The Australian Trials of Class B and C Japanese War Crime Suspects, 1945–51

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Abstract

This article examines the legal issues arising from the Australian trials of Class B and C Japanese war crime suspects that took place between 1945 and 1951, with a view to discerning the various considerations at play in the question of 'victors' justice'. It begins by canvassing the background of the Australian trials, and then turns to consider the procedural and substantive legal issues that surfaced. It is shown that, in many respects, the Australian trials did not meet the international standards of justice that we have become accustomed to today — mainly due to the inadequacies of the war crimes legislation in place at the time. Nevertheless, it is concluded that the 'victors' justice' question unhelpfully frames these inadequacies as ones motivated by revenge, which does not accord with the conduct, for the most part, of the officers of the military tribunal, and the manner in which they interpreted and applied the war crimes legislation and legal precedent. Instead, this article argues in favour of a more beneficial approach to drawing upon the experiences of the Australian trials, one that goes beyond the confines of the assumptions inherent in the question of 'victors' justice'.

Introduction

In 1985, the late David Sissons, an Australian historian who had dedicated a great part of his life to researching Japan-Australia relations and the post-war Japanese war crimes trials, wrote an article for the *Sydney Morning Herald* that began with a telling anecdote. It described an incident involving a visiting Japanese author who had brought Mr Sissons a photograph of a monument erected on Mt Sagane commemorating the Japanese men sentenced to death in the Australian war crimes trials, which had inscribed on it the words: '[t]hese trials were nothing more than vengeance, the proud victors exercising arbitrary judgment over the vanquished'. The visiting author had asked him whether he agreed with the sentence — '[t]he question called for a "yes" or "no" answer. I'm afraid my reply must be more complex' was the measured position of Mr Sissons.[1]

In considering the war crimes trials conducted by Australia from a legal perspective and the question of 'victors' justice' that inescapably crops up in a study of this nature, this article arrives at a similar conclusion. These trials, which took place from 1945 to 1951

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[1] David Sissons, 'The trials: were they justice or vengeance?' *Sydney Morning Herald* (Sydney), 26 August 1985, 9.

under the *War Crimes Act 1945* (Cth) (*WCA*), in many respects fell short of the international law standards of justice that we have evolved today. Yet, at least in a great majority of cases, there was nevertheless a notable exercise of legalistic restraint and an effort to achieve procedural integrity (despite the shortcomings of the *WCA*), which belies a simplistic view that the Australian trials were nothing more than vengeance disguised as law.

There are several ways in which the trials conducted by the Australian military tribunal could be categorised for examination. One way is by the nature of the victim — for example, whether the victim was a civilian or prisoner of war (POW); or by the nationality of the victim. Another method might be the nature of the crimes — whether they were massacres, ill-treatment of POWs, illegal medical experiments and so on. Although a comprehensive study of the war crimes tried by Australia would demand that material be organised under such rubrics, in this article the discussion is organised under the legal issues that emerge from the Australian trials. Individual cases are referred to in the course of discussion, but this article does not purport to examine the range of the 296 trials.

After briefly considering the background of Australia's war crimes trials, this article examines the procedural and substantive legal issues arising from those trials, with a view to discerning the various considerations at play in the question of 'victors' justice'. In so doing, it is hoped that this article will contribute to filling a conspicuous scholarly lacuna in this area of Australian legal history.[2] Aside from the limited secondary sources available, the article draws upon primary sources from the Australian War Memorial (AWM) and National Archives of Australia (NAA) in the form of court transcripts and documents, as well as materials in Japanese. Diacritics in Japanese words are omitted and, in keeping with their naming style, surnames precede first names when referring to Japanese appellations. Unless otherwise indicated, all English renditions of Japanese words are mine, as is responsibility for their accuracy.

1. Background and overview of the Australian trials

When viewing post-war Australian policy towards Japan, including the manner in which the war crimes trials were conducted, several features stand out against the policies adopted

[2] The dearth of scholarship on the subject is surprising considering that these war crimes trials were Australia's first significant participation in enforcing international law on the global stage. Further, as McCormack points out, it is astounding that the Australian trials — and Allied Class B and C trials more generally—have been neglected to this extent, given that the International Military Tribunal of the Far East (which has received comparatively more academic attention than the Class B and C trials) awarded only seven death penalties and 18 prison sentences compared with the 148 death sentences and 496 prison sentences confirmed as a result of the Australian trials. If one leaves aside the scattering of short articles and chapters, the only comprehensive treatment of the Australian trials are two doctoral theses written in the last decade by Caroline Pappas and Michael Carrel, and perhaps a 66-page paper by Sissons. See Caroline Pappas, *Law and Politics: Australia's War Crimes Trials in the Pacific, 1943–1961*, (PhD thesis, University of New South Wales, 1998); Michael Carrel, *Australia's Prosecution of Japanese War Criminals: Stimuli and Constraints*, (PhD thesis, University of Melbourne, 2005); David Sissons, *The Australian War Crimes Trials and Investigations (1942–51)* (2006) <http://socrates.berkeley.edu/~warcrime/documents/Sissons%20Final%20War%20Crimes%20Text%2018-3-06.pdf>. Regarding scholarship on the post-World War II war crimes trials, McCormack comments that, while there have been numerous studies on the Nuremberg trials of German and Italian war criminals, studies on the Tokyo Trials are manifestly fewer in number and there is an even smaller measure of scholarship on the trials of Class B and C Japanese war crimes suspects conducted by the Allied nations. Of these, trials conducted by Australia have received least attention of all. See Gavan McCormack 'Apportioning the blame: Australian trials for railway crimes' in Gavan McCormack and Hank Nelson (eds), *The Burma-Thailand Railway: Memory and history* (Allen & Unwin: 1993), 85.

by other Allied powers. For one, Australia began investigations on Japanese war crimes in 1943, before any other Allied nation, spurred by mounting evidence of Japanese atrocities that emerged from 1942. These investigations were the three Federal Government-commissioned inquiries that took place under the leadership of Sir William Webb, conducted and collated in reports between June 1943 and January 1946. Many of the findings would later be used as evidence by the prosecution. Second, the Australian trials are noted for their extended duration: they lasted until mid-1951, one-and-a-half years longer than the other Allied trials, in spite of recommendations from the Far Eastern Commission (FEC) to conclude trials by 30 September 1949. Finally, it is an oft-remarked fact that Australia took a strong stance on the issue of indicting the Japanese Emperor, unheeding of the political pragmatism embraced by the United States (US) and Britain, which thought it best to '[use] the Imperial throne as an instrument for the control of the Japanese people'.[3] General MacArthur, the Supreme Commander for the Allied Powers (SCAP) in charge of Japanese occupation, deemed he would need 'at least one million reinforcements should such action [as the indictment of the Emperor] be taken. I believe that if the Emperor were indicted, and perhaps hanged, as a war criminal, military government would have to be instituted throughout all Japan, and guerrilla warfare would probably break out'.[4] Unmoved, however, by such political considerations and expedients driving occupation policy at the time, Australia continued to demand that the Emperor, as Head of State and Commander-in-Chief of the Armed Forces, not be given immunity, until the matter was finally settled by a vote in 1946 among the prosecuting nations of the International Military Tribunal for the Far East (IMTFE) that immunity was to be granted.[5]

All of these features of post-war Australian policy — the early war crimes investigations, extended duration of the trials and demand for the Emperor's indictment — reflected Australia's deeply-felt fears of Japanese military aggression, which was experienced as an immediate reality due to the country's geographical proximity and the air-raids suffered directly at the hands of the Japanese military in Darwin. Given the intense threat that Japan had posed and the reports of wartime atrocities uncovered by the Webb inquiries, it is not surprising to find that much public opinion and press coverage in the immediate post-war years was decidedly anti-Japanese, and a desire for retribution could certainly be found among these sources.[6] It should also be borne in mind that this

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[3] National Archives of Australia (NAA): A5954, Box 453 — Cable from the British Government to Australia — From Dominions' Secretary, Cable No 303, 17 August 1945.

[4] General MacArthur quoted in Mikiso Hane, *Eastern Phoenix: Japan Since 1945* (Westview Press: 1996), 17.

[5] For a discussion on Australia's post-war position on the indictment of the Emperor, see David Sissons, 'Osutoraria ni yoru senso hanzai chosa to saiban — Tenno menseki ni itaru katei [Australia's war crimes investigations and trials — how the Emperor came to be granted immunity]' in *Kindai Nihon to Shokuminchi Vol. 8: Ajia no Reisen to Datsushokuminchika* [Modern Japan and Colonialism: Cold War and Decolonisation in Asia], Iwanami Koza Series (Kosuga Nobuko trans, 1993).

[6] For example, the NSW RSL President was reported in the *Daily Telegraph* (Sydney) as uttering the following words:

> If the Japanese had been found guilty shortly after the war finished they would most likely have been shot, but now it's the old story of letting bygones be bygones. Our own boys suffered at the hands of these jungle apes, yet our own military leader is exercising the power to reprieve them. There should only be one sentence for them — death. Then this would be too swift for them. There is no shortage of executioners, if that is what is holding the Government or the Army up. I know of plenty of ex-prisoners of war who would willingly do the job free.

[footnote continued on the next page]

was during the peak of the White Australia policy, and racist propensities had informed both Australian and Japanese wartime propaganda.[7]

Nevertheless, the celebrated words of Attorney-General and Minister for External Affairs Dr Evatt in 1945 were those disavowing vengeance:

> If those responsible for those outrages are allowed to escape punishment, it will be the grossest defeat of justice and a travesty of principle for which the war has been fought. In its demand that all Japanese war criminals be brought to trial, the Australian Government is actuated by no spirit of revenge, but by profound feelings of justice and of responsibility to ensure that the next generation of Australians is spared such frightful experiences.[8]

The 'justice' called for by Evatt entailed bringing Japanese war criminals to 'full account' for their conduct in war irrespective of their office.[9] In a number of ways, the manner in which Australia conducted its trials reveals an endeavour to follow the aspirations of Evatt (though, of course, the quality of justice remains a sticking point in the debate). Australia's trials were thorough (save perhaps those of Manus Island, which were conducted under a time constraint), and one Japanese commentator has remarked that, compared to other Allied trials, many minor offences seem to have been included for prosecution.[10] Yet, while the prosecution was rigorous, there was nevertheless a visible exercise of restraint when it came to the final outcomes. After China, Australia recorded the most number of acquittals among the Allied nations trying Class B and C Japanese war crime suspects.[11] In addition, many of the sentences handed down reveal a marked degree of leniency, so much so as to at times provoke an outraged reaction from the Australian public.[12]

According to the records of the Army Headquarters, Australia conducted a total of 296 trials, against 924 individual defendants, where findings and sentences were confirmed.[13]

'Soldiers Want Guilty Japs to Die', *Daily Telegraph* (Sydney), 22 February 1946 in NAA: MP 742/1, 336/1/980 — War Criminals — Secretary's File, referred to in Carrel, above n 2, 126.

7 As Hugh Clarke says of his experience at Nagasaki, '[m]y generation had been brought up under the influence of the White Australia policy and considered ourselves superior. Our attitude to our captors had, at all times, been defiant and arrogant. We sabotaged anything we touched': Hugh V Clarke, *Last Stop Nagasaki* (Allen & Unwin: 1984), 65.

8 A statement by Evatt 10 September 1945 in H V Evatt, *Australia in World Affairs* (Angus and Robertson: 1946), 68.

9 Ibid 66.

10 See for instance the commentary of Hayashi, who has researched various Class B and C Allied trials of Japanese war crimes: Hayashi Hirofumi, *BC-kyu Sempan Saiban (Class B and C War Crimes Trials)* (Wanami Shoten: 2005), 91.

11 Ibid 89. The high number of acquittals of course could be a result of Australia's meticulous approach to prosecuting even minor offences.

12 See Carrel, above n 2, 128–30.

13 On the number of trials see NAA: MP 742, A336/1/29 — Table compiled by AG Coordination, Army Headquarters in 1958. Sissons, however, states that although the total number of trials is listed as 296 in these records, there was an error of one in the total of Labuan trials, perhaps because the trial of Yamamoto Shoichi (M36) was mistakenly added (in which findings were not confirmed) and, thus, the figure should in fact read 295. Also note that this figure excludes the five trials where the proceedings were aborted before a finding was made or where findings were not confirmed because the same accused were later tried on identical charges. See Sissons, above n 2, 19, fn 7. Concerning the number of individual defendants, although the Army Headquarters table displays the total number of persons tried as 924, this reflects the fact that some defendants were tried in more than one trial. The actual number of individual defendants was 814. See Sissons, above n 2, 20, fn 8. In this article, the figures are kept as they appear in the Army records, as otherwise it becomes a highly complex task to adjust all the figures of convictions, acquittals and sentences to account for those tried more than once. Note that the number of trials and number of 'accused tried' that appear in 'Table B Statistics — Australian War Crimes Trials' in Carrel's thesis (2005), which he compiles from various AWM records (AWM226, 14; AWM226, 15; AWM226, 16;

[footnote continued on the next page]

Of these, 280 were acquitted and 644 convicted, with death sentences (either by hanging or shooting) given to 148 defendants and prison sentences to 496 defendants (of which 39 were given life sentences; 156 received sentences of 11–25 years; and 301 were given sentences of 10 years or less).[14] Australia's war crimes trials took place from November 1945 to May 1951 in various locations in the Pacific: Morotai, Wewak, Labuan, Ambon, Rabaul, Darwin, Singapore, Hong Kong and Manus Island.[15]

The trials were conducted by military courts under the *WCA*, which was closely modelled on the British Special Army Order 81/1945 — though it added the crime of aggression to the list of war crimes an Australian court could prosecute, as well as the crimes of cannibalism and mutilation of the dead, bringing to bear some of the disquieting findings of the Webb inquiries.[16] These military tribunals, which were to 'consist of not less than two officers in addition to the President of the court', had jurisdiction to try persons charged with committing war crimes against 'any person who was at any time resident in Australia' or against a British subject or citizen of an Allied Power.[17] The *Regulations for the Trial of War Criminals 1945* (Cth) ('*Regulations*') provided further details on trial procedure and referred to several provisions in the *Army Act* and the *Rules of Procedure* that should or should not apply to the war crimes trials.[18] The *Regulations* further allowed the Convening Officer the option to appoint a Judge Advocate to advise on legal matters (reg 5).

The procedural issues that arise from the *WCA* and the *Regulations* will be discussed further in the following section. Suffice to say here that the Australian war crimes legislation, by its very nature, envisaged somewhat summary trials, and reasons for the Court's decisions were not usually discussed as in civil courts.[19] There was no appeal process — though the petition procedure often served as a form of de facto appeal — and no specific requirements for legally trained officers to be present in the trials.[20] The shortage of financial and human resources was a tangible constraint on all Australian trials, leading to much inefficiency and, doubtlessly, a compromise of the quality of justice achieved.

AWM226, 17), differ from those of the Army Headquarters (NAA: MP 742, A336/1/29) because Carrel includes in his table those trials where findings and sentences were not confirmed or where the accused was ordered for a retrial. See Carrel, above n 2, 100.

[14] Again, note that due to the fact that certain defendants received the death penalty in more than one trial, the actual number of those given the death penalty should, in fact, be 137. See Carrel, above n 2, 100.

[15] The five executions resulting from the sentences handed down in the Manus Island trials took place in June 1951.

[16] No defendant, however, was charged with the crime of aggression in the Australian trials.

[17] *War Crimes Act 1945* (Cth) ss 5(3), 7, 12.

[18] *Regulations for the Trial of War Criminals 1945* (Cth) regs 4, 7, 10, 18. The *Regulations* stated that the Convening Officer should 'so far as is practicable…appoint as many officers as possible of equal or superior relative rank to the accused' (reg 8). As Sissons, above n 2, 22, points out, however, this latter provision was largely ignored.

[19] It has been noted that in 1949 the *Third Geneva Convention on the Treatment of Prisoners of War* was revised so as to stipulate that three weeks should elapse after the delivery of the charge and the commencement of the trial, but in one Morotai trial (M43), a couple of years before this revision took place, two of the three accused were charged on a Saturday afternoon, sat in court on Monday and were sentenced to death on Thursday. See David Sissons, 'War Crimes Trials', *Australian Encyclopaedia* (5th ed, 1988), 2981. Nelson remarks that this was probably the fastest of all the 296 trials conducted by Australia. See Hank Nelson, 'Blood Oath: A Reel History', (1991) 24(97) *Australian Historical Studies* 429, 436.

[20] Carrel, above n 2, 83; Sissons, above n 2, 8, 22.

That the peacetime volunteers of the Australian Army Legal Corps (AALC) were stretched to the limit after demobilisation of the war-time army is widely noted. In one case, there was such a shortage of legal staff that when the two captains were not acting for the accused's counsel assisting the defence, they served as Judge Advocates.[21] Other cases were even less fortunate: in two of the Labuan and one of the Rabaul trials, there appeared to be neither a Judge Advocate nor legally qualified members present to assist the Court.[22] In contrast to the US, which began to employ civilian lawyers to meet the demands of their war crimes prosecution, the Australian trials remained an Army-run affair until the end, despite the fact that inclusion of civilian legal professionals would certainly have assisted the Court immensely and improved the overall effectiveness and standard of the trials.[23]

The insufficiency of resources suffered by the Army not only affected the staffing of the Court, but also the post-war investigation programme.[24] Further, problems in terms of the collection of evidence were caused by the fact the Japanese Army had engaged in a meticulous concealment of war crimes, exemplified by the establishment of the Committee for the Concealment of War Crimes by the Japanese Eighteenth Army in New Guinea.[25] Concealment of war crimes created difficulties for the trial of the Ocean Island and Kavieng massacres, and there were other instances of misinformation by the Japanese.[26]

As Carrel notes, evidentiary and investigative difficulties were also caused by problems with the identification of Japanese suspects, and the fact that many former Australian POWs and internees had been repatriated and were no longer available for interviewing.[27] There were immense challenges in tracking down the accused, who were often known only

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[21] NAA: A471, 80749 — Proceedings of Military Tribunal — Lt Mitsuba, Hisaneo et al.

[22] NAA: A471, 80911 — Proceedings of Military Tribunal — Cap Nakata, T et al; A471, 80754 — Proceedings of Military Tribunal — Sgt Maj Kuraji Shoji et al; A471, 80745 — Proceedings of Military Tribunal —Sgt Maj Teizo Furukawa. See Sissons, above n 2, 22.

[23] Carrel, above n 2, 147, who discusses the numerous constraints on the Australian trials in some detail, suggests two possible reasons why civilian lawyers were not engaged:

> Firstly, at the time when Sir William Webb was pressing for some form of civilian oversight of the programme, the Army had managed to convince both the Defence and Army Ministers that it had sufficient of its own legal resources to run the trials. It would have perhaps been a considerable back down for the Army to later admit that it actually did not have sufficient of those resources. Secondly, the cost of having to pay for civilian lawyers to serve in remote localities and overseas would certainly have been at a considerable premium to the salaries being paid to equivalent uniformed lawyers. The financial constraints then being imposed on Australia's peacetime Army would likely have made such a proposal difficult to contemplate.

[24] These were under the supervision of the War Crimes Sections set up in Singapore in December 1945 (1 AWCS) and in Tokyo in February 1946 (2 AWCS). The office in Singapore was subsequently relocated to Hong Kong and finally to Manus Island.

[25] This Committee adopted a policy to 'minimise the number of victims and Japanese involved in war crimes; refrain absolutely from talking about other Japanese personnel and, in speaking about oneself, limit statements to matters which must unavoidably be said of one's duties'. The Committee saw that 'matters of war crimes are a fight to the last against the Allied forces': NAA: MP742/1, 336/1/1559 — Concealment of Evidence by Japanese Suspected War Criminals — Australian Mission in Japan, Tokyo, Memorandum 257 dated 19 May 1948, to The Secretary Department of External Affairs, Canberra — Annex A:2.

[26] As late as September 1950, evidence of atrocities committed in Rabaul against Australian and Allied aircrew between May 1942 and April 1944 was being discovered (the late discovery was due to the elaborate program of concealing war crimes that the Japanese Army had adopted). These belatedly discovered crimes, however, would never come to trial. See Carrel, above n 2, 132–9.

[27] Ibid 133.

by a nickname, which may have varied from compound to compound.[28] Even when the Japanese names were known, 'it was invariably in phonetic form with just a surname given [and] differing Japanese and Chinese renditions of similar characters resulted in many Japanese and all Formosans having two names'.[29]

Alongside such challenges, the political environment influenced the course of the Australian prosecution. Australia's war crimes trials were brought to a somewhat hasty close in 1951, largely due to political reasons. By the latter half of 1948, the US occupation policy in Japan had shifted from 'reform to recovery' and SCAP's goal was now for 'an early non-punitive peace treaty with Japan' to reflect the new security interests of the emerging Cold War paradigm.[30] In the words of one scholar:

> The US needed a strong and prosperous Japan as a counter to the extension of Soviet influence in the Asia Pacific region and the growth of Japanese communism. Australia was frustrated by this approach. Until the start of the Korean War in 1950, at least, Australia considered Japan, and not the Soviet Union, to be the greater threat to peace in the Asia-Pacific region.[31]

There was the issue of holding Japanese suspects in detention for prolonged periods without trial, which SCAP invoked in its argument for Australia winding up its trials as swiftly as possible.[32] In the end, pressure from the US and the FEC to conclude the trials quickly, coupled with difficulties in finding a suitable venue to conduct the remaining cases, forced Australia to reach a compromise: it would pursue only those cases where the suspects were charged with serious offences that would merit a death sentence or where there was sufficient evidence to result in a conviction.[33] These final trials, narrowed down to 26 cases involving 91 suspects — practically all involving killing of Australians, were conducted on Manus Island from 1950 to 1951, a location initially deemed to be less than satisfactory due to its remoteness from both Australia and Japan.[34]

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[28] For example in a case of ill-treatment of POWs in Ambon, ex-prisoners were required to match nicknames such as 'Black Bastard', 'Grey Mare', 'Frill Neck', 'Giggling Gertie', 'Muttering Mick', and 'Creeping Jesus' with photos shown to them in order to identify the accused. See Nelson, above n 19, 433. See also Carrel, above n 2, 133.

[29] Ibid; AWM: AWM54, 1010/1/5 — Report on War Crimes Investigations, British Borneo by HQ 9th Australian Division, circa December 1945. See also Pappas, above n 2, 125–6, for a discussion of identification problems.

[30] See Philip R Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East 1945-1951* (University of Texas Press: 1979), 136.

[31] Carrel, above n 2, 208.

[32] A letter from SCAP to the Australian Mission in Tokyo dated 20 October 1949 read: 'More than four years after the termination of hostilities and from one to two years after the original apprehension of the majority of the suspects, their continued incarceration without specific charges and without even a certain prospect of eventual trial can scarcely be reconciled with fundamental concepts of justice': NAA: MP742/1, 336/1/1203 — GHQ SCAP Diplomatic Section letter APO 500, dated 20 October 1949.

[33] Real estate shortages in Singapore and Hong Kong ruled out those locations for the trial venue, and the US, with its goal to achieve a peace treaty with Japan as soon as possible, refused repeated requests to hold the trials in Japan — a location deemed to be most practical in conducting the remaining trials. See Carrel, above n 2, 211–27.

[34] General MacArthur had recommended that Australia confine its final trials to nine cases involving 15 suspects, but some of the cases were later subdivided and cases for final prosecution were added by Australia for the reason that the additional cases met the criteria outlined by MacArthur: '(i) they involved murder or revolting atrocities meriting a death sentence; (ii) there was in each sufficient evidence to make a conviction likely' (Sissons, above n 19, 2981). See Iwakawa Takashi, *Koto no tsuchi to narutomo — BC-kyu sempan saiban* [To become the earth of a solitary island — Class B and C war crimes trials] (Kodansha: 1995), 257, for criticism of the way the final cases were selected with an overemphasis on the Australian nationality of the victim. See also Carrel, above n 2, 226.

An analysis of the quality of justice rendered by the Australian war crimes court would necessarily need to factor in considerations such as the nature of the military courts, resource shortages, investigative and evidentiary difficulties, and the wider political context in which those trials occurred. In an in-depth study appraising Australia's war crimes trials as a whole, these aspects would merit greater attention than my brief treatment here.[35] However, bearing in mind the scope of the present article, two facets of the Australian trials will be examined in turn: the procedural and the substantive law issues.

2. Procedural issues in the Australian trials

Many of the procedural issues that surfaced are largely traceable to certain controversial provisions of the *WCA* and *Regulations*. Before considering those issues, it is relevant to point out several difficulties stumbled upon that did not specifically relate to the Australian legislation, such as the language barrier and unfamiliarity on the part of the Japanese lawyers with the Anglo-Australian procedures, as well as the question of court neutrality. Issues will then be discussed specific to the Australian war crimes legislation and pertaining to the use of evidence, group trials, sentencing and double jeopardy.

A. Language obstacles and Japanese unfamiliarity with Australian procedures

Language barriers posed formidable challenges for the Court, even with the aid of translators. For instance George Dickinson, who served as Advisory Officer to the Japanese Defence Team at Manus, mentions how colloquial Australian parlance would often mystify Japanese interpreters and witnesses.[36] General Imamura Hitoshi, who appeared as witness in many of his subordinates' trials at Rabaul, reported that even where the Japanese interpreter was quite competent, many of the accused and witnesses were frustrated at not being able to express their views in their own words. Since court proceedings were not translated for them (other than the questions directed at them in cross-examination), it is said that these accused and witnesses felt largely 'left out of the loop'.[37] The report by Imamura below illustrates the early difficulties encountered by the defence and the subsequent improvements that took place with experience:

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[35] Out of the studies conducted thus far, Carrel's work probably provides the most comprehensive overview of the political and legal dynamics that informed the Australian war crimes trials.

[36] For example, Dickinson writes:

> The Japanese language makes no provision for irony. In one instance a prosecutor suggested that at the execution site 'swords were lying about like baseball bats' (presumably for anyone to use). 'There were no swords like baseball bats,' answered the witness. Colloquial speech sometimes bewildered the Japanese interpreters. 'Beat them to it' brought the answer, 'We did not beat them.' 'What on earth were you talking about?' asked one prosecutor. 'Nothing on earth,' replied the witness.

See George Dickinson, 'Manus Island Trials: Japanese War Criminals Arraigned' (1952) 38(1) *Journal and Proceedings (Royal Australian Historical Society)*, 67, 69. This report from Dickinson is somewhat startling considering that the Manus Island trials were the last of the Australian-tried cases, and one would have expected that by this late stage, the Australian prosecutors and the Japanese defence team would have come to terms with each other to overcome language impediments of this kind.

[37] Imamura Hitoshi, 'Senso hanzai saiban kankei horei tekiyo (A Synopsis of Legal Matters Relating to War Crimes Trials)' in Ota Shoji (ed) *Rabauru sempan saiban no kaiko (Imamura taisho no saiban kiroku)* [Recalling the War Crimes Trials at Rabaul (The trial records of General Imamura)] (1985), 47.

> [I]n the early stages of the Rabaul trials, the defence counsel would be an Australian lawyer, and Japanese lawyers were in reality nothing but assistants. In addition to this, there were the above-mentioned procedural problems, language handicaps etc, and so there was a sense that as the defending side, we could not make a sufficient case for the accused. However, after June 1946, when the defence was overseen entirely by the Japanese side, we were generally able to conduct a satisfactory defence. Also, in terms of procedural matters, unfamiliar aspects gradually disappeared as we accumulated court experience, and we also improved our language ability so that by the end, when faced with leading questions, the defence counsel could stand up immediately and object. In the later stages, we were able to confront the Australian Army prosecutors with confidence without losing ground, and therefore achieved a fairer trial.[38]

Translation problems were encountered throughout the Australian trials, but in the early stages especially, considerable procedural delays were suffered due to the need to 'translate into English all questions and evidence given in Japanese and to translate into Japanese all questions and statements given in English'.[39] At times, the whole case would rest on the accuracy of the English rendition of certain Japanese words. To illustrate, in a case concerning the Kavieng massacre, the interrogating officer, unable to write Japanese, had taken down the statements made by the accused and other witnesses in English. This subsequently led to a question over the correct translation of Rear-Admiral Tamura Ryukichi's order. Whereas the interrogating officer had written down that the 23 Australian internees (together with nine German missionaries) were to be killed 'in the event of [Allied] landing', later Lieutenant-Commander Yoshino Shozo stated that Tamura's order had been that the internees should be killed when 'faced with imminent landing'.[40] Even slight discrepancies in translation such as these had potential to importantly sway the outcome of the trial, and the case exemplifies the basic hurdles of an international and multilingual trial, which are of course even more acutely felt when limits are placed on human and other resources.

An issue touched upon in Imamura's words above is the fact that Japanese lawyers were initially unacquainted with the adversarial process and Anglo-Australian rules of evidence (Japan having an inquisitorial system modelled on German and French law). At the Manus trials, which were in fact the last trials conducted by Australia, it is reported that on more than one occasion, the Japanese defence counsel produced 'evidence of a conclusive character against his client'.[41] Further, Imamura observes that the Japanese

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[38] Ibid.

[39] Though apparently by December 1945 these procedures had become more streamlined. See Carrel, above n 2, 158.

[40] NAA: A471, 81645 — Proceedings of Military Tribunal — Rr Adm Tamura Ryukichi et al, sheets 13–16. This case (HK1), conducted in Hong Kong in December 1947, also displayed the unfamiliarity of the Japanese defence counsel with Australian procedures — the Court had to adjourn twice to allow the defence to grasp the discussion. The case stands out for the unusually high degree of interjection from Judge Advocate Brock, who advised the defence counsel on procedural matters (particularly on whether section 9(1) of the *WCA* had the effect of displacing the common law rule that a confession is not admissible as evidence against anyone except the person making it) to stop the prosecution from unfairly taking advantage of the situation (sheets 25–35). See Pappas, above n 2, 184–5.

[41] Dickinson, above n 36, 70. It would seem, therefore, that despite Imamura's comments regarding the Rabaul trials, unfamiliarity with Anglo-Australian procedures on the part of the Japanese defence counsels continued right until the end in certain courts.

defence team at Rabaul would often receive the particulars of a case only two or three days before the actual hearing, which did not leave them sufficient time to prepare their defence and collate evidence to counter the prosecution's claim, and as a result, 'in many cases the accused received an unfair trial'.[42] Apparently, as a result of several requests by the Japanese counsel to be provided with the particulars earlier, the Australian Army did eventually take action, but not until August 1946 would particulars be received two weeks in advance of trial. Munemiya, who was a defending officer at Ambon, recommended in 1946 that 'when tried by the court of a foreign country, one should apply for a defence counsel of the country as well as a lawyer of one's own country' since the former would be able to assist in navigating the legal procedures of the prosecuting nation, and the latter, effectively communicate what the accused wished to convey.[43] The shortage of human resources, unfortunately, meant that such a practice would never be achieved.

B. Neutrality of the Court

Under the *Regulations*, the Convening Officer was endowed with the authority to select court officers. It has been pointed out, however, that unlike the empanelling of a jury, the appointment of officers was a subjective process on the part of the Convening Officer and, thus, capable of abuse.[44] There was perhaps one case where the neutrality of the Court was called into question due to the notoriety of the anti-Japanese attitudes of two court members, which was commented upon by the Australian press covering the trial at the time.[45] This case, the first of the Australian trials conducted in Wewak (M1), involved the charge of cannibalism and mutilation of the dead against a Japanese officer who had, in his delirious state of starvation, eaten the flesh of a dead Australian soldier.[46] By a 3:1 majority, the Court sentenced him to death. The severity of the sentence brought a shocked reaction from the Judge Advocate, but the Confirming Authority (CA) subsequently mitigated the sentence to five years' imprisonment with hard labour.[47]

Iwakawa, a Japanese scholar of the Class B and C trials, states that the accused in this Wewak case had in fact refused to lodge a petition after being sentenced to death when urged by his defence counsel (Captain Watson) to do so, because he was already resigned to dying in a foreign land, but his counsel nevertheless went ahead to lodge one on his behalf. 'I was profoundly impressed by the way in which the first Australian I had met had

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[42] Imamura, above n 37, 45.

[43] Munemiya Shinji, *The Account of Legal Proceedings of Court for War Criminal Suspects* (trans Kazuo Yoshioka) (1946), 36–7. For the Japanese original see Munemiya Shinji, *Ambonto Sempan Saibanki* [Trial of War Criminals on Ambon Island] (1946).

[44] Sissons, above n 19, 2981.

[45] War Correspondent Noel Ottaway had reported that Court President Lieutenant-Colonel Cameron's hatred towards the Japanese was a 'byword amongst troops here' and that '[a]nother member of the court had stated openly that he did not intend to allow the little yellow bastards to escape'. Cameron was known throughout his division as 'Jap-Happy Jack'. See NAA: A472, W18153 Part 2 — Inquiry into Japanese Atrocities — Letter from War Correspondent Noel Ottaway to News Editor of *The Sun* John Goodge, dated 3 December 1945.

[46] 'M1' is an allocation number for the case, as appearing in the Army HQ Register of Proceedings, maintained by the Directorate of Prisoners of War and Internees (DPW&I). The Australian War Memorial holds these registers at AWM226, 15–17. See David Sissons, 'Sources on Australian Investigations into Japanese War Crimes' (1997) 30 *Journal of the Australian War Memorial*, <http://www.awm.gov.au/journal/j30/sissons.asp>. See also NAA: A471, 80713, War Crimes — Proceedings of Military Tribunal — Lt Tazaki Takehiko.

[47] The Judge Advocate had considered the accused's debilitated state as a ground of mitigation.

conducted his work duties with utmost sincerity' was the reminiscence of the accused in later years.[48] There were no other noted instances of bias on the part of the Australian tribunal, even though the selection of court officers did remain a subjective process. Despite antipathy and ill-feelings towards the Japanese among sections of the Army, integrity similar to that seen in the action of the defence counsel can be recognised in the conduct of a number of other Australian officers during the trials, which no doubt had the effect of preserving a certain standard for the tribunal, and also showed that many Australian participants were serious about ensuring that due process was achieved.[49]

C. Admissibility and use of evidence

The most controversial aspect of the trial procedure was that relating to the use of evidence under the *WCA*. Section 9(1) of the *WCA* modified traditional common law rules of evidence, so that 'any oral statement or document appearing on the face of it to be authentic, provided the statement of document appears to the Court to be of assistance' could be admitted.[50] The provision resulted in the majority of defendants being convicted on the basis of documentary evidence alone in denial of the common law right to confront one's accuser and test the evidence in cross-examination.[51] This issue is rendered all the more problematic when one considers that in the majority of cases, the prosecution's evidence was in the form of affidavit statements of living persons who could have been produced for cross-examination had appropriate resources been invested.[52]

A number of those on the Australian side were less than enamoured with these rules of evidence. Among them was Judge Advocate General (JAG) J Bowie Wilson, who in one Morotai Trial (M44) stated his criticism of s 9(1) openly: '[u]nder what are called trials under the War Crimes Act, none of the rules that have been considered necessary to protect accused persons apply … I would have thought that much of the evidence

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[48] Words of Tazaki Takehiko (who adopts the pseudonym of Matsuzaki Takeo) quoted in Iwakawa, above n 34, 247.

[49] For example, a Japanese defending officer at Ambon recalled: 'In the defence counsel section, there was an Australian military officer, named Capt. Campbell, as a defending officer, who joined us at our request to the Tribunal…From the opening of the trial, Capt. Campbell did all in his power to defend the accused ... His activeness did not fail to fire us defence counsels [sic] with courage and high-spirit ... Encouraged by Capt. Campbell's unusual favours, all defendants took the stand and testified, in a great composure to defend themselves as effectively as they desired, before the judges who were also very kind and permitted them to say everything they wanted'. Munemiya went on to say that 'during the whole session of the trials, we defence counsels [sic] could appreciate the justice according to which these trials were conducted: all of the accused were given every chance to testify to defend themselves'. See Munemiya, above n 43, 36 and 40. Sissons also states that: '[f]rom the transcripts it seems that the Presidents of the courts were patient men eager to play by the rules. The rules enacted by the legislature did, however, provide for a system of justice that was somewhat summary'. See Sissons, above n 19, 2981.

[50] The full text of s 9(1) read:

> At any hearing before a military court the court may take into consideration any oral statement or document appearing on the face of it to be authentic, provided the statement of document appears to the court to be of assistance in proving or disproving the charge, notwithstanding that the statement or document would not be admissible in evidence before a field general court martial.

Comparable provisions could be found in the legislation of other Allied nations, as well as the charters of the International Military Tribunals at Nuremberg and Tokyo.

[51] Sissons, above n 2, 16. The inclusion of this provision was recommended by Webb, who found during the course of his investigations that 'in many of the most barbarous atrocities that he had investigated, the only evidence available would be inadmissible if the rules of evidence were applied'. See Sissons, above n 19, 2980.

[52] Apparently the US war crimes tribunal was much less willing to accept such evidence when the witness could be produced in person. See Sissons, above n 2, 16.

admitted in these proceedings, even under the system of being no rules of evidence, should not have been admitted as being relevant to the charge before the court'.[53] A similar view is taken by Dickinson:

> It would appear that Australian War Crimes Courts were established with the apparent intention of depriving an accused person of safeguards recognised by reasonable men and eminent lawyers as the basis of a fair trial in the Western World … Contrary to popular belief the rules of evidence were not invented by lawyers to shut out truth. The aim of such rules is to exclude irrelevant or time-wasting matters from going before a jury of laymen who are untrained in matters of evidence. Without the application of the rules of evidence a case becomes cluttered up with matters that are not rightly before the Court to the exclusion of the real issues.[54]

Dickinson remarks that one 'curious boomerang effect' of the provision was not only that it permitted the prosecution to submit 'any evidence no matter how unfair', but also that it enabled inexperienced Japanese lawyers 'to go on for weeks and months', which led to the Court expending substantial amounts of time sifting through bulky and often irrelevant evidence.[55]

One particular Manus trial (LN2) has attracted some attention and has been written about in several books, including that by Ian Ward, who alleges that the accused's indictment was due to a conspiracy involving the Australian Government and Military.[56] The case involved Lieutenant-General Nishimura Takuma (tried together with his aide, Captain Nonaka Shoichi), who was already serving a life sentence for a different charge when he was indicted at Manus for ordering the murder of 110 Australian and 35–40 Indian POWs at Parit Sulong in January 1942.[57] The issue for the Court was whether Nishimura had in fact given orders to execute the prisoners, the question centring on the meaning of the Japanese words of his order '*shobun seyo*'.[58] As with all the other Manus trials, the only evidence against him was in the form of documentation, including sworn statements from four junior staff officers. The outcome of the case was that Nishimura was sentenced to death and Nonaka to six months' imprisonment. Nishimura had petitioned the finding, which was dismissed, but petitions and pleas from others prolonged the case.[59] Importantly, three staff officers who had previously given evidence against Nishimura subsequently claimed that the statements were not made voluntarily, and that they had been obtained by threats, leading questions, intimidation and suggestion on the

[53] NAA: A471, 81068 — Proceedings of Military Tribunal — Lt. Taisuke Kawazumi et al.

[54] George Dickinson, 'Japanese War Trials' (1952) 24 *The Australian Quarterly* 69, 71.

[55] Dickinson says that in the first case at Manus, two weeks were spent on examining a Japanese Major's evidence on his primary, secondary and military academy education in his attempt to show that he had no real knowledge of the laws and customs of warfare. Ibid 70.

[56] Ian Ward, *Snaring the Other Tiger* (Media Masters: 1996). Historian Lynette Silver, however, refutes Ward's theory with counter-evidence. See Lynette Silver, *The Bridge at Parit Sulong: An Investigation of Mass Murder* (Watermark Press: 2004).

[57] NAA: A471, 81942 — Proceedings of Military Tribunal — Lt Gen Nishimura et al.

[58] Nishimura's counsel argued that: "'Shobun" or disposal not only means execute but fundamentally it means to dispose of, to deal with or to put things in order. In this case the word "Shobun" means to dispose of the prisoners by sending them back to the rear'. NAA: A471, 81942 — Proceedings of Military Tribunal — Lt Gen Nishimura and Capt Nonaka, sheet 3.

[59] Petitions were made on behalf of Nishimura from his wife, a Buddhist priest on Manus Island as well as the Holy See in Rome.

part of the interrogating officer.[60] In the end, the petitions persuaded neither the JAG nor the CA, and Nishimura's execution was carried out in June 1951.

The case exemplifies the dilemma entailed in making a finding purely on documentary evidence.[61] Much deliberation and soul-searching that took place could probably have been avoided had more conclusive evidence been obtained by enabling the junior staff officers to be cross-examined. Evidently, Nishimura's counsel, who was convinced of his innocence, later blamed himself for not having insisted on calling those witnesses, though the production of live witnesses seems to have been generally discouraged due to the logistical difficulties it posed.[62] The case of Nishimuara also touches upon the problem of admitting statements alleged to have been extracted by threats or improper conduct that resulted from relaxing the rules of evidence.[63] It would appear that stricter — or at least more nuanced — evidentiary rules would certainly have contributed to greater procedural integrity and efficiency.

D. Concerted action and group trials

Section 9(2) of the *WCA*, in combination with reg 12 of the *Regulations*, provided that where there is evidence that a war crime was a result of 'concerted action', then those involved could be jointly tried.[64] This provision led to trials involving large numbers of

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[60] Gilbert Mant, *Massacre at Parit Sulong* (Kangaroo Press: 1995), 114.

[61] As the defence counsel for Nishimura opined: the case is 'most strange of modern times as it was conducted with only documentary evidence' quoted in Mant, above n 60, 109. There was one Labuan case (M36) where the CA ordered a retrial because affidavit evidence was used when live witnesses could have been called, but such orders appears to have been 'quite atypical'. See Sissons, above n 19, 2980.

[62] See Carrel, above n 2, 179. Director of Prisoners of War and Internees Flannagan had reported to his superior in March 1950 that: 'The production of live witnesses [from Japan] by the defence cannot be prevented and if material witnesses are required by the defence, I consider arrangements would have to be made for their movement to Manus. However, whenever it is practicable, evidence at war crimes trials is limited to documentary evidence and the production of live witnesses by the defence should not be encouraged'. AWM: AWM 166, 3 (AG Coord 220) — War Crimes Trials 24 February to 4 April 1950 — Minute from DPW&I to AG Coord, dated 15 March 1950.

[63] See Sissons, above n 19, 2980, who refers to the case of LN21. Many Japanese naval officers at Manus challenged the validity of affidavits made against them on the ground that they had been induced by threat or coercion, though evidence to the contrary would at times be produced by the prosecutor. One trial where the accused successfully challenged the validity of his sworn statement was the case of Naval Captain Ichikawa Yoshimori, who alleged that 'certain passages had been inserted in the English version after he had signed it, or in the alternative, these particular passages had not been read to him'. As no evidence to the contrary was provided by the prosecution, Ichikawa was acquitted. See Dickinson, above n 54, 71–2. Note also that many of the affidavits were taken down by investigators who were neither trained in law nor in criminal investigation, and it has been suggested that the affidavit evidence would have been of greater assistance had more experienced criminal investigators been employed. See David Creed, Moria Rayner and Sue Rickard, 'It will not be bound by the ordinary rules of evidence …' (1995) 27 *Journal of the Australian War Memorial* 47, 51.

[64] *WCA* s 9(2):

> Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, evidence given upon any charge relating to that crime against any member of the unit or group may be received as evidence of the responsibility of each member of that unit or group for that crime.

Regulations reg 12:

> Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group may be received as prima facie evidence of the responsibility of each member of that unit or group for that crime. In any such case all or any members of any such unit or group may be charged and tried jointly in respect of any such war crime and no application by any of them to be tried separately shall be allowed by the Court.

defendants, the foremost among them being the trial of 45 defendants at Labuan (M37) and the trial of 91 defendants commenced at Ambon (M45), but later relocated to Labuan. Both trials focused on the ill-treatment of POWs and were held in the early stages of the Australian trials, at the beginning of 1946.

The latter trial of 91 defendants concerned ill-treatment of prisoners in Tan Toey camp, where 528 Australians, 14 Americans and seven Dutch troops had been interned. Seventy-seven per cent of the Australians there had died as a result of ill-treatment, overwork, lack of medical supplies, and starvation or malnutrition from reduced food rations.[65] JAG Simpson in this case made a 'most emphatic protest against the administrative system that asks a Court to try such a number at once or expects the reviewing or confirming authority to be able to do justice to all the accused'.[66] Apart from the problems of identification mentioned above, the main difficulty posed by such a mass trial was ensuring that all those tried were at fault. Section 9(2) envisaged some sort of conspiracy among a group of defendants. However, as Judge Advocate Lieutenant-Colonel Brock pointed out in another case, the section was not to be 'construed as making a particular individual responsible for a crime merely because of his membership of a unit', but rather to establish that, on the evidence, there was a prima facie case of conspiracy for which the accused could be tried:

> In constructing a penal Act, such as this Act, the rule of statutory construction is that you must construe it strictly against the Crown and in favour of the accused, and you must construe it as not amending the Common Law unless it expressly does so. I am, therefore, of the opinion that this provision cannot be construed as eliminating the necessity of proving individual guilt, which is necessary to the proof of any crime…The proper interpretation, in my opinion is that that section is merely an evidentiary provision and that that evidentiary provision extends to cases of concerted action in substance, the rules of evidence applicable to conspiracy charges.[67]

In the Australian case of 91 defendants, the Court, unable to agree on the occurrence of a conspiracy, in the end acquitted 55 and found 36 guilty, imposing four death sentences. The findings would seem to be largely based on individual guilt.[68] After this case, apparently Australian tribunals were more circumspect when it came to mass trials: the number of defendants in a given trial did not exceed 17 after September 1946 and evidence would be presented against each of the defendants.[69]

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[65] See NAA: A471, 81709 — Proceedings of Military Tribunal — Capt Shirozu Wadami et al. Pappas remarks that the other Allied powers experienced similar problems regarding group trials, with the Americans removing such a provision altogether and only the Dutch legislation permitted conviction because of membership of a group. The specific offences charged against the 91 defendants were: (1) physical beatings and torture; (2) compelling sick prisoners of war to go on work parties; (3) failing to ensure the provision of proper food supplies; and (4) failing to provide proper medical supplies and care. See Pappas, above n 2, 207.

[66] NAA: A471, 81709 — JAG's Report dated 24 April 1946 — Trial of Capt Wadami et al, sheet 1.

[67] NAA: A471, 81653 Part A — Judge Advocate's Summation — Trial of Hirota Akira, sheet 122.

[68] It appears they were convicted only when they had been 'involved in a major incident and if they and their crime was readily identified in statements'. Pappas, above n 2, 207.

[69] Carrel, above n 2, 170, fn 39.

E. Sentencing issues

As Sissons remarks, the chief criticism that has been levelled against the *WCA* was that it was discriminatory, 'denying a suspect, if he was Japanese, time-honoured safeguards considered vital if he was Australian'.[70] Together with the relaxation of traditional evidentiary rules, which often prejudiced the accused as discussed above, the procedure by which a death penalty could be awarded has also been seen to be problematic. Under s 98 of the *Defence Act 1903* (Cth), as it then was, Australian officers could only receive a death penalty for certain acts of treachery and when confirmed by the Governor-General in Council.[71] Yet under s 11 of the *WCA*, the death penalty could be awarded for any war crime committed, and s 14 enabled the Governor-General to delegate the confirmation function.[72] Indeed, Secretary for the Army, Frank R. Sinclair showed remarkable prescience when he said:

> If one … takes a critical view of this procedure, (and such a critical view will, I suggest, be taken in the years to come) it might be held that any departure from the normal methods of administration and justice cannot be justified, because the motives which underlie our activities in bringing our former enemies to trial cannot be said to be altogether disinterested or unbiased… .[73]

The fact that the death penalty could be awarded for crimes for which an Australian could not be so sentenced led the outcomes of a number of cases (especially those in the earlier trials of 1945 and 1946) to seem quite harsh even by standards of that time.[74] On many occasions (including the above case involving the cannibalism charge), the CA would commute the death sentence pronounced by the Court, usually on the recommendation of the JAG. However, there were other times when the harsh sentences would be confirmed and duly carried out, even where mitigating circumstances appeared to be present.

One illustrative case of harsh sentencing is found in a Morotai trial (M43) that took place in February 1946, involving an illegal order to execute four captured RAAF aircrew,

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[70] Sissons, above n 2, 15.

[71] Justice William J F Kearney, 'Australian War Crimes Trials: lessons from the Darwin experience' (Speech delivered at the Red Cross commemoration of the 50th Anniversary of the Geneva Conventions 1949 by the International Humanitarian Law (IHL) Committee of the Northern Territory (NT) Division of the Australian Red Cross, 23 April 1999), 31. Note too, that the Australian Labour Party in power at the time had a policy against capital punishment, but 'in the face of the enormity of the crimes, the anger of the Australian public, and the fact that other victor countries were executing war criminals, the Government put its principles aside'. Nelson, above n 19, 434.

[72] Section 11(1) read:

> A person guilty by a military court of a war crime may be sentenced to and shall be liable to suffer death (either by hanging or by shooting) or imprisonment for life or for any less term; and, in addition or in substitution therefore, either confiscation of property or a fine of any amount, or both.

[73] NAA: A472, W28681 — Secretary for the Army to Minister for the Army, 6 December 1945. Sissons remarks that, thanks to the strong protest by Secretary of Army, F R Sinclair against the regulations delegating the confirmation function to Divisional Commanders, a compromise was reached whereby death sentences would only be confirmed by the Commander-in-Chief (or later by the Adjutant-General) of the Australian Military Forces, after taking the JAG's Report into account. See Sissons, above n 2, 17.

[74] Creed, Rayner and Rickard, above n 63, 50, refer to one case involving a woman who was stripped naked in front of her child and struck 30–40 times with a cane while being questioned about the presence of some Americans. The three accused were sentenced to death. The accused had obviously committed a war crime, but Creed, Rayner and Rickard say that the sentence was excessive and that 'it would not have been possible for defendants to have been sentenced to death in Australia for these crimes'. They suggest that the harsh sentence in this case may have been due to the sexual undertones of the crime.

carried out by three junior officers; Sub-Lieutenants Katayama and Takahashi, and Warrant Officer Uemura (this is the case on which the *Blood Oath* film is loosely based).[75] Death sentences against these officers were confirmed against the recommendations of the JAG, but executions of two of the officers were subsequently deferred so that they could attend as witnesses in later trials. Despite the fact that sentencing norms had become much more lenient by 1947 and some discussion had taken place within the Directorate of Prisoners of War and Internees (DPW&I) on whether to commute the two officers' sentences, in the end Army Headquarters decided against this and both officers were executed in October 1947.[76] The sentences in this case are generally considered to be inconsistent with other findings, because the plea of 'superior orders' (discussed in the next section of this article) should have served as a ground for mitigation.[77] The inconsistency is rendered all the more stark when one considers that Commander (Baron) Takasaki Masamitsu, who had himself interrogated the captured airmen and ordered their execution, was set free. A number of people have questioned why Takasaki was not recalled for trial, especially as evidence of his guilt subsequently amassed in later trials.[78] In the Editor's preface to the first edition of Katayama's diary, there is suggestion that Katayama and other junior officers had served as scapegoats to save Takasaki, who was a noble.[79] There were also instances outside the Australian trials where commanders belonging to the aristocracy had escaped war crimes liability, apparently as part of the occupation policy to preserve the 'imperial polity' —

[75] Another Morotai trial taking place around the same time with a similar outcome was one concerning the murder of an Australian POW who had stolen supplies and, after escaping from the camp, was caught by two junior officers, Sub-Lieutenant Honji Matagi and Petty Officer Kurokawa Eizo. Honji, who had himself received an order for the prisoner's execution, had taken several guards with him to dig the prisoner's grave and ordered Kurokawa to execute the prisoner. At trial, Honji claimed that he believed the prisoner had been duly tried by a court martial, but it seems the Court did not believe him and he was sentenced to death and Kurokawa to 15 years' imprisonment. Although JAG Wilson considered that the superior orders received by Honji were a ground for mitigation and that the junior officers should not have been assumed to have knowledge to question such orders, CA Sturdee nevertheless confirmed the sentences. NAA: A471, 80780 — Proceedings of Military Tribunal — Sub-Lt Honji Matagi et al; A471, 80780 — JAG's Report dated 15 March 1946 — Trial of Sub-Lt Honji Matagi et al. *Blood Oath* (Directed by Stephen Wallace, Village Roadshow Productions/Blood Oath Productions, 1990). See Nelson, above n 19, for an analysis of how the film departs from the actual cases.

[76] The bases for this DPW&I recommendation to the Directorate Head were: reasons discussed in the JAG's original advice; the fact that both officers had now spent 19 months in condemned cells; and the need for a 'uniform standard of punishment according to the degree of guilt': NAA: MP742/1, 336/1/1737.

[77] Nelson, above n 19, 438, also observes that '[t]he three defendants, Katayama, Takahashi and Uemura, were among the most harshly treated of all the 924 Japanese charged with war crimes before Australian military courts'.

[78] Katayama, for one, asserted that he 'could not understand why Cdr Takasaki was not found guilty so far'. He said that Takasaki was responsible for the welfare of the prisoners since only he had the power to improve conditions: 'only he did not try to do it. As everybody knows he enjoyed a very good time even during the war, and after the war he was not guilty and to be worse, he tried, it seemed to me, to pass his responsibility to the lower ranking officer who had the worst time during the war'. NAA: A471, 80918 — Proceedings of Military Tribunal — Trial of Sub-Lt Hideo Katayama et al. There were also Australians who had wished for Takasaki to be recalled. See Nelson, above n 19, 439.

[79] Nakao Tadao mentions, in his book's preface, an interview he had had with a certain 'Professor S', a historian at the Australian National University (who would appear to be the late David Sissons) where he had asked the professor why a respectable Christian such as Katayama had been executed by shooting. Professor S answered: 'The Officer who had issued the harsh order was a nobleman, and in order to save him, this young officer fresh out of school was sacrificed'. See Nakao Tadao, '"Ai to shi to eien to" shohan no keii [Love, Death and Eternity, 1st ed]' in Katayama Hideo, *Ambon de naniga sabakaretaka —'Ai to shi to eien to' fukkoku-ban* [What was Judged at Ambon?, reprint edition of Love, Death and Eternity'] (1991), 13.

a direct concomitant of absolving the Emperor of blame.[80] Critical voices from Japanese scholars can be heard in regard to the asymmetrical way in which post-war responsibility was attributed and some say that the greatest punishment fell upon the lowest echelons of the Japanese Army.[81]

Creed, Rayner and Rickard suggest that there may have been an 'all or nothing policy of punishment, under which penalties should be either death or a nominal term of imprisonment', for it appears that both Judge Advocate Generals generally advised on the pointlessness of long imprisonment terms because living conditions in Japan, Korea and Formosa were thought to be worse than prisons in Australia or New Guinea.[82] Whatever the reason, the lack of uniformity in sentencing and the disproportionate punishment that occasionally occurred is a point of concern and disquiet often raised by Australian and Japanese critics.[83]

F. Double jeopardy

Another controversial feature of the Australian war crimes legislation was that regs 4 and 9 of the *Regulations* enabled an accused person to be tried (or 'put in peril') twice for the same crime, in denial of the common law rule against 'double jeopardy'.[84] In the case of one Formosan prison guard tried in Rabaul in May 1946 for murder of an Australian POW, the accused, Private Fukushima Masao, was acquitted, only to be found guilty a few days later in a second trial on the same charges and sentenced to death.[85] The second trial, convened soon after the first, was composed of different members.[86] The finding was petitioned and JAG Simpson, noticing the remark of the defence counsel that 'the accused was tried yesterday on this charge and acquitted', advised the CA that the Court 'had no jurisdiction and that the proceedings cannot be confirmed'.[87] The JAG maintained that the common law rule against double jeopardy could only be displaced by statute, and that regs 4 and 9 of the *Regulations* were ultra vires. The CA accepted JAG Simpson's advice and did not confirm the findings.

There was another instance in Rabaul (R137), soon after Fukushima's case, where the accused, who had been found not guilty in an earlier trial, was subsequently found guilty

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[80] For example, the Supreme Commander of the army involved in the Nanjing Massacre, Prince Asaka Yasuhiko, was not charged as a war criminal by the Tokyo Tribunal. His exemption was believed to be because of his aristocratic background. See Mikiso Hane, above n 4 at 20.

[81] For instance, Awaya says: 'To put it most simply, one gets the strong feeling that even the political responsibility that should have attached to the war leaders was loaded onto the "B" and "C" class criminals, and even set aside altogether, as part of the inescapable price for "preserving the imperial polity"': Awaya Kentaro, *Tokyo Saiban-Ron* [On the Tokyo Trials] (1989), 291. The passage is translated and quoted in McCormack, above n 2, 87.

[82] Creed, Rayner and Rickard, above n 63, 51. On the advice of the Judge Advocate General see NAA: A471, 80772— JAG's Report dated 8 February 1946 — Trial of Nagahiro Maseo et al; A471, 80770 — JAG's Report dated 16 January 1946 — Trial of Nav Lt Yunomura Fumiwo.

[83] Sissons, above n 4, 41; Hane, above n 4, 20.

[84] Reg 4 of the *Regulations* specifically excluded the application of s 36 of the *Rules of Procedure* governing courts-martial, which enabled an accused to offer a plea in bar on the ground that he had been previously convicted or acquitted of the offence. Further, reg 9 of the *Regulations* provided that 'an accused shall not be entitled to offer any plea in bar'.

[85] The Formosans and Koreans in the Japanese Imperial Army all had Japanese names as well as their native birth names, but they were tried under Japanese appellations. See NAA: A471, 81060 — Proceedings of Military Tribunal — Priv Fukushima Masao; A471, 81218 — Proceedings of Military Tribunal — Priv Fukushima Masao.

[86] The first trial (R121) was convened 28–29 May 1946, and the second trial (R122) was held 30–31 May 1946.

[87] NAA: A471, 81218 — JAG's Report dated 24 July 1946 — Trial of Priv Fukushima Masao; Sissons, above n 2, 52.

and sentenced to a prison term.[88] The sentence was confirmed on this occasion on the recommendation of the JAG, seemingly because there was nothing to put the JAG on notice that a previous trial on the same charges had taken place.[89] Still, other cases can be found that are beset with similar irregularities.[90] These instances of double jeopardy — arguably ultra vires — reveal a further aspect of the Australian legislation that was deemed to be discriminatory in that Japanese suspects were denied the rights and safeguards that an Australian would be entitled to in the process of justice.

3. Substantive law issues

The *WCA* enabled the Australian tribunal to try 35 separate war crimes. Much of the adversarial argumentation and the summation of the Judge Advocate, however, concentrated not on the definition of those heads of crime, but on more doctrinal issues relating to: questions of status and jurisdiction; the essential elements of a legitimate trial; and the legal principles of military necessity, superior orders and command responsibility. In this section, each of these is considered in turn in an effort to review the main substantive law issues emerging from Australia's post-World War II trials.

A. Questions of status and jurisdiction

One of the issues contested vehemently by the Japanese defendants was the status of the Indians, Chinese and Indonesians who accused the Japanese Army of ill-treatment after the war. On the one hand, the accusers contended that they had been mistreated as Allied POWs. On the other hand, the main defence advanced by the Japanese was that the Indians, Chinese and Indonesians had changed their status to become *heiho* and were constituents of the Japanese Army, either as members of working parties or the auxiliary army — the argument, thus, being that Australia did not have jurisdiction in these cases because war crimes were not committed against Australians, British subjects or other Allied citizens.[91] The issue had grave ramifications in that, of the 296 trials conducted by

[88] NAA: A471, 81036 — Proceedings of Military Tribunal — Sgt Karube Saburo. Although Carrel remarks that after Fukushima's case, '[f]or the remainder of the Australian war crimes trials programme, no further attempt would be made to place the accused in double jeopardy', this is mistaken. Carrel, above n 2, 171.

[89] See Sissons, above n 2, 52–3.

[90] For example, in a Singapore case involving a Korean prison guard, the accused was convicted of causing death to an Australian POW on 25 June 1946 at his first trial, but on the advice of the JAG, confirmation had been withheld. He was tried again on the same charges and given the same sentence in March 1947. This time, the JAG dismissed his petition and advised that the sentence be confirmed. Hayashi was hanged at Changi jail in Singapore on 18 July 1947. NAA: A471, 81659 — Proceedings of Military Tribunal — Hayashi Eishun (Im Yong-Jun). McCormack remarks that '[t]o the end his case was marked by irregularities, since the execution warrant was valid for execution within 24 hours but was not carried out for 3 weeks': see McCormack, above n 2, 91. Another case afflicted with irregularities was that of a Korean guard, Hiromura Kakurai (Yi Hak-Nae) who was alleged to have ill-treated POWs by beating them. Despite the fact that, in 1946, Hiromura was arrested, imprisoned, investigated and then released on the ground that the War Crimes Section in Singapore did not deem the case 'serious enough to warrant trial', he was re-arrested later on the same charges, which had been deemed by the Section to be only of 'minor nature', and this time sentenced to death. His sentence was later commuted to 20 years' imprisonment. Since Hiromura was never tried in court when first charged, strictly speaking this is not a case of double jeopardy, but it does raise similar concerns. See NAA: A471, 81640 — Proceedings of Military Tribunal — Hiromura Kakurai (Yi Hak-Nae); McCormack, above n 2, 91–5.

[91] *Heiho* literally means 'army assistants'. On Australian jurisdiction see *War Crimes Act 1945* (Cth) ss 7, 12. One clear application of this was in a case involving murder of German missionaries in the Kavieng massacre. The crimes

[footnote continued on the next page]

Australia, 124 trials — more than a third of all Australian trials — in fact arose because of accusations of mistreating Indians, Chinese and Indonesians (the Indian cases were by far the most numerous among them).[92] All of these trials were conducted in Rabaul, which recorded the greatest number of cases and defendants among the various Australian tribunals.[93]

(i) Status of Indians

Many of the Indians who were captured by the Japanese forces at the fall of Singapore were subsequently brought to New Guinea in the form of working parties. The Japanese claimed that the working parties were drawn from the Indian National Army (INA), led by Subhas Chandra Bose, which was a formation fighting for Indian independence that allied itself with the Japanese Army.[94] General Imamura, who appeared in many of the Rabaul trials as witness for the defence, took full responsibility for recognising their status in this way.[95] He wrote several petition letters to members of the Australian and US military leadership (including General MacArthur) explaining the status of the Indians, Chinese and Indonesians as the Japanese saw it, in which he makes the following points.[96]

First, Imamura stated that most of the Indians and others were initially prisoners, but were freed after taking a written oath of allegiance. Some became labourers under a wage contract and others volunteered to enter the auxiliaries. Imamura stated that the Indians were part of Chandra Bose's INA and sought military training so that they could later participate in the Indian independence movement.[97] Second, these people, though not Japanese, were treated as 'quasi-Japanese' and if there were illegal acts committed against them, those should be tried under *Japanese Army Criminal Code*.[98] Imamura supported this claim by indicating that the Indians were put in charge of guarding the British and Australian POWs after the fall of Singapore and that the Indians lived in the same quarters

against the Germans were not tried as it was held to be outside Australia's jurisdiction. See NAA: MP742/1, 336/1/1951 — War Crimes, Rr Adm Tamura Ryukichi et al.

[92] There were 100 trials arose where the victim was Indian, 22 trials where the victim was Chinese and two where the victim was Indonesian. See Table B: Australian War Crimes Trials (Classified by victim) in Sissons, above n 2, 24.

[93] In Rabaul, 188 trials with 390 defendants were held.

[94] For history on the INA, see Joyce C Lebra, *Jungle Alliance, Japan and the Indian National Army* (Asia Pacific Press: 1970); Kalyan K Ghosh, *The Indian National Army: Second Front of the Indian Independence Movement* (Meenakshi Prakashan: 1969).

[95] Imamura was known for his ardent endeavours to improve conditions for his subordinates who were tried in Australian tribunals after the war. It seems he also won the appreciation of the Australian military for his assistance in organising evidence and his courteous manner. Dickinson remarks that at Manus: 'Only Imamura's clear and logical arrangement of [the defendant's] facts saved the Court from three months' hearing related to this matter alone [ie. the matter of the defendant's level of military education to see if he had knowledge of the laws and customs of warfare]'. See Dickinson, above n 54, 70. Pappas notes that even when Imamura seemed to be assisting the Court, the welfare of his subordinates always came first and that his cooperation with the Court was geared to this end. See Pappas, above n 2, 257–8.

[96] Imamura Hitoshi, 'Go dai juichi shidancho Isa shosho ni taisuru moushikomibunsho [Petition to the Commander of the Australian 11th Division Major General Eather]' in Ota Shoji (ed) *Rabauru sempan saiban no kaiko (Imamura taisho no saiban kiroku)* [Recalling the war crimes trials at Rabaul (The trial records of General Imamura)] (1985), 53–7; NAA: CRS B4175, 11 — Submission to General MacArthur from General Imamura concerning the status of Indian soldiers and the *War Crimes Act* (Cth).

[97] Imamura, above n 96, 55–6.

[98] Ibid 56.

as the Japanese and they were not under surveillance.[99] Third, Imamura claimed that at the war's end, the Indians completely changed their attitude and by slandering members of Japanese Army they were hoping to cover up their acts of treason against the Allied forces.[100] Finally, he asserted that if, despite the above reasons, prosecution was to be pursued for ill-treatment of Indians, Chinese and so on, then as commander of those accused, he would rather be prosecuted in their place, as all responsibility for recognition of the status of the Indians and others lay with him and not his subordinates.[101]

Against Imamura's contention, the chief witness appearing in most of the Indian cases, Jemadar Chint Singh, maintained that although some Indian officers had collaborated with the Japanese, the leaders of those refusing to join the INA had, in effect, been forced to join by threat of starvation and torture.[102] As a result of these coercive tactics, Singh claimed, 20,000 joined, but 8,000 subsequently withdrew their cooperation when Ras Behari Bose, a leader of the Indian Nationalists, told them that those who did not participate willingly should leave.[103] Later however, 3,000 Indians were forced to rejoin the INA, while the rest were put in camps. In 1943, the several thousand remaining Indians were brought to New Guinea as labourers, despite their protests that such treatment was against international law.[104]

As it transpired, the Court believed the Indians' side of the story. It was in the senior officer (command responsibility) trials that the legal issue of change of status was addressed in most detail. Although Pappas describes the arguments of Judge Advocate Brock on this question as 'so confusing that he appeared to almost be contradicting himself',[105] the main consideration seems to have been whether the former allegiance was voluntarily relinquished or not. As Brock stated, 'I have advised the Court that if the captured Indian Prisoners of War had voluntarily relinquished their allegiance and, following on that, joined the Japanese Forces, then they would not then still retain their status as Prisoners of War'.[106] Thus, the Judge Advocate appeared to be saying that even if a sworn oath had been taken, the Indians and others were to be regarded as 'prisoners under oath' and even if Indians were working and fighting for the Japanese Army, they were to be viewed as 'prisoners serving under such conditions' since either way, the Court saw these actions by the Indians as ones undertaken involuntarily.[107]

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[99] Ibid; Imamura Hitoshi, 'Rengogun saiko shireikan Makkasa taisho ni taisuru shinsei [Petition to Supreme Commander of the Allied Forces, General MacArthur]' in Ota Shoji (ed), *Rabauru sempan saiban no kaiko (Imamura taisho no saiban kiroku)* [Recalling the war crimes trials at Rabaul (The trial records of General Imamura)] (1985), 60.

[100] Imamura, above n 96, 56–7.

[101] Ibid 57.

[102] NAA: A471, 80749 — Exhibit G: Statement by Jemadar Chint Singh — Trial of Capt Mitsuba Hisaneo et al.

[103] Ibid.

[104] Ibid. For an account of the way in which international law was taught in military academies in Japan before and during the war, see Kita Yoshito, 'Kyukaigun shogakko ni okeru kokusaiho kyoiku [The international law education at various former naval academies]' in Chaen Yoshio (ed) *BC kyu Sempan Gogun Rabauru Saiban Shiryo* [Material on the Rabaul trials of the Class B and C war criminals by Australian military tribunal] (1990), 260-271; Kita Yoshito 'Kyu rikugun no kokusaiho kyoiku [The international law education at various former military academies]' in Chaen Yoshio (ed) *BC kyu Sempan Beigun Shanhai Saiban Shiryo* [Material on the Shanghai and other trials of the Class B and C war criminals by the American military tribunal] (1989), 150–64.

[105] Pappas, above n 2, 268.

[106] NAA: A471, 81065 — Judge Advocate's Summation — Trial of Kato Rinpei, sheet 48.

[107] See Iwakawa, above n 34, 252.

The Judge Advocate's legal guidance to the Court was probably also influenced by practical considerations for the conduct of international relations:

> I suggest to you, Gentlemen, that it would be quite illogical to say that, after the end of hostilities, we find that these prisoners have changed their status during the war, therefore, they now owe no allegiance to our Crown — that the Japanese during the hostilities regarded them as collaborators, and we are now bound to accept that view, and that, at the same time, we must, therefore, consider that they did not do any act of treason against the British Crown by changing that allegiance and we may not, therefore, punish them for it. Is that logical?[108]

Brock argued that international law authorities do not include a voluntary service with the enemy as a method of releasing a prisoner, and that the agreement to take up service should rather be seen as 'a condition of the parole on which the prisoner is released'; the Indians thereby retaining their status as POWs.[109]

(ii) Status of the Chinese and Indonesians

Similar legal issues arose in respect of the status of the Chinese and Indonesians. In the senior officer trial of Hirota Akira, the defence argued that the Chinese who were claiming to be mistreated POWs were either: (1) 'labourers employed by the Japanese and volunteers for that purpose';[110] or (2) captured members of guerrilla troops who did not have the status of POWs. The former issue rested on a similar question to that of the Indian trials — whether the Chinese workers had in fact volunteered or not — in response to which the Court found against the accused based on the evidence. The exhibits of Chinese leaders declared that none of the Chinese troops or guerrilla fighters brought to Rabaul ever took an oath of allegiance to the Japanese or volunteered to serve with the Japanese Forces.[111] Regarding the defence's second contention, Judge Advocate Brock advised that there was no conclusive evidence to say that the Chinese were irregular soldiers, but even if they had been captured guerrilla fighters, they could still be considered as POWs under article 1 of the *Hague Convention (IV) respecting the Laws and Customs of War on Land*, which states that '[t]he laws, rights and duties of war apply not only to the army but also to militia and volunteer corps'.[112] Further, he found that the fact that many of these men came from Japanese occupied areas of China did not change their status or make them Japanese subjects.[113]

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[108] NAA: A 471, 81635 Part A — Judge Advocate's Summation — Trial of Imamura Hitoshi, sheet 144.

[109] Ibid sheet 142, 144. Brock added that, by commission of war crimes, espionage or violation of parole, the prisoner would of course forfeit the status of prisoner of war, but that such was not the case with the Indian cases at hand. NAA: A471, 81065 Part A — Judge Advocate's Summation — Trial of Hirota Akira, sheet 125.

[110] NAA: A471, 81653 Part A — Judge Advocate's Summation — Trial of Hirota Akira; NAA: A471, 81653 Part A— JAG's Report dated 5 June 1947.

[111] NAA: A471, 81653 Part B – Exhibit E: Declaration of Lt Col Woo Yin (Yien) dated 5 November 1946—Trial of Hirota Akira; A471, 81653 Part B – Exhibit F: Declaration of Maj. Chen Kwok Leong dated 5 November 1946 — Trial of Hirota Akira. There was some evidence that a section of the Chinese labourers were paid for their labour, though this practice did not seem to extend across all working parties (Exhibit F).

[112] NAA: A471, 81653 Part A — Judge Advocate's Summation — Trial of Hirota Akira, sheet 125. *Hague Convention (IV) Respecting the Laws and Customs of War on Land*, opened for signature 18 October 1907 36 Stat 2277, Preamble (entered into force 26 January 1910) ('*Hague Convention (IV)*').

[113] Ibid.

The status of Indonesians was more problematic for the Court in that 'some of them had openly joined the Japanese in resisting the Allies…[and m]embers of the Netherlands East Indies forces had also volunteered and went through a selection processes [sic] whereby some were selected and trained as *heihos* and given arms'.[114] There were somewhat discordant findings on the question of whether the Indonesians were 'coolies' or '*heihos*'. In two cases, the Indonesians were deemed to have the status of POWs,[115] yet in the trial of General Imamura (the superior of those accused in the two cases), the JAG supported the Court President's finding that the Court 'could not find beyond reasonable doubt that the Indonesians were not working for the Japanese; particularly as there was some evidence they were trusted more than the Indians and Chinese and had carried arms'.[116] The Court's position on the status of the Indonesians, therefore, appears to have been somewhat confused.

(iii) Some observations on the question of status

Greater consultation and sharing of information with the other Allied powers would probably have benefited the Australian tribunal and have led to greater consistency on the question of status among nations prosecuting Class B and C war crime suspects. Many of the Japanese tried resented the Australian courts' findings on this question, especially as halfway into the British trials, the Indians were deemed to have switched their allegiance to the Japanese Army, and prosecution of such cases ceased in British courts after 1947.[117] In the Dutch trials, Indonesians were also held to have changed their status due to 'foreign military service without the permission of the Dutch Government'.[118] More importance should have been placed on the right of the defendant to cross-examine witnesses, especially as: the facts were complex; the cases involving questions of status so numerous; and there was 'at least room for suspicion that some of the affidavits [by the Indians and others] may have been composed more with a view to re-establishing the writer with his own superiors than in the pursuit of truth'.[119]

Although the Australian tribunal appeared sympathetic towards the Indians, Chinese and Indonesians who were mistreated by the Japanese, when compared to the findings of several other Allied nations (probably because Australia did not share the problem of dealing with dissidents engaged in independence struggles), scholars such as Utsumi and McCormack remark that no thought was extended by the war crimes tribunal to the plight of the Koreans and Formosans in the lowest ranks of the Japanese Army, who 'though

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[114] Pappas, above n 2, 271.

[115] NAA: A471, 81633 — Proceedings of Military Tribunal — Capt Ikeba Toma et al; A471, 81001 — Proceedings of Military Tribunal — Capt Yamamoto Hyoto et al.

[116] For cases where Indonesians were deemed to have the status of POWs, see NAA: A471, 81633 — Proceedings of Military Tribunal — Capt Ikeba Toma et al; A471, 81001 — Proceedings of Military Tribunal — Capt Yamamoto Hyoto et al. On the Court President's finding see Pappas, above n 2, 272; NAA: MP742/1, 336/1/1865 — Minute of Maj Gen Whitelaw, President of DPW&I dated 11 June 1947. Pappas notes that it was unusual for JAG Simpson not to pick up on the conflicting findings since he was wont to re-read his comments on related cases.

[117] Hayashi, above n 10, 92.

[118] United Nations War Crimes Commission, *Law Reports of the Trials of War Criminals* (1947–1949) vol 7, 126–9. Under the law of Netherlands East Indies, Indonesians were deemed to have become assimilated as an enemy national by joining the ranks of the Japanese military. See Pappas, above n 2, 273.

[119] Sissons, above n 19, 2980.

constituting a part of the "enemy" … were at the same time themselves victims'.[120] Indeed, these members were 'treated judicially *as Japanese*, without any sign of understanding of the cultural and historical specificity of their experience of incorporation within the Japanese empire. Even their names were recorded in Korean in the trial transcript only as a kind of afterthought'.[121] The Koreans and Formosans, being at the bottom of the Japanese Army, had often served as prison guards during the war — roles where the blame tended to concentrate most at the post-war trials. Often these solders felt obliged to take harsh measures as prison guards simply to prove that they were not collaborating with the prisoners and to show their loyalty towards the Japanese empire.[122] Even if they could not be acquitted for their conduct, a fairer outcome would surely have followed had considerations of the 'cultural and historical specificity of their experience'[123] been taken into account, perhaps as a ground for mitigating sentences.

B. Essential elements of a 'trial'

Article 30 of the *Hague Convention (IV)* provides that 'a spy taken in the act shall not be punished without previous trial'. The article usually covers the rights of those suspected of war treason as well.[124] This provision led to a number of cases where the essential elements of a 'trial' were discussed, since whether a proper trial took place or not determined the difference between an execution being seen by the Court as 'murder' or legitimate punishment in the situation. Judicial immunity was not granted to these Japanese officers of court martials and summary trials and, thus, in many cases there was discussion of whether the 'trial' conducted by the Japanese Army was legitimate.[125]

The cases are interesting in that deliberations on what constitutes a legitimate trial would at times have ironically reflexive implications for Australia's very own tribunal. For example, in one case, the prosecutor argued that the natives and Chinese who were tried in the Japanese court (and subsequently executed) should have been given a right to call witnesses and that statements from these people should not have been obtained without their knowledge of what it would be used for. The defence counsel rebuked the prosecutor, asserting that in their very own war crimes trial, written statements were relied

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[120] McCormack, above n 2, 82. Also see Utsumi Aiko, *Chosenjin BC-kyu sempan no kiroku* [Records of Korean B and C-Class War Criminals] (1982); Utsumi Aiko, Kimu wa naze sabakaretanoka: Chosenjin BC-kyu sempan no kiseki [Why was Kim Brought to Justice? The Locus of the Korean Class B and C War Criminals] (2008).

[121] McCormack, above n 2, 82 (emphasis in original). Also see Utsumi Aiko, *Chosenjin BC-kyu sempan no kiroku* [Records of Korean B and C-Class War Criminals] (1982), 112.

[122] Ch'en Kwang-In (Chiba Korin) in a court statement tells of how he was urged to mistreat the POWs and also how he was being made a scapegoat for the Japanese Army:

> I admit that I had to scold or beat the prisoners in front of the Japanese officers, because if I showed any sympathy towards a war prisoner, I shall increase that suspicion [of collaborating with the prisoners], and that would then be quite against me … Captain Hiramatsu gave me such work that would be on the surface and he dealt with inner matters. Anything that would appear very bad on the surface they would make the Koreans do and anything that would appear good they would do themselves. That is why we came to be marked as a bad guard.

Ch'en was sentenced to death on 23 July 1946 and executed on 21 January 1947. NAA: A471, 81242 — Proceedings of Military Tribunal — Chiba Korin (Ch'en Kwang-In), sheet 174 (Chiba's statement in mitigation of punishment).

[123] McCormack, above n 2, 82.

[124] Pappas, above n 2, 189.

[125] See Dickinson, above n 54, 74.

on even where live witnesses could be produced for cross-examination, and statements made by Japanese suspects during interrogations, which had been extracted without their knowledge of what use it would be put to, were admitted as evidence.[126]

An illustrative case on Australia's approach to the essential ingredients of a 'trial' concerned Lieutenant-General Ito Takeo and his subordinates, who were charged with murder of 'a number of Chinese, half-caste civilians and natives' suspected of conveying military intelligence to the Allies in New Ireland (R127).[127] The issue for the Court was whether the summary trials (a one-man court consisting of Ito), which were said to be the only means available in the circumstances, could be regarded as legitimate trials under the *Hague Convention (IV)*.[128] The Court sentenced to death everyone from Ito down to executioners. However, again on the advice of JAG Simpson, the findings were not confirmed.

Simpson believed that the Judge Advocate had erred in his direction to the Court on the essential elements of a legitimate trial, and that the *Hague Convention (IV)* only required 'the ascertainment by a competent authority of the truth or otherwise of allegations made against the accused person where such competent authority applies its mind fairly and impartially to the matters at issue'.[129] So long as the Court, even a one-man court, 'met the dictates of public conscience', Simpson said the findings should be regarded as valid: 'it must be remembered that the test is not what does British jurisprudence understand by a trial, but what does a trial mean applying the principles of the laws of nations'.[130] However, in a subsequent case in July 1947 (R183), Simpson embraced some elements of the Judge Advocate's direction in the Ito case in holding that: 'any form of trial which does not give the prisoner an opportunity of knowing that he is being charged or being heard in his defence cannot properly be called a trial under Public International Law'.[131]

A Singapore case in September 1946 (S11) prompted the Court to consider whether a 'trial' could take place by filling out certain prescribed documents and attaching evidence to them to obtain the sanction of a higher authority to carry out punishment.[132] In this case,

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[126] NAA: A471, 80734 — Proceedings of Military Tribunal — Capt Shinohara Eitaro et al, sheets 3 and 11.

[127] NAA: A471, 81030 — Proceedings of Military Tribunal — Lt Gen Ito Takeo et al. This trial took place in May 1946.

[128] In his defence, Ito claimed that he acquitted at least 100 suspected spies.

[129] The Judge Advocate advised the Court that in a legitimate trial, the accused must: (a) know the charge he is facing; (b) be present before the tribunal that decides upon the verdict and sentence; and (c) be given the right to speak on his own behalf and call witnesses in his defence: NAA: A471, 81030 — JAG's Report dated 24 July 1946 — Trial of Lt Gen Ito Takeo et al. In respect of the *Hague Convention (IV)*, Simpson was referring to a section in the Martens Clause stating that 'the principles of the law of nations derived from usages established among civilised peoples, from the laws of humanity, and from the dictates of public conscience'. See also NAA: A471, 81030 — JAG's Report dated 24 July 1946 — Trial of Lt Gen Ito Takeo et al.

[130] NAA: A471, 81030 — Letter from JAG Simpson to DPW&I dated 24 July 1946 — Trial of Lt Gen Ito Takeo et al.

[131] NAA: A471, 81210 — JAG's Report dated 30 August 1947 — Trial of Capt Noto Kiyohisa et al. In holding thus, JAG Simpson was also concurring with the opinion of the Judge Advocate in this case, who advised the Court that: (1) if there had been a trial of the three prisoners, the action of Noto and Watanabe would not amount to murder; and (2) although in international law the presence of the accused was not mandatory, among the essential ingredients of a trial were that the accused should have the opportunity of knowing the charge and the evidence adduced against him, and of putting forward his defence.

[132] NAA: A471, 81241 — Proceedings of Military Tribunal — Maj Katsumura Yoshio et al. The case involved executions that had taken place under the *Ki Operation* directive issued by the Commander-in-Chief of the Japanese 16th Army in July 1943 that allowed for this procedure. Witnesses testified that the *Ki Operation* directive was as follows: '(1) Instead of being referred to a court martial as in the past, each case of obstruction of military

[footnote continued on the next page]

the Australian Court acquitted all the accused, but it would seem that the decision turned more on the Court's belief that the accused had reasonable grounds to think that an acceptable 'trial' had taken place (and that they were carrying out orders that were 'not obviously unlawful' when asked to execute persons accused of spying or war treason); rather than on an acceptance by the Court that the form of trial used satisfied the elements of a legitimate trial. The Court expressly stated that, in arriving at its decision it was guided by the amendment of paragraph 443 of the *Manual of Military Law* (*MML*), which instructed that they were to take into consideration the fact that 'obedience to military orders *not obviously unlawful* is the duty of every member of the armed forces'.[133]

On the question of trial in absentia, upon the request of the War Crimes Section in Singapore, the Director of Legal Services (DLS) later produced an opinion statement that said that article 30 of the *Hague Convention (IV)* did not necessarily require 'that the accused be present or represented before the tribunal which determines the verdict and sentence'.[134] Australia's approach to what constituted essential ingredients of a 'trial' was much more lenient compared to the criteria set by the other Allied tribunals, which stated that 'fair and impartial investigation, adequate opportunity to the accused to defend himself and present counter-evidence' were key elements.[135]

C. Military necessity

Even at the time of the war, the Preamble to the *Hague Convention (IV)* made mention of 'military requirements'.[136] However, what actually constituted a valid claim of military necessity remained ambiguous, despite the fact that both the British and Australians had adopted the principle of military necessity into their manuals of military law by 1914: 'a belligerent is justified in applying any amount and any kind of force which is necessary for the purpose of the war: that is, the complete submission of the enemy at the earliest possible moment with the least possible expenditure of men and money'.[137] It was not until after World War II that the requirements of a claim of military necessity would be clarified.

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operations or the possession of the arms will be reported to higher authority and sanction for the execution of the culprit requested on the prescribed form, to which will be attached photographs and all the evidence; (2) When the sanction of the C-in-C has been received, execution by beheading will be performed by the Military Police detachment in whose custody the prisoner is held': quoted in Sissons, above n 2, 48.

133 Military Board of Australia, *Manual of Military Law 1941* (1941), 288 (emphasis added).

134 AWM: AWM226, 18 — Opinion statement issued by Director of Legal Services, DPW&I to War Crimes Section in Singapore dated 13 November 1946.

135 Sissons, above n 2, 43. Also see United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (1947–1949) vol 5, 76–7.

136 The *Hague Convention (IV)* Preamble contains the words:

> According to the views of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations with the inhabitants.

137 The concept of 'military necessity' had been first defined by Francis Lieber in 1863 to mean: 'those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war' (*The Lieber Code* art 14). Whereas 'military necessity' was framed in the *Lieber Code* in terms emphasising the need to keep the cost of war to a minimum, it is noted that the reference to military necessity in the *Hague Convention (IV)* seems to have broadened the concept so that at the beginning of World War I, there were 'signs that the elasticity in the term was beginning to swing towards maintenance of the military advantage': Carrel, above n 2, 64. Military Board of Australia, above n 133, 194.

The plea of military necessity was invoked by the defence in cases of superior orders, as well as command responsibility, to claim that the actions deemed as war crimes were committed due to the operational requirements at the time. In the case of Ito et al (R127) mentioned previously, the JAG held that the one-man court was justified on the basis of military necessity. However, in cases that involved clear violations of the rules of war, a claim of 'military necessity' generally did not succeed, and the Court was not swayed by this plea in the trials concerning the massacres at Ocean Island and Kavieng.[138] Nevertheless, the relatively light sentences given to defendants involved in the Laha Airfield massacre (in proportion to the crime committed as well as compared to the sentences of other cases such as that of Katayama et al (M43)) would seem to imply that 'the court would always evaluate the necessity of an action when determining both the guilt of the accused and the sentence deserved'.[139] The Laha Airfield massacre involved a series of five known executions, resulting in the death of at least 315 Australian and Allied troops, but in this case only one of the accused was given the death penalty.[140] Since no reasons are given for the decisions, one can only speculate on why the Court sentenced in this way. Pappas suggests that the principle of military necessity may have mitigated their sentences, although the light sentences could also be explained by the fact that these trials were conducted at Manus late in Australia's war crimes prosecution program, when sentencing had become more lenient.[141]

D. Superior orders

The defence of 'superior orders' was the most common claim heard in the Australian trials and, alongside the question of status, it was also one of the most bitterly contested issues by the Japanese defendants. The polemical character of this issue arose because whereas the plea of 'superior orders' as a defence to war crimes was rejected by 1944 by Britain, Australia and the US through amendment of their military manuals and by 1945 by the United Nations War Crimes Commission, Japanese military law not only continued to allow this defence, but also required absolute obedience to superior orders and stipulated that disobedience was punishable by death.[142] The issue of superior orders is controversial and

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[138] Lieutenant-Commander Suzuki essentially relied on a plea of military necessity and admitted that he had given orders to kill the remaining local inhabitants on Ocean Island after hearing about Japan's defeat. His claim was that: '[w]e had decided to fight to the finish and inflict as much damage as possible on the Allies. We thought the natives would be a hindrance to us so we decided to kill them': NAA: A471, 80796 — Written statement made by Lt Gen Suzuki at Rabaul dated 20 March 1946. Here 23 Australians along with nine German missionaries were massacred.

[139] See Nelson, above n 19, 440; Pappas, above n 2, 222.

[140] On the Laha Airfield massacre see Courtney T Harrison, *Ambon: Island of Mist* (1988) 184–5. See also NAA: A471 81212 — Proceedings of Military Tribunal — Comdr Hatakeyama Kunito et al; A471, 81951 — Proceedings of Military Tribunal — Warrant officer Yamashita et al; A471, 81952 — Proceedings of Military Tribunal — Warrant officer Yamashita et al; A471, 81967 — Proceedings of Military Tribunal — Comdr Tsuaki et al.

[141] Pappas, above n 2, 224, suggests that the Australian court officers would have understood:

> the problems faced by taking the surrender of a large number of forces on the battlefield. There was evidence that the Allied troops were misbehaving and that some had escaped; the Japanese had suffered many casualties and were having trouble finding enough guards. While this would in no way excuse their actions…the court would have understood the difficulties they faced — the military necessity — and this might have mitigated in their favour.

[142] The defence of 'superior orders' had gained acceptance after it was espoused by Lassa Oppenheim, who claimed that 'violations of rules regarding warfare are crimes only when committed without an order' and that '[t]he law

[footnote continued on the next page]

constitutes a moot point for international law scholars, because the rule that such orders do not constitute a defence was retroactively applied — one of the major arguments advanced by those who view the war crimes trials as 'victors' justice' compromising the ideal of the rule of law.[143] Indeed, the argument by the defence in numerous cases was that 'the accused had had a defence of superior orders available to him in international law at the time he committed the acts for which he was standing trial, and therefore to deny him that defence at his trial was a breach of the fundamental maxim of justice "nulla poena sine lege"'.[144] Despite such submissions, in its tribunals Australia generally adopted the approach embodied in article 8 of the *Charter of Nuremberg Tribunal*, which rejected 'superior orders' as an absolute defence, but allowed it to constitute a plea for mitigating punishment.[145]

Another provision which influenced Australian courts' approach to the issue of superior orders was paragraph 443 of the *MML*, stressing that members of the armed forces are 'bound to obey lawful orders only' and that the Australian military tribunal, 'confronted with the plea of superior orders … is bound to take into consideration the fact that obedience to military orders not obviously unlawful is the duty of every member of the armed forces'.[146] In a statement of opinion issued in late 1946 regarding the application of paragraph 443, the DLS clarified that '[t]he onus is on the prosecution to prove that the order was obviously unlawful…or that the nature of the order and/or the facts known to the accused were such that he should have known that the order was unlawful or would raise such doubts in his

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cannot require an individual to be punished for an act which he was compelled by law to commit': see Lassa Oppenheim, *International Law: A Treatise*, (2nd ed, 1912). In 1914, Britain, Australia and the US adopted the rule in their military manuals. In the Kavieng Massacre case (HK1), for example, evidence of relevant articles from the Japanese *Manual of Naval Criminal Law* was produced by the defence. Chapter 4, art 55 of this law read: 'One who resists the superior officer's order or who is not subordinate to it, shall be condemned to such penalties as follows: (1) In the face of the enemy, he shall be condemned to death or life term or above ten years confinement; (2) In war-time or when in need of emergency measures of rescuing ships, from above one to ten years confinement; (3) In other cases, under five years confinement': NAA: A471, 81645 — Defence Exhibit 5 — Japanese Manual of Naval Criminal Law, Ch 4, art 55 on Crimes of Resisting Order. Furthermore, the Japanese *Regulations for Officers and Crews of Ships and Vessels* stipulated that: 'The obedience in the Military is absolute, and must be the second nature of the military personnel. Once he is ordered, complaining of the difficulty of the execution or to neglect the execution, or argue the right or wrong of it will never be allowed'. A471, 81645 — Defence Exhibit 6 — Regulations for the Officer and the Crews of Ships and Vessels.

143 See a discussion on this point in Andrew Altman, *Arguing About Law: An Introduction to Legal Philosophy* (1996).

144 See Kearney J, above n 71, 26.

145 Australia acceded to the *Charter of Nuremberg Tribunal* on 5 October 1945. Art 8 read: 'The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires'. For an example of the Court's rejection of the 'superior orders' defence, see NAA: A471, 81029 — Proceedings of Military Tribunal — Capt Yamamoto Shoichi et al.

146 Paragraph 443 reads:

> The fact that a rule of warfare has been violated in pursuance of an order of the belligerent Government or of an individual belligerent commander does not deprive it of its character as a war crime, neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent. Undoubtedly a Court confronted with the plea of superior orders … is bound to take into consideration the fact that obedience to military orders not obviously unlawful is the duty of every member of the armed forces, and that the latter cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received. The question, however, is governed by the major principle that members of the armed forces are bound to obey lawful orders only, and they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiments of humanity.

Military Board of Australia, above n 133, 288.

mind as to its legality that he should refuse to carry it out'.[147] Hence, even in cases of illegal orders, if there was nothing to put the accused on notice that the order was 'obviously unlawful', the JAG advised that a guilty finding should not be made out.[148]

Regarding superior orders as a ground of mitigation, the DLS recommended that the probable consequences of refusing to obey such orders should be taken into account in assessing punishment.[149] Where 'other ranks' were carrying out superior orders in committing war crimes, their punishment, if it was a death penalty, was usually mitigated to a prison term, though there were exceptions, as in the case of Katayama, Takahashi and Uemura (M43).[150] However, where the order was clearly unlawful, or where illegal acts were committed on the initiative of the accused, no mitigation took place.[151]

E. Command responsibility

From March to June 1947, five senior officer trials were held in Rabaul: those of Major-General Hirota Akira (R172), Major-General Adachi Hatazo (R173), Major-General Kato Rinpei (R174), General Imamura Hitoshi (R175), and Lieutenant-General Baba Masao (R176).[152] When viewing the proceedings of these trials, one can discern a certain self-consciousness on the part of the Court members; an awareness of the import of what was occurring before them for the shaping and evolution of international law — much of which was still in its formative stages at the time and, in the words of the Judge Advocate, 'law in the making':

> Gentlemen, I desire to advert to what was said by the Counsel for the defence in opening his case before you on his trial. This trial is of far wider implication than the fate of the individual now before you. That alone is in itself a heavy responsibility. But heavier still is the weight of the opinion of the world, not only those unseen eyes,

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[147] AWM: AWM226, 18 — Opinion statement issued by Director of Legal Services, DPW&I to War Crimes Section in Singapore dated 13 November 1946. The latter point made by the DLS is based on the qualification made by the JAG in M14 stating that 'there must be something either from the nature of the order [or] the circumstances surrounding it, from which the accused should know, or at least be put on inquiry, that such order was illegal': quoted in Sissons, above n 19, 2982.

[148] In two cases (M39 and M42) where the POWs had stolen food (a crime that was punishable by death under Japanese military law) and in one case (M14) where the accused was held to have no reason to doubt that the prisoners he executed had not been tried, the JAG advised that the guilty findings and sentences not be confirmed, but the CA did not act on his advice and confirmed the guilty findings. Four death sentences were awarded in the first two cases, though the CA commuted the sentence in the third case to 5 years' imprisonment. The CA in these cases had arguably acted in contravention of the *Australian Military Regulation*, reg 575(10), which stipulated that the members of the AMF were bound by rulings and opinions on questions of military law given by the JAG. See AWM: AWM226, 18.

[149] NAA: MP742/1, 336/1/295 — Execution of spies in New Ireland, Legal Position — Letter from DLS, Army Headquarters, to A/DDLS, HQ First Army Rabaul, dated 11 February 1946.

[150] Kearney J, above n 71, 24. A possible explanation of the Court's decision in that case is that two of its members had sat in another trial (M45) at which affidavits were tendered that alleged Warrant Officer Uemura had directly participated in other crimes (of which he was not charged). Sissons states that '[h]ad they been jurors in a civil trial such extraneous knowledge would, of course, have disqualified them': Sissons, above n 19, 2982.

[151] See Carrel, above n 2, 190–1, fn 26 and 27, for a discussion of such instances.

[152] Initially, a list of 18 senior officers was prepared, but the list was narrowed down to just four, with Lt Gen Baba Masao later being added. The list was reduced because the Army Headquarters abandoned their initial intention to prosecute staff officers along with their commanders. See AWM: AWM54, 780/1/6 — DPW&I History, Part V — War Crimes at 428.

> to which Counsel referred, who are now throughout the World watching the result of this trial, but more particularly the eyes of the future.[153]

Australia considered the senior officer cases its equivalent of the Class A trials and invested significantly more resources in conducting them.[154] Trials R172–R175 largely concerned crimes against the Indians and Chinese committed by the senior officers' subordinates. As the question of status has already been discussed above, this section will deal solely with the principle of command responsibility as interpreted and applied by the Australian tribunal.

Although the notion of command responsibility could be found in customary law, as well as the *Hague Regulations 1907*[155] and the *Red Cross Convention 1949*,[156] it was the precedent established in the case of General Yamashita Tomoyuki, tried before the US military court, that was the single most important influence on the Australian command responsibility trials.[157] The charges against each of the five senior officers tried by Australia were couched in almost identical terms as that against Yamashita — that while serving as commander, each had 'unlawfully disregarded and failed to discharge his duty as Commander to control the conduct of the members of his command whereby they committed brutal atrocities and other high crimes against people of the Commonwealth of Australia and its Allies'.[158] The finding of *In re Yamashita* has been criticised for stating a position of strict liability for commanders (ie that commanders are responsible for all acts of their subordinates whether known to them or not).[159] Yet it has also been pointed out that 'at no time did either the military commission … [or] the [US] Supreme Court, or in fact any of the reviewing authorities, hold that knowledge was irrelevant', and Pappas and Parks suggest that, rather than introducing strict liability, the *Yamashita* precedent established that commanders have a positive duty to take precautions to prevent war crimes by their subordinates and to inform themselves of the general situation regarding their subordinates' activities.[160]

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153 NAA: A471, 81635 Part A—Judge Advocate's Summation—Trial of Imamura Hitoshi, sheet 147.

154 See Carrel, above n 2, 184; Pappas, above n 2, 259.

155 See *Hague Convention (IV)* arts 1, 43; *Hague Convention (IV) Regulations Concerning the Laws and Customs of War on Land*, opened for signature 18 October 1907 (entered into force 26 January 1910), art 19.

156 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31, art 26 (entered into force 21 October 1950).

157 *In re Yamashita* 327 U.S.1 (1946). Yamashita was Commanding General of all the Japanese forces in the Philippines.

158 The charges against Kato Rinpei contained slight modifications to reflect his position as a Chief of Staff rather than a commanding officer. AWM: AWM54, 780/1/6 — DPW&I. History, Part V — War Crimes, 439.

159 See the writings of Yamashita's defence lawyer for a reproving appraisal of the *Yamashita* trial: Adolph Frank Reel, *The Case of Yamashita* (1949). Pappas, above n 2, 231.

160 Yamashita appealed the decision by the US military court that found him guilty and sentenced him to death. Despite two dissenting opinions, the US Supreme Court dismissed his appeal. See Pappas, above n 2, 231; Raphael Littauer and Norman Uphoff (eds), *The Air War in Indochina* (1972), 140. See also William H Parks, 'Command Responsibility for War Crimes', (1973) 62 *Military Law Review* (Autumn) 1, 71. They both point to a subsequent US case concerning Admiral Toyoda Soemu, where the precedent in Yamashita's case was clarified by the Court President (an Australian Brigadier, John O'Brien): 'As I see it, the test should be whether the commander has been guilty of fault … that he did not neglect to take normal, reasonable precautions to prevent any offence and keep himself informed … I cannot however, accept the view that a superior commander is *ipso facto* criminally responsible for any and all acts of his subordinates': quoted in Gordon Rimmer, *In Time for War, Pages From the Life of the Boy Brigadier: the Biography of John O'Brien* (1991), 184.

Australia's approach to command responsibility, it would seem, rejected strict liability. In the trial of Hirota Akira, Judge Advocate Brock in essence maintained that the charge was premised on qualified responsibility, rather than strict liability, and that, when determining the merit of the defence's arguments that the accused was precluded from obtaining knowledge or taking action due to the nature of the campaign, the Court should bear in mind the following dissenting opinion of Murphy J (of the US Supreme Court) in *Yamashita*:

> The clause 'responsible for his subordinates' [appearing in article 1 of the Annex to the *Hague Convention (IV)*] fails to state to whom the responsibility is owed or to indicate the type of responsibility contemplated … It seems apparent beyond dispute that the word 'responsibility' was not used in this particular Hague Convention to hold the Commander of a defeated army to any high standard of efficiency when he is under destructive attack, now [sic] was it used to impute to him any criminal responsibility for war crimes committed by troops under his command under such circumstances.[161]

In Brock's analysis, the mens rea required for command responsibility was either: (1) a guilty mind or intention to commit the crime; or (2) a reckless disregard of responsibility.[162] He again referred to *Yamashita* in stating that when assessing whether a commander 'failed to use due diligence', his responsibility should be limited to 'an affirmative duty to take such measures as were within his power and appropriate in the circumstances', and the degree of neglect was to be weighed having regard to the blameworthiness of the crime and the 'whole circumstances', including the commander's military knowledge, the area of his command, the nature of his unit and its particular function in the Japanese army.[163]

Perhaps due to Brock's emphasis on qualified responsibility, the findings of the Court were more lenient than expected for these senior officers, and the sentences were lighter than what many of their subordinates had received. Hirota was sentenced to seven years' imprisonment, Imamura to 10 years', Adachi for life, and Kato was acquitted.[164] Only Baba was sentenced to death for the specific crime of ordering the two Sandankan-Ranau marches (rather than general responsibility for actions of subordinates, as was the case in the other four trials), probably because there was strong evidence that he knew the condition of the prisoners before ordering the marches and should have foreseen the dire

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[161] NAA: A471, 81653 — Judge Advocate's Summation — Trial of Hirota Akira, sheet 119.

[162] Ibid sheets 119–23.

[163] Ibid sheets 121, 123–4.

[164] Adachi committed suicide on 10 September 1947, saying that he had only been waiting for his subordinates to be repatriated. Kato was charged for signing an unlawful order that read: '[t]he Indians and Indonesians of the Special Duty Coys are to be retained and employed until the end as a part of the Army strength'. Although he admitted to signing it, Kato said that the order in fact needed to be approved by the Commander-in-Chief. See NAA: A471, 81065 — Proceedings of Military Tribunal — Lt Gen Kato Rinpei. Since no reasons were given for the Court's decisions, one can only speculate that Kato's acquittal was due to the Court deciding that Kato, as Chief of Staff, and not a commander, was not to be charged for command responsibility. However, Sissons refutes the fact that his rank could amount to a proper defence, since 'his signature was proof of participation in the illegal act'. Kato's other defence, that of seeing the Indians and Indonesians as holding the status of Japanese Army constituents, was rejected in previous trials. Sissons explains the outcome in the following way: 'the acquittal is not difficult to explain. Enough was enough. They had just sentenced Adachi for the India P.O.Ws [sic] and Imamura's turn was coming. Kato was a lesser link in the chain and they ruled their line under the commanders': Sissons, above n 2, 41.

effects of such an order.[165] The comparative harshness of Baba's sentence also reflected the fact that while commanders were held responsible for both their omissions and commissions, the latter (say, in the form of an order) attracted greater penalty.[166] Overall, it is observed that Australia's command responsibility trials achieved a 'remarkably consistency',[167] which was likely a result of the same court composition throughout the trials (save that of Baba) and the fact that there was broad knowledge of the *Yamashita* precedent among the Court members as information on the case was readily available.[168]

Conclusion

This article has sought to undertake an analysis of the various legal issues — procedural and substantive — that bear upon the question of 'victors' justice'. However, like Sissons in his 1985 article,[169] it is not proposed here that the question of whether the Australian trials of Class B and C Japanese war crime suspects constituted victors' justice be answered in either the negative or affirmative, for such a reply largely misses the mark. Often underlying the accusation of victors' justice is an assumption that if what the tribunal achieved was not justice, then it must surely have been vengeance. This is an unhelpful binary to lock oneself into.

It should be noted, however, that there is a widely held perception in Japan that the Australian trials *did* constitute 'victors' justice', though some Australian commentators have also implied that a spirit of revenge may have driven certain elements of the trials.[170] One observation by Japanese scholars that is rarely visible in the literature emerging from former Allied powers is that the war crimes trials took place at a time when independence struggles were aflame in Asia (as touched upon in the discussion on the status of the Indians and Indonesians). Utsumi, for example, asserts that the fact that the prosecuting powers of the Class B and C trials were previous imperial masters (the US, Britain, Holland and France) of those Asian nations invaded by Japan, rather than the aggrieved peoples themselves, casts doubt on the political legitimacy of many of the trials.[171] She points to other problems with the Allied trials as well, such as: the prosecution of those carrying out superior orders; the influence of independence struggles on some proceedings such as the Dutch tribunal; and the fact that in the early hearings, defendants were not provided with

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165 NAA: A471, 81631 — Proceedings of Military Tribunal — Baba Masao. For a description of the trials of Baba's subordinates, see the writings of Moffit, who served as prosecutor at these trials: Athol Moffitt, *Project Kingfisher* (1995).

166 Pappas, above n 2, 255.

167 Carrel, above n 2, 188.

168 Pappas, above n 2, 259.

169 Sissons, above n 1.

170 For example, Hane, above n 4, 20, states: 'There were considerably arbitrary and irregular proceedings in the trials conducted in countries that Japan had invaded during the war, with innocent people unable to receive due process because of the bitterness about Japanese actions and atrocities'. Referring to the outcomes of the trials, Ienaga says that '[t]he executions were more expedient revenge than careful justice': Saburo Ienaga, *The Pacific War 1931–1945* (1978), 328. Awaya points out that in contrast to the Class A trials, the Class B and C trials were summary trials without adequate legal procedures: Awaya, above n 81, 282. See also Creed, Rayner and Rickard, above n 63, 50; McCormack, above n 2, 85–119.

171 See Utsumi Aiko, 'BC-kyu saiban (B- and C-class trials)' in Shukan Asahi Hyakka, *Nihon no rekishi* (125), *Gendai* 4: *Tokyo Saiban to jugo nen senso no sekinin* [The Tokyo trials and responsibility for the 15 year war], (1988), 121.

Japanese lawyers and interpreters and did not have the benefit of professional legal assistance.[172]

An indicting statement also comes from a former Korean guard who was tried and sentenced to 20 years' imprisonment by Australia: 'I have the strong feeling that the post-war trials, which should have been conducted against the enemies of peace, humanity and justice, did not match that objective, especially so far as we B- and C-class war criminals, who were in the very lowest position, were concerned'.[173] Considering the lightness of sentences in the senior officer trials (held in 1947) in comparison to many harsher findings against their subordinates (mainly in pre-1947 trials), some reflection might be due as to whether those who were truly responsible were 'brought to justice' as Evatt had envisaged. Part of the problem seems to have been the obfuscated chain of command that led to '[t]he problem of tracing the locus of responsibility'.[174] As McCormack states, 'the moral vortex of Japanese militarism worked to suck up all autonomy and responsibility from the lower levels and concentrate it at the top',[175] and given the character of this system of command, greater responsibility for war crimes should have been found to lie with senior officers than with their subordinates. However, the emphasis on individual responsibility in post-war international law meant that 'Japanese underlings were held responsible for their actions, even though they might have been following their superiors' orders'.[176]

Overall, it was Australia's approach to superior orders and to the question of status that was most vigorously challenged by the Japanese defence. Considering those issues influenced the findings in the majority of cases, as well as how bitterly disputed they were by the Japanese, further studies on these questions would no doubt be instructive in assessing the quality of justice achieved by Australia.[177] Another area that would warrant greater investigation is the war crimes that have been alleged on the part of Allied nationals in the post-war period.[178] Sissons points out that the *WCA* 'empowered the Australian courts to try war crimes against Allied nationals but not war crimes committed by them'[179]

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[172] Ibid 121–2.

[173] Yi Hak-Nae (Hiromura Kakurai) was sentenced to 20 years' imprisonment for acts allegedly committed as a prison guard, which he denies. Yi Hak Nae, 'The man between: a Korean guard looks back' (Gavan McCormack trans) in McCormack and Nelson (eds), above n 2, 120.

[174] McCormack, above n 2, 113.

[175] Ibid.

[176] Hane, above n 4, 20.

[177] See Nagano Tameyoshi, *Rabauru gunji hotei: Aru nihonjin no saiban kiroku* [The Rabaul Military Tribunal: Trial records of one Japanese] (1982); Matsuo Sabuoro, 'Sempan shikeishu no shuki: Koshudai no hibiki [An account of a war criminal on death row: sound of the gallows]' in Tanigawa Kenichi, Tsurumi Shunsuke, Murakami Ichiro (eds), *Dokyumento Nihonjin 8: Anchi human* [Document Japanese: Anti-human Vol 8] (1969); Katayama Hideo, 'Shi no shotosu: Rabauru Sempan no Shinso [Face to face with death: the true story of Rabaul war criminals]' in Tanigawa Kenichi, Tsurumi Shunsuke, Murakami Ichiro (eds), *Dokyumento Nihonjin 8: Anchi human* [Document Japanese: Anti-human Vol 8] (1969); Matsuura Yoshinori, *Rabauru sempan bengonin* [Defending officer of the Rabaul war criminals: a Japanese who fought against the revenge trials] (2006); Hayashi Eidai, *Jusatsu Meirei: BC kyu sempan no sei to shi* [Order to execute by shooting: Life and death of a Class B and C war criminal] (1986).

[178] Sissons, above n 19, 2983; Matsuo, above n 177; Katayama, above n 177.

[179] Sissons, above n 19, 2983. He elaborates by saying:

> Among those alleged by Japanese writers, Australian records suggest that the following may have taken place: (i) At the end of the war the Australian authorities moved the Japanese garrisons at Ocean Is[land] and Nauru to Piedu and Masa Masa Is[land] where, although aware that they had no immunity to malaria, they failed to supply them with anti-malarial drugs and concentrated them alongside

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and whilst this does not bear upon the conduct of the trials per se, evidence of Australian (and Allied) mistreatment of Japanese troops after the war does raise vital questions about the broader process of how the war crime suspects were brought to justice.

Kearney J has remarked that, in the sense that the victors were seen to have the right to try each belligerent for violating the laws of war before their own courts, the war crimes trials can be viewed as "'victor's justice," par excellence'.[180] However, as already indicated, to hold thus is potentially misleading, for despite the range of problems with the trials, various other aspects tend towards a finding that the Australian trials cannot merely be characterised as a vehicle for retribution. They include: the effort to keep the Court neutral after the first sign of bias; the practical adjustments made to lessen potentially unfair consequences of certain provisions in the *WCA* and *Regulations* (including the endeavour to contain the number of those tried in group trials after initial difficulties with mass trials or the JAG's recommendations to avoid instances of double jeopardy); the accommodating manner in which a legitimate 'trial' was interpreted; the rejection of a strict liability approach to command responsibility; and the generally thoughtful dispositions and exercise of restraint by the JAG and other court members. While the Australian military tribunal meted out some harsh sentences, other cases showed a surprising degree of leniency. Indeed, the sentences resulting from the first of the three Darwin trials in March 1946 drew criticism for being excessively light by sections of the Australian public (particularly the ex-service community and the House of Representatives), prompting the Court President to vigorously respond that the Court would 'not in any circumstances be stampeded into wrong action by public opinion'.[181]

Although vengeful propensities could at times be seen in public opinion, there were instances where Australian society revealed a striking commitment to 'even handed justice'.[182] For example, when in June 1950 rumours were heard in Canberra that the government had already appointed an executioner and authorised construction of gallows at Manus Island before trials had even begun there, virulent parliamentary attacks were directed towards the Government that asked: '[would the premature appointment of an

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infected Japanese troops from Bougainville with the result that all contracted malaria and more than 200 died of it. (ii) In the course of concentrating at Torokina Japanese troops from the surrounding islands, they were, despite their debilitated condition made to march the 8 miles from the disembarkation point to the PW cages without adequate watering and medical facilities being provided en route. This policy was enforced although adequate transport was available to render marching unnecessary and was continued despite deaths on the march on each occasion. (iii) There were a number of instances at Morotai, Ambon and aboard LST 9 en route from Kuching to Kuala Belait where war crimes suspects were subjected to beatings and other ill-treatment. (iv) War criminals were required to perform dangerous tasks in the course of which lives were lost (e.g. in bomb disposal work at Torokina on 15 July 1947 1 was killed, 1 blinded and 5 received other serious injuries).

[180] Stone explains that this right by the victor to do so was premised on the basis that those who violate the laws of war 'ceased to enjoy the protection of those laws and are thus at the discretion of the aggrieved State': Julius Stone, *Legal Controls of International Conflict: a treatise on the dynamics of disputes- and war-law* (1954), 357–9. See also Kearney J, above n 71, 8.

[181] Quoted in Kearney J, above n 71, 11. In the first Darwin trial charging nine defendants with ill-treatment of Australian POWs in Timor between 1943–1945, six were acquitted and the three found guilty were sentenced to terms of imprisonment from one to three months. For a discussion on the reactions of the ex-service community, see Carrel, above n 2, 128. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 20 March 1946, Vol 186, 414–5.

[182] Piccigallo, above n 30, 138.

executioner] gain the respect of the peoples of Asia for our ideas of justice?'.[183] Mant, who interviewed Ben Hackney, one of the few survivors of the Parit Sulong massacre and a former prisoner of the Japanese Army, recorded that:

> Hackney did not use the word 'hate' when I asked him what he thought about the Japanese. He left no doubt, however, that he did not love them — and never would. He disciplined his bitterness. He said very quietly: 'I presume and hope that British justice will be done at Los Negros. After all, that was one of the main things we fought for, wasn't it?' He did not emotionally say 'Hang them!' He just looked at me and said 'Give them justice' … It was finer still when he added, 'It's a bad thing to have kept those men for five years without a trial'.[184]

Rather than arguing that the Australian trials were 'victors' justice', a more helpful approach is probably to be mindful of the various grades of justice that might be achieved and to ask how the quality of justice could have been improved. Dickinson, who assisted the defence at Manus, remarked in 1952 that: 'To my mind the only satisfactory War Crimes Court would be one conducted by a neutral. It might be accessible to both the victor and vanquished alike, and such a court would avoid the character of a "revenge party"'.[185] With the establishment of a permanent tribunal for prosecuting war crimes in the form of the International Criminal Court, it is hoped that not only the lessons of Nuremberg and Tokyo Tribunals, but also those of the Class B and C trials will be heeded in paving the way for a fairer, truly impartial system of international justice.

[183] Quoted in Piccigallo, above n 30, 138–9.
[184] Los Negros is near Manus Island. See Mant, above n 60, 112.
[185] Dickinson, above n 54, 75.