Maru trial*); *Prosecutor v. Bunji Odake, Takeo Ino*, Military Court for the Trial of War Criminals, convened by Commander of the Singapore District, trial dates 2, 3, 4, 5, 6, 9 and 11 September 1947, Case No. 65246 JAG, WO 235/1052 (hereinafter *Asaka/Hakusan Maru trial*). These trial records are currently housed on microfilm at the National University of Singapore's Central Library.

30 *Hofuku Maru trial*, *ibid.* In March 1947, a five-member British military tribunal considered POW ill-treatment onboard the *Hofuku Maru*. Between 4 July 1944 and 21 September 1944, the *Hofuku Maru* sailed from Singapore to Japan with 1250 British and Dutch POWs onboard. During this journey, it was torpedoed by American bombers because it was not marked to indicate that it was transporting POWs. Only 280 POWs survived the journey.

31 *Singapore Maru trial*, *supra* note 29. The defendants in this case were heard before a three-member military tribunal on charges similar to that of the *Hofuku Maru*, namely, POW ill-treatment. The vessel sailed from Singapore on 25 October 1942 and arrived at Moji on 24 November 1942 with 1081 British POWs onboard. 60 POWs had perished along the way from inter alia, an outbreak of dysentery that was caused by the ship's unsanitary and overcrowded living conditions.

32 *Takan Maru trial*, *supra* note 29. In May 1947, a three-member British military tribunal was assembled to hear the case of the *Takan Maru* that had sailed close to WWII's end.

state that there were 'some' POW deaths, the exact number is not specified. The ship's master, Bunji Odake, and the Japanese POW draft conducting officer of *Hasukan Maru*, Takeo Ino, were sentenced to 6 months and 3 months of imprisonment, respectively.[33]

These cases considered two issues which continue to be debated in international criminal law today: the criminalization of omissions and the attribution of criminal responsibility for institutional crimes. First, the exact scope of criminal liability for omissions remains contentious in international criminal law. In contrast, the 'hell-ship' cases did not hesitate to hold the defendants responsible on the basis of their omissions. Second, there is a trend for present-day international criminal prosecutions to focus on high-ranking individuals.[34] On the contrary, the 'hell-ship' cases targeted defendants who held mid-ranking positions within the 'hell-ship' transport system. The following two sections analyse how the 'hell-ship' cases dealt with these two issues, highlighting the extent to which they depart from or reflect present-day sensibilities.

3. Judging Criminal Omissions in the 'Hell-ship' Cases: Breaches of POW Protection Duties

Criminal law, as implemented at the domestic and international level, is generally reluctant to penalize failures to act as opposed to positive acts. Accordingly, only certain kinds of omissions will expose an individual to criminal sanctions. Prior to considering whether an individual may be held liable for a crime on the basis of his or her omission, it first has to be determined if the particular omission is one that is capable of attracting individual criminal responsibility.

Policy-makers and scholars continue to debate the rationale and basis for criminalizing omissions.[35] This section sets out the main concerns driving this debate and contemporary case law's duty-based approach to omissions.

The *Takan Maru* sailed from Ambon to Surabaya from 8 September 1944 to 5 September 1944 and transported 600 British and Dutch POWs.

33 *Asaka/Hakusan Maru trial, supra* note 29. In September 1947, a three-member British military tribunal was convened in Changi Prison to consider allegations of POW ill-treatment onboard the *Asaka Maru* that had sailed from Singapore to Moji from 11 June 1944 to 16 August 1944. The *Asaka Maru* carried 750 British POWs. Like the *Takan Maru*, conditions aboard the *Asaka Maru* appeared to be particularly bad. For example, POWs were not provided with sufficient life-saving equipment. This had serious consequences when the *Asaka Maru* encountered a storm and POWs had to be transferred to another ship, the *Hasukan Maru*.

34 C. del Ponte, 'Prosecuting the Individuals Bearing the Highest Level of Responsibility', 2 *Journal of International Criminal Justice* (*JICJ*) (2004) 516–519; D. Raab, 'Evaluating the ICTY and its Completion Strategy', 3 *JICJ* (2005) 82–102.

35 For general discussions on omission, see, A. Ashworth, *Principles of Criminal Law* (6th edn., Oxford: Clarendon Press, 1995), at 98–101; A. Simester and G.R. Sullivan, *Criminal Law: Theory and Doctrine* (3rd edn., Oregon and Portland: Hart Publishing, 2007), at 65–73; G. Fletcher, *Basic Concepts of Criminal Law* (Oxford: Oxford University Press, 1998), at 45–50; L. Alexander, 'Criminal Liability for Omissions: An Inventory of Issues', in S. Shute and A.P. Simester

It then examines the 'hell-ship' cases' characterization of the defendants' omissions as breaches of POW protective duties.

A. Criminal Omissions: Issues and Approach

Most domestic legal systems are unwilling to extensively criminalize omissions out of respect for the politically liberal idea of individual autonomy. Societies subscribing to this idea believe that individuals are best positioned and should, for the most part, be permitted to decide how to organize their own lives.[36] Prohibiting a specific act is generally considered less intrusive on an individual's autonomy as compared to requiring the individual to act or behave in a certain way.[37] However, in some circumstances, it may be both necessary and fair to limit an individual's autonomy by criminalizing omissions for collective or social interests. Such circumstances may arise when the consequences of the omission are particularly serious.[38] To be fair, the individual should have had notice of the omission's criminal nature, and he or she should have had control over the situation.[39]

This same reluctance to criminalize omissions is reflected in international criminal law. Any reference to omissions was left out of the International Criminal Court's Statute (ICC Statute) as delegates at the Rome Conference could not agree on a mutually acceptable solution.[40] It is generally accepted that omissions may attract criminal responsibility if the crime concerned is defined in terms of a failure to act. An example would be the crime of intentionally starving civilians during times of armed conflict.[41] The ICTY and ICTR have adopted a more general approach. Drawing on the judicial practice of common law legal systems, they have held that an accused may be held liable on the basis of omissions if the accused was subject to a prior legal duty to act but had failed to do so.[42]

Domestic legal systems employing such a duty-based approach to omissions are typically cautious in identifying legal duties which, if not performed, will expose one to criminal liability. Before automatically transplanting this restrictive attitude to the international criminal legal system, it should be noted

(eds), *Criminal Law Theory: Doctrines of the General Part* (Oxford: Oxford University Press, 2002), at 121–142.

36 Ashworth, *ibid.*, at 23–26.

37 Simester and Sullivan, *supra* note 35, at 65.

38 Ashworth, *supra* note 35, at 101

39 *Ibid.*

40 Most delegates debating the ICC Statute at the Rome conference were of the opinion that war crimes involve positive acts of cruelty rather than omission. E. Gadirov, revised by R.S. Clark, 'Article 9: Elements of Crime', in O. Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Beck/Hart Publishing, 2008) 505–530, at 515. Due to an inability to agree, the ICC Statute did not articulate a general rule on omission. K. Ambos, 'Article 25: Individual Criminal Responsibility', in Triffterer (ed.), *ibid.*, 743–770, at 770.

41 G. Werle, *Principles of International Criminal Law* (The Hague: T.M.C. Asser Press, 2005), at 170.

42 Judgment, *Orić* (IT-03-68-T), Trial Chamber, 30 June 2006, § 304.

that international criminal law operates in a significantly different context. The consequences of international crimes are especially severe in terms of the nature of harm inflicted and the number of victims affected. The severe power imbalance between combatants and non-combatants justifies limiting the autonomy of combatants in favour of vulnerable groups. It may well be desirable for international criminal law to impose a wider range of legal duties on certain individuals due to the serious nature and impact of international crimes.

Even so, the criminalization of omissions in international criminal law should take place in conformity with fundamental principles of fairness, such as the principle of individual criminal responsibility. According to this principle, individuals should be held criminally responsible for their own acts and choices rather than that of others. Criminalizing omissions must not result in vicarious liability. In addition, the principle of *nullim crimen sine lege* requires crimes to be clearly defined and due notice of the crime to be given. These principles ensure that individuals are penalized for their choices and their agency rather than for 'things that happen to them' or for 'doing nothing'.[43]

To the casual observer, the 'hell-ship' trials may give the impression that the mid-ranking defendants were punished for 'doing nothing' or their institutional membership, rather than for their actions or decisions. Such an impression, if true, would be inconsistent with the principle of individual criminal responsibility.[44] In what follows, I will refute this possible interpretation by identifying the 'hell-ship' cases' duty-based approach towards omission, which is similar to that taken by contemporary international criminal tribunals.

B. Identifying and Criminalizing Breaches of POW Protection Duties in the 'Hell-ship' Cases

The 'hell-ship' prosecutorial authorities depicted the defendants' omissions not as simple failures to act but as breaches of POW protection duties. Prior to the 19th century, POWs were owed no duties of protection.[45] Instead, they were simply considered as the 'chattels' or property of the detaining state. This attitude towards POWs, however, gradually underwent change as states entered into bilateral and multilateral agreements that established duties of care owed by detaining states to POWs. At the outbreak of WWII, two such multilateral POW protection agreements were in force, namely, the 1907 Hague Convention (IV) and the 1929 POW Geneva Convention.[46]

43 Ashworth, *supra* note 35, at 101.

44 *Ibid.*, at 26–27.

45 H. Fischer, 'Protection of Prisoners of War', in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (2nd edn., Oxford: Oxford University Press, 2009) 367, at 368.

46 1907 Hague Convention (IV), *supra* note 26; 1929 POW Geneva Convention, *supra* note 26.

The 1907 Hague Convention (IV) and the 1929 POW Geneva Convention expressly require detaining states to humanely treat POWs.[47] They also set out a variety of specific duties arising from this general obligation of humane treatment. Particularly relevant to the 'hell-ship' cases are the duties of maintenance and transfer.[48] Detaining states are expressly obligated to provide POWs with the maintenance necessary to sustain their health and well-being.[49] POWs are to be given sufficient drinking water, lodged in hygienic accommodation, and have access to adequate medical care.[50] States should treat POWs in a non-discriminatory fashion. For example, POWs are to be provided with food rations equivalent to that provided to the detaining authorities' own troops.[51]

It should be noted that the legal duties set out in the 1907 Hague Convention (IV) and the 1929 POW Geneva Convention address themselves to states rather than to individuals. This gives rise to a number of problems. First, the agreements do not specify how POW duties are to be divided up among military forces or how individuals should perform these duties in different situations. Second, they do not identify the kinds of breaches that will result in war crime charges.[52] The first problem exists also with respect to modern-day POW agreements such as the 1949 POW Geneva Convention.[53] However, unlike its predecessor, the 1949 POW Geneva Convention expressly identifies 'grave breaches' that will attract 'penal sanctions'.[54] Omissions are also recognized as a possible basis for criminal liability.[55] It does not, however, spell out specific POW duties owed by agents of the detaining state. The 'hell-ship' cases provide some instruction on this point. While these cases did not expressly refer to the then-applicable 1907 Hague Convention (IV) or the 1929 POW Geneva Convention, they did consider and elaborate on the kinds of duties

47 Art. 4, 1907 Hague Convention (IV), *ibid.*; Art. 2 1929 POW Geneva Convention, *ibid.*

48 Arts 14 and 20, 1907 Hague Convention (IV), *ibid.*; Arts 25 and 26 1929 POW Geneva Convention, *ibid.* WWII instruments contained relatively brief conditions on POW transfer. The post-WWII Geneva Conventions implemented more detailed duties relating to the transfer of POWs as a response to WWII atrocities involving POW transfer.

49 Art. 4, 1929 POW Geneva Convention, *ibid.*

50 Arts 10–14, *ibid.*

51 Art. 11, *ibid.*

52 It should be noted that not every violation of international humanitarian law by positive act or omission amounts to a war crime. As held in *Tadić*, only 'serious' violations of customary or treaty law will amount to a war crime. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić* (IT-94-1-A), Appeal Chamber, 2 October 1995, § 94. Breaches of international humanitarian law will generally expose an individual to disciplinary sanctions but not all breaches amount to a war crime that gives rise to individual criminal responsibility. The 'hell-ship' cases appear to have implicitly accepted that the POW ill-treatment which took place was a serious-enough violation amounting to a war crime that would attract individual criminal responsibility.

53 Geneva Convention (III) relative to the Treatment of Prisoners of War (hereinafter 1949 POW Geneva Convention), Geneva, 12 August 1949, available at www.icrc.org.

54 Arts 129 and 130, 1949 POW Geneva Convention, *ibid.*

55 Some of the 'grave breaches' recognized may be committed through omissions, such as 'wilfully causing great suffering or serious injury to body or health' and 'wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention', Art. 131, 1949 POW Geneva Convention.

owed by detaining agents to POWs under their care. By holding individuals criminally responsible on the basis of specific duties, these cases identify the kinds of duties that, if breached, expose an individual to war-crime charges.

The discussion in the 'hell-ship' cases reflect modern-day concerns in the area of POW protection. For example, the 'hell-ship' cases sought to ensure continuous and effective protection throughout POW transfer and captivity. The ICTY recently has emphasized the importance of making sure that there is no gap in POW protection during their transfer.[56] The 'hell-ship' prosecutors argued that the duty to provide POWs with necessities and accommodation should be understood as a continuous one. The defendants were said to be under a duty to ensure that there was adequate food and water onboard prior to leaving port. The defendant in *Takan Maru* was accused of failing to check 'the type, the quality, the quantity' of food available onboard the ship before the journey.[57] This duty of ensuring proper and adequate provisions continues throughout the journey. The ship's captain and commanding officer of *Singapore Maru* were accused of permitting food to become exposed to flies and failing to ensure that living conditions did not become 'dangerously filthy and unhygienic'.[58] This is strikingly similar to the general principle adopted by the ICTY Appeals Chamber in *Mrkšić,* which noted that '[t]he fundamental principle … that prisoners of war must be treated humanely and protected from physical and mental harm, applies from the time they fall into the power of the enemy until their final release and repatriation. It thus entails the obligation of each agent in charge of the protection of custody of the prisoners of war to ensure that their transfer to another agent will not diminish the protection the prisoners are entitled to'.[59]

The 'hell-ship' cases also addressed the institutional context in which the POW abuse took place. The detention and transfer of POWs during conflict is made possible by institutional arrangements composed of multi-layered divisions of responsibility. This was particularly true with respect to the Japanese military's 'hell-ship' system. In order for such multi-layered systems to function in a non-abusive and legal manner, there needs to be responsible information transfer and supervision across different institutional layers. Duties of reporting and supervision are crucial. Recognizing this, the 'hell-ship' prosecutors argued that the defendants had failed to perform duties of reporting and supervision. Apart from ensuring the proper distribution of necessities onboard, the defendants had a duty to report shortages to their superiors. In the *Takan Maru* case, the prosecution accused the defendant of failing to report the need for more latrines and space to his superiors.[60] Apart from

56 Judgment, *Mrkšić* (IT-95-131-A), Appeals Chamber, 5 May 2009, §§ 71–73.
57 *Takan Maru trial*, *supra* note 29, closing address by the Prosecution, at § 5(a).
58 *Singapore Maru trial*, *supra* note 29, opening address by the Prosecution, at 2.
59 *Mrškić*, *supra* note 56, § 71.
60 *Takan Maru trial*, *supra* note 29, opening address by the Prosecution, at § 2.

such a reporting duty, the 'hell-ship' defendants were to properly supervise their subordinates. For example, the *Singapore Maru* defendant was accused of failing to control subordinates who regularly and repeatedly beat POWs. [61]

Defendants charged with institutional crimes often argue that their choices and actions were limited by their formally delegated powers. The ICTY has specifically rejected this argument with respect to the performance of POW protection duties during transfer.[62] This argument was similarly advanced by the defence in the 'hell-ship' cases. The prosecutors' response was that the defendants should have gone beyond their formal duties to secure minimum POW living conditions. They had a duty to improvise if this was necessary to ensure POW welfare. In the *Takan Maru* case, though the defendant had not been provided with sufficient latrines, it was argued that he should have given POWs the opportunity to build more facilities for themselves.[63] When accused of failing to secure sufficient water for the journey, the *Asaka Maru* defendant protested that the Japanese central authorities had a practice of assigning insufficient water.[64] The prosecution responded that as a ship's master of 'some experience', the defendant should have appreciated the necessity of having sufficient water.[65] He should then have formally requested for more water than was strictly necessary to compensate for the central authorities' practice of allocating insufficient water.[66] By considering the continuous, contextual and de facto nature of POW protection duties, the 'hell-ship' cases demonstrated significant sensitivity to the particularly vulnerable position of POWs.

The 'hell-ship' cases were similarly sensitive to the difficulties faced by defendants charged with POW protection. In deciding whether the defendants had fulfilled their POW protection duties, the cases took into account each defendant's individual situation and the facts of each case. For example, the *Asaka Maru* defendants were eventually acquitted, based on the finding that each had 'done all that was possible in very difficult circumstances'.[67] Rather, 'war conditions' and 'the port authorities' had made the defendants' fulfilment of their duties 'nigh impossible'.[68] On the other hand, the *Singapore Maru* defendants were criticized for not readjusting rations and distributing more food to POWs during the journey. According to witness statements, a substantial store of provisions was discovered onboard the *Singapore Maru* at the end of the journey.[69]

61 *Singapore Maru trial*, *supra* note 29, opening address by the Prosecution, at 3–4.
62 *Mrškić*, *supra* note 56, § 94.
63 *Takan Maru trial*, *supra* note 29, closing address by the Prosecution, at § 5 (d).
64 *Asaka/Hakusan Maru trial*, *supra* note 29, closing address by the Prosecution, at 1.
65 *Ibid.*
66 *Ibid.*
67 *Asaka Maru trial*, *supra* note 29, JAG advisory opinion, at § 4.
68 *Ibid.*
69 *Singapore Maru trial*, *supra* note 29, at 7, closing address by the Prosecution.

4. Conceptualizing Mid-ranking Responsibility: Ideas of Attribution in the 'Hell-ship' Trials

Due to their mid-ranking positions within the 'hell-ship' system, the defendants could not be depicted as solely responsible for, or as physical perpetrators of, the POW ill-treatment that took place onboard the 'hell-ships'. Individuals who did not physically perpetrate the crime concerned may still be held responsible if their involvement falls within the 'modalities of criminal conduct' recognized criminal law.[70] While the 'hell-ship' cases made no explicit reference to actual legal doctrine, these British-run trials were probably influenced by then-existing common law doctrines, such as the concepts of aiding and abetting and common purpose.

Contemporary international criminal law has developed various doctrines aimed at capturing the different roles played by individuals in international crimes.[71] The scope and limits of these doctrines continue to be debated, particularly when one moves from considering the responsibility of leaders to considering the responsibility of lower-ranking or mid-ranking defendants. This is all the more so when the latter stand accused, not of intentional acts of cruelty, but of unconscious failures to act. In what follows, I identify four different arguments advanced in the 'hell-ship' cases. The first argues that the 'hell-ship' defendants should be held liable for POW ill-treatment based on their shared responsibility with others within the 'hell-ship' system. The second focuses on the defendants' contributions as secondary actors who facilitated the ill-treatment of POWs by others. The third assesses responsibility based on the defendants' command over those who ill-treated the POWs. The fourth holds the defendants liable as primary actors for POW ill-treatment based on their negligent failures to act.

A. The 'Hell-ship' Defendants as Participants in a System of POW Abuse: Joint Responsibility for Institutional Crimes

At various points in the 'hell-ship' trials, the defendants were depicted as jointly responsible with others for the 'hell-ship' system's abuse of POWs. The JAG officer in the *Hofuku Maru* case noted that the defendant 'shared responsibility' with other individuals within the military hierarchy and confirmed the defendant's guilt on this basis.[72] The defence counsel in the *Singapore Maru* case argued that POW ill-treatment had resulted from a number of other 'important and fundamental causes', for example, the POWs' own poor health, the length

70 A. Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2008), at 188.

71 For an overview of these various doctrines, see generally, Cassese, *ibid.*, at 187–252; G. Boas, J.L. Bischoff, and N.L. Reid, *International Criminal Law Practitioner Library: Volume 1: Forms of Responsibility in International Criminal Law* (Cambridge: Cambridge University Press, 2010).

72 *Hofuku Maru trial*, *supra* note 29, JAG advisory opinion, at 2.

of the voyage and climate conditions.[73] These factors were not within the control of the defendant.

Contemporary international criminal law has developed complex doctrines addressing such 'shared responsibility'. Those most applicable to the facts of the 'hell-ship' cases are the doctrines of joint criminal enterprise (JCE) and co-perpetration. The JCE doctrine's origins are popularly attributed to the ICTY's *Tadić* case.[74] According to the ICTY in *Tadić*, customary international criminal law recognizes three different forms of JCE, all of which emphasize the defendant's conscious subscription to a larger criminal plan.[75] The institutional form of JCE, commonly referred to as JCE II, applies to crimes committed within a system or institution. In contrast, the ICC addresses 'shared'-responsibility', using the doctrine of co-perpetration.[76] This doctrine has been discussed by the ICC Pre-Trial Chamber, but it has yet to be applied at the trial level.[77] These two doctrines link a defendant to the crime charged based on his or her conscious participation in a larger criminal institution or plan that has enabled the crime's commission.

To be held responsible based on JCE II, a defendant has to be aware of the system's criminal nature, 'knowingly participate' in it, and intend to further the system's criminal purpose.[78] The 'hell-ship' defendants must therefore be shown to have been aware of and to have intended to further the 'hell-ship' system's criminal purpose of transporting POWs in abusive manner, with complete disregard for their rights. In contrast, to be held responsible pursuant to the ICC's co-perpetration doctrine, a defendant must have consciously shared in a common agreement that has a criminal element.[79] This agreement need not be explicit.[80] He or she must also intend, know, or at least accept that the

73 *Singapore Maru trial*, *supra* note 29, closing address by Defence Counsel, at 1.

74 Judgment, *Tadić* (IT-94-1-A), Appeals Chamber, 15 July 1999, at §§ 185–229. As observed by Boas, Bischoff and Reid, *supra* note 71, the ICTY first articulated the idea of JCE in the *Furundžija* Trial Judgment. See Judgment, *Furundžija* (IT-95-17/1-T), Trial Chamber, 10 December 1998.

75 For a description of the three different types of JCE, see *Tadić*, at §§ 195–220. The first kind of JCE applies to cases in which all participants have the same criminal intent to commit the crime charged. The second kind of JCE applies to 'concentration camp' cases and focuses on the participants' knowledge of the criminal system and intent to further its criminal design. The third kind of JCE applies to participants who took part in a JCE which did not include the actual crime charged but who nevertheless foresaw the possibility of the crime charged occurring in the course of implementing the JCE. The third form of JCE has been much criticized and debated. The ECCC has most recently refused to recognize and apply this third form of JCE, see, Decision on the Appeals against the Co-investigative Judges Order on Joint Criminal Enterprise (JCE), *Case No. 2* (002/19-09-2007-ECCC/OCIJ (PTC38)), 20 May 2010.

76 Art. 25(3)(a) ICCSt.

77 Decision on the confirmation of charges, *Lubanga* (ICC-01/04-01/06), Pre-trial Chamber, 29 January 2007; Decision on the confirmation of charges, *Katanga* (ICC-01/04-01/07), Pre-trial Chamber I, 30 September 2008.

78 Judgment, *Tadić*, *supra* note 74, § 203; Judgment, *Kvočka* (IT-98-30/1-T), Trial Chamber, 2 November 2001, § 308.

79 *Lubanga*, *supra* note 77, § 343.

80 *Lubanga*, *ibid.*, § 345.

agreement's implementation would result in the crime concerned.[81] Thus, to be held responsible as a co-perpetrator, the 'hell-ship' defendants must have at least acquiesced in a common agreement to establish and administer the 'hell-ship' system as an abusive enterprise. They must have known that the implementing of the 'hell-ship' transport system would include, would certainly involve, or would risk the ill-treatment of POWs. Given the defendants' mid-ranking positions within the 'hell-ship' transport system, it would probably be difficult to establish that the defendants knew of the 'hell-ship' system's abusive purpose or had agreed to a plan of establishing a system that included, certainly involved, or risked POW ill-treatment. However, it may be possible to establish such an awareness or acquiescence based on the defendants' behaviour onboard the 'hell-ships'. A number of defendants were argued to have been callous and indifferent towards POWs under their care. For example, the *Asaka Maru* defendants were accused of displaying 'gross negligence', 'callous indifference' and 'deliberate neglect'.[82] One defendant was described as 'not really interested or concerned about the lives of the POWs'.[83] The *Hofuku Maru* defendant was accused of 'gross negligence'; the *Takan Maru* defendant was argued to be guilty of 'neglect, inefficiency and indifference'; and the *Singapore Maru* defendants were described as showing 'apathy and neglect'.[84] Such attitudes, when coupled with the defendants' omissions, may be interpreted to reflect an intention to facilitate or, at least, to accept the 'hell-ship' system's abusive treatment of POWs.

Both doctrines of JCE II and co-perpetration require a certain amount of participation in the larger criminal enterprise or plan before an individual is held criminally responsible for the crime committed. To be held liable based on JCE II, the defendant must be involved in the criminal institution concerned.[85] Earlier JCE II case law did not clearly specify the exact amount of involvement required. Such participation could be demonstrated by the defendant's position of authority within the criminal institution.[86] In contrast, the ICC's doctrine of co-perpetration requires a defendant to consciously have 'overall control' over the crime; he should have the ability to frustrate the crime's commission.[87] However, more recent JCE II case law has required a higher level of

81 This agreement must have an 'element of criminality' but does not have to be directed at the commission of the actual crime concerned. *Lubanga*, *ibid.*, at § 344. The criminal element need not be present from the very beginning as long as the co-perpetrators are aware that it is likely to surface in the circumstances. H. Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Criminals* (Oregon: Hart Publishing, 2009), at 274.

82 *Asaka/Hakusan Maru trial*, *supra* note 29, abstract of evidence cited in opening address by the Defence, at 1.

83 *Asaka/Hakusan Maru trial*, *ibid.*, closing address by the Prosecution, at 4.

84 *Hofuku Maru trial*, *supra* note 29, closing address by the Prosecution, at 2; *Takan Maru trial*, *supra* note 30, closing address by the Prosecution, at 1; *Singapore Maru trial*, *supra* note 29, closing address by the Prosecution, at 8.

85 Judgment, *Krnojelac* (IT-97-25-A), Appeal Chamber, 17 September 2003, § 96.

86 *Tadić*, *supra* note 74, § 203.

87 *Lubanga*, *supra* note 77, § 342.

contribution on the part of a defendant. A defendant is to make a 'significant' contribution to the criminal institution.[88] He or she must have made the system more 'efficient or effective'.[89] The difference between more recent articulations of JCE II and co-perpetration thus lies in the amount of participation that separates 'overall control' from 'significant' contribution.

In brief, to hold the 'hell-ship' defendants liable on the basis of more recent JCE II definitions, the defendants' omissions must be shown to have significantly contributed to the criminal objectives of the 'hell-ship' system. They must also have known of the 'hell-ship' system's criminal nature, namely its systemic abuse of POW rights. To hold the 'hell-ship' defendants responsible as co-perpetrators, the defendants must have each consciously exercised control over the POW ill-treatment that took place. Each could have frustrated or prevented such ill-treatment. The defendants must also have agreed or acquiesced to the implementation of a common plan of transporting POWs that included, would certainly involve, or would risk POW ill-treatment.

Shared responsibility arguments made in the 'hell-ship' cases more closely approximate earlier JCE II definitions. By occupying mid-ranking positions within the 'hell-ships' system, the defendants enabled the efficient functioning of the 'hell-ship' system. It may be harder to hold the defendants liable under more recent JCE II definitions or the ICC's doctrine of co-perpetration, as the defendants did not occupy sufficiently senior positions that enabled them to 'significantly' contribute to the 'hell-ship' system or to exercise control over the crime. A number of 'hell-ship' defendants pointed out that their requests for additional provisions and space had been ignored. However, despite their mid-ranking *de jure* positions, the defendants may have had de facto control over the crime.[90] For example, though the 'hell-ship' defendants were not legally empowered to alter allocated rations or accommodation, they could have taken steps to reorganize rations or accommodation to alleviate POW suffering.

B. The 'Hell-ship' Defendants as Supporters: Aiding and Abetting

Even if the 'hell-ship' defendants were not sufficiently involved in the 'hell-ship' system to deserve the label of JCE participant or co-perpetrator, they may be held liable as secondary actors who contributed to the ill-treatment of POWs by others. Aiding and abetting as a form of participation is well-accepted in international criminal law.[91] The defendant is not involved in directly bringing about the elements of the crime itself. Nevertheless, he or she has facilitated

88 *Tadić*, *supra* note 74, §§ 195–228; *Kvočka*, *supra* note 78, § 308; Judgment, *Martić* (IT-95-11-A), Appeals Chamber, 8 October 2008, § 172.

89 *Kvočka*, *supra* note 78, at § 309.

90 I would like to thank the reviewers for their helpful observation on this point.

91 Aiding has been defined as 'giving assistance to someone' while abetting refers to 'facilitating the commission of an act by being sympathetic thereto'. Judgment, *Akayesu* (ICTR-96-4-T), Trial Chamber, 2 September 1998, § 484. For an overview of aiding and abetting, see Cassese, *supra* note 70, at 214–218. This mode of liability is also recognized in Art. 25(c) ICCSt.

the crime's commission through his or her actions or omissions. The aiding and abetting doctrine distinguishes between principal actors, who directly bring about the crime, and secondary actors, who indirectly support the crime's commission.

The ICTY and ICTR have set out the general doctrine of aiding and abetting in substantial detail. The aider or abettor does not need to share the criminal purposes or intent of the primary actor. However, he or she should intentionally act with the knowledge or awareness that his or her act will assist the perpetrator's commission of the crime.[92] He or she must also be aware of the essential elements of the crime committed by the physical perpetrator.[93] In order to qualify as an aider or abettor, a defendant's positive act or omission needs to have a 'substantial effect' on the principal actor's commission of the crime.[94]

While the doctrine of aiding and abetting is well-accepted, its specific application to omissions is more contentious. The ICTY has consistently held that omissions may, in principle, amount to aiding and abetting. However, this has been criticized by a number of commentators.[95] Despite such reservations, in 2009, the ICTY found Mrkšić liable for aiding and abetting on the basis of omissions alone.[96] It should be noted that a defendant's omission may amount to aiding and abetting for different reasons.[97] In some circumstances, a failure to act may amount to a 'tacit approval or encouragement' of the crime concerned.[98] In others, a failure to act may amount to an 'omission proper' resulting from the failure to perform one's legal duty.[99] The 'hell-ship' defendants' omissions would most likely fall within the second category, as breaches of protective duties and based on their mid-ranking positions.

The line between a JCE participant and an aider and abettor is a fine one. This distinction often hinges on the facts of the case such as the nature of the defendant's duties, the duration for which the defendant had performed his duties, and the defendant's knowledge of the criminal system.[100] The 'hell-ship' defendants' level of participation in the 'hell-ship' system would have been crucial to determining whether they were aiders and abettors or JCE

92 Judgment, *Blaškić* (IT-95-14-A), Appeal Chamber, 29 July 2004, § 49.

93 *Furundžija*, *supra* note 74, § 246. The precise crime intended does not need to be known as long as the defendant is aware that one of a number of crimes will probably be committed.

94 *Ibid.*, §§ 234–235, 249.

95 Boas, Bischoff and Reid, *supra* note 70, at 310–315.

96 *Mrkšić*, *supra* note 56.

97 For judicial recognition of how different kinds of omissions with different impacts would be expressed through different modes of liability, see Judgment, *Brđanin* (IT-99-36), Appeals Chamber, 3 April 2007, §§ 273–274; Judgment, *Ntagerura* (ICTR-99-46-A), Appeals Chamber, 7 July 2006, § 338.

98 *Brđanin*, *ibid.*, § 273.

99 *Brđanin*, *ibid.*, § 274.

100 *Krnojelac*, *supra* note 85, § 111. The Appeals Chamber overturned the findings of the Trial Chamber holding that the fact of the case showed that the accused was in fact 'part of the system and thereby intended to further it'. Therefore, he was to be held liable as a JCE participant rather than a simple aider or abettor.

participants. The ICTY has recognized that, in some cases, a defendant who started off as an aider and abettor may 'graduate' through increased participation and become a perpetrator.[101] For example, a defendant may not have been aware of the 'hell-ship' system's criminal purpose if it was his first assignment onboard a 'hell-ship'. Throughout the journey, the defendant would have become aware of POW ill-treatment. Such an awareness, along with inaction, may result in the defendant becoming an aider or abettor. Over time, a 'hell-ship' defendant's increased knowledge, callous attitude, and failure to ensure POW welfare may demonstrate an intention to further the system's criminal purpose as a JCE participant.

C. *The 'Hell-ship' Defendants as Commanders: Culpable Attitudes of Indifference*

Apart from starvation, dehydration and cramped quarters, many POWs were physically abused onboard the 'hell-ships'. Much of this physical abuse was committed by lower-ranking individuals under the authority of the 'hell-ship' defendants. The 'hell-ship' prosecutors argued that the 'hell-ship' defendants should be held responsible for their own physical abuse of POWs as well as that committed by their subordinates. The *Hofuku Maru* defendant had not only engaged in active POW abuse but had also 'allowed the guards a free hand in beating' the POW concerned.[102] In the *Singapore Maru* case, a mid-ranking defendant holding the rank of sergeant was accused of having 'caused or permitted' lower-ranking POW guards to abuse British POWs.[103] Similarly, the *Takan Maru* defendant was accused of failing 'to restrain' lower-ranking POW guards under his supervision from abusing POWs.[104]

As demonstrated by the nature of POW abuse onboard the 'hell-ships', institutional crimes often result from a malfunctioning in the institution's hierarchical structure. Those along the chain of command may have passed on an illegal instruction. They may also have simply failed to prevent, punish or report the crimes of their subordinates. The latter situation involves a failure to act rather than a positive act. Penalizing superiors for such failures to act recognizes that in hierarchical institutional settings, the commission of crimes by lower-ranking individuals results, at least indirectly, from a superior's failure to properly perform his duties of supervision.

Recognizing the important oversight role played by superiors, the doctrine of superior responsibility in international criminal law states that superiors may be held responsible for their subordinates' crimes if they fail to perform certain supervisory duties. Based on today's doctrine of superior responsibility, a superior may be held liable for the crimes of his subordinates when there is a superior–subordinate relationship, if the superior knew or had reason to know that

101 *Kvočka*, *supra* note 78, at § 249.
102 *Hofuku Maru trial*, *supra* note 29, JAG advisory opinion, at 2.
103 *Singapore Maru trial*, *supra* note 29, opening address of the Prosecutor, at 3.
104 *Takan Maru trial*, *supra* note 29, opening address of the Prosecutor, at 2.

the criminal act was about to be or had been committed by his subordinates, and if the superior failed to take necessary and reasonable measures to prevent the criminal act or to punish the perpetrator.[105] There is no need for a causal link between the superior's failure to act and the crimes committed by his subordinates.[106] This doctrine is seen as morally justified as well as necessary for the prevention of crimes in light of the effective control exercised by superiors over those committing the crimes concerned.[107] Under the associated doctrine of executive responsibility, a superior may also be held responsible for crimes committed by those who are not his subordinates if these crimes took place in an area over which he exercised control.[108] An essential condition for the application of the doctrines of command responsibility and executive responsibility is that the superior must have had effective control over the subordinates concerned or the particular geographical area concerned.[109] It is noteworthy that though the 'hell-ship' cases did not make any express reference to the doctrine of superior responsibility, the defendants were argued to have had both *de jure* and de facto control over those who physically abused POWs.

What is interesting about the 'hell-ship' cases is their discussion of the defendants' mental culpability. As mentioned above, pursuant to the case law of the ICTY and ICTR, a superior will only be responsible for his or her subordinate's crimes if he or she is aware of, or is put on notice of, the need to investigate. The 'hell-ship' cases discussed various mental culpability standards. In some instances, the prosecution argued for a purely objective standard of

105 Judgment, *Čelibići* (IT-96-21-T), Trial Chamber, 16 November 1998, § 346.

106 *Blaškić*, *supra* note 92, § 77. Mettraux points out that this position on causation that present-day tribunals take is not supported by customary international law, in particular the post-WWII cases that required some form of causative link between the superior's failure to act and the crime. The superior must have been able to prevent the crime's commission by acting; G. Mettraux, *The Law of Command Responsibility* (New York: Oxford University Press, 2009), at 82–89.

107 I. Bantekas, *Principles of direct and superior responsibility in international humanitarian law* (New York: Juris Publishing, 2002), at 70–73. This reflects present-day understanding that international crimes by their nature are usually organized or condoned by superiors who could have prevented them by intervening. Cassese, *supra* note 70, at 241.

108 This geographically organized form of superior responsibility has been referred to as the exercise of 'executive command' and 'occupation command'. Bantekas, *ibid.*, at 99–104. See E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague: T.M.C. Asser Press, 2003), 147–149. For recent judicial recognition of criminal liability attaching on the basis of command exercised over a detention camp, see *Krnojelac* (IT-97-25-T), Trial Chamber, 15 March 2002, at §§ 495, 497–498. The Appeals Chamber confirmed this by finding that the defendant had jurisdiction over subordinates committing the crimes based his 'responsibility to manage the whole prison'; *Krnojelac*, *supra* note 85, at § 164.

109 Sliedregt notes that command and control are both required to pin criminal responsibility on superiors. However, she also notes how tribunals have not in practice differentiated between field command, occupation command or command over POW and detainee camps. Instead, tribunals have focused on examining if effective 'control' is exercised by the superior over subordinates. In doing so, tribunals have established 'one uniform standard' in deciding whether to attribute responsibility to a superior. Sliedregt, *ibid.*, at 148–149.

mental culpability. For example, the prosecutor in the *Takan Maru* case argued that the defendant should be held responsible for his subordinates' POW abuse because he 'knew or ought to have known' that such abuse was taking place.[110] However, the prosecution also argued in the same case that the defendant was 'criminally negligent' and even 'reckless' in his failure to supervise his subordinates.[111] Despite occasional variations, a common standard of indifference was put forth in the 'hell-ship' cases. The 'hell-ship' defendants were described as being guilty of 'callous indifference', 'gross negligence', 'apathy' or 'criminal negligence'.[112]

By labelling the defendants as indifferent, the prosecution portrayed the 'hell-ship' defendants as consciously adopting an attitude inconsistent with their protection duties. This attitude may lead to failures to notice or obtain information regarding crimes committed or about to be committed by one's subordinates. There are many reasons why a superior fails to act. A superior may fail to act because he was careless or too caught up with other matters. This does not seem sufficiently culpable for one to be labelled a war criminal. A superior may, however, have failed to act because he could not care less or because he was indifferent. Such an attitude is blameworthy. The defendant's moral culpability lies in his or her conscious adoption of an attitude of indifference despite being charged with supervisory duties. This indifference may be made manifest in many ways, for example, by failing to take notice of crimes committed by subordinates or by blatantly ignoring the existence of such crimes.

The 'hell-ship' cases' standard of indifference is not inconsistent with present-day definitions of superior responsibility. The ICTY and ICTR hold superiors liable only if they had, at least, some information that put them on notice on the need to take further investigative action. When a superior fails to act despite having such knowledge, this choice would ordinarily be reflective of an attitude of indifference.

The ICC Statute imposes a slightly different standard for military leaders. A military leader may be held responsible if he or she knew or should have known 'owing to the circumstances at the time' that a crime had been or is to be committed by his subordinates.[113] The 'should have known' standard may be read as imposing a purely objective standard of culpability, resulting in the penalizing of military superiors based on simple inadvertence.[114] The ICC

110 *Takan Maru trial*, *supra* note 29, opening address by the Prosecution, at 2.

111 *Takan Maru trial*, *supra* note 29, JAG advisory opinion, at 1; opening address by the Prosecution, at 2.

112 *Asaka Maru trial*, *supra* note 29, abstract of evidence cited in opening address by the Defence, at 1; *Hofuku Maru trial*, *supra* note 29, closing address by the Prosecution, at 2; *Takan Maru trial*, *supra* note 29, closing address by the Prosecution, at 1; *Singapore Maru trial*, *supra* note 29, closing address by the Prosecution, at 8.

113 The ICC draws a distinction between military and civilian leaders. The former is subject to a 'should have known' standard while the latter is subject to a 'knew or consciously disregarded information' standard: Art. 28 ICCSt.

114 Mettraux, *supra* note 106, at 210. Some commentators have argued for an interpretation of the ICCSt. that emphasizes the phrase 'owing to the circumstances at the time'. According to this

Pre-trial Chamber has recently interpreted 'should have known' to mean that a military superior has 'more of an active duty' to take 'necessary measures to secure knowledge of the conduct of his troops and to inquire, regardless of the availability of information' at the time of the crime.[115] To avoid imposing guilt on the basis of pure inadvertence, the ICC's 'should have known' standard could be interpreted based on the 'hell-ship' cases' standard of indifference. As mentioned earlier, a superior's failure to act despite knowledge generally demonstrates indifference. This is not necessarily true if the defendant had completely no knowledge of his or her subordinates' actions. When then should the defendant be held to have fulfilled the standard of 'should have known'? Drawing on the 'hell-ship' cases standard of indifference, the defendant would fulfil the standard of 'should have known' if his or her absence of knowledge was due to an indifference that is inconsistent with his or her supervisory duties, therefore justifying the accusation that he or she 'should have known'. However, if the defendant's absence of knowledge was not due to any indifference, he or she should not be held to have fulfilled the standard of 'should have known'.

D. The 'Hell-ship' Defendants as Caretakers: Crimes of Neglect

The 'hell-ship' cases also examined a simpler and more direct relationship between the defendants and POW ill-treatment, one that depicted the defendants as primary actors who had caused POW ill-treatment through their negligent omissions. This argument based on negligence holds a defendant responsible as a primary actor. In contrast, the shared responsibility argument holds a defendant responsible based on the impact of the defendant's omissions within the 'hell-ship' transport system. The aiding and abetting argument views a defendant as a secondary actor who assists others in the crime's commission. The superior responsibility argument holds a defendant liable for a crime perpetrated by the defendant's subordinates. However, the argument based on negligence holds a defendant liable for having caused POW ill-treatment by negligently failing to perform POW protection duties.

The 'hell-ship' cases studied the defendants' direct contribution to POW ill-treatment through their negligent failure to perform POW protection duties. For example, in the *Asaka/Hakusan Maru* case, the prosecution argued that the defendant's negligent behaviour 'caused' suffering and harm

interpretation, the circumstances must be such that the superior was aware of some information that would have put him on notice. This interpretation would bring the ICCSt. in line with the case law of the ad hoc international criminal tribunals. R. Arnold and O. Triffterer, 'Article 28: Responsibility of Commanders and other Superiors', in Triffterer, *supra* note 40, 797–844, at 830.

115 Decision Pursuant to Art. 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, *Bemba* (ICC-01/0501/08), Pre-Trial Chamber II, 15 June 2009, § 433.

to POWs.[116] One of the *Singapore Maru* defendants was accused to have 'caused' or 'materially contributed' to POW suffering and deaths by failing to maintain latrine facilities.[117]

The defendants were at various points argued to be grossly negligent or callously indifferent. Today, international criminal law seldom imposes individual criminal liability on the basis of negligence. This reluctance to criminalize negligence is reflected in the ICC Statute where intention and knowledge are recognized as the only mental states sufficiently culpable to attract criminalization.[118] The negligent performance of POW protection duties, even if this leads to POW death or ill-treatment, is not specifically recognized in the 1949 POW Geneva Convention as a grave breach that attracts individual criminal responsibility. POW ill-treatment must be intentional in order for it to be considered a grave breach under the 1949 POW Geneva Convention.[119] In this respect, the 'hell-ship' defendants were held responsible for a war crime that does not fall within the 1949 POW Geneva Convention's 'grave breaches' regime.

However, it may make sense to criminalize certain war crimes based on simple inadvertence rather than conscious wrongdoing. This is especially so if the crimes concerned have sufficiently serious consequences; are not committed in the chaotic conditions of direct warfare; and the defendants concerned had sufficient notice that they could be held responsible on the basis of negligence.[120]

Individuals placed in positions of control over POWs have the ability to inflict severe harm on POWs under their care. This bilateral relationship of control and dependence gives rise to a fiduciary relationship, which generates not only a duty to refrain from intentionally or knowingly causing harm, but also a duty to assume a protective attitude and ensure POW welfare.[121] Due to the relationship of power and dependence between the 'hell-ship' defendants and their POW charges, a failure to perform protection duties takes on a seriousness that justifies the imposition of individual criminal responsibility.

Any such criminalization would however have to be carefully circumscribed to ensure liability based on individual responsibility rather than simple role responsibility. It is noteworthy that the 'hell-ship' cases only required the defendants to take steps that are reasonable and possible.[122] For example, the JAG officer in the *Asaka Maru* case advised against confirming the defendants' sentences because each accused had 'in his sphere' done all that was possible.[123]

116 *Asaka/Hakusan Maru trial*, *supra* note 29, opening address by the Prosecution, at 1.

117 *Singapore Maru trial*, *supra* note 29, opening address by the Prosecution, at 2.

118 Art. 30(1) ICCSt.

119 Art. 130 1949 POW Geneva Convention, *supra* note 26.

120 Cassese, *supra* note 70, at 94.

121 May argues that there are good reasons for using international criminal law to prosecute soldiers for the abuse of POWs or detainees under their care due to the fiduciary duty between the two parties as well as the serious and systemic nature of such crimes. L. May, *War Crimes and Just War* (New York: Cambridge University Press, 2008), 243–247.

122 *Čelebići*, *supra* note 105, § 395; *Orić*, *supra* note 41, at § 329.

123 *Asaka Maru trial*, *supra* note 29, JAG advisory opinion, at § 4.

The 'hell-ship' cases also required a causal link between the defendant's negligent failure to act and the POW ill-treatment.[124]

5. Conclusion

International criminal law has rapidly developed over the last few years, particularly with the judgments of the ad hoc international criminal tribunals and the establishment of the ICC. The international criminal legal field, once open and amorphous, is being rapidly populated with treaties, case law and commentaries. Even as present-day legal concepts continue to harden and solidify, historical records such as the Singapore trials may serve as lessons of inspiration and caution in our journey forward.

As my paper has sought to highlight, the 'hell-ship' cases both reflect and differ from contemporary jurisprudence. For example, the 'hell-ship' cases characterized the defendants' omissions as breaches of POW protection duties. This tracks today's duty-based approach towards omissions. The 'hell-ship' cases also considered different ideas of attribution in seeking to link the defendants to POW ill-treatment on the basis of their omissions. Its ideas of 'joint responsibility' and 'superior responsibility' are similarly reflected in modern-day doctrines of JCE, co-perpetration and superior responsibility.

The 'hell-ship' cases differ from contemporary jurisprudence on a number of issues. As explained above, the 'hell-ship' defendants were held responsible for the acts of their subordinates. Such liability is expressed in today's doctrine of superior responsibility. However, unlike the mental standards required by today's doctrine of superior responsibility, the 'hell-ship' defendants were portrayed as grossly negligent and callously indifferent. Drawing on the 'hell-ship' cases' standard of 'callous indifference', we may develop a more subjective interpretation of the ICC's standard of 'should have known'. In addition, the 'hell-ship' defendants were accused of causing POW ill-treatment by negligently performing their protection duties. International criminal law generally frowns on the criminalization of negligence. However, as demonstrated by the 'hell-ship' cases, such criminalization may be both fair and necessary when based on a fiduciary relationship and when there are severe consequences at stake.

As cautionary tales, the 'hell-ship' defendants' omissions remain as relevant today as during WWII. In the war zone, ordinary structures of order are suspended. Power is severely biased in favour of active combatants. The laws of war and the Geneva conventions establish a regime of rights and obligations aimed at protecting those who are particularly vulnerable. However, the international crimes that grip our imagination, and that international criminal law is best equipped to sanction, are usually crimes involving positive acts of cruelty and malicious intent. The 'hell-ship' trials remind us that in many cases, severe suffering and death may result from unconscious failures to act.

124 Werle, *supra* note 41, at 98.