Omission Liability for War Crime Charges in International Military Tribunal for The Far East

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Abstract:

This paper focuses on omission liability for war crimes at International Military Tribunal for the Far East. The author analyses the legal basis and constitutive elements of this forms of individual responsibility at the Tokyo tribunal and argued that it is wrong to disregard the contribution of Tokyo IMT in terms of omission liability on the grounds that it disrespects criminal principles such as principle of legality and personal culpability. Such a kind of individual responsibility theory may be considered as a precedent of contemporary superior responsibility by nature and also possesses some characteristics of joint criminal enterprise, and the controversial issues as raised in Tokyo IMT should have informed contemporary discussions on principles of liability.

I. Introduction

International Military Tribunal for the Far East or 'Tokyo International Military Tribunal'(Tokyo IMT) was established in 1946, composed of judges from 11 countries, for the purpose of 'meting out stern justice' to Japanese war criminals.[1]28 defendants, including both military commanders and civilian officials, were brought to the tribunal based on charges of crimes against peace, murder, conventional war crimes and crimes against humanity.[2] Previous research showed that the Allied Powers' policy, which to some extent shaped the focus of court sessions and following academic research, put too much emphasis on crimes against peace, presently known as crimes of aggression, while making little account of war crimes and related modes of liabilities.[3] However, in terms of crimes against peace, Tokyo IMT followed the line of reasoning of the Nuremberg International Military Tribunal and did not make much original development,[4] while it made more

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[1] 'Proclamation Defining Terms for Japanese Surrender, July 26, 1945' (Potsdam Declaration), in Neil Boister and Robert Cryer (eds), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (OUP, 2008) 1.

[2] 'Indictment, International Military Tribunal for the Far East' (Indictment), in Neil Boister and Robert Cryer (eds), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (OUP, 2008)16-33.

[3] Tuma Totani, 'The case against the Accused', in Yuki Tanaka, Tim McCormack and Gerry Simpson (eds) *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited* (Martinus Nijhoff, 2010) 147. See also Robert Cryer, Hakan Friman, Darryl Robinson *et al.*, *An Introduction to International Criminal Law and Procedure* (2nd edn, Cambridge University Press, 2010) 116.

[4] The majority judgment held that "In view of the fact that in all material respects the Charters of this Tribunal and the Nuremberg Tribunal are identical, this Tribunal prefers to express its unqualified adherence to the relevant opinions of the Nuremberg Tribunal rather than by reasoning the matters anew in somewhat different language to open the door to controversy by way of conflicting interpretations of the two statements of opinions." See 'Majority Judgment', in Neil Boister and Robert Cryer (eds), *Documents on the Tokyo International Military*

creative illustration on the law in relation to principles of liability for war crimes. This paper aims to fill the gap in the studies of Tokyo IMT by looking into the omission liability for war crime charges.[5]

The contribution of Tokyo IMT is largely overlooked by contemporary scholars partly because of the criticism that it disrespectedsome basic principles of criminal law, especially principle of legality and personal culpability.[6] Some even argue that the post-WW II cases should not be taken into consideration when proving customary rules of international criminal law owing to the court's disrespect with the basic principles of criminal law.[7] This is right to some extent, especially with regards to the court's treatment of the crimes against peace. However, this essay argues that when it comes to theomission liability, Tokyo IMT did not violate the principle of *nullum crimen sine lege*(or principle of legality) as there already existed such a principle of responsibility in international criminal law prior to WW II. Moreover, based on a close analysis of the constitutive elements of the omission liability respectively for military commanders and civilian governmental officials, it can be demonstrated that the court indeed treated seriously with the link between the accused and the physical perpetrators and therefore the principle of personal culpability was to a large extent respected when Tokyo IMT dealt with the accused's responsibility for war crimes.

II. War Crime Charges and Modes of Individual Responsibility at Tokyo IMT

During World War II, Japanese troops committed heinous atrocities in Asia-Pacific region, one of the most notorious event being 'Nanking Massacre' or 'Nanking Rape', where, according to the Majority Judgement,approximately 20,000 cases of rape occurred within the city during the first month of Japanese occupation and over 200,000 civilians and prisoners of war were found to be murdered during the first six weeks of occupation.[8] Despite of disputes around the exact numbers of victims during the horrible events, there was no doubt of the fact that Japanese indeed caused great sufferings to civilians and prisoners of war during the warfare. Even Pal, the Indian Judge - famous for holding that all defendants were not guilty- agreedin his dissenting opinion that 'the

Tribunal: Charter, Indictment and Judgments (OUP, 2008) 81.

[5] There have recently been some articles on modes of liabilities applied at Tokyo IMT. See for example, T. Totani (n 3) 147-61; Gideon Boas, 'Command Responsibility for the Failure to Stop Atrocities: The Legacy of the Tokyo Trial', in Yuki Tanaka, Tim McCormack and Gerry Simpson (eds) *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited* (Martinus Nijhoff, 2010) 163-73; Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal*(Oxford University Press, 2008) 206-37; Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II*(Harvard University Press, 2008) 105-50; Daivd Cohen, 'The Draft "President's Judgment" of Sir William Webb at the IMTFE', in *东京审判研究中心*Dongjing shen pan yan jiu zhong xin (ed), *东京审判再讨论 Dongjing shenpan zai tao lun* (Shanghai Jiao Tong University Press, 2015) 100-12.

[6] Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press 2009) 139.

[7] Barrie Sander, 'Unravelling the Confusion Concerning Successor Superior Responsibility in the ICTY Jurisprudence' (2010) 23 *Leiden Journal International Law*130.

[8] Majority Judgment (n 4) 536-7.

evidence is still overwhelming that atrocities were perpetrated by the members of Japanese armed forces against the civilian population of some of territories occupied by them as also against the prisoners of war'.[9]

Commission of atrocities by Japanese soldiers did not necessarily entail individual liability of the accused, who are high-level military and political leaders not present at the scene of crimes, the judges still need to take consideration into the following questions: whether the atrocities constitute a crime in international law and whether in international law the accused are criminally liable for such offences,[10] in other words, whether there was certain form of nexus between the accused and the perpetrators who physically carried out murders, rapes and other war crimes to hold the former responsible for violation of rules of war.

None of the 28 defendants at Tokyo IMT conducted atrocities personally, the court found some of them guilty for war crimes based on two charges provided by the prosecution. The first was count 54, which accused those who 'ordered, authorized and permitted' the commission of war crimes.[11] But this charge can at most convict *de jure* or *de facto* superiors who have the authority to order, authorize and permit commission of war crimes and can be proved to do so. But it is found by historians that before the occupation of Japan by the Allied Powers, Japanese government had intentionally destroyed many military records which otherwise might be used to prove the order, authorization and permission of war crimes.[12] The challenges brought about by lack of military records that could be used to prove issuance of orders and the desire to convict high-level perpetrators gave rise to count 55, which was devised by the prosecution to charge the accused for their omission. Civilian officials such as Hirota and Shigemitsu, who served as foreign ministers when the crimes were committed, and some military commanders such as Matsui, were found guilty by the court based on count 55 on the grounds that they 'deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance and prevent breaches [of law of war]'.[13]The principle of liability used in count 55, which resembles contemporary doctrine of superior responsibility was referred to as 'negative criminality', 'negative responsibility' or 'responsibility for omission' by some commentators.[14] Different from many contemporary authors who directly use the modern term 'command responsibility', in this essay, I will use the term 'omission liability' to refer to the principle of liability as envisaged in count 55

[9] Dissenting Opinion of the Member from India (Justice Pal), in Neil Boister and Robert Cryer (eds), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (OUP, 2008) 1343.
[10] Ibid, 1339-40.
[11] Indictment (n 2) 32.
[12] Y. Totani (n 3) 155.
[13] Indictment (n 2) 33.
[14] B.V. A Röling and Antonio Cassese, *The Tokyo Trial and Beyond* (Polity Press, 1993) 70; Richard H. Minear, *Victor's Justice - The Tokyo War Crimes Trial* (Princeton University Press, 1973) 67; IMTFE, 'Opinion of Mr. Justice Röling Member for the Netherlands' (Opinion of Justice Röling) 54, <http://www.legal-tools.org/doc/fb16ff/> accessed 27 May 2016.

of the Indictment, considering that the nature of it is not quite clear as itmay be considered as a precedent of contemporary superior responsibility by nature,[15] but it also possesses some of the characteristics of a joint criminal enterprise.[16]

However, some authors criticized that there existed no international law criminalizing superiors' omissions at World War II and only positive offenses sufficed, and therefore Tokyo IMT's conviction of officials, especially civilians, for their omissions constituted *ex post facto* law, violating the principle of legality.[17]The following part of the essay will argue against this criticism by analyzing the legal basis of omission liability at Tokyo IMT.

III. Legal Basis ofOmission Liability for War Crimes at Tokyo IMT

Although the Charter of Tokyo IMT is silent on the omission liability, it was agreed by the majority judges that the applicable law of the tribunal is international (criminal) law. Even the dissenting Judge Pal was willing to accept this.[18] Therefore, the court must find that there existed a violation of law of war by virtue of a failure to prevent atrocities.[19] The sources of international criminal law in post-WW II cases were summarized in the judgment of *Hostage* case as follows: (1) customs and practices accepted by civilized nations generally, (2) treaties, conventions and other forms of inter-state agreements, (3) the decisions of international tribunals, (4) the decisions of national tribunals dealing with international questions, (5) the opinions of qualified text writers, and (6) diplomatic papers.[20]

At the trial, the prosecution listed a number of articles in the Fourth Hague Regulation of 1907 and 1929 Geneva Conventions on Prisoners of War as a legal basis to convict both military and civilian Japanese leaders for violations of law of war. For example, Article 4 of 1907 Hague Regulation stipulates that 'prisoners of War are in the power of the hostile Government, but not of the individuals or corps who capture them'. Article 7 provides that 'the Government into whose hands prisoners of war have fallen is charged with their maintenance'.[21]1929 Geneva Conventions on Prisoners of War contains similar articles.[22] The prosecution interpreted these articles as that

[15] According to Cassese, the doctrine of superior responsibility emerged in its modern form as a discrete and important type of omission liability in the post-war case law. Antonio Cassese, *International Criminal Law*(2nd edn, Oxford University Press, 2003) 200.
[16]Neil Boister and Robert Cryer (n 5) 234.
[17] Richard H. Minear (n 14) 67, 72.
[18] Neil Boister and Robert Cryer (n 5) 233.
[19]Opinion of Justice Röling (n 14) 58.
[20]'II. The Source of International Criminal Law', UNWCC2.csv:1057, at 5 <http://www.legal-tools.org/doc/c03b33/> accessed 30 May 2016.
[21] Hague Conventions IV Respecting The Laws And Customs Of War On Land (adopted 18 Oct. 1907, entered into force 26 Jan. 1910) 36 Stat. 2277, 1 Bevans 631, 205 Consol. T.S. 277, 3 Martens Nouveau Recueil (ser. 3) 461, arts 4, 7, 10-12.
[22] Convention relative to the Treatment of Prisoners of War (adopted 27 July 1929, entered into force 19 June 1931) 118 L.N.T.S. 343, arts 2, 4 and 77.

the government as a whole is primarily responsible for prevention of breaches of these laws of war. Thus every member in the cabinet and their supervisors, and every high officer in the chain of command have the duty to ensure their observance, the violation of which can lead to individual criminal responsibility.[23]

The defense contested the applicability of these two treaties, particularly the 1929 Geneva Convention, which was not ratified by Japan. In relation to the Hague Convention, Japan was bound by it, but the defense argued that the 'all-participation clause' in Article 2 of the Hague Convention requires that the convention can be applicable only if all the belligerents are parties to the Convention. Considering that a number of enemy states were not parties to it, the Hague Convention should not apply.[24]

The majority judgment followed the prosecution's line of reasoning, finding Japan should be bound by the articles because both the rules in Hague Convention and Geneva Convention were customary rules of international law. They found that:

> The fact remains that under customary rules of law, acknowledged by all civilized nations, all prisoners of war and civilian internees must be given humane treatment. It is grossly inhume treatment by the Japanese military forces as referred to in this part of the judgment that is particularly reprehensible and criminal.[25]

Like Nuremberg Tribunal's judgment, Tokyo tribunal also accepted that the relevant Hague rules were customary.[26] This holding is right and can be supported by a lot of state practice and domestic cases before and during World War II.[27] It also proved to be highly influential, and was cited by many following cases.[28]

However, it remains a problem whether the rules of customary law as codified by the Hague Regulations and the 1929 Geneva Convention, which were intended to impose state

[23] IMTFE, Transcripts, pp. 40111-40113, <http://mylib.nlc.gov.cn/web/guest/djsp/trialrecord> accessed on 27 May 2016.
[24] IMTFE, Transcripts, pp. 42481, 40015-40016, <http://mylib.nlc.gov.cn/web/guest/djsp/trialrecord>accessed on 27 May 2016.
[25]'Majority Judgment', 49719-20, in Neil Boister and Robert Cryer (n 4) 578.
[26]'Majority Judgment', 48500-502, in Neil Boister and Robert Cryer (n 4) 105-6.
[27] See *Ex parte Quirin*, 317 U.S. 1 (1942); Trial of Nazi Criminals, 'Their Accomplices and Abettors, No. 81, Verdict of the Military Tribunal in the Case of Atrocities Committed by German-Fascist Invaders in the City of Kharkov and Kharkov Region During Their Temporary Occupation', 15-18 December 1943, <: http://forum.axishistory.com/viewtopic.php?t=43263> accessed on 1 June 2016; Arieh J. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment*(University of North Carolina Press, 1998), 71, 72–73, cited in Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law*, (Cambridge University Press, 2009) 70.
[28]*The Prosecutor v Delalic, Delic, Mucic and Landžo* (Trial Judgment)IT-96–21-T(16 November 1998) para 315.

responsibility,could be applied to hold individuals criminally responsible.[29]Individual criminal responsibility is not a function of state responsibility for the breach of a treaty binding on that state. It arises from the violation by an individual of an international legal obligation imposing upon him or her.[30]Therefore, a better interpretation of the majority opinion would be that along with the rules imposing state responsibility as codified in Hague Regulations and the Geneva Convention, there existed customary rules of individual criminal responsibility with similar contents onthe duty to prevent war crimes. The customary status of individual omission liability could be supported by some international instruments and cases before World War II.

The moral ideas that a superior is responsible to prevent his subordinates from misbehaviors date back to hundreds of years ago, as can be found in the writings of Sun-zi and Grotius.[31] But as a matter of positive law, it is only until early 20th century that the legal doctrine emerged that superiors should be held criminally responsible if they fail to ensure the obedience by their subordinates of rules of war.

The Commission on the Responsibility of the Authors of War and on Enforcement of Penaltiesappointed at the Paris Peace Conference by the victorious allies in the First World War, submitted a'Report presented to the preliminary peace conference', recommended prosecution of the following individuals:

> Allauthorities, civil or military, belonging to enemy countries, however high their position may have been, without distinction of rank, including the heads of state who ordered, or, with knowledge thereof and with power to intervene, *abstained from preventing or taking measures to prevent, putting an end to, or repressing, violations of the laws or customs of war.*[32]

Although the recommendation was opposed by American and Japanese members of the Commission who argued for a strict application of criminal principles and narrowing down the

[29] Actually, it was not until the 1993 Statute of International Military Tribunal for Yugoslavia (article 3) and 1998 Rome State (article 8(2)) that the international community formally codified the rules in Hague Regulations as rules applicable for individual criminality. See William A. Schabas, *An Introduction to the International Criminal Court* (4th edn, Cambridge University Press, 2011) 2.

[30] Roger O'Keefe, *International Criminal Law* (Oxford University Press, 2015) 79.

[31] Sun Tzu, *The Art of War*, trans. S. Griffith (1963), 125, cited in W. H. Parks, 'Command Responsibility for War Crimes', (1973) 62 *Military Law Review* 1, at 3: 'when troops flee, are insubordinate, distressed, collapse in disorder, or are routed, it is the fault of the general. None of these disorders can be attributed to natural causes'; H. Grotius, *De Jure Belli ac Pacis: Libri Tres* (1625), cited in Gideon Boas, James L. Bischoff, and Natalie L. Reid., *Forms of Responsibility in International Criminal Law* (Cambridge University Press, 2007) 145: '[C]ommunity, or its rulers, may be held responsible for the crime of a subject if they know of it and do not prevent it when they could and should prevent it'.

[32]'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties', 14*American Journal of International Law*95 (1920) 121.

scope of responsibility,[33] the report nonetheless reflects the consensus by the majority of international community to impose omission liability for war crimes on individuals.

Omission liability already existed in domestic cases enforcing international humanitarian law after World War I. *Emil Muller* case is such an example. During World War I, Captain Emil Muller was in charge of a German Prisoners of War Camp at Flavy-le-Martel. In 1921, the German Supreme Court found Muller guilty on the ground that he saw the incident of prisoners of war being harshly rebuked by his subordinates but did nothing to stop it. The tribunal held that 'it is to be assumed that the accused at least tolerated and approved of this brutal treatment, even if it was not done on his orders'.[34]

It is also a well-established principle in domestic criminal law that liability may arise from omission as well as commission, as can be found in many domestic legislation and cases. *French Ordinance of 18 August 1944*, for example, provides that superiors who tolerated the criminal acts of their subordinates are equally responsible.[35] Common law also recognizes omission liability on the part of military superiors. In *Franz Schonfield* case, the Judge Advocate made the following remarks:

> In English law, a person can be held responsible in law for the commission of criminal offences committed by others, if he employs them or orders them to act contrary to law. He would, in such circumstances, be criminally responsible for the crimes of his employees whether he was present or not at their commission. Criminal responsibility might also arise, in the case of a person occupying a position of authority, through culpable negligence…[36]

The notion omission liability for war crimes can also be found in academic writings during World War II. Professor Glueck in his treaties on 'War Criminals, their Prosecution and Punishment' published in September 1944 defines 'war criminals' as includes 'persons – regardless of military or political rank – who, … having knowledge that such acts [in violation of law of war] were about to be committed, and possessing the duty and power to prevent then, have failed to do so."[37]

Therefore, although there maybe doubt about the exact scope of omission liability for war crimes,

[33]ibid 152.The American members stressed that the responsibility for omission should only be applied under the satisfactions of the following conditions: knowledge of the facts, power to act, and command responsibility.
[34] 'German War Trials: Judgment in the Case of Emil Muller', 30 May 1921, 16*The American Journal of International Law*14, (1922) 685, 691.
[35] See Ilias Bantekas, *Principles of Direct and Superior Responsibility in International Law*(Manchester University Press, 2002) 96.
[36] Case No. 66 (Trial of Franz Schonfield and Nine Others) , United Nations War Crimes Commission (UNWCC), Vol. XI, pp. 70-71.
[37]Judge Pal, 168, in Neil Boister and Robert Cryer (eds), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (OUP, 2008) 879.

the existence of such a legal doctrine before Tokyo trial was by no means problematical. In this sense, the principle of legality was respected in relation to IMT's treatment of omission liability .

IV. Principle of Personal Culpability and Constitutive Elements of Omission Liability at Tokyo IMT

Tokyo IMT, like various other international criminal courts and tribunals, lay great importance on prosecuting leaders. Those who were charged at Tokyo IMT were tagged as "Class A" war criminals, which denotes that they should be most responsible for international crimes.[38] This is because that only by prosecuting leaders can the collective nature of international crimes be fully captured.[39] But addressing the collective context is only half of the picture of international criminal responsibility. There is also an emphasis by modern international criminal courts and tribunals on the principle of personal culpability, a maximum of both international criminal law and domestic criminal law which proposes that nobody may be held criminally responsible for acts in which he has not personally engaged.[40]

As is noted by some scholars, there exists a tension between capturing the collective nature of international crimes and focusing on individual responsibility.[41] Such a tension can also be found at Tokyo IMT, where the desire to capture the whole picture of atrocities committed by Japanese forces seems to outweigh the need to prove personal responsibility, which gives rise to much criticism. This can be shown by the fact that only about 5% of the Majority Judgment deals with individual responsibilities of the accused while the rest is left for describing the acts of aggression and the atrocities.[42] However, through analysis of the constitutive elements of omission liability as reflected in the Majority Judgment in light of the arguments of the prosecution and defence, as well as the minority judges' opinions, it can be demonstrated that the conviction of the military commanders for war crimes was to a large extent consistent with the principle of personal culpability. As for the conviction of civilian governmental officials for war crimes, opinions among judges vary and a final conclusion cannot easily be drawn on the legitimacy of the tribunal's conviction of civilian officials, the question of which remains highly controversial in contemporary courts and tribunals. This will be illustrated by studying cases against military commanders and civilian officials respectively.

[38]Cheng Zhaoqi, 'Re-Evaluation of Iwane Matsui's War Guilt: Verification of Testimony on the Nanjing Massacre Given by Defendant at the Tokyo War Crimes Trials', 6 *Modern Chinese History Studies* 4 (2008) 9.
[39]Sliedregt (n **Ошибка! Закладка не определена.**) 1187.
[40]*Prosecutor v. Tadić* (Judgment) ICTY-94-1 (15 July 1999) para. 186.
[41] Gerry Simpson, 'Men and Abstract Entities: Individual Responsibility and Collective Guilt in International Criminal Law' in Nolkaemper and van den Wilt (eds), *System Criminality in International law* (Cambridge University Press 2009) 71; James G. Stewart, 'The End of "Modes of Liability" for International Crimes' (2012) 25 *Leiden Journal Internal Law* 165, 167.
[42]Cohen(n 5) 100-12

A. The Case Against Military Superiors

The case against military superiors in Tokyo IMT is considered a precedent of modern superior responsibility. Contemporary jurisprudence listed three elements for superior responsibility, namely:

(i) the existence of a superior-subordinate relationship;
(ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and
(iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.[43]

Considering that the third element is dependent on the first and second element,[44] here we will only focus on the analysis of the first and second element. As can be demonstrated by making a comparison between the law applied at Tokyo IMT and contemporary jurisprudence, the nexus between superior and subordinate by the former is no less stringent than the latter, as both require *de facto* superior-subordinate relationship and an approach based on circumstantial evidence towards *mens rea*.

(i) Superior-subordinate relationship

It may be argued that Tokyo IMT cases attached much importance to a*de jure*position rather than a*de facto* position of the accused, while the latter of which is the decisive factor in contemporary jurisprudence.[45]Some argued that the superior-subordinate relationship is taken for granted when the accused is a military officer in post-world II cases. Thus, the official position in the state hierarchy was enough for the accused to have superior-subordinate relationship over those who physically committed international crimes.[46]

At a first glance, the law applied by the judgment seems to only focus on the *de jure* position and takes it for granted that the responsibility for prisoners shall be rested on:

(1) Member of the government;
(2) Military or naval officers in command of formation 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 navel, having direct and immediate control of

[43]*The Prosecutor v. Mucić et al* (Judgment) IT-96-21 (16 November 1998)346.
[44]Beatrice I Bonafé, 'Finding a Proper Role for Command Responsibility'(2007) 5 Journal of International Criminal Justice 599,605
[45]*The Prosecutor v. Mucić et al.* (Appeal Chamber Judgment) IT-96-21 (8 Feb 2001), para 197; See also O'Keefe (n 29) 202.
[46]Bonafé (n 43) 608.

prisoners.[47]

The judgment held that the above positions shall have the duty to ensure proper treatment of prisoners and to prevent ill-treatment, the violation of which would incur individual responsibility based on count 55.

However, it is argued in this essay that the decisive factor in determination of superior-subordinate relationship in Tokyo IMT was not the *de jure* position, but rather the *de factor* position, which in the words of the Majority Judgment is 'in a position to influence policy'.[48] This can be demonstrated through the transcripts of proceedings, as well as both majority and minority opinions at Tokyo IMT.

The requirement of a *de facto* authority can be found in the conviction of Akira Muto, an officer on the Staff of Matsui from 1937 and July 1938 during which period the Nanking Massacre was committed. The *de jure* position as a military officer in the state hierarchy appears to make Muto responsible for war crimes in Nanking. But in the opinion of the Majority Judgement, at that time Muto was in a subordinate position and could not take steps to stop the atrocities. By contrast, in 1944 when he became Chief-of-Staff to Yamashita in the Philippines, his position allows him to 'influence policy'. He shares responsibility for the gross breaches of the laws of war in Philippines.[49] The decisive factor here is not the *de jure* position held by Muto but whether he actually has the ability to influence policy, which is analogous to contemporary requirement of "effective control".[50]

The requirement of the *de facto*authority to prevent and repress atrocities can also be seen during the debate in the court sessions. During the court debate, both the prosecution and the defendant put much emphasis on whether General Matsui actually have the ability to prevent or repress the atrocities committed in Nanking. General Matsui was the Commander-in-Chief of the Central China Area Army which was responsible for the Nanking fall.[51]He was held criminally responsible for not taking effective measures to abate the atrocities committed by Japanese soldiers against civilians in Nanking and was sentenced to death solely based on this conviction.[52]

In the cross-examination, the prosecution focused on proving that Matsui actually had the power to prevent and punish war crimes. Here are some excerpts from the transcripts of proceedings on the power of General Matsui to enforce discipline of the troops under his command:

[47]Majority Judgment, 48444, in Neil Boister and Robert Cryer (n 4) 83.
[48]Majority Judgment, 49820, in Neil Boister and Robert Cryer (n 4) 614.
[49]Majority Judgment, 49820, in Neil Boister and Robert Cryer (n 4) 614.
[50]*The Prosecutor v. Delalic et al* (Appeal Judgment) IT-96-21 (20 February 2001) para. 192.
[51]Majority Judgment, in Neil Boister and Robert Cryer (n 4) 1365.
[52]Majority Judgment, 49816, 49856, in Neil Boister and Robert Cryer (n 4). 612, 627.

Q: You were the Commander-in-Chief of the Central China Area Army, were you not?

A:Yes.

Q: Are you suggesting to this Tribunal that power of command did not carry with it the power to enforce discipline on the troops under your command?

A: As Commander-in-Chief of the Central China Area Army I was given the power to command operations of the two subordinate armies under my command, but I did not have the authority directly to handle the discipline and morals within these respective armies.

……

Q: And that is because there is an army commander in the units under your command, and you carry out disciplinary measures through your army commander?

A: I, myself, did not have the authority to take disciplinary measures, or to hold court-martial, such authority resided in the commander of the army or the division commander.

Q: But you could order a court-martial to be held either in the army or in the division?

A: I had no legal right to issue such an order.

Q: Well, then, how do you explain your efforts to show that you ordered severe punishment meted out to the guilty for the outrages in Nanking, and that you did everything in your power as Commander of the Central China Area Army to give severe punishment to the guilty.

A: I had no authority except to express my desires as over-all Commander-in-Chief to the commander of the army under my command and the divisional commanders thereunder.[53]

As can be demonstrated in the transcripts, Matsui argued that his *de jure* position as commander-in-chief does not necessarily entail his *de facto* authority to ensure the obedience of law of war by subordinates, the*de facto* authority of which resided in divisional commanders thereunder. The defendant therefore argued that Matsui was not directly responsible for the maintenance of discipline and therefore shall not be held guilty for the war crimes committed by his subordinates.

It was also argued by Judge Pal in his dissenting opinion that the superiors has the duty to take such measures as were within his power to control the troops under his command. But only *de jure* position is not enough to hold the accused criminally responsible, he argued that:

We must not forget the actual area of operation of the army and the normal machinery provided wherewith the commander or the commander-in-chief is expected to exercise this

[53]IMTFE, Transcript 33873-5, 33,784 - 33,880, <https://www.legal-tools.org/uploads/tx_ltpdb/TR16-319-a_04.pdf> accessed 12 January 2017.

control and on the proper functioning of which he is entitled to rely in this respect.[54]

To conclude, despite of the controversies on the factual determination as to whether Matsui actually had the authority directly to prevent or punish the soldiers who physically perpetrated the war crimes, it is a consensus among prosecutors, defendants and the majority and minority judges that the *de jure* position held by the accused merely provides *prima facie* evidence with regards to the superior-subordinate relationship, what is more decisive is whether the accused actually have the ability to prevent or repress the crimes. Even under contemporary law on command responsibility, Matsui might still be held responsible based on command responsibility, regardless of whether he hasdirect authority for the maintenance of discipline or not. Contemporary law on command responsibility as developed by the jurisprudence of the *ad hoc* international criminal tribunals takes a broad interpretation of 'commission of a crime by subordinates' which includes all modes of liability[55] and even includes failure to prevent or punish;[56] it also takes a broad interpretation of 'subordinates' which include those who are not directly subordinate to the superior.[57]As was found by the Chinese domestic court dealing with the war crimes committed in Nanking, there existed a joint criminal enterprise among divisional commanders to commit atrocities against Chinese civilians.[58] If evaluated under contemporary law, General Matsui at least shall be held responsible for failure to prevent or punish the divisional commanders from committing the war crimes by participating the joint criminal enterprise.

(ii) Mental elements

The mental elements of omission liability applied by Tokyo IMT represents an improvement in terms of respecting the principle of personal culpability than that applied by its predecessor, *Yamashita* case, which is considered by many as the first case applying command responsibility.[59]In the latter case, the American military commission considered by many as applying a 'strict liability' test, namely, the commander's knowledge of the crimes was presumed from the official position held by General Yamashita.[60]As a comparison, the test applied at Tokyo IMT is that the superior knew or should have known the commission of the crimes, which were proved through direct or circumstantial evidence.

[54] Judge Pal, 1113, in Neil Boister and Robert Cryer (n 4) 1365.
[55] *Prosecutor v.Blagojević & Jokić* (Judgment) IT-02-60-A (9 May 2007) paras 277-85;*Prosecutor v. Orić* (Judgment) IT-03-68 (30 Jun 2006) para 20.
[56]Elies van Sliedregt, 'The Curious Case of International Criminal Liability' (2012) 10 *Journal of International Criminal Justice*1181-2.
[57]*Orić* (n 53) para 478.
[58]LIU Daqun, 'The Nanjing Trials-Victor's Justice? Revisiting the Case of Tani Hisao', in Daqun Liu and Binxin Zhang (eds.) *Historical War Crimes Trials in Asia* (FICHL 2016) 26.
[59]*US vs. Yamashita*, 327 U.S. 1 (1946), IV LRTWC 1.
[60] But some argued that the mens rea of Yamashita was satisfied which can be proved through circumstantial evidence. William H. Parks, "Command Responsibility for War Crimes", *Military Law Review*, Vol. 62, 1973, pp. 25, 27-28, 87.

The 'should have known' test was considered by Tokyo IMT as to mean 'a duty to know'. The Majority Judgement imposed a duty on the accused to acquire the knowledge that crimes were being committed, and the accused may be held guilty if he is at fault in having failed to acquire such knowledge.[61]The accused shall not be excused solely based on the fact that he received assurances that the crimes won't happen again, he still has a duty to make further enquiry as to whether those assurances were true or not.[62] The superiors also have the duty to infer from prior crimes that such crimes might occur again.[63] In practice, Tokyo IMT usually inferred that the accused actually have knowledge about the commission of war crimes through examining circumstantial evidence. For example, the knowledge by General Matsui was proved by the fact that he was in Nanking in 5 days when the crimes occurred and the crimes committed were in such a large scale, therefore he must have learned the war crimes either through his personal observance or through reports of his staff.[64]

In short, at least from the perspective of military superior's omission liability, the Tokyo IMT represents an improvement in terms of the principle of personal culpability. The law applied by Tokyo IMT put particular emphasis on the nexus between the accused and the lower-level perpetrators and require not only *de jure* position but also *de facto* ability on the part of the accused to prevent and repress the crimes. As to the mental elements, Tokyo IMT requires personal knowledge and duty of the accused to know the commission of crimes. Despite of some controversies on the factual determination, the law applied by the Tokyo IMT is no less stringent than that of today.

B. The Case against Civilian Officials

The Majority Judgement of Tokyo IMT held seven defendants, of whom three were civilian officials, responsible for failure to take adequate steps to secure the observance of law of war in respect of prisoners of war and civilian internees. The principle of liability applied by Tokyo IMT to link the civilian officials to war crimes was usually referred to as 'cabinet responsibility'.[65] The constitutive elements of this responsibility can be summarized as follows:

1) The person was a member of cabinet, 'even though the department of which he has the charge is not directly concerned with the care of prisoners'.[66]

[61]Majority Judgment, 48445, in Neil Boister and Robert Cryer (n 4) 83.
[62]Majority Judgement, 48446, in Neil Boister and Robert Cryer (n 4) 83.
[63]Majority Judgment 48447, in Neil Boister and Robert Cryer (n 4) 84.
[64]Majority Judgment 49815, in Neil Boister and Robert Cryer (n 4) 612.
[65] E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (T·M·C·Asser Press, 2003) 208.
[66]Majority Judgment, 48445-6, in Neil Boister and Robert Cryer (n 4) 83-4.

2) The person 'had knowledge that such crimes were being committed, and having such knowledge they failed to take such steps as were within their power to prevent the commission of such crimes in the future', or he was 'at fault in having railed to acquire such knowledge'.[67]
3) The person omitted or failed to 'secure the taking of measures to prevent the commission of such crimes in the future, he elects to continue as a member of the Cabinet'.[68]

Koki Hirota, who served as Japanese foreign minister during 1937-8, was found responsible for failure to put an end to the atrocities at Nanking in December 1937 and January and February 1938. As Foreign Minister, he discussed the reports of these atrocities with War Ministry in early stages of this terrific massacre and got assurances from the War Ministry that the atrocities would be stopped. He knew that the assurances were not being implemented but he was still content to rely on them, and the atrocities continued for at least a month. Tokyo IMT opined that 'Hirota was derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result.'[69]He was therefore sentenced to death.

Another case was concerning Mamoru Shigemitsu, who was Foreign Minister from April 1943 to April 1945. He received protests after protests from Protecting Powers on mistreatment of prisoners of war and other behaviors violating laws of war in relation to protection of prisoners of war thus he was aware of the commission of war crimes. The tribunal was of the opinion that as a member of Cabinet, he was responsible of the welfare of prisoners of war. He took no measures to have the matter investigated. The majority judgment held that 'he should have pressed the matter, if necessary to the point of resigning, in order to quit himself of a responsibility which he suspected was not being discharged'.[70] In mitigation of sentence, the tribunal takes into account that 'the military completely controlled Japan while he was Foreign Minister, so that it would have required great resolution for any Japanese to condemn them', and therefore only sentenced him to seven years,[71] which is the lowest sentence given to the accused in Tokyo IMT.

The tribunal also acquitted some civilian officials for war crime charges, including Togo Shigenori, Kido Koichi and Kaya Okinori. The tribunal found that Togo Shigenori in his first term as Foreign Minister had taken appropriate measures to ensure the observance of law of war, as he passed on such protests as came to him for investigation, and in several instances remedial measures were taken.[72] As for Kido Koichi, during the war against the Western Powers in 1941 and thereafter, his position (as Lord Keeper of the Privy Seal) was such that he cannot be held responsible for the

[67]Majority Judgment, 48445-6, in Neil Boister and Robert Cryer (n 4) 83.
[68]Majority Judgment, 48446, in Neil Boister and Robert Cryer (n 4) 84.
[69]Majority Judgment, 49791, in Neil Boister and Robert Cryer (n 4) 604.
[70]Majority Judgment, 49830-2, in Neil Boister and Robert Cryer (n 4) 618-9.
[71]Ibid.
[72]Majority Judgment, 49842, in Neil Boister and Robert Cryer (n 4) 622.

atrocities committed.[73]Kaya Okinori, as Finance Minister, was acquitted from war crimes for because there was no evidence.[74]

The cases against civilian officials were subject to much controversy in the minority opinions of judges.The Indian Judge Pal was the only one among the 11 judges of Tokyo IMT who claimed that all of the defendants to be innocent. His dissenting opinion was more than 1,000 pages and was published soon after he came back to India. He did not deny the existence of the atrocities committed by Japanese,[75] and accepted that liability might arise from omission as well as commission,[76]but he held that civilian cabinet members should not be found guilty for their omission. In his dissenting opinion, he argued that:

> As members of the government, it was not their duty to control the troops in the field, nor was it within their power so to control them. The commanding officer was a responsible personage of high rank. The members of the government were certainly entitled to rely on the competency of such high-ranking officers in this respect.[77]

Dutch Judge Röling believed that Tokyo IMT marked a big step forward in upholding omission liability, and some provisions in 1907 Hague Regulations and 1929 Geneva Conventions can serve as the legal basis for it, but he thought the tribunal went too far with respect to the cases of civilian officials.[78]In his separate opinion, Röling held that the omission liability is a very restrictive one. To hold an official criminally responsible for certain acts which he himself did not order or permit, following conditions should be fulfilled:

1. That he knew, or should have known of the acts.
2. That he had the power to prevent the acts.
3. The he had the duty to prevent these acts.[79]

Röling admitted that cabinet members can be held responsible for omission, but stressed that the duty to prevent unlawful acts should not be extended to every member of the cabinet, especially the cases regarding foreign ministers. He held they could not have done more than informing the Minister of Warfare. ‘They could not communicate directly with the commanders in the field.

[73]Majority Judgment, 49806, in Neil Boister and Robert Cryer (n 4) 609.
[74]Majority Judgment, 49802, in Neil Boister and Robert Cryer (n 4) 608
[75] Pal, *International Military Tribunal for the Far East: Dissentient Judgment of Justice Pal*(Kokusho-Kankokai Inc., 1999) 609.
[76]Ibid, 631.
[77]Ibid, 629.
[78]Antonio Cassese, Guido Acquaviva, Mary Fan, and Alex Whiting (eds), *International Criminal Law：Case& Commentary* (Oxford University Press, 2011) 432.
[79] IMTFE, Opinion of Mr. Justice Röling Member for the Netherlands, p. 59, <http://www.legal-tools.org/doc/fb16ff/> accessed 27 May 2016.

Their possibility for action was restricted by the system in which they fulfilled their functions'[80], thus they did not have the power to prevent the acts. Röling also doubted whether these civilian officials had the duty to prevent violations of rules of war. He held that there was a division of labor in Japanese government, and only very limited departments, such as War and Navy Ministers, Home Ministry, Ministry of Overseas Affairs, had the duty to care prisoners of war and civilian detainees, which implies that civilian officials such as Foreign Minister should not be held responsible for failure to prevent acts violating laws of war.

President Webb's judgment can also help in illustrating the law applied in the cases against civilian officials. The well-known president opinion written by the Australian Judge was actually an outline of the full-version of his 'Judgment of the President', but the latter was neither submitted or published. Professor Cohen wrote an article to introduce this full version and Webb's opinions on principles of liability.[81] The major difference between Webb's full-version judgment and the Majority Judgment is that the latter was mainly about responsibility of state in relation to aggression and only around 5% of it deals with individual liabilities, while nearly 60% of Webb's unpublished judgment is about responsibilities of individuals. Had the 'Judgement of the President' been published, the criticism on that Tokyo IMT disrespects the principle of personal culpability might have been abated.

Webb discussed his theory of omission liability in detail in his draft judgment, which requires not only the accused's official positions and their failure to take actions, but also that the accused knew, or had information sufficient to put them on inquiry notice, the commission of war crimes.[82]He also mentioned, that in order to put an end to the atrocities, civilian officials such as Tojo Hideki or Koki Hirota should make protests or petitions to the emperor of Japan, and if necessary, trigger a crisis in the Japanese government. They should be responsible for the war crimes as they knew or should have known the commission of war crimes but failed to take possible measures within their power to stop the crimes. Webb also insisted that the emperor of Japan has the most supreme authority in Japan to make decisions regarding peace and war,[83]thus he believed that the civil officials have the duty to report the atrocities to the cabinet or even to emperor Hirohito for the purpose of preventing or repressing war crimes. He also agreed with the strict duty of resign imposed by the majority opinion to cabinet members like Shigemitsu.[84]

Generally speaking, the case against civilian officials is more controversial than that against military officials. The main problem lies in the factual determination of whether the civilian

[80] B.V.A Röling and Antonio Cassese, *The Tokyo Trial and Beyond* (Polity Press, 1993) 74-75.
[81]Cohen (n 5) 100-10.
[82] Ibid, 107.
[83]Ibid, 108.
[84]Ibid, 108-9.

officials being charged actually have the *de facto* authority to prevent or punish international crimes.Despite such controversies, the conviction of civilian officials was common in post-war cases.[85]The 'cabinet responsibility' put more emphasis on horizontal relationship between cabinet members rather than vertical relationship between superiors and subordinates. Therefore, some argued that Tokyo IMT's cabinet responsibility had better be seen as a form of joint criminal enterprise.[86]The case against civilian superiors also demonstrates the difficulty in determining the superior-subordinate relationship with regards to superiors other than military commanders, which remains problematic today. The Appeals Chamber of International Military Tribunal for Rwanda has held that the effective control that must be established in respect of a civilian superior is not necessarily the same as that exercised by a military commander.[87] Article 28 of Rome Statute also distinguishes the requirement of superior-subordinate for military superiors and civilian superior respectively.[88] It was not the purpose of this essay to give any great answers to the difficult issues on responsibility of civilian officials. The point is more to show that these problems are far from new: they were already present in the Tokyo IMT, especially in the separate and dissenting opinions. Had a greater degree of interest been shown in them after the event, the discussion could have started further ahead than it did when the statutes of ICTY, ICTR and Rome Statute were being drafted.[89] There was considerable discussions in the Tokyo IMT that should have informed later discussion on command responsibility. Sadly, as can be seen, it did not.

V. Conclusion

The controversies on omission liability demonstrate the tension inherent in international criminal law as between the need to capture the collective nature of international crimes and the focuses on individual criminality. The majority judgment put more attention on the collective crimes while the discussion on individual criminality is relatively less. But this does not mean that the court does not care much about the basic principles of criminal law.As is reflected by the law applied by Tokyo IMT, its respect of the principle of legality and personal culpability at Tokyo IMT is, if no better than, at least the same as many other international criminal courts. However, Tokyo IMT's contributions and discussions were overlooked when similar issues arose in ICTY, ICTR and ICC.To overlook Tokyo IMT based on the ground that it disregards basic principles of criminal law was unfair given the fact that many other controversial cases such as *Yamashita* case,

[85]Ibid, 109.
[86] Neil Boister and Robert Cryer (n 5) 234.
[87]*The Prosecutor v. Ignance Bagilishema* (Appeal Judgment) ICTR-95-1A (3 July 2002) paras 52 and 55;See also O'Keefe (n 30) 203.
[88]Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute) art. 28.
[89]Robert Cryter, ' Command responsibility, the Tokyo Tribunal and modern international criminal law', in Kirsten Sellars (ed) *Trials for International Crimes in Asia* (CUP, 2016) 74.

notorious for failure to respect personal culpability, are still cited frequently.[90]Tokyo IMT, established based on the proclamation of a joint organ of states, is an international criminal court[91] and therefore its judgment, by definition, represents internationally authoritative, albeit not necessarily conclusive statements as to the content and existence of omission liability for war crimes and should**not** be given less attention than decisions of municipal courts (such as Yamashita case, and those cases heard by Nuremberg Military Tribunal established under Control Council Law No. 10),the latter of which constitute no more than state practice and *opinio juris* on the part of the forum states.[92]History repeats itself. The lessons learned from Tokyo IMT, good or bad, should and should have informed latter discussion of international criminal law.

[90]Neil Boister and Robert Cryer (n 5) 3.
[91]O'Keefe (n 30) 89.
[92]Ibid, 110.