

THE AUSTRALIAN WAR CRIMES TRIALS AND INVESTIGATIONS (1942-51)

By D.C.S.Sissons

CONTENTS

THE AUSTRALIAN WAR CRIMES INQUIRIES

Tol Massacre

First Webb Inquiry

Second Webb Inquiry

Third Webb Inquiry

THE INDICTMENT OF THE MAJOR JAPANESE WAR CRIMINALS

THE WAR CRIMES ACT, 1945

THE AUSTRALIAN MILITARY COURTS

History

Composition and Procedure

THE TRIALS

Massacres of Surrendered Troops

Laha

Parit Sulong

P.O.W Camps and Work-Places

Borneo: Sandakan and Ranau

First Sandakan-Ranau Death March

Second Sandakan-Ranau Death March

Massacre of Survivors at Ranau and Sandakan

Sarawak: Kuching and Miri

The Burma-Siam Railway

Tan Toey Camp, Ambon

Hainan Is

Indian P.O.W

Chinese P.O.W

United Kingdom P.O.W

The Command Responsibility Trials

Murder and Ill-Treatment of Natives

Ocean Is

Nauru

New Britain

THE TRIALS (cont.)

Murder and Ill-Treatment of Local Chinese

New Ireland

New Britain

Nauru

Murder and Ill-Treatment of Caucasian Residents

New Ireland

New Britain

Infiltration Parties

The Otakwa Party

The Ainbai Party

The Batavia Escapees: Operation 'Ki'

The Tambisan Party

Captured Air-Crews

Tandjong Priok

Ambon

Double Jeopardy

PRISON SENTENCES: LOCATIONS & EVENTUAL REMISSIONS

CRIMES NOT BROUGHT TO TRIAL

Table A: Statistics—Australian war Crimes Trials

Table B: Australian War Crimes Trials—Classified by Victim

Abbreviations

Notes

Select Bibliography

THE AUSTRALIAN WAR CRIMES INQUIRIES

In January 1942 the governments-in-exile of the countries under Nazi occupation issued the Declaration of St James in which they adopted as a principal war aim the punishment of those responsible for ordering, perpetrating or participating in war crimes and resolved to ensure that they be sought out, handed over to justice and judged. The United States and British governments associated themselves with these objectives and, to facilitate their implementation, on 8 August 1942 proposed the setting up of a United Nations War Crimes Commission (U.N.W.C.C.) whose functions would include the preliminary examination of charges against individual war criminals for extradition for trial by the Ally laying the charges. Australia on 8 December 1942 made application to join the U.N.W.C.C. as an original member.

THE ALLEN COURT OF INQUIRY—THE TOL MASSACRE

At 2 a.m. on 23 January 1942 the Japanese task force for the capture of Rabaul, the *Nankai Shitai* (Maj.Gen Horii), landed at several points in Blanche Bay. Comprising the force were the three battalions of the 144th Infantry Regiment (Col Kusunose) and supporting arms. Resistance by the outnumbered Australian garrison (2/22nd Bn and supporting arms) continued until about 5 p.m., by which time the garrison had split up into small parties moving, for the most part, along two escape routes, the one in the direction of Pondo on the west coast, the other in the direction of Awul on the east coast.

As part of the mopping up operations, 3rd Bn, 144 Regt (Lt.Col Kuwada) despatched a force by sea from Kokopo to intercept the escapees at Tol Plantation, a choke point where the eastern escape routes converged. It landed there on the morning of February 3rd. A party of 22 congregated around a white flag on the beach awaiting the arrival of the Japanese was spared and taken back to Kokopo. But during the day the remaining Australian troops in the area were rounded up and imprisoned in a large hut. The next day they were bound together in groups of nine or ten, marched off into the undergrowth and killed by the bayonet, one by one. The Japanese force re-embarked for Kokopo the same day.

Six of the victims left for dead managed to survive and were rescued by later groups of Australians moving along the eastern escape route. They were among the 156 escapees by the eastern route who reached Port Moresby aboard the *Laurabada* on April 12th.

This was reported to the Advisory War Council on by the C.G.S. on April 28th. The Adjutant General thereupon on May 12th appointed a Court of Inquiry (President: Brig A.R.Allen) with the following terms of reference:

To inquire into and report upon the facts and circumstances associated with the landing of Japanese forces and events subsequent thereto in New Britain, Timor and Ambon, and in particular, the facts and circumstances relating to:

- (a) the surrender and capture of Australian troops;
- (b) the treatment of Australian prisoners of war by Japanese troops;
- (c) the death, after capture or surrender, of Australian troops;
- (d) any acts of terrorism or brutality practised by the Japanese against Australian troops;

(e) any breaches of International Law or rules of warfare committed by Japanese forces...¹

After examining under oath the available survivors and independent witnesses who had passed through the area, the Court on July 8th reported its finding that

There were at least four separate massacres of prisoners on the morning of 4th February, the first of about 100, the second of 6, the third of 24 and the fourth of about 11... All the men had surrendered or been captured and held in captivity for some time before being slaughtered.²

Those responsible for the Tol Massacre were never brought to trial. Horii was drowned in the withdrawal down the Kumasi River on 19 November 1942. Kuwada was killed in action near Giruwa on 22nd November. Kusunose after his preliminary interrogation by 2 Aust War Crimes Section in Tokyo on 5th and 6th December 1945 fled to Takigahara and committed suicide there on December 17th.³

FIRST WEBB INQUIRY

Following the Japanese landings in New Britain and New Guinea in 1942, evidence accumulated of the commission of atrocities. On 30 January 1943 the Commander-in Chief Australian Military Forces instructed the Chief of the General Staff to issue formal directions to formation headquarters to collect and submit evidence of atrocities with a view to its examination by a competent judicial authority. Such directions were duly issued on February 3rd. On March 31st the Minister for the Army at the instance of the Commander-in-Chief wrote to the Prime Minister requesting 'the appointment of a judicial authority who would take the evidence and submit a full report on this matter'. As a result the Australian Attorney-General (Dr H.V.Evatt—concurrently Minister for External Affairs) on 23 June 1943 commissioned Sir William Webb (Chief Justice of Queensland)

To inquire into and report to the Attorney-General on ... whether there have been any atrocities or breaches of the rules of warfare on the part of members of the Japanese Armed Forces in or in the neighbourhood of the Territory of New Guinea or the Territory of Papua and, if so, what evidence is available of any such atrocities or breaches⁴.

The Inquiry heard testimony from officers and troops from Australian and United States formations that had been in action in the region up to the capture of Komiatum on the approach to Salamaua in late August (1943). To this end Webb visited and conducted hearings at places in rear areas in Papua and North Queensland where the formations were recuperating and retraining. Testimony was also taken from natives and civilians. Also tendered as evidence were captured enemy documents and the interrogation reports of Japanese prisoners of war.

Webb on 15 March 1944 tendered his report (c.450 pp) together with the affidavits of the 471 witnesses he had examined.⁵ His findings included: (i) The massacres on 3 January 1942 at Tol and Waitavalo plantations in New Britain of at least 123 Australian soldiers and civilians; (ii) The torture and killing of up to 59 male and female natives and 36 Australian soldiers at various points in the Milne Bay area in August/September 1942; (iii) The execution of 11 missionaries (male and female) at Buna, Popondetta and Guadalcanal in August 1942; (iv) A number of cases during the

Owen Stanleys campaign where individual Australian and American prisoners had been tied to trees and bayoneted; (v) Mutilation of the dead and cannibalism; (vi) The execution of the bomber pilot, Flt-Lt W.E.Newton V.C., at Salamua on 29 March 1943.

SECOND WEBB INQUIRY

The function of the U.N.W.C.C. was: (i) to hear evidence of war crimes brought to it by member governments and, where it considered that a substantial case had been made out, to list the perpetrator for arrest and extradition ; (ii) to make recommendations to member governments on how war criminals could be brought to trial. It held its first meeting on 20 October 1943 and in reporting this to his Minister (Dr Evatt) the Secretary of the Department of External Affairs recommended that to this end a new commission should be issued to Webb to conduct a continuous inquiry regarding war crimes against Australians and to bring before the Governments such cases as should be forwarded to the U.N.W.C.C.. On 9 February 1944 Evatt issued an invitation to Webb in these terms, which Webb accepted on February 24th. The new commission was issued on June 8th.

In hearings that commenced on 14 August 1944 and concluded on October 20th testimony was taken from 112 witnesses. Forty-one gave evidence on the torpedoing of the hospital ship *Centaur* by a Japanese submarine off Brisbane on 14 May 1943. Twelve Australian P.O.W. rescued by American submarines when the Japanese transport, *Rakuyo Maru*, was sunk off Hainan on 12 September 1944 gave evidence on the murder and ill-treatment of P.O.W. on the Burma-Siam railway and elsewhere in South-East Asia. Of the remaining 59 witnesses, 35 gave additional evidence on crimes committed up to the capture of Komiatum and 14 on later crimes. On 31 October 1944 Webb tendered an interim report (104 pp) together with the depositions of the witnesses.⁶

On the basis of these two reports Webb prepared specific cases which he presented to the U.N.W.C.C. at meetings of its Facts and Evidence Committee at London on 24 & 31 January and 7 & 8 February 1945. As a result the U.N.W.C.C. listed for arrest 73 individuals and all the members of ten units, and listed for further investigation an additional 18 individuals /units not sufficiently identified.⁷

While in London Webb was invited to confer with the United Kingdom Law Officers on appropriate trial procedures. At his meeting with the Law Officers on January 22nd Webb stressed the need that in war crimes trials the rules of evidence be broadened to enable the admission of affidavits, depositions, unsworn statements etc and that where members of a particular unit had been shown collectively to have committed a war crime the onus of proof of non-participation should be shifted to the accused – a view that had also emerged in the deliberations of the U.N.W.C.C. The Law Officers agreed and assured him that the Royal Warrant and Regulations for United Kingdom war crimes tribunals then being drafted would contain such provisions.⁸

On his return to Australia Webb on February 27th (1945) submitted his resignation. Although Evatt on April 3rd pressed him to continue, the Premier of Queensland on April 30th notified the

Prime Minister that because of the pressure of his duties as Chief Justice the Queensland Government was unable to make his services available.

THIRD WEBB INQUIRY

On May 23rd the Prime Minister replied to the Queensland Premier proposing that ‘an arrangement might be made for Sir William to carry on the investigation of war crimes concurrently with his work in the Supreme court with the aid of secretarial assistance for his work on war crimes’. This was accepted; but it was not until July 31st that the secretary was appointed.⁹ Before Webb was able to resume his activities the Inquiry was overtaken by events. At the four-power Conference on Military Trials which convened in London on June 26th it was agreed that in addition to conventional war crimes planning or waging a war of aggression was also a criminal offence in international war and this was embodied in the Charter of the Nuremberg Tribunal issued on August 6th. Next, the cessation of hostilities on August 15th made the collection of evidence a more urgent and extensive task. To meet these changed circumstances a new commission was issued on September 3rd appointing Webb and two other judges, Mr Justice Mansfield of the Queensland Supreme Court and Judge Kirby of the N.S.W. District Court as a board of inquiry. Its terms of reference were essentially the same as in the previous commission except that they were expanded to embrace war crimes against any person who was resident in Australia prior to the commencement of the War, but also ‘any British subject or any citizen of an allied nation and that in addition to the thirty-two war crimes previously defined there were added: (i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the forgoing; (xxxiv) Cannibalism; (xxxv) Mutilation of the dead.¹⁰

The Commissioners issued a war crimes questionnaire to all Australian P.O.W and internees. More than 12,000 of these were completed and lodged. From these respondents 248 witnesses were selected for examination by one of the commissioners or their staff. To enable this to be done promptly before the P.O.W were repatriated and dispersed, Mansfield and Kirby were despatched by air to the recovery areas overseas to examine the witnesses there. The repatriation of the P.O.W., however had proceeded so smoothly that most had embarked before the commissioners arrived. Mansfield examined 50 at Manila, 21 at Morotai (7 Australian P.O.W. and 10 Dutch civil internees from Ambon, 4 Indian P.O.W. from Borneo), 11 at Labuan (5 British internees and 6 Indian P.O.W.), and 7 at Macassar (4 Dutch internees and 3 graves registration personnel). Kirby at Singapore and Kandy collected depositions regarding the murder of the Australian army nurses and the Australian official, V G Bowden on Bangka Is. En route, at Morotai he had examined 8 Indian P.O.W. recovered in the Halmaheras.

There was general agreement that there should be no delay in commencing the Australian trials. In Parliament Members were demanding it and Ministers were providing the required assurances. The necessary legislation, the Australian War Crimes Act was introduced into Parliament on October 4th and was passed by both Houses on that day. Initially it was assumed that before a war criminal suspect could be tried he had to be listed by the U.N.W.C.C. On October 6th, however, the Chairman of the U.N.W.C.C. informed the Australian Minister for External Affairs (Dr H V Evatt) that this was not necessary.¹¹ The procedure of listing by the U.N.W.C.C. had been designed primarily to ensure that, as guaranteed in the three-power Moscow Declaration of 1 November

1943, suspects could be arrested by whichever Ally captured them and extradited to the country in which the crime had been perpetrated. Throughout the proceedings of the U.N.W.C.C. the established right in international law of a belligerent to try and punish for breaches of the laws and customs of war an enemy who had come into his custody was frequently affirmed and never challenged. The United States and British commanders were already exercising this right in the European theatre, and in the Far East Yamashita had been charged before a U.S. Military Commission on September 25th without prior listing by the U.N.W.C.C. It was expected that the first Australian cases—against some 70 held in custody at Labuan on suspicion of involvement in the murder and ill-treatment of P.O.W. in Borneo—would be ready for trial at Labuan by November 15th. In discussion with the Chief of the General Staff at A.H.Q. Melbourne on October 15th, Webb proposed that in the Australian trials the prosecutions should be conducted by his Commission—with the assistance of the best Kings Counsel if the culprits and offences so warranted. The C.G.S. agreed to this¹² and Webb cabled to Mansfield, who was at Morotai at the C-in-C's Advanced Headquarters, asking him to return to Labuan and remain there until the trials there were completed. But the C.G.S. was promptly overruled. The following day the C-in-C (Gen Blamey) informed Mansfield that, having perused a copy of the War Crimes Act and the terms of reference of the Commission, he had reached the conclusion that the Australian trials were purely an Army matter and that the Commission had no authority to participate in or attend them.¹³ On October 22nd the Adjutant-General informed Webb that in the Australian trials the prosecutions would be conducted by the 'very efficient and experienced legal staff on the Headquarters of Commanders in the territorial areas concerned' and that the assistance of civilian counsel would not be required.¹⁴

As a result of these developments the task of the Commission as regards the so-called 'minor' or 'conventional' war crimes (i.e. crimes against the laws and usages of warfare as distinct from the 'major' crime of planning or waging aggressive war) had undergone a change. Its task was no longer to examine witnesses for the purpose of preferring charges and presenting cases against specific individuals or units either for the U.N.W.C.C. or for the Australian trials. Its task was now essentially informative—to report to the Minister the general picture—although it would continue promptly to provide the depositions to the Army authorities for use as evidence in such prosecutions as the latter might undertake. For such a report it would, Webb decided, suffice to select only about two hundred witnesses for examination.¹⁵

Mansfield returned to Australia on October 30th. There he had examined 41 witnesses (4 in Brisbane, 37 in Sydney) when Evatt on December 7th dispatched him to London to present to the U.N.W.C.C. an Australian list of major war crimes suspects and the charges against them. Kirby returned to Australia on November 11th and examined 3 witnesses in Melbourne before resigning in order to conduct a Royal Commission on another matter. On December 5th Mr Justice Philp of the Queensland Supreme Court was appointed to examine the remaining 33 witnesses (14 in Sydney, January 16th-21st; 19 in Melbourne, January 24th-February 1st, while Webb drafted the Report.

In a letter to the Acting Minister for External Affairs dated November 29th Webb set out how he saw the task:

...The Army are dealing with the ordinary war criminals as and when they capture them. The press to-day announces the constitution at Morotai of the first Australian Military Court, which will deal with 150 Japanese accused of war crimes in the Halmaheras and Celebes.

The commission's main task, however, is to ascertain the major criminals, most, if not all of whom, are in Japan.

As the Commission examines witnesses it obtains evidence against ordinary war criminals. This evidence is passed on to the Australian Army for use in the prosecution of such criminals.

As to the major war criminals, it is necessary to show in considerable detail the type of war the Japanese have waged. For this purpose it is necessary to show how the Japanese behaved not only in battle but also out of it, not only in the field, but in prisoner-of-war camps and towards civilians...

Although the case against the major war criminals should be presented in considerable detail, it does not follow that every detail is required to be stated and the report delayed until the last bit of evidence is taken. The case against Tojo will not necessarily be less effective if it does not deal with every offence committed; it will be enough to prove a large number of all kinds of offences over a long period and a wide area. But conditions in every prisoner-of-war camp where Australians were confined will, if the evidence is available, be stated in the report.

I propose to make the report in two parts. The first part will disclose the serious offences committed by the ordinary war criminals and contain a tentative list of the major war criminals and the draft of a possible indictment against them on the lines of that against the major German war criminals; the second part will contain the final list of major Japanese war criminals and indicate their respective offences

At this stage I am inclined to think that the second part cannot be satisfactorily completed until we get access to Japanese records...

No doubt we can get information from Japanese experts in Australia, but this is limited, as I discovered when the present tentative list of major war criminals was drawn up. The Japanese leaders, unlike the Germans, did not use the press or the radio to any great extent to inform the world of their individual activities.

It may happen that the major war criminals prosecuted will be only those the Americans desire to prosecute. If they see fit to confer immunity on any we think guilty, it is possible they will not give us the necessary materials and facilities to prosecute...

Before the report is prepared it is likely that we shall have evidence of all the serious war crimes committed by the Japanese, against Australians at all events, and also evidence of the conditions obtaining in all prisoner-of-war camps in which Australians were located. So far 208 witnesses have been examined, some at considerable length, and many documents have been tendered in evidence.

More remains to be done than the making of a report. Lt.Col T B Stephens, who is assisting me to examine witnesses, has in the attached memorandum emphasized the need for a Prosecutions Bureau. This Bureau should comprise trained investigators as well as lawyers. Your Security Branch may provide the investigators. Both should be under a Commissioner, say, Mr J V Barry, K.C.

The taking of evidence has been suspended for a day or two while the whole staff classify and digest the evidence already taken before proceeding to survey the remaining questionnaires, with a view to ensuring that evidence will be taken covering all serious crimes and every prisoner-of-war camp that contained Australians...

I shall be disappointed if the first part of the report is not in your hands before the end of January.¹⁶

But within a fortnight, while Webb was still in the early stages of drafting Part 1, the Commission was again overtaken by events. Webb was offered nomination as the Australian judge on the International Military Tribunal for the Far East. In his letter of acceptance dated December 13th he wrote that he accepted nomination 'subject to my being qualified to act. Of course, I have so far made no finding against any major war criminal. The second part of the report, dealing with the

major war criminals could be completed by another Commissioner...'.¹⁷ Thus it is that the Report, which ultimately was presented on January 31st, confines itself to conventional crimes against the laws and usages of warfare. e.g: ill-treatment of P.O.W in camps in South-East Asia, Formosa, Hainan, Manchuria and Japan and on the Burma-Siam railway; the Sandakan-Ranau death-marches; and the massacres at the Alexandra Military Hospital, at Bangka Is and at Parit Sulong. It contains only one reference to the major war criminals:

472. The Board has not yet obtained any evidence indicating that any Japanese other than those referred to in this report and annexures was guilty of aggression, or a war in violation of international treaties, agreements or assurances or of participating in a common plan or conspiracy for the accomplishment of any of the foregoing. It may be that no such evidence is available in Australia and that it will become available only from records in Japan, including those in the custody of the American Army. Mr Justice Mansfield was endeavouring while in London to obtain evidence of the commission of this crime, that is, evidence against what are termed major Japanese war criminals and any evidence that he has secured will be included in a further report dealing with the major war criminals, if that is found necessary. However, it may be that the trials of the major war criminals will be completed before this further report can be made.

In the event, no further report appeared.

With Webb's appointment to the Tribunal and Mansfield's appointment on January 10th to the International prosecution Section, the report of the Commission was written under great pressure; for it had to be completed before both Commissioners left Australia to take up their appointments. Mansfield did not participate in the drafting, he did not return to Australia from London until January 20th and, together with Webb, signed the Report ten days later on January 31st before they departed that day for Tokyo. Attached to the Report are the depositions of 208 of the 247 witnesses examined by the Commission. Omitted are the depositions of the 39 witnesses examined by Mansfield at Morotai, Labuan and Macassar. Although copies were retained by the respective Army formation headquarters these depositions appear never to have reached the Commission's secretariat. None of these witnesses are cited in the body of the Report. Similarly none of the 33 witnesses examined by Philp are cited in the body of the Report.

The work of the Commission was brought to an abrupt conclusion when Webb was appointed to the International Military Tribunal for the Far East (I.M.T.F.E.) and Mansfield to its International Prosecution Section—before they had heard evidence on the planning and waging of aggressive war. They signed and lodged their report to the Minister (147 pp plus affidavits) on 31 January 1946—the day of their departure for Tokyo. Accordingly, like its predecessors, the report covers only conventional war crimes, e.g: ill-treatment of P.O.W in camps in Malaya, Ambon, Sarawak, Formosa, Hainan, Manchuria and Japan and on the Burma-Siam railway; the Sandakan-Ranau death-marches; massacres of some 323 patients and staff at the Alexandra Military Hospital at Singapore, of twenty-two Australian nurses at Banka Is and of about 150 Australian and Indian wounded at Parit Sulong.

THE INDICTMENT OF THE MAJOR JAPANESE WAR CRIMINALS

Australian policy to indict the Emperor as one of the major war criminals appears to have been instituted and directed by Evatt, himself. A distinguished lawyer, Evatt was a Justice of Australia's highest appeal court when he resigned to enter Parliament as a Labor Party candidate in 1940.

The earliest indication of a policy in this area is a cable on 26 May 1945 from Evatt at the San Francisco Conference to his Acting-Minister in Canberra admonishing him that 'Nothing should be said in Australia to indicate any weakening of our policy of bringing Japanese criminals to justice irrespective of their office or eminence of their position'.¹⁸

On July 17th the British Government passed on for information its comments on the U.S. State Department's draft 'Occupation Policy for Japan'. Britain suggested that instead of suspending the constitutional powers of the Emperor, as the draft proposed, and engaging in direct military government, it might be preferable for the Supreme Allied Commander 'to work through those powers'. The Australian reply was clear cut: 'The Emperor as head of State and Commander-in-Chief of the Armed Forces [must] be given no immunity for Japan's acts of aggression and war crimes, which in evidence before us are shown to have been of a most barbarous character'.¹⁹ This was reaffirmed on several occasions in the exchange of cables between the Australian and the British governments that took place between July 27th and August 18th in connection with the Potsdam Declaration and the terms of the eventual surrender. Take for example the Australian cable of August 11th:

.....we must appeal to you to undertake to resist any claim of the Emperor or on his behalf to immunity from punishment, to support us in bringing him to justice and to deprive him of any authority to rule from the moment of surrender. We submit that any other course will effectually prevent the emergence of a democratic and peace-loving regime in Japan.²⁰

To this the British Government replied on August 17th:

We consider.....that it would be a capital political error to indict him as a war criminal. We desire to limit commitment in manpower and other resources by using the Imperial throne as an instrument for the control of the Japanese people and indictment of the present occupant would, in our view, be most unwise.²¹

Meanwhile in London, at meetings of the U.N.W.C.C. on August 1st and 14th, the Australian delegate urged that lists of the Japanese major war criminals be submitted to the Commission for its endorsement without delay. As the Four Powers were at that moment waiting to receive the Japanese reply to the surrender terms, the American Ambassador thereupon sought the immediate assistance of the British Foreign Office to cause the Australian delegate to desist, and the following day the latter agreed for the moment to wait on American action.²² On September 19th, however, the delegate cabled to Canberra that Evatt (who was in London at the time) wished an Australian list of major Japanese war criminals to be tendered to the U.N.W.C.C. by Webb as a matter of the greatest urgency. As regards its composition:

.....Presumably Chief Justice Webb will consider including Hirohito as Head of the Army, and as a knowing participant in systematic and barbaric practices in actual warfare. Presumably also the lists should include the names of leading Japanese statesmen, militarists, financiers and industrialists who were responsible for the preparation, launching and waging of aggressive war...²³

In reply, Webb on September 26th cabled to Evatt that if he were asked to say, on the basis of his own and American reports on Japanese atrocities in the field and in occupied territory, whether the Emperor and his Cabinet Ministers should be placed on the list of war criminals, he would reply in the affirmative on the following grounds:

- (1) That as far as he is aware international law does not give immunity to sovereigns or their advisers who abet or connive at breaches of the laws of war by their soldiers and people, although this is controversial as stated by Dr Lauterpacht;
- (2) That the breaches committed by the Japanese were so terrible, commencing with the China Incident and continuing until February of this year and so widespread that the Emperor and his ministers must have learned of them, if not from Japanese sources then from neutral and enemy sources, through the press or broadcasts;
- (3) That having learned of them they must be taken to have approved of them or connived at them or abetted them, if they did not take steps to prevent them, a matter of defence for them to establish;
- (4) That in view of the great authority, whether spiritual or otherwise is immaterial, displayed by the Emperor in bringing about the unconditional surrender of Japan, it is clear that, if he ordered his forces or people to desist from atrocities and other violations of the laws of war, he would have been promptly obeyed; and
- (5) That it would be a travesty of justice, seriously reflecting on the United Nations to hang or shoot the common Japanese soldier or Korean guard while granting immunity to his sovereign perhaps even more guilty than he.²⁴

The task of compiling the list was entrusted to the small Post-Hostilities Planning Section of the Department of External Affairs assisted by the head of the Department of Information's Listening Post (the organisation that analysed and disseminated to Ministers and Departments news and information derived from the monitoring of foreign news services and broadcasts). The Section commenced the task on September 24th.²⁵ The completed list, 64 names in all including the Emperor and fourteen bankers and industrialists, was on October 22nd tendered to Webb by the Acting-Head, External Affairs (J.W.Burton) for his approval. On October 24th Webb endorsed the list with one qualification: 'As regards the Emperor, my attitude is as stated in my cable of 26th September, but if it be within my province I suggest...need for Hirohito's case being decided at the highest political and diplomatic levels'.²⁶ In a memorandum to External Affairs Webb elaborated on this point:

Out of deference to the British view-point, as indicated to me, but by no means pressed...I respectfully suggest that we omit the Emperor from this tentative list.

Of course, the Emperor's immense power, as shown by the prompt way he ended the war, carried a commensurate responsibility to prevent the war, or, if he could not do that, to see that it was conducted in a civilised way. The defence that he was head of a State is negated by the Four Power Pact of 8 August last [i.e. the Charter of the Nuremberg Tribunal], which also negated the defence that he was a puppet, which is only the defence of superior orders. Further, any defence of ignorance must fail unless he shows he discharged his duty to inquire.

But, even if he is guilty, there is a way out if one is desired on the ground of expediency, which does not concern us—a pardon for informing on his associates in war crimes. Fifty years ago in Queensland a doctor, who headed a blackbirding expedition and personally committed murders, escaped by turning King's evidence while his minions went to gaol or to the scaffold...²⁷

Burton replied to Webb by teleprinter on October 25th rejecting this suggestion: 'The question of taking action for bringing to trial any person on our list will require inter-governmental decision on high level. But this is not necessary for listing of any person by Commission for further investigation and position of Emperor on list is in keeping with declared Australian Government policy'.²⁸

On October 26th the complete list, with the Emperor still on it, was despatched by External Affairs to the Australian delegate with instructions that it be placed before the U.N.W.C.C. for consideration. Webb's fellow War Crimes Commissioner, Mansfield, was sent by air to London on December 8th to prepare and present the case against the 64 before the Evidence and Facts Committee of the U.N.W.C.C.. Mansfield completed a 17-page 'Excursus'²⁹ in support of the indictments by December 28th and lodged these to be considered by the U.N.W.C.C. at its meeting on January 9th. Mansfield describes the Excursus as a 'brief outline of the more important factors in the rise of Japanese imperialism' during the preceding century. It was hastily put together from whatever information Mansfield could find locally—principally, he said, 'from British White Papers'. In it 'The Position of the Emperor' receives 1½ pages plus one full page of quotation from the declaration of war Rescript. Briefly, the substance of the charge is that: (i) The Emperor gave his approval to the invasion of Manchuria and the advance on Chinchow in 1931, the crossing of the Great Wall in 1935, the invasion of China in 1937, and the attacks on the Western powers in 1941; (ii) 'Under the constitution the Emperor declares war, makes peace and concludes treaties. It has therefore been necessary for him to give express approval to every aggressive military action'. (iii) 'He was not at any time forced by duress to give written approval. He could have refused to do so and supported his protests by abdication or *hari-kari* (sic)'.³⁰

On December 13th Webb accepted nomination as the Australian member of the IMTFE (Evatt's first choice, Lord Wright, the U.K. Appeal Court judge who had served as the Australian delegate on the U.N.W.C.C., had refused the position). As we have already noted, his letter of acceptance contains an illuminating passage—he accepts nomination 'subject to my being qualified to act. Of course, I have so far made no finding against any major war criminal. The second part of the report, dealing with major war criminals, could be completed by another Commissioner...'.³¹ This shows clearly his awareness that it could (and would) be argued that his prior participation in the investigation and prosecution process should disqualify him from trying the case. When in mid-January he was asked in his capacity as Commissioner to approve an updated copy of the Australian list, he declined, stating that 'he did not feel that he should do so now that he has been nominated to the International Tribunal'.³² A similar anxiety seems to underlie the letter that he wrote two years later to Gen MacArthur in response to a critical article published in *Life* magazine. In it he writes: '...at the request of the Australian Government to advise on his position, I advised that, although there was a prima facie case against the Emperor, his position should be determined at the highest level. I cabled to that effect to Dr Evatt in Washington or London towards the end of 1945. Later I told Dr Evatt that if the Emperor were indicted I would not take part in his trial.'³³

As we have already mentioned, Webb and Mansfield's commissioners' report to the Minister of January 31st deals only with conventional war crimes and not with crimes against peace.

When on January 9th (1946) the U.N.W.C.C. reconvened after the Christmas recess, the American and British delegates first adopted the tactic of at each meeting postponing consideration of the

Australian list to a later date. It was just at this time that Gen MacArthur was advising the Chiefs-of-Staff that if the Emperor were indicted 'It is quite possible that a minimum of a million troops would be required which would have to be maintained for an indefinite number of years'.³³ When at the meeting of the U.N.W.C.C. of February 13th Australia forced the issue and demanded a vote on the proposal that the U.N.W.C.C. should issue a list of key Japanese war criminals and that the Australian list should be the basis of discussion, the proposal was defeated. One of the arguments advanced against the proposal was that, now that the Tribunal itself had been set up (Its Charter was issued by MacArthur on January 19th), the indictments could be handled more effectively and expeditiously by the Tribunal's International Prosecution Section.³⁴

The scene then moved to Tokyo. From there on April 6th Mansfield cabled to Evatt:

The inclusion of the Emperor as defendant is now being discussed. There is at least a prima facie case of guilt which can be proved. This is not contested by the Allied prosecutors. When the final decision is taken, political considerations will probably prevent votes in favour of inclusion. I am pressing strongly for inclusion....³⁵

His instructions were cabled to him on April 9th:

As previously advised to you, if you are satisfied that there is a case, it is left entirely to you to act upon considered view. At same time you should avoid any public protest if decision is against indictment or if MacArthur vetoes proposal. You are familiar with the facts and it has always been our view that if the facts warranted indictment, Hirohito is no more entitled to special immunity than the common soldier who inflicted such cruel barbarities against Allied soldiers and civilians.³⁶

The matter had, however, been determined the previous day. The minutes of the April 8th Meeting of Associate Prosecutors read as follows:

Suggestions were invited as to any additions to the List. Mr Justice Mansfield proposed that the Emperor be included. A discussion ensued, after which it was agreed that owing to various considerations outside the Prosecution, it would be an error to indict the Emperor. AGREED not to include the Emperor.

AGREED To prepare the Indictment of the 26 Defendants whose names had been decided upon.³⁷

At that meeting Mansfield's was the only affirmative vote.

At the conclusion of the trial, in his Supplementary Opinion, Webb referred to the Emperor's part in starting the war and included the Emperor's immunity from prosecution as one of the grounds on which, in sentencing, he had, in the case of each of the accused, opposed a death sentence:

The authority of the Emperor was proved beyond all question when he ended the war. The outstanding part played by him in starting as well as ending it was the subject of evidence led by the Prosecution. But the Prosecution also made it clear that the Emperor would not be indicted. This immunity of the Emperor, as contrasted with the part he played in launching the war in the Pacific, is I think a matter which this Tribunal should take into consideration in imposing sentences...a British court in passing sentence would, I believe, take into account...that the leader in the crime, though available for trial, had been granted immunity...

The Emperor's authority was required for war. If he did not want war he should have withheld his authority. It is no answer to say that he might have been assassinated. That risk is taken by all rulers who must still do their duty. No ruler can commit the crime of launching aggressive war

and then validly claim to be excused for so doing because his life would otherwise have been in danger

The suggestion that the Emperor was bound to act on advice is contrary to the evidence. If he acted on advice it was because he saw fit to do so. That did not limit his responsibility. But in any event even a Constitutional Monarch would not be excused for committing a crime at International Law on the advice of his Ministers.³⁸

Mansfield continued as the Australian Associate Prosecutor at the IMTFE throughout 1946. Principal among his duties was the superintendence of the preparation and presentation of the 'Prisoners of War' phase of the Prosecution's case, in which under Counts 52-55 of the indictment many of the accused were charged with 'ordering, authorizing and permitting' their subordinates 'frequently and habitually' to commit breaches of the Laws and Customs of War against the armed forces of the Allies and against 'many thousands of prisoners of war and civilians then in the power of Japan' and violating the Laws of War by 'deliberately and recklessly disregarding their duty to take adequate steps to secure the observance and prevent breaches thereof'.

THE WAR CRIMES ACT 1945

The Australian trials were conducted by Military Courts, whose powers, composition and procedures were laid down in the Australian *War Crimes Act* (No 48 of 1945) and *Regulations for the Trials of War Criminals* (Statutory Rules 1945, No 164). These were modelled very closely on the United Kingdom Royal Warrant (Army Order 81/1945). They applied to these Military Courts -- with certain exceptions or modifications—the provisions of the United Kingdom *Army Act* and *Rules of Procedure* (which, as applied by the Australian *Defence Act*, constituted the disciplinary code of the Australian Military Forces in time of war) governing Field General Courts-Martial.³⁹

A criticism that has been levelled against this legislation is that it was discriminatory, denying a suspect, if he was Japanese, time-honoured safeguards considered vital if he was Australian.

As the war progressed it had become increasingly apparent to the legal experts in the U.N.W.C.C. that, if the war crimes courts to be set up were required to follow the traditional rules of evidence of Anglo-American law (which confine evidence to the testimony of witnesses actually produced in court and subject to cross-examination), many war criminals would go free. For example, the evidence against those who killed Flt-Lt Newton was a diary found on a Japanese corpse. It contained an eye-witness account of the execution and named the executioner and the officers who were present. But, as the writer was dead, the diary would, according to the rules of evidence, be inadmissible. Section 9 of the *Act* accordingly, following the war crimes legislation of the other Allied Powers, authorises the courts to admit 'any oral statement or any document appearing on the face of it to be authentic'.

One of the basic purposes of the traditional rules of evidence is to ensure that punishment is confined to the actual offender. Apparently the highest repositories of legal rectitude in each of the Allied nations did not regard this principle as absolute. It seems to me that what they were saying was: 'It is more important that an innocent man should go free than that a guilty man should hang;

but this is true only where the innocent man is one of our own side. When he is an enemy national, it is not so important'.

Among the critics of Section 9 was the Australian Judge-Advocate General (a civil appointment with quasi-judicial tenure—held from 1936 to 31 March 1946 by J.Bowie Wilson, K.C. and thereafter by Mr Justice Simpson of the Supreme Court of the Australian Capital Territory). In his report on one of the Morotai trials (M44) Bowie Wilson expressed himself in strong terms:

Under what are called trials under the *War Crimes Act*, none of the rules that have been considered necessary to protect accused persons apply...would have thought that much of the evidence admitted in these proceedings even under the system of there being no rules of evidence, should not have been admitted as being relevant to the charge before the court.⁴⁰

In the typical war crimes trial the greater part of the prosecution evidence consisted of written statements from living persons who were not produced in court. Section 9 deprived the accused and his Defending Officer of the very valuable right to confront the witness and test his evidence and his veracity by cross-examination. In one of the Labuan trials (M36)⁴¹ the Confirming Authority (apparently on his own initiative and without any prompting from the Judge Advocate General) withheld confirmation and ordered a re-trial because affidavit evidence was used when the witnesses could have been produced in person. Such action on these grounds by the Confirming Authority appears, however, to have been quite atypical. The United States war crimes courts are said to have been much less ready than the Australian courts to accept affidavit evidence when the witness himself could be produced.⁴²

In a calmer atmosphere in 1949 Australia and its former allies, in the amendments to the 1929 Prisoners of War Convention, renounced the option to act in this discriminatory manner in the future. Under a.85 and a.102 of the new Convention, war criminals, like other P.O.W., can be tried only by the same courts and according to the same procedure as soldiers of the Detaining Power. These 1949 amendments also appear to close the door to any repetition of another discriminatory feature of the Australian trials. Following the generally accepted view that under international law any war crime was punishable by death, Section 11 of the *Act* empowered the courts to award the death penalty. But under the *Defence Act* the only offences for which an Australian soldier could be sentenced to death by a court martial were certain enumerated acts of treachery—even murder attracted only a life sentence under Australian military law.

The confirmation procedure was also discriminatory. A feature of Australian military law dating from the *Defence Act* of 1903 was the provision that sentences of death could be confirmed only by the the Governor-General in Council—i.e. by the civil authority and not by the military. When the *War Crimes Act* was enacted empowering the Governor-General to delegate this function and Cabinet approved regulations delegating it to Divisional Commanders, F.R.Sinclair, the Secretary for the Army, protested to his Minister in strong terms: '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...'.⁴³

As a result of Sinclair's intervention, a compromise was reached whereby death sentences would be confirmed only by the Commander-in-Chief, Australian Military Forces (or, after the abolition of that appointment, by the Adjutant-General) and only after considering a report by the Judge Advocate General (J.A.G.) who, in such cases, was authorised to comment not only on the court's findings but also on its sentences.⁴⁴

THE AUSTRALIAN MILITARY COURTS

History

Initially in planning the Australian trials it was assumed that each prosecution would require the prior authorisation of the U.N.W.C.C. or, at least, of its local National Office (i.e. the Webb Commission). On 12 October 1945, however, the Chairman of the U.N.W.C.C., Lord Wright, advised Evatt that it was only in the case of the major war criminals to be tried by international tribunals (or war criminals whose extradition was required) that this was necessary; trials of ordinary war criminals already in Australian custody could proceed without reference to the U.N.W.C.C.; the United States was already proceeding with national trials on this basis.⁴⁵ On October 20th Webb wrote to the Secretary, Department of the Army, confirming that the Australian trials were, henceforth, purely an Army matter and that he and his fellow commissioners would confine their activities to collecting evidence and reporting to the Minister for External Affairs. On October 24th an Order-in-Council was issued delegating to commanders of divisions and above the power to convene Military Courts for the trial of war crimes. On November 26th orders were issued by the Adjutant-General instructing delegates to convene such courts as soon as the charges were ready for trial.⁴⁶ The first trial was convened by the G.O.C. First Aust Army that day and commenced at Wewak on November 30th.

On December 14th a small section was set up in the Adjutant-General's Branch at Army Headquarters, Melbourne (in the Directorate of P.O.W. & Internees) to exercise and administer central control and direction over war crimes investigations and prosecutions. This was headed by an Assistant Adjutant-General, Lt.Col J.W.Flannagan (a barrister in civil life), who continued in this post until its disbandment in July 1950.

The locations and dates of the Australian trials are as shown in **Table A: Trials Conducted under the Australian War Crimes Act.** (v p.23 *infra*). At Wewak, Morotai, Ambon, Labuan, and Darwin (and at Rabaul prior to March 1946) the investigations and the trials were conducted by the local formation headquarters. The accused were personnel located in the areas that came under Australian occupation at the Surrender. Thereafter, under the central direction of the War Crimes section in the Directorate of P.O.W. & Internees, investigations and trials were administered on a continuous basis at Rabaul and Singapore (and subsequently, Hong Kong) with investigative assistance from the Australian War Crimes Sections established for that purpose in Singapore and Tokyo.

Early in 1948 the Hong Kong Government communicated to the Australian Government its wish to resume the premises occupied by the Australian war crimes court and its inability to provide

alternative accommodation. At the same time the supreme Allied council, the Far Eastern Commission, had begun consideration of a draft recommendation to member governments that trials should not continue beyond 30 June 1949. In this situation the Australian Cabinet on 15 June 1948 issued instructions that every endeavour be made to have the trials completed by the latter date. Representations were then made to Gen MacArthur's headquarters (G.H.Q. S.C.A.P.) for permission to hold the Australian trials in Japan. When these representations were unsuccessful, Darwin and Manus Is (Territory of New Guinea) were examined as possible venues, but found impractical. The Adjutant-General, accordingly, on 14 April 1949 recommended that all trials and investigations be abandoned. When this proposal was brought by the Minister for the Army to Cabinet on June 28th some ministers, including the Minister for External Affairs, opposed it and agreement could not be reached: both ministers were asked to confer and present a report. In the weeks that followed, the Minister for the Army gave ground. At the Cabinet meeting of September 5th he proposed that trials be held at Manus, that they be confined to cases involving 'murder or other revolting war crimes for which, on conviction of the accused involved, the sentence of death might be appropriate' (There were ready for trial 27 such cases (102 suspects), of which 22 involved murder), and that all other investigations (174 cases, 280 suspects) be terminated. But, if the Minister for the Army had been converted, there were other ministers who remained opposed to trials being held anywhere in Australia or its Territories. Cabinet was deadlocked. The respective minute reads: 'It was agreed that "enquiries would be made into the possibility of making suitable arrangements for holding war trials". Meanwhile, war prisoners awaiting trial would not be released'.

TABLE A: STATISTICS – AUSTRALIAN WAR CRIMES TRIALS ¹
 (Table compiled in AG Coordination, Army Headquarters, 1958 – MP742, A336/1/29) ²

Place	Trials	Accused Tried	Accused Convicted	Accused Acquitted	Death		Imprisonment				
					Hanging	Shooting	Life	25 yrs	11-24 yrs	10 yrs	Under 10 yrs
Labuan (3/12/45-31/1/46)	16 ³	145	128	17	2	5	5	-	56	38	22
Wewak (30/11-11/12/45)	2	2	1	1	-	-	-	-	-	-	1
Morotai ⁴ 29/11/45-28/2/46)	25	148	81	67 ⁵	-	25	-	-	10	7	39
Rabaul ⁶ 12/12/45-6/8/47)	188	390	266	124	84	3	8	2	49	22	98
Darwin (1/3-29/4/46)	3	22	10	12	-	1	-	-	-	1	8
Singapore (26/6/46-11/6/47)	23	62	51	11	18	-	6	-	10	3	14
Hong Kong (24/11/47-25/11/48)	13	42	38	4	5	-	4	-	12	3	14
Manus Island (5/6/50-9/4/51)	26	113	69	44	5	-	16	-	17	6	25
Total	296 ⁷	924 ⁸	644	280 ⁹	114	34	39	2	154	80	221

1. These figures incorporate the variations made to the findings and sentences by the confirming authority.
2. This Table is reproduced as in the original except for the addition of trial dates and explanatory footnotes.
3. The figure 16 would appear to be a clerical error. The Register from which the Table was compiled shows 145 accused tried at Labuan in 15 trials. The clerk may have added, in error, trial M36 (YAMAMOTO Shoichi, and 11 others, Labuan, 23-28/1/46) in which the findings and sentences were not confirmed. (This case was retried at Rabaul 21-22/5/47, R178)
4. Included here is trial of SHIROZU Wadami and 90 others (M45) which began at Ambon 2-18/1/46 and ended at Morotai 25/1-15/2/46. The figures for that trial are: Accused 91, Not Guilty 55, Convicted 34 (Shooting 4, 11-24 years 5, 10 years 2, under 10 years 25).
5. According to the Register from which this Table was compiled, this figure should be 66.
6. The trials at Rabaul took place over three periods: 12/12/45-31/7/46 (R1-167); 7/12/46-23/1/47 (R168-R170); and 3/4/47-6/8/47 (R172-R188).
7. Because of the error of 1 in the total of Labuan trials (See footnote 3 *supra*) the total number of trials in which the findings were confirmed should be 295 not 296. In addition there were 5 trials (either aborted before a finding was made or where the finding of guilty was not confirmed) where the same accused were subsequently retried on the same charges:

(i) YAMAMOTO Shoichi and 11 others, Labuan 23-28/1/46 (M36), not confirmed, retried at Rabaul 20-27/5/46 (R125);
(ii) NEGISHI Kazue, Rabaul 12-13/2/46 (unnumbered), aborted, retried 21-22/5/47 (R178); (iii) SATO Jin, Rabaul, 25-26/4/46 (unnumbered), aborted, retried Hong Kong 3-8/12/48 (HK12); (iv) HAYASHI Eishun, Singapore 25/6/46 (S2), not confirmed, retried 10-12/3/47 (S27); (v) NAGATOMO Yoshitada and 14 others, Singapore 24-31/7/46 (unnumbered), aborted, retried 8/8-16/9/46 (S12).

8. As some were defendants in more than one trial, the total number of persons tried was 814 (not 924). For this and the additional reason that 2 condemned men died in custody, the total number executed was 137 (not 148).

9. According to the registers from which this Table was compiled, this figure comprises: (i) 253 found not guilty by the court – Labuan 17, Wewak 1, Morotai 65 (incl. Ambon 55), Darwin 12, Rabaul 102, Singapore 10, Hong Kong 3, Manus 43; (ii) 26 whose convictions were not confirmed – Morotai 1, Rabaul 22, Singapore 1, Hong Kong 1, Manus 1.

On September 16th G.H.Q. S.C.A.P. notified the Australian mission that, in the absence of any definite plan for their immediate trial, the 87 Japanese war crimes suspects being held in Sugamo Prison on Australia's behalf would be released on November 1st. A request for an extension of time was refused:

...G.H.Q. is unable to discover adequate grounds on which to justify their detention for a further indefinite period. More than 4 years after the termination of hostilities and after from 1 to 2 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...

On October 19th G.H.Q. released from Sugamo all suspects held on behalf of the American authorities. On October 26th a cable was despatched to the C-in-C British Commonwealth Occupation Force conveying to him that a decision regarding the resumption of trials could be made by January 1st (a general election was to be held on December 10th and ministers would be sworn in a few days later) and instructing him to make a direct approach to MacArthur for a short extension of time. At the interview MacArthur informed him that his staff had examined the Australian cases and considered that about 8 (later clarified to 9 cases involving 51 suspects) 'merit trial whatever happens and...would be tried if they were offenders against the United States'. (In each of these cases the victims were Australians). In the remainder (in some of which the victims were Americans, not Australians) his staff advised that either a conviction was doubtful or the appropriate sentence was less than the period for which the suspect had been already detained. MacArthur agreed to continue the detention of the suspects until the end of the year.

At the elections the Labor Government was defeated. The Menzies Government took office on December 19th. The following day, at its first meeting, Cabinet decided to bring these 9 cases to trial 'with the utmost expedition'. At its meeting on January 10th (1950) it approved a submission by the Minister for the Army that: (i) the trials be conducted at Manus; (ii) that the trials consist of the 9 cases already approved and such other cases ready for trial approved by the Minister for the Army on the recommendation of the Adjutant-General which satisfied the same criteria (i.e. cases involving Australians, in which convictions and the death sentence were likely; (iii) the Minister should determine the final list of cases within one month.

The Minister approved an additional twelve such cases. As some cases were subsequently subdivided, the actual number of trials held at Manus was 26.⁴⁷ Of the 91 persons tried there, the court sentenced 13 to death. In the case of 5 of these the sentences were confirmed and carried out.

Composition and Procedure

The Military Courts had jurisdiction to try persons charged with violations of the laws and usages of war or war crimes against any person who was at any time resident in Australia, or against any British subject or citizen of an Allied Power. They were empowered to sentence any person found guilty to death (either by hanging or shooting), imprisonment, or to a fine. A death sentence required: where the court consisted of three members, unanimity; in other cases, a two-thirds majority.

The Act provided that courts consist of at least three officers (including the President). The usual size was: at Morotai, Labuan, Singapore, Hong Kong and Wewak, 3; at Rabaul, 4; at Manus, 5.

Regulation 8 of *Regulations for the Trial of War Criminals* stipulated that the Convening Officer should, so far as practicable, appoint as many officers as possible of equal or superior rank to the accused and that, where the accused belonged to the navy or the air force, the court should contain at least one member from that service, if available. This provision was virtually ignored. The best attempt to follow it was at the five 'Command Responsibility' trials of generals at Rabaul in April and May 1947 where the courts consisted of a major-general, a brigadier, a colonel, three lieutenant-colonels and a major. More typical was the trial of Lt-Gen Ito,T in May 1946 by a brigadier and three majors. Although many of the accused were from the navy, it was only at Morotai (on two occasions) that a naval officer was ever appointed to a court.

The Act provided that up to half the non-Presidential members could be officers of an Allied Power. From time to time use was made of this provision to include a British, Indian, Dutch, American or Chinese officer on the court in cases where their nationals were among the victims.

Usually one member of the court had legal qualifications and in such cases it was rare to appoint a Judge-Advocate. The Rabaul courts, however, almost invariably⁴⁸ had a Judge-Advocate. Two of the Labuan and one of the Rabaul trials had no Judge-Advocate and their transcripts do not indicate legal qualifications for any members of the court.⁴⁹

The Prosecuting-Officers were Army officers with legal qualifications, supplemented by a civilian King's Counsel and his junior at the Command Responsibility trials at Rabaul and by a King's Counsel for some of the Manus trials.

The practice regarding Defending-Officers varied according to time and place. At Morotai, Wewak and Darwin they were officers of the Australian Army Legal Corps (A.A.L.C.). At Rabaul until April 1947 they were A.A.L.C. officers assisted by Japanese lawyers among the troops in the area at the time of the Surrender. At Rabaul from April 1947 onwards and at Ambon, Singapore, Hong Kong and Manus they were Japanese lawyers despatched by the Japanese Government for that purpose, assisted by AALC officers (except at Singapore and Hong Kong where the assistants appear to have been British regimental officers). At Labuan they appear to have been Japanese officers without legal qualifications and there is no indication in the transcripts of the appointment of AALC officers to assist them.

The president was usually a lieutenant-colonel (sometimes a major; or, at Morotai, a colonel). At Manus the president was a brigadier (a Supreme Court judge recalled to the Active List from the Reserve).

THE TRIALS

In **Table B: Australian War Crimes Trials (Classified by Victim)** (v. p.29 *infra*) I have endeavoured to classify the trials according to the type of victim (e.g. Australian P.O.W., Indian P.O.W., Natives, Local Chinese, Caucasian Residents, etc).

The following are examples. In these, each trial is identified by its official trial number, in which the alphabetical prefix indicates the place of trial: M for Morotai, Wewak, Labuan or Ambon; R for Rabaul; S for Singapore; HK for Hong Kong; LN for Los Negros (i.e. Manus Is)

Massacres of Surrendered Troops

THE LAHA MASSACRES

It is proposed to report the Laha cases in greater detail than most of the other Australian trials in order to indicate the procedure of a typical trial and to state in some detail defences common to many of the Australian trials .

Summary of Events

In the course of the Japanese occupation of the island of Amboina a small force under the command of a Rear Admiral was landed at Hitoelama on the north coast of Hitoe Peninsula at 2.15 a.m. on 31/1/42. Its task was to capture the vital airfield at Laha some 18 km distant on the south coast of the peninsula. The force consisted of the HQ of 1 Bn Kure Special Naval Landing Force (Actg.CO: Nav Lt Hatakeyama), No.2 Coy of the latter (OC: Sub.Lt Nakagawa) and No.10 Coy of the 228 Inf Regt. (No. 10 Coy had no involvement in the massacres that ensued, and in fact, was withdrawn from the peninsula immediately after the capture of the airfield on the morning of Feb 3rd).

At about 3.30 p.m. the force reached the village of Soeakodo about 4 km from the airfield and there the R/Adm established his forward base. The advanced guard continued forward and engaged the outer defences of the airfield at about 4 p.m. There it encountered intense mortar and MG fire and at about 5.30 p.m. the attack was suspended and it withdrew to Soeakodo.

At about 9 p.m.on Feb 1st the advance guard left Soeakodo to resume the attack. During the day about 10 prisoners (most of them members of a Dutch signals section attempting to move to Paso) had been captured and evacuated to Soeakodo. There they were put to death by bayoneting shortly before the main body of the force, led by the R/Adm, moved forward at midnight to support the attack. This was the first of the four Laha massacres.

By about 4 a.m. on Feb 2nd the advance guard had succeeded in penetrating at several points the wire around Tawiri at the northern edge of the airfield. Very heavy fighting ensued in which the Japanese losses amounted to about 40 killed (including the Senior Staff Officer (Cdr Ieki) and two platoon commanders) and 60 wounded. Accordingly a withdrawal to Soeakodo

TABLE B: AUSTRALIAN WAR CRIMES TRIALS (CLASSIFIED BY VICTIM)

VENUE	CIVILIANS			ALLIED SERVICEMEN													TOTAL						
	Native	Local Chinese	Caucasians	Australian (including, in some cases, other) POW																			
				Burma/Siam (Trial 57 includes Indo-China)	Borneo	Amboin	Timor & Halmahera	Java	AI Sea	N. Britain	Malaya	Hainan Is.	N. Britain	AI Sea	U.K. POW	Indian POW	Chinese POW	Indonesian POW	Crested Acrew	Infiltration Parties	Carriacou	Mutilation of the Dead	
WEWAK																							
Trials in Which Convictions Obtained																						1	1
Trials in Which No Convictions Obtained	1																						
MICROTAI							5													16	1		
Trials in Which Convictions Obtained								1												2			
Trials in Which No Convictions Obtained																							22
LABUAN																							
Trials in Which Convictions Obtained																							15
Trials in Which No Convictions Obtained																							
RABAUL																							
Trials in Which Convictions Obtained	22	12	3		4	3										68	20		2	1	2		
Trials in Which No Convictions Obtained	3	5	1		2											34	2		2	2		2	
DARWIN																							
Trials in Which Convictions Obtained								2														1	
Trials in Which No Convictions Obtained																							3
SINGAPORE																							
Trials in Which Convictions Obtained																						18	
Trials in Which No Convictions Obtained													2	1								1	
HONG KONG																							
Trials in Which Convictions Obtained	2		2	3																			
Trials in Which No Convictions Obtained	1																						
MANUS																							
Trials in Which Convictions Obtained	1			3		3	6				1	1									3	4	1
Trials in Which No Convictions Obtained					1		1																1
TOTAL																							
Trials in Which Convictions Obtained	25	12	5	24	19	11	8	2	1	1	1	1	1	2	1	66	20	2	24	8	1	1	235
Trials in Which No Convictions Obtained	5	5	1	1	3		2									34	2		4	1	2		60
TRIALS: GRAND TOTAL	30	17	6	25	22	11	10	2	1	1	1	1	2	1	100	22	2	28	9	3	1	295	

commenced at about noon and was completed by about 9 p.m. During the day about 50 prisoners were taken, most of them Australian. Among them was the Australian commander at Laha, Maj Newbury, who at about 2 p.m. at the head of a party of 10 entered the Japanese lines under a white flag as a *parlementaire* to propose the surrender of his force. Along with the others they were taken into custody and confined at Soekodo.

The third attack on the airfield was launched at 3 a.m. the following day (Feb 3rd). This was successful. Resistance petered out at about 4 a.m. and the force surrendered at 5 a.m. Its members, about 260 all ranks (mostly Australian but including a few Dutch), were placed in confinement in some of the barracks at the airfield.

The second massacre took place two days later, on Feb 5th, when at Soeakodo the 50 prisoners captured before the surrender (incl Maj Newbury and his party) were killed. The Company Commander, Nakagawa, during the committal proceedings of his Japanese Naval Court Martial on 22 December 1945 testified as follows:

We were ordered by the Admiral to kill them on the following day; for he had received a report informing him that the POWs at Soeakodo were restive. In compliance with this order, on February 5th I took about 30 other ranks to Soeakodo. I cannot recall now from which platoons these men were selected. We dug holes in a coconut plantation about 200 metres from Soeakodo in the direction of the airfield and killed the POWs with swords and bayonets. It began at 10 a.m. and took about two hours. I divided my men into three groups, the first for moving them out of the house in which they were confined, the second for preventing disorder on their way to the plantation, the third for beheading or bayoneting them. The POWs were sent to the spot one by one and made to kneel, with their eyes bandaged. Our men of the third group came out in turn one at a time to behead the POW with a sword or to bayonet him through the chest...⁵⁰

The following day (Feb 6th) at the third massacre, the first Tawiri massacre, was perpetrated. To quote from Nakagawa's testimony once again:

About thirty of the POW were considered especially disobedient. The R/Adm heard of this and on the evening of 5th February summoned me and Hatakeyama to his room and ordered that they be put to death. At about 3 p.m. the following day, in a coconut plantation near Tawiri about 700 metres from the airfield, I had some twenty of my other ranks kill them. I cannot recall which platoons my men were from. On this occasion, too, the hapless POW were first marshalled in a nearby house and then called out in turn one by one and killed with a sword or bayonet. Their corpses were buried in the hole dug for that purpose. As previously, for most of the time I stood about midway between the house and the hole, in overall command...

It appears that on this occasion about 62 of the prisoners were killed including W/Cdr E.D.Scott and seven of his RAAF subordinates who had been captured at sea on Feb 4th making for Ceram in a native craft.

On February 9th the force, leaving behind a platoon to garrison Laha moved across the bay to the town of Ambon vacated by the Japanese Army, which had moved on for its next task, the capture of Timor. At about the same time the new Commanding Officer of 1 KSNLF took up his appointment, Lt Hatakeyama reverting to his former position of Adjutant. Some days later the execution of the remaining POWs took place. This was the fourth Laha massacre. To quote once again from Nakagawa's testimony at his Japanese court-martial:

On about February 20th at our HQ in Ambon town I was told by Lt Hatakeyama that I should go to Laha to have the POWs there put to death.... At about 2 p.m. that day I arrived at the quarters of the Laha detachment with about 60 men of my own coy and about 30 men of Minesweeper No.9 who were then

accommodated in my company barracks. A Reserve Officer of the minesweeper consented verbally to my taking these latter personnel. Though he accompanied us, nothing was directed or requested of him on my part.

I briefed these 90 other ranks and assigned them their duties. All would participate in the digging of the burial pits. Next, they were to be divided into three parties—the first for transporting the victims from the camp to the place of execution, the second for preventing disturbances, and the third (composed of some 20 men) for doing the actual killing.

The execution site was selected in a coconut plantation situated on both sides of a road running a little beyond a marsh which lies about 200 metres northeast from the detachment's barracks standing just in front of the pier. The smaller burial pit on the right side of the road was for about 30 corpses, while the larger one dug on the left side was for the remainder.

According to my memory the number of POWs killed was about 220. They were killed either by sword or by bayonet, with their eyes covered. I was directing affairs from the detachment office.

If I remember right, the fateful deed was commenced at about 6 p.m. and ended at about 9 p.m.

The first of these four Laha massacres did not become the subject of a war crimes trial. It appears that it was carried out by the section of Ens Sakamoto's platoon left behind at Soeakodo by the main body, and that Sakamoto received the orders direct from the R/Adm. By the war's end both these men were dead. The other three massacres were the subject of four Australian trials. In each of these trials the Defence argued, inter alia, that:

(i) The defendants were acting under compulsion: they were carrying out the explicit orders of their superior officers, in the knowledge that disobedience was punishable by death under the Naval Penal Code. The Prosecution argued that the commands were patently unlawful and that, accordingly, obedience to superior orders was no defence.

Whether or not international law countenanced superior orders as a defence had since the early years of the XXth Century been the subject of some dispute.⁵¹ In what became perhaps the standard work in English on public international law, L.F.L. Oppenheim (the Professor of International Law at Cambridge) in 1906 stated that superior orders constituted a complete defence, but advanced neither reasoning nor written authority for this. This was repeated in his second edition in 1912. In 1914 when a chapter on 'The Laws and Usages of War on Land' was added to the British Army's official text-book, the *Manual of Military Law*, Oppenheim was commissioned as the joint author and the assertion was repeated there: 'It is important to... note that members of the armed forces who commit such violations of the recognised rules of warfare as are ordered by their Government or by their commander are not war criminals and cannot therefore be punished by the enemy...'. The same view was adopted in the *Rules of Land Warfare*, the United States official manual.

In the years that followed, this proposition continued to be maintained in subsequent editions of Oppenheim (including the 5th edition, by Lauterpacht in 1935). Meanwhile, however, it had been rejected by a number of other learned writers such as Phillipson (1915), Bellot (1917), Mérignhac (1917) and by the committee of distinguished experts appointed by the U.K. Attorney-General in November 1918 to inquire into German war crimes. It had also been rejected by the German Supreme Court, which in 1921 in the *Llandovery Castle* case held that superior orders was no

justification where the act was manifestly and undoubtedly contrary to international law. By 1940, Lauterpacht had experienced a conversion: his sixth edition of Oppenheim rejects the original Oppenheim postulation. It was not, however, until the 1944 edition of the *Manual of Military Law*, however, Oppenheim's original chapter was replaced. There and in the Australian edition of that year the relevant paragraph reads:

§443. 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 adduced in justification of a war crime 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 sentiment of humanity.

In was also in that year that the American *Rules of Land Warfare* was similarly amended.

In March 1945 the United Nations War Crimes Commission in its *Report to Governments on the Plea of Superior Orders* expressed the unanimous view that 'the mere fact of having acted in obedience to the orders of a superior does not of itself relieve a person who has committed a war crime from responsibility'. Three months later, in June, the International Conference on Military Trials embodied this principle in Article 8 of the Charter of the Nuremberg Tribunal: '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 determine that justice so requires'.

Throughout the Australian war crimes trials the Prosecuting Officers, Judge-Advocates and the courts consistently accepted §443 as declaratory of international law.

(ii) Another defence tendered was that the executions were justified by military necessity—*Kriegsraison geht vor Kriegsmanier*; the success of the operations against Java depended on the immediate and uninterrupted operation of the Laha airfield; for days after the surrender the airfield continued to be under small arms fire from bands of the enemy who had not surrendered; the POWs outnumbered their guards, were restive and likely to mutiny and recapture the airfield. The Prosecution rejected this description of the situation as arrant nonsense. Furthermore it argued that, even in the XIXth century, far from being consensus mundi, this maxim was no more than the view of a minority of continental writers. Following Oppenheim, the Prosecution argued that Any general rule that necessity in the interest of self-preservation excuses an illegal act was abrogated by Hague Convention IV whose Preamble expressly states that that the Hague Rules were framed with regard to military necessity. In other words, military necessity was discounted in the drawing up of the Rules.⁵²

A unique feature of the Laha trials was that the prosecution was able to introduce in evidence portions of the proceedings of the aborted Japanese Naval Court Martial of Nav.Lt Hatakeyama and Sub.Lt Nakagawa on charges of homicide (Japanese Criminal Code, Art.199) at Laha. This was one of the four war crimes trials initiated by the Japanese Government in

November 1945 and aborted by order of Gen MacArthur in February 1946.⁵³

Trial of Nav Lt Hatakeyama and Sub.Lt Nakagawa (R186)

The first of the Laha trials, R186, took place at Rabaul on 14,15 & 17 July 1947.⁵⁴ In it Nav Lt Hatakeyama and Sub.Lt Nakagawa were charged with murder in respect of each of the second, third and fourth massacres and were found guilty on each charge. Hatakeyama was Acting/Battalion Commander at the time of the second and third massacres and Adjutant at the time of the fourth. Nakagawa, his Company Commander, was the officer-in-charge at the place of execution on each occasion.

The court sentenced Hatakeyama to death and Nakagawa to 20 years' imprisonment. On July 30 both defendants submitted petitions against the findings and sentences. The J.A.G. in his advice to the Confirming authority dated August 28th recommended that the petitions be dismissed and reported as follows: 'I am of the opinion that none of the defences offered could properly be set up as a defence to the charge, and I see no reason why the finding and sentence should not be confirmed'. He argued, however, that the sentence awarded Hatakeyama was inappropriate:

I find it difficult to follow the reasoning of the court in sentencing the senior officer to death and the junior officer to 20 years imprisonment. Both officers were extremely junior in rank at the time of these murders, and the actual executions were supervised by Nakagawa, while Hatakeyama was merely the conduit pipe between his Admiral and his fellow accused. Were I the Confirming Authority I would mitigate the sentence of death by hanging to 20 years imprisonment.

Despite this advice the Confirming Authority (the Adjutant General, Maj.Gen W.M.Anderson), on September 10th, confirmed both sentences and signed the death warrant. Hatakeyama, however, had lodged a further petition on September 4th and this together with a supplication by Gen Imamura on Hatakeyama's behalf was forwarded to Army HQ by air and tendered to Adjutant General. After considering these documents Anderson on October 7th revoked his confirmation of Hatakeyama's sentence, cancelled the death warrant and commuted his sentence to 20 years imprisonment.

Trial of WO Yamashita and 5 Others (LN6)—The Second Soeakodo Massacre

On 27 July 1950 WO Yamashita and five members of his platoon, (PO Cl 3 Shimohama, and Seamen Kamioka, Murayama, Hayashi and Miyawaki), were arraigned at Manus on the charge of murdering a number of Australian and Allied POWs at Soeakodo on or about 5 February 1942.⁵⁵

Of the six accused all except Miyawaki admitted their presence at the execution. The only evidence implicating him was the uncorroborated testimony of the co-defendant Murayama: 'I remember that Hayashi and Miyawaki each beheaded at least one prisoner-of-war'. The court acquitted him.

The evidence for the Prosecution consisted of statements made to Australian interrogating

officers at Tokyo during the period 1948-49 by each of the accused and several other Japanese. Each of the accused elected to go into the witness-box and gave evidence. Kamioka admitted that, under orders, he attempted to decapitate one prisoner-of-war but was unsuccessful. Hayashi admitted that under orders, he had finished off that prisoner with the bayonet.

In his interrogation of 4 May 1949 Yamashita stated that he had been second-in-command at the execution and in this capacity had for some minutes directed the executions during the temporary absence of the commander.

The evidence against Shimoyama was the statement of his comrade Inazaki when interrogated on 13 September 1949, in which Inazaki stated that when, immediately after the execution, he asked whether he had executed any of the prisoners, Shimoyama replied 'Of course I did'.

The Prosecution's case against Murayama consisted of allegations in a number of statements that he was present and his statement at his interrogation on 12 July 1949 that he had beheaded five of the prisoners.

Yamashita, Murayama and Shimoyama subsequently retracted the statements they made at their interrogations, claiming that the interrogation officer, Capt J Sylvester, had put the words into their mouths and had obtained their signatures by offering inducements, making threats, and by torture, such as making them stand to attention for long periods, pushing them against the wall, hand-cuffing them and tugging at the hand-cuffs. (Surprisingly, the signed statements produced in court were translations in English, a language the deponents were unable to read!). In rebuttal, the Prosecution produced as a witness an Australian officer who had occupied a room adjacent to the room in which the interrogations had taken place. He testified that the interrogation room was an open-plan office occupied by six interrogating officers each of whose activities would be visible to the others and that he had never seen handcuffs anywhere in the suite of offices occupied by the Australian War Crimes Section.⁵⁶

The court on 7 August 1950 sentenced Yamashita to 20 years imprisonment, Murayama and Kamioka to 15, Shimohama to 10 and Hayashi to 8. The JAG recommended that the finding of guilty be confirmed but commented on the severity of the sentences: 'The accused were all men of poor education and of low rank... I would, if the decision rested with me, have reduced all those sentences which exceed ten years to one of ten years imprisonment. The Adjutant-General on 4 October 1950 confirmed the courts findings and sentences.

Trial of WO Yamashita and 5 Others (LN12)—The First Tawiri Massacre

On 8 September 1950 WO Yamashita, three members of his platoon (PO Cl 3 Shimohama, Seaman Hayashi and Seaman Murayama) together with WO Sasaki and WO Suwa, were arraigned at Manus on the charge of murdering a number of Australian and Allied POWs near Laha airfield on or about 7 February 1942.⁵⁷

At the conclusion of the Prosecution's case submissions were made by the Defence that there was no case to answer against Suwa, Hayashi and Murayama—that no fact had been

established by any of the Prosecution's evidence that they participated in the execution or that they were on guard duty at the place of execution. These submissions were accepted by the court, and these three were thereupon acquitted.

The evidence for the Prosecution was entirely documentary. Regarding the other accused, the Prosecution's case was that Yamashita was present at the execution as commander of the guards and for a short period in the absence of a senior officer actually supervised the execution. Sasaki, it was alleged, was an executioner and he executed the first prisoner, shouting, as he did so 'I thus avenge my dead comrades'. It was alleged that Shimoyama who had been employed on sentry duty elsewhere went to the execution site of his own volition and for a short time was employed as a guard there.

The accused each gave evidence, and on their behalf their defending counsel called certain witnesses.

The defence, in part, was concerned to establish that the execution was ordered by the Commanding Admiral either for reasons of military necessity, in that he had insufficient forces to guard the prisoners or because they had made or were about to make a riot and perhaps to escape. This defence, no doubt, was raised to combat the suggestion of the Prosecution that it was a cold-blooded massacre in revenge for the casualties suffered in the battle for the airfield.

Another part of the defence was that each of the accused was bound to do what he did by virtue of the direct orders of his naval superiors.

Yamashita sought to establish, in his defence, that he was merely engaged in guard duties when so ordered, and in no way participated in the execution.

Sasaki's defence was largely that he was bound to do what he did, namely, command the execution parade and actually execute some of the prisoners, by virtue of the direct orders of his military superiors.

Shimoyama's defence was that he went to the execution ground to report to his platoon commander that he had finished his tour of sentry duty elsewhere and while so reporting was ordered to stand guard over some of the prisoners for a period of 10 or 15 minutes.

Yamashita was sentenced to life imprisonment, Sasaki to death by hanging, and Shimohama to 10 years' imprisonment.

In his report on the trial to the Confirming Authority the JAG wrote:

In Paragraph 11 of his petition Sasaki points out that Nakagawa, who was his immediate superior at the time of the occurrence, and Nakagawa's immediate superior, Hatakeyama, were tried and sentenced to 20 years and death respectively but Hatakeyama's sentence of death was commuted to 20 years by the Confirming Authority... [This] deserves earnest consideration by the Confirming Authority. I have not got the proceedings of the military court that tried Hatakeyama and Nakagawa before me, but I have some recollection of the proceedings, which I reviewed. My recollection... is that Hatakeyama was much more responsible for the murders than Sasaki was, and the confirming Authority may well feel, if

he agrees with the statement I have just made, that Sasaki's sentence should be commuted to imprisonment.

The Confirming Authority then commuted Sasaki's sentence to life imprisonment, mitigated Yamashita's sentence to 20 years, and confirmed Shimoyama's sentence of 10 years.

Trial of Sub.Lt Tsuaki and 2 Others (LN24)—The Second Tawiri Massacre

The evidence for the Crown was all documentary.⁵⁸ The Crown case was that Tsuaki, a reserve Sub-Lieutenant, had been Executive Officer on a mine-sweeper which struck a mine in Ambon Bay. The explosion killed about 20 and injured about 7 of the crew. The survivors were subsequently attached for duty to 1 Kure Special Naval Landing Force. On or about February 13th Tsuaki learnt that an execution of prisoners was going to take place the following day and volunteered the service of himself and his ship-mates as executioners.

On Sheet 25 of the proceedings Tsuaki says: 'The Company Commander ordered me to cut the first prisoner-of-war... I cut him with a sword'.

The accused Kanamoto in a statement made by him before the trial (which was tendered as Exhibit 19 (b) of the Crown case) said:

I could not see the faces of the men who were standing around; but I believe most of them were survivors of the sunken mine-sweeper... I heard the order was that the survivors of No.9 Mine-Sweeper No.9 had requested and received permission from HQ to execute the prisoners-of war to revenge the death of their comrades... I sat and watched the execution. Every one of the men without exception shouted the name of his fallen comrades and cried 'in revenge of so-and-so' as he swung the sword.

As regards Kanamoto, the OC of the Pioneer Platoon, the Crown case was that at about noon he heard that executions were to take place that evening and, since he had never seen an execution, he requested permission to attend from his superior officer who, the Crown alleged, replied; 'Anyone who wants to try can try it'.

Kanamoto, the Crown further alleged, informed his subordinates of the proposed execution and offered to take with him anyone who wanted to participate in the execution.

The Crown further alleged that Kanamoto subsequently admitted that he had beheaded a prisoner, but no evidence was offered as to whether this confession was true or false. But the Crown did allege and offered evidence that Kanamoto lent his sword to one of the executioners who requested it.

The Defence alleged that Tsuaki had not volunteered to participate but had been ordered to do so by his superiors and that Kanamoto had not participated in the executions.

The only evidence against Nakamura was the sworn statement of Kanamoto:

At about 1730 hrs I went to my subordinates' quarters and said to them 'I am going to attend than execution at Laha. I shall take anyone who wants to go with me'.As a result three marines volunteered,

including Seaman Cl.1 Ikezawa and, I believe, Seaman Cl.1 Nakamura. I do not recall the name of the other volunteer...

The Prosecutor referred to this in the course of his Closing Address:

The law does admit as sufficient the uncorroborated testimony of one witness, even an accomplice, if the jury consider him credible; but it is now held to be the duty of the Judge to warn the jury of the danger of convicting a prisoner on the uncorroborated evidence of an accomplice and in his discretion advise them not to do so, though at the same time pointing out that it is within their legal province to convict upon it if they so choose... So what this really means is that there is sufficient evidence to convict Nakamura if you are satisfied that Kanamoto's statement is true, but you must approach this task with the utmost caution, being at all times mindful of the danger.

The court acquitted Nakamura and sentenced Tsuaki to death by hanging and Kanamoto to life imprisonment.

The JAG, in his report to the Confirming Authority, wrote:

In my opinion there was ample evidence from which the court could arrive at the conclusion which it did arrive at, that both these accused were guilty of the charge of murder. Tsuaki by virtue of the fact that he himself took part in one of the 'executions' and Kanamoto as a principal of the second degree, that is one who is present at the commission of this offence and aided and abetted its commission. I see no reason why the findings and sentences should not be confirmed.

On 2 May 1951 the Adjutant-General did so. Tsuaki was hanged at Manus on June 11th

THE PARIT SULONG MASSACRE

On 22 January 1942 about 100 Australian and 40 Indian soldiers were captured by 4 Konoe Division in the fighting at Parit Sulong. They were inspected by the Divisional Commander, Lt-Gen T.Nishimura, who thereupon issued verbal orders through his A.D.C. that they be executed. They were killed that evening by machine-gun and rifle fire. In trial LN2 Nishimura was sentenced to death; the A.D.C., to six months imprisonment.⁵⁹ Nishimura had already on 2 April 1947 been sentenced to life imprisonment by a British court in connection with the massacre of Chinese civilians in Singapore following the surrender.

P.O.W Camps and Work-Places

BORNEO: SANDAKAN AND RANAU

In World War II the Australian Army lost 18,000 men. Of these, about 1650 perished in or about Sandakan in British North Borneo during 1945. At Sandakan in August 1944 the Japanese had about 2200 P.O.W. They had brought them there to build airfields from which the Japanese hoped to stem the Allied advance on the Philippines and on Java. About three-quarters were Australian; the rest, British. Within twelve months all but six were dead. Some 1200 died in Sandakan Camp itself; the rest on the two Death Marches to Ranau, 260 kilometres to the west—about half of them

on the march and half at Ranau. Of the total 2200, at least 150 were shot, either when, exhausted, they fell out on the march, or in the executions of the last survivors—23 at Sandakan and 33 at Ranau—in July and August. The rest died of starvation and its grim attendants, malaria, beri-beri and dysentery.

In R176⁶⁰ the first and second Sandakan-Ranau marches and the massacres at Ranau were the basis of the charge against the Corps Commander, Lt-Gen Baba, of 'unlawfully disregard[ing] and fail[ing] 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'. He was sentenced to death.

The ill-treatment of the P.O.W. in Sandakan Camp in the period preceding the marches was the subject of two trials: the commandant was sentenced to death (M28)⁶¹ and three of the Formosan guards were sentenced to 15 years (M35)⁶².

The First Sandakan-Ranau Death March

The first Sandakan-Ranau march was the subject of three trials. In R125⁶³ the march commander (Capt) and ten of his subordinates (8 officers, 2 other ranks) were charged with: (i) murder of numerous P.O.W in their charge; (ii) (Alternative Charge) ill-treatment of P.O.W. in compelling them 'to march long forced marches under difficult conditions when sick and underfed as a result whereof many of the P.O.W. died'.

In this trial the accused pleaded 'superior orders' as a defence. This defence was rejected by the court.

the march commander and the commander of the rear group (the group whose task included shooting the stragglers from the groups preceding it) were sentenced to death; the other officers, to 10 years. . The other ranks were acquitted;

The other two trials arising out of the first Sandakan-Ranau march were R102⁶⁴ and R151⁶⁵. In the former a Formosan guard was sentenced to death for bludgeoning to death with a rifle butt a P.O.W. who fell behind; in the latter three Formosan guards were sentenced to death for torturing to death over a period of four days a recaptured escapee.

The Second Sandakan-Ranau Death March

The second Sandakan-Ranau march was the subject of five trials. The commander and second-in-command were sentenced to death (M17)⁶⁶, as was a sergeant who on his own initiative had shot two P.O.W who fell behind (M16)⁶⁷. Twenty-one guards (mainly Formosans) who, as ordered, shot those who were unable to continue marching were charged with murder (M18)⁶⁸. Of these, two were acquitted and the remainder were sentenced to periods ranging from 8 to 20 years.

In R122⁶⁹ a Formosan guard was charged with the murder of one of the P.O.W. after his arrival at Ranau. At a parade of a working party when a sick P.O.W. (who also had badly ulcerated leg)

failed to march off, the guard had knocked him to the ground and repeatedly kicked him on the head and body, as a result of which he died some hours later. The court found him guilty and sentenced him to death. Confirmation was, however, withheld, on the ground that the accused had been acquitted on the same charge by an earlier court (v. p XX infra).

In these death marches cases, where other ranks under orders killed P.O.W. who were unable to march, the courts did not award death sentences. And in these circumstances the J.A.G. recommended that the sentences be mitigated—in most cases to 3 years imprisonment. The Confirming Authority, however, with rare exceptions confirmed the original sentences.

Massacres of Survivors at Ranau and Sandakan

The final massacres of survivors at Ranau⁷⁰ and Sandakan⁷¹ were the subject of five trials of N.C.O.s and rank-and-file (including Formosans) in which 8 were acquitted and 33 were sentenced to terms ranging from 5 years to life imprisonment.

SARAWAK: KUCHING AND MIRI

At Kuching in Sarawak the P.O.W camp held about 1250 persons (mostly United Kingdom other ranks, but including 160 Australian P.O.W. and some U.K. civil internees). 592 died -- most of them from starvation.

The CO (Lt-Col) committed suicide in custody. The 2 i/c (Capt) (who controlled the general affairs of the camp), the Quartermaster (Capt), the labour officer (Lt) and the M.O. (Lt) were charged with ill-treatment of P.O.W. and internees by: (i) authorising and permitting assaults; (ii) denial of sufficient food and medical supplies and attention; (iii) forcing the sick and starving to do heavy manual work. They were found guilty on all charges (with the exception of 'medical supplies and attention' in the case of the 2 i/c and the labour officer) and sentenced to death (M11)⁷². The J.A.G. recommended that in the case of the Quartermaster and labour officer the findings be not confirmed: he argued that they were subordinate officers who were unable to obtain supplies and that they were not responsible for the conduct of the guards or the provision of medical attention. The Confirming Authority confirmed all the findings, but for these two officers commuted the sentences to 5 years imprisonment.

Among the camp guards 6 N.C.O.s, 2 interpreters and 37 rank-and-file (mostly Formosans) were charged with assaulting P.O.W. and internees in violation of the Laws and Usages of War. The court acquitted three of the rank-and-file and sentenced the remainder to terms of imprisonment ranging from 1 year to life (M37)⁷³. The J.A.G. was very critical of this trial—the use of affidavits, thereby denying the accused the opportunity to test the evidence by cross-examination, the failure of the court to produce individual P.O.W sought by the accused as defence witnesses, and the manner in which the prosecution presented the case:

It was alleged by the prosecution that the serious death rate amongst prisoners of war during the last few months of their internment was due to the ill-treatment of the guards. There was no evidence to support such statement and there was no evidence to show that the ill-treatment had

increased during the last few months and in fact most of the incidents referred to in the statements occurred well before that time and I think it is clear that the increased mortality was due chiefly to the shortage of food and medical supplies.

He recommended that the sentences be reduced—for the 28 sentenced to 10 years or more, to 3 years; for the remainder, to 1 year. The Confirming Authority disregarded these recommendations and confirmed all the sentences unaltered.

On 10 June 1945, in consequence of Allied landings in other parts of Borneo and the imminent threat of a landing in the Miri area, a labour detachment of 51 P.O.W. at Cape Lobang were disposed of by shooting and bayonetting. The sergeant-major in charge was sentenced to death (M2)⁷⁴. Of the guards (M3⁷⁵, M4⁷⁶), 4 were acquitted and the remaining 20 were sentenced to death (commuted to 10 years imprisonment).

THE BURMA-SIAM RAILWAY

Twenty-one of the Australian trials (18 at Singapore⁷⁷, 3 at Hong Kong⁷⁸) were in connection with the ill-treatment of P.O.W. on the Burma-Siam Railway. Of the 44 accused, 4 were acquitted, 16 were hanged and 24 sentenced to imprisonment (life, 7; 11-20 years, 8; 10 years, 2; less than 10 years, 7). The typical charge was 'inhumanely treating P.O.W.'. The accused were for the most part N.C.O.s and guards in close contact with the P.O.W. and the typical crimes were assaults and forcing the sick to work. In only 5 of the 21 trials were officers (Lt-Col 1, Capts 5, Lts 4) charged. Among the 44 accused, 15 were Korean guards. Of the 16 hanged, 6 were officers, 3 were N.C.O.s, 1 was a private, and 6 were Korean guards.

The principal Railway trial was S12⁷⁹, in which Lt-Col Nagatomo (C.O. of No 3 P.O.W. Branch), 5 officers, 2 N.C.O.s, 1 interpreter and 6 Korean guards were charged with committing a war crime in that between 25 October 1942 and 1 May 1944 in the construction of the Burma-Siam Railway between Thanbyuzayat and Niki they 'illtreated P.O.W. thereby causing deaths of many of them and bodily injury, damage to health and physical suffering of many others of the said P.O.W'. Nagatomo and two of the officers were also charged on six additional counts of ordering the shooting of recaptured P.O.Ws. Nagatomo, 2 officers, 1 NCO and 4 Korean guards were sentenced to death; 3 officers, to life imprisonment; 2 Korean guards, to 20 and 6 years respectively. The interpreter and 1 Korean guard were acquitted. The court made specific findings of fact against each of those convicted. For example against the Korean, Hirahara (sentenced to death): '(i) Frequent brutal assaults on P.O.W. including Ebaugh, Zummo, Tims, Ritchie, Gibbons, Collins, Hall and Lt Hard; (ii) Forcing sick PsW to work; (iii) Frequently assaulting many sick P.O.W. including Trim, Joyner, Williams, Reed, Smith, Forgey, Bray, Ward and Hall'.

TAN TOEY CAMP AMBON

Trial M45⁸⁰ commenced at Ambon on 2 January 1946 and ended at Morotai on February 15th. In this trial 91 persons were charged with ill-treatment of Australian and Dutch P.O.W at Tan Toey Camp, Ambon during the period February 1942 and August 1945. There were 15 separate charges

covering the following general categories: (i) assaults; (ii) withholding of adequate food, medical supplies and medical treatment; (iii) imposition of unreasonably heavy and dangerous labour. In addition to numerous individual attacks, the assaults included two large-scale protracted beatings: in July 1942 thirty-three Dutch P.O.W were beaten for some two hours for conveying messages to their families without permission; in November 1942 twenty-five Australian P.O.W were systematically beaten and tortured (some for as long as eleven days) for procuring food from the native population. In each of these incidents deaths and serious injuries resulted. Of the 548 P.O.Ws in the camp in October 1942 379 died of illness, 17 were executed, 13 escaped and in August 1945 there were only 139 survivors.

Of the 91 accused, the court acquitted 55. It sentenced 4 to death—a naval captain (the commander of the garrison unit), a naval lieutenant (the deputy commander), a sub-lieutenant (the commander of the camp guard company), the camp manager (a civilian). The garrison medical officer (a lieutenant-commander) was sentenced to eighteen months imprisonment. Of the 31 other ranks found guilty, the sentences were: 12-20 years, 5; 5-10 years, 11; less than 5 years, 15.

HAINAN IS

In November 1942 263 Australian and about 240 other Allied P.O.W. were moved from Ambon to a P.O.W. Camp on Hainan Is controlled and staffed by 4 Yokosuka Special Naval Landing Force (S.N.L.F.), where they remained for the rest of the war. Their rations were inadequate and were progressively reduced (In February 1945 the daily rice ration was 450 gm; by May they were receiving less than 170 gm), they were denied medical supplies and assistance, they were compelled to engage in heavy labour (including the construction of defence works) even when sick, and assaults and ill-treatment by the guards were common. Of the 263 Australians, 72 died. Among the P.O.W. as a whole, there were 626 cases of the deficiency disease, beri-beri, resulting in 26 deaths in 1943, and there were 67 deaths, principally from malnutrition and starvation, between March and August 1945.

This was the subject of trial HK3⁸¹ in which 17 members of 4 Yokosuka S.N.L.F. were charged with being 'concerned in the inhumane treatment of...P.O.W. thereby contribution to the deaths of some and causing bodily injury, damage to health and physical and mental pain and suffering to many of such P.O.W.'. The 17 accused consisted of the following: (i) Force H.Q. Officers—the three successive Commanding Officers (Nav Cpts), their two successive Senior Medical Officers, and their two successive Principal Supply Officers (Nav Lts); (ii) Camp H.Q. Staff—the Camp Adjutant (Nav Lt), the two successive Supply Officers (Sub-Lts) and one of their Supply Assistants (Ldg Seaman); (iii) Camp Guards—three C.P.O.s and one civilian; (iv) Force AA Regt—the Commanders (Nav Lts) of two AA Btys to which P.O.W. were assigned for construction work.

The case for the Prosecution was, inter alia, that each of the CPOs had himself assaulted P.O.W.s as well as permitting their subordinates to do so, that both Bty Cdrs had failed to control the conduct of their subordinates in charge of working parties and that one of the Bty Cdrs had himself inflicted cruel beatings, and that the Supply Assistant had assaulted P.O.W, had diluted the rations

with floor sweepings, and had confiscated the P.O.W.s' scales to prevent their recording the amounts issued.

The sentences (after commutations and mitigations by the Confirming Authority on the recommendation of the J.A.G.) ranged among the other ranks from 14 to 1 years and among the officers from 20 years (the S.M.O. from 1942 to March 1945) to 6 months (the C.O. from November 1944 to January 1945—acquitted on the principal charge but convicted on the second charge of employing P.O.W. on 'work having connection with the operations of war'). The other two C.O.s and the other S.M.O. received 12 years. The two Principal Supply Officers received 10 and 4 years. Of the two camp Supply Officers one was acquitted, the other (regarded by the P.O.W. as well-intentioned but ineffective in securing compliance with his instructions among his staff) received 1 year which was remitted after he had served five months.

INDIAN P.O.W.

During 1943 several thousand of the Indian troops captured at Singapore were brought to New Guinea, New Britain and Bougainville as labourers. Ninety-nine of the Australian trials (about one third) arose out of their subsequent ill-treatment there. In 66 of these (including the 'Command Responsibility' trials of the theatre commander Gen Imamura⁸² and the Army commander Lt-Gen Adachi⁸³, in which the ill-treatment of Indian and Chinese labourers was among the principal charges) convictions were obtained. Thirty-six of those accused were sentenced to death.

In these cases not only the elements of the charge, but also the jurisdiction of the court depended on the truth of the affidavits of the prosecution witnesses. If (as the Japanese claimed and the Indians denied) the latter had joined Japan's Indian National Army, then it is arguable their ill-treatment became a matter for a Japanese and not an international tribunal.

The following are some examples of the Indian cases.

In R72 two subalterns received death sentences for executing without trial at Arigau (Bougainville) in April 1945 fifteen Indians apprehended deserting with arms and food.⁸⁴ In R90 a captain and two subalterns were sentenced to 10, 5 and 2 years for the execution in similar circumstances of 12 Indians at Tenin-Bau-Bau (Bougainville) in January of that year.⁸⁵

R41 arose out of the shooting of two Indians at Parom (New Guinea) in August 1944. In a quarrel, the two Indians beat another, who complained to a guard. Thereupon a sergeant-major, a corporal and a lance-corporal beat the two Indians senseless and bound them. Half-an-hour later they were joined by another sergeant-major who shot the two Indians on the orders of the platoon commander. The latter was sentenced to death; each of the other four, to fifteen years.⁸⁶

A number of the Indian trials involved ill-treatment of individual P.O.W. resulting in death.

In R142 a sergeant-major was convicted on thirteen counts of murder and sentenced to death. Each charge involved beatings that he had administered to Indians working in the vicinity of Parom (New Guinea) as a result of which, it was alleged, each had died within a few days.⁸⁷

In R33 two N.C.O.s received death sentences for the murder of an Indian at Bitawanas (New Britain) in January 1945. They had forced a sick Indian to carry a heavy load, causing him to collapse. They then kicked and beat him, causing him to vomit blood. He died two days later.⁸⁸

In R38 L/Cpl Maeda was sentenced to death for the murder of an Indian at Kurringe (New Guinea) in February 1945. In an affidavit jemadar Chint Singh deposed that he saw Maeda severely beat the deceased with a big stick so that he bled and became unconscious; the deceased said that he was beaten because he had not cleaned Mazeda's boots perfectly; Maeda forced him to work while still suffering from the beating as a result of which he became progressively weaker and died three weeks later.⁸⁹

CHINESE P.O.W.

Late in 1943 some 1500 Chinese troops were brought as labourers to the New Britain-New Guinea theatre from the region of China under the control of the puppet, Wang Ching-Wei regime. Their ill-treatment was the subject of 22 of the Australian trials, in 20 of which convictions were obtained. In R55 two N.C.O.s and seven Formosan guards were on 16 April 1946 sentenced to death by a court consisting of three Australian and two Chinese officers for in March 1943 shooting 30 of the sick among some 800 Chinese P.O.W. working for the 26 Field Supply Depot at Rabaul. The sentences were confirmed on June 28th and the two N.C.O.s and two of the Formosans hanged on July 17th.⁹⁰ The execution of the other five Formosans was deferred so that they could testify as crown witnesses in the 'Command Responsibility' trial of Maj Gen Hirota, the G.O.C. supply depots in Rabaul, on the charge of 'failing to control the members of his command whereby they committed brutal atrocities...'. On 3 April 1947 a court consisting of a major-general and six other officers sentenced Hirota to seven years imprisonment.⁹¹ It also addressed a memorandum to the District Commandant strongly recommending that the transcript of the Hirota trial be closely examined with a view to quashing the convictions against the five surviving Formosans:

After carefully examining the evidence submitted to the Military Court which tried these Formosans, the present Court has very grave doubts whether such evidence is sufficient to establish their guilt. In forming this opinion, the Court has the advantage of observing the demeanour of the five Formosans while in the witness box. While the Military Court by which they were tried had a similar advantage, this Court had the additional advantage of hearing the evidence of Maj Gen Hirota, which was, for some reason, not called by the Defending Officer at the original trial...

The proceedings of the original trial were accordingly reexamined by the J.A.G.. He reported that he remained of the opinion that there was ample evidence to justify the original court in its decision and that he was therefore not prepared to recommend a review of the case and a quashing of the convictions. He suggested that 'in all the circumstances' the CA commute the death penalty to a long period of imprisonment. He expressed astonishment that men should be kept awaiting execution for such a long period. This alone, he considered, more than justified commutation. In forwarding the J.A.G.'s recommendation to the Adjutant-General the Director of P.O.W. & Internees added his own recommendation:

...whereas these Formosans and many others, have been sentenced to death for crimes committed while under the command of Maj-Gen Hirota, the Court in sentencing this Japanese General, saw fit to impose 7 years' imprisonment. Therefore, as this officer has only been awarded this light sentence after being found guilty of the responsibility for the crime committed by his subordinates, it is not considered the death penalty should be carried out in this case...

The Adjutant-General on 27 June 1947 commuted the death sentences to life imprisonment.⁹²

UNITED KINGDOM P.O.W.

A working party of 599 United Kingdom P.O.W. arrived in Rabaul in October 1942. Of these, 517 drowned in Rabaul harbour when the Japanese ship taking them to the Solomons was sunk by American aircraft. Of the 82 who remained in New Britain only 18 survived. Two of the deaths were the subject of Australian trials. In R62 a Japanese private was on 7 May 1946 sentenced to death for the murder on Watom Is in May 1945 of a British officer who was bedridden with malaria, beri-beri and a tropical ulcer. The officer had spilt a bed-pan, whereupon the accused beat him severely on the ulcer causing it to bleed profusely. He died four days later. Apparently the court did not believe the evidence of the Japanese medical officer who had written the death certificate. He testified that the cause of death was black-water fever and that the corpse bore no signs of a beating.⁹³ In R65 the same Japanese was, the following day, sentenced to five years imprisonment for at the same time repeatedly beating another sick P.O.W. and for reducing his rations. This P.O.W., too, had died.⁹⁴

The Command Responsibility Trials

In July 1946 when the first series of trials at Rabaul ended, Flannagan sought from the Adjutant-General a policy direction regarding trials of more than a dozen Generals (commanders and staff-officers) held as war crimes suspects but against whom specific charges had not yet been formulated:

It appears that all or most of these officers were in command or were staff officers in areas where most shocking and brutal atrocities were carried out. Such atrocities having been proved in Aust War Crimes Courts and appropriate action taken against the actual perpetrators or others directly concerned with the crime it is considered that all or most of these officers should have knowledge of the conduct of the personnel of their command and therefore can be held responsible accordingly.

He argued that 'when atrocities were consistently committed in their commands and in justice to their subordinates who have been punished...these seniors must at least be arraigned before a court'.⁹⁵ The matter was referred to the Director of Legal Services (D.L.S.) at Army Headquarters and, after examining the dossier against Lt-Gen Adachi (G.O.C. 18 Army), he advised that on the basis of evidence presented at certain of the trials of his subordinates for the ill-treatment of Indians a charge would lie of 'disregarding and failing to discharge his duty as Commander by permitting the members of his command to murder prisoners of war'.

On September 4th the Adjutant-General authorised the trial of Adachi and the other senior officers on such charges wherever there seemed to be 'a reasonable chance of conviction'. By December

the preparation of the cases had been completed for three such trials: Gen Imamura (G.O.C. 8 Army Group), Lt-Gen Adachi (G.O.C. 18 Army—in New Guinea) and Lt-Gen Kanda (G.O.C. 17 Army—in Bougainville). In each case the victims were Indian or Chinese or Indonesian P.O.W. brought as labourers to their areas of command. In each trial, there were to be charged jointly with the G.O.C. his two principal staff officers. In January (1947), however, the D.L.S. advised that there was no case against the staff officers: 'Although an army commander, being charged under the law of war with the duty of preventing the troops under his command from committing violations of the law of war, may be charged with personal responsibility for failure to take steps to prevent violations, I know of no authority or principle which fastens a similar responsibility on his staff officers . . .'. Staff officers, he advised, could be properly charged only with violations in which they had personally participated or which they had expressly permitted. (This is similar to the view taken by an Allied tribunal in Germany in the *High Command* trial: 'In the absence of participation in criminal orders or their execution within a command, a Chief-of-Staff does not become criminally responsible for criminal acts occurring therein . . .'). In the evidence assembled for these cases the D.L.S. could see no basis for any charges against any of the staff officers named except Lt-Gen Kato (Chief of Staff, 8 Army Group), who he considered could be charged with 'unlawfully employing prisoners of war on work having a direct connection with the war' contrary to the provisions of the Hague Convention. As regards the commanders, he considered that charges lay against Imamura and Adachi (but not against Kanda as the atrocities in question had occurred very shortly after he assumed command and in a location distant from and out of communication with his headquarters).

The outcome was that, in addition to Imamura and Adachi, Maj-Gen Hirota, the G.O.C. supply depots in Rabaul, was charged with command responsibility regarding the ill-treatment of Indian and Chinese P.O.W. and Lt-Gen Baba, the corps commander in North Borneo, with command responsibility regarding the Sandakan-Ranau death marches. In each case the wording of the charge was identical with that on which Gen Yamashita had been arraigned before an American military tribunal at Manila: 'While a commander...unlawfully disregarded and failed to discharge his duty as such Commander to control the conduct of the members of his command whereby they committed brutal atrocities and other high crimes against...'.

Kato was tried on the charge recommended by the D.L.S. These five trials took place at Rabaul during the period March to June 1947 before courts consisting of a major-general and six other officers (in the Baba trial, five other officers), the President and the same four of the other members participating in every trial. Except for the Baba trial the prosecution was conducted by a civilian KC and his junior.

On this question of a commander's responsibility to prevent the commission of war crimes by his troops there had been among international lawyers two schools of thought. According to one view he was responsible only when he 'ordered or, with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent...violations of the laws or customs of war'. This was the doctrine accepted by the Allied Commission on Responsibilities which reported to the Paris Peace Conference in 1919. It is reflected in the wording of Count 55 of the IMTFE Indictment: 'deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance and prevent breaches...'. According to the other, his responsibility went further and included a duty to take steps to see whether offences were being committed. The

Australian courts convicted each of the commanders, the sentences being: Baba, death (R176);⁹⁶ Adachi, life (R173);⁹⁷ Imamura, 10 years (R175);⁹⁸ Hirota, 7 years (R172).⁹⁹ Imamura's conviction coupled with a substantially lighter sentence than Adachi's suggests that the court subscribed to the latter doctrine and believed that Adachi was aware that crimes were being committed but that Imamura as a result of culpable negligence was unaware. The J.A.G. accepted the wide responsibility doctrine. In his report on the Imamura case he argued that 'the laws and usages of war impose a responsibility upon commanding officers to take all possible measures to prevent violations of those laws by troops in their command'. Some months later the IMTFE, approaching the subject from a slightly different angle, arrived at a similar result: 'An Army Commander must be at the same pains to ensure obedience to his orders in this respect as he would in respect of other orders he has issued on matters of the first importance'.

The court acquitted Kato (R174).¹⁰⁰ The case against him was that an 8 Army Group order stating that 'The Indians and Indonesians of the Special Duty Coys are to be retained and employed until the end as a part of the Army strength...' bore his signature. The defence he tendered was that: (i) in the Japanese Army every order originating from a G.O.C. is drafted in its final form by a staff-officer and bears the latter's signature; (ii) the Indians and Indonesians were no longer P.O.W. but Japanese volunteers. The acquittal is difficult to justify in logic. The first proposition does not amount to a defence: his signature was proof of participation in the illegal act. The second proposition the court had rejected in the Adachi trial. On the other hand the acquittal is not difficult to explain. Enough was enough. They had just sentenced Adachi for the India P.O.W.s and Imamura's turn was coming. Kato was a lesser link in the chain and they ruled their line under the commanders.

Murder and Ill-Treatment of Natives

OCEAN IS

The execution of the entire population of Ocean Is on about 20 August 1945 on the orders of the commander of the local Naval Garrison Unit (Lt-Cdr) was the subject of five trials, R51, 52, 53, 68, 70.¹⁰¹ The day after the natives were informed by the Japanese of the war's end they were assembled, divided into about five groups, marched to different sections of the cliffs overlooking the sea, bound, blindfolded and shot. The bodies were weighted and dumped at sea. The lieutenant-commander, the supply-officer (who had separated the victims into groups for execution), the four company commanders (Lts) and three of the platoon commanders (Sub-Lts) were sentenced to death (On the recommendation of the J.A.G. the supply-officer's sentence was reduced to 20 years). Among the remaining platoon commanders: six sub-lieutenants and one sub-lieutenant (junior grade) received 20 years imprisonment; three (Sub-Lts, junior grade), 15 years, and one (Sub-Lt, junior grade) was acquitted. Two other ranks received 7 years and one was acquitted.

NAURU

In July 1943 the commander of the naval garrison at Nauru (Lt-Cdr) issued orders to his adjutant (W.O.) that as, in the air raids then taking place, there was the danger that the lepers (about 20 in number) in the isolation hospital would escape and infect the rest of the population, they were to be embarked in a small boat which was to be towed out to sea and sunk by gunfire. Any that survived the sinking were to be shot in the water by rifle fire. In November 1948 the adjutant, a petty-officer and a seaman were tried for the murder of the lepers. (The lieutenant-commander had in 1946 been sentenced to death and executed for the murder of the five Caucasian residents of Nauru in March 1943 (R93)).¹⁰² The petty-officer and the seaman were on the towing vessel, the former in charge of the gun crew which fired the shots, the latter as look-out. The adjutant and the petty-officer were sentenced to life imprisonment, the seaman to four years. On the recommendation of the J.A.G. the conviction and sentence of the seaman were not confirmed.¹⁰³

At Nauru in September 1944 a native employed by the Japanese in producing an essential foodstuff, toddy, was detected diluting and stealing it. He was sentenced by the naval officer in charge of native affairs (Sub-Lt) to three days imprisonment during which period he was to receive ten strokes of the cane daily. During those three days he was kept tied to a tree and was repeatedly beaten in turn by this officer's subordinates (4 sub-lieutenants and a warrant officer) using such instruments as a walking stick and a heavy pole. In R54 all five were convicted of torture. The sub-lieutenant in charge was sentenced to 20 years. Of his subordinates, two were sentenced to death, one to 20 years and two to 15 years.¹⁰⁴

NEW BRITAIN

At Vunarima in New Britain in September 1944 the local Military Police detachment arrested seventeen natives and one half-caste suspected of acts of sabotage, possession of firearms and conspiracy to assist the Allies, and secured a partial confession from the suspected leader, the half-caste. The detachment commander (a subaltern) then held a conference with his two sergeant-majors at which it was decided that all eighteen were guilty of offences and to execute them. They were bound together, blindfolded and decapitated. In R26 the two sergeant-majors (who also took part in the decapitations) and five of their subordinates were charged with murder. (The detachment commander had not been apprehended). The court acquitted the five subordinates and sentenced the two sergeant-majors to life imprisonment. The J.A.G. recommended mitigation since, although their conduct constituted a war crime, they were acting within the scope of Japanese military law. The Confirming Authority reduced the sentences to two years.¹⁰⁵

At Ramale in New Britain on four occasions during 1945 a sergeant-major and sergeant of the Military Police in the course of interrogating natives in custody to secure confessions used two of the Military Police's well known torturing techniques: (i) making the victim kneel, inserting a pole behind his knees and placing heavy weight on it; (ii) placing him on his back and pouring water down his throat. In R8¹⁰⁶ and R7¹⁰⁷ they were convicted of torture and sentenced to 30 and 25 years (reduced in each case by the Confirming Authority to 10 years).

Murder and Ill-Treatment of Local Chinese

During 1944 and 1945 on a number of occasions the lieutenant-general in command in New Ireland authorised the Lumburua detachment of Military Police to execute Chinese, half-castes and natives held by them on charges of war treason. On the ground that such killings were executions without prior trial as required by the Hague Rules, nine persons who at various levels participated in the process—the lieutenant-general, his legal staff officer (Lt-Col), the Assistant Provost-Marshal (Capt), the detachment commander (W.O.) and the four non-commissioned officers who were the actual executioners—were charged with murder. In R127¹⁰⁸ the court acquitted the two most junior non-commissioned officers (corporals) but found the rest guilty of murder and sentenced them to death. The Confirming Authority, however, quashed all the convictions. In so doing he followed the advice of the J.A.G., who argued that the court had been misdirected by its judge-advocate when he instructed it that the presence of the accused before the 'tribunal' and his ability to speak on his own behalf and call witnesses were essential elements of a trial. According to the J.A.G.:

A trial within the meaning of the Hague Rules is 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....I see no reason why the accused must be present before the tribunal which decides upon the verdict and sentence....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 derived from the usages established among civilised people from the laws of humanity and from the dictates of public conscience.

Witnesses had testified that the procedure in force had been that in each case the charge was investigated and the lieutenant-general, on the basis of the investigation report, made a decision upon the guilt or otherwise of the person charged. The J.A.G. advised that if these witnesses were believed, then the essential elements of trial were present and, in so far as in international law war treason was a crime punishable by death, the executions were lawful.

In some other cases involving the execution of natives (in New Guinea and New Britain) and the essential elements of prior 'trial', either the accused was acquitted (R29)¹⁰⁹, or on the advice of the J.A.G. either the findings of guilty were not confirmed (R31)¹¹⁰ or the sentences were substantially reduced (R26).¹¹¹ It may be noted that the decisions of some other Allied tribunals (e.g. a U.S. Military Commission in *Lt-Gen Isayama and others* and the Norwegian Supreme Court in *Latza and others*) indicate that they interpreted the Hague Rules to go further and to require, in addition to fair and impartial investigation, adequate opportunity to the accused to defend himself and present counter-evidence.

In January 1945 the Military Police detachment at Loguramau (New Ireland) interrogated a Chinese woman suspected of providing assistance to a crashed airman. In the course of the interrogations the detachment commander (a warrant officer), another warrant officer and a sergeant on separate occasions instructed native police to insert bananas into her vagina. The detachment commander struck her more than forty times with a cane. In R35 all three were found guilty of torturing and sentenced to death.¹¹²

NEW BRITAIN

Two trials arose out of the execution of Woo Chin Kiong at Massowa in New Britain in October 1944. Woo had been arrested on a charge of illegal possession of dynamite and inciting the natives against the Japanese. After interrogating him and two native witnesses, the sergeant-major in charge of the Massowa Military Police Detachment decided that he was guilty and sent a report to this effect to the Provost Marshal at Rabaul (a colonel). The latter replied ordering his execution. The sergeant-major himself decapitated Woo. Two of his subordinates were present at the execution, one escorting the prisoner, the other blindfolding him. In so far as Woo had been executed without trial, the sergeant-major and his two subordinates were charged with murder. The court on 18 December 1945 sentenced all three to death. In his advice to the Confirming Authority, the J.A.G. expressed 'grave doubts' whether the actions of the two subordinates constituted a crime and suggested that he quash the convictions against them. The Confirming Authority on February 15th confirmed the finding of guilty against all three and in the case of the two subordinates commuted the sentence to two years imprisonment. The sergeant-major was hanged on March 20th.¹¹³ The Provost-Marshal was tried for the same offence on March 28th, found guilty and sentenced to death (R30). This was confirmed by the Confirming Authority on June 11th. Subsequently, however, the Confirming Authority received a plea for leniency on the Provost-Marshal's behalf from the Roman Catholic Bishop of Rabaul and other priests who stated that during their internment at Vunapope and Ramale they had been well treated and that this they attributed to his efforts. In the light of this, the Confirming Authority on July 8th commuted the sentence to seven years imprisonment.¹¹⁴

Late in 1944, in order to exact her consent to sexual intercourse with him, a Military Police sergeant at Massowa (New Britain) tied a Chinese woman to a tree for three hours and put ants on her face and body. She consented only when he threatened to execute her husband. This was the subject of the first of the Rabaul war crimes trials. On 12 December 1945 the sergeant was convicted of rape and torture and sentenced to death by hanging.¹¹⁵ It is one of the very few cases in which the accused did not exercise his right to submit a petition to the Confirming Authority against the verdict and sentence.¹¹⁶ According to one of the Japanese Defending Officers, the Commander-in-Chief, Gen Imamura, regarded rape by a military policeman as such a heinous crime that he forbade the condemned man to appeal.¹¹⁷

NAURU

In R69 a paymaster warrant officer and six petty officers were sentenced to death for the murder of a Chinese gardener, Lee, on Nauru in December 1944. At a time of acute food shortage, Lee was suspected of stealing pumpkins, the staple foodstuff. He was beaten, immersed in a well and again beaten. During the second beating boiling water was poured over his legs. While undergoing this he died.¹¹⁸

Murder and Ill-Treatment of Caucasian Residents

NEW IRELAND

When in March 1944 the intense Allied air attacks commenced there were in Kavieng (New Ireland) under Navy control about 23 Australian planters and about 9 Roman Catholic priests (one was a Luxemburger; the remainder, German, i.e. Axis nationals) housed in two internment camps in the vicinity of Kavieng No.1 Airfield. On about March 17th, some days after the commencement of the air raids, these two groups were told to pack their belongings for a move to Rabaul. They were then escorted by a party headed by the senior platoon commander of the local security detachment to a spot about 50 metres from Kavieng South Wharf, where two barges loaded with cement sinkers had been moored. There they were blindfolded and, one by one, led to the edge of the wharf and required to sit. Sailors then placed a noose over each victim's head and strangled him. The bodies were weighted with the sinkers and dumped in Steffen Strait.

After the surrender in August 1945 the perpetrators of this crime and their superiors at Fleet Headquarters at Rabaul stated that these internees had been evacuated from Kavieng on 17 February 1944 on the *Kōwa Maru*, a vessel sunk by Allied aircraft on February 21st. This was not believed—particularly as, at the time, there had been rumours among the local population that they had been executed. Furthermore—a fact of which Fleet Headquarters was unaware—the U.S. Navy had rescued some survivors from the *Kōwa Maru* and the reports of their interrogations showed that she had taken no P.O.W. or internees on board.

]

In HK1 the Naval Officer in Command in New Ireland (a Captain) and five of his subordinates were charged with the massacre of the 23 Australians in this group and found guilty. At the trial the Captain testified that, when the air raids had become intense and the Executive Officer of the Naval Garrison Unit sought instructions regarding the internees, he had ordered that in the event of an enemy landing they were to be killed. The Prosecution argued that the order was manifestly criminal and that accordingly those who at each level issued it and carried it out were guilty. The court sentenced the Captain to death and the others to terms of imprisonment ranging from 20 years in the case of the Executive Officer to 4 years in the case of the executioner.¹¹⁹

NEW BRITAIN

In November 1943 Father Mayrhofer, a Roman Catholic missionary at Ramale in New Britain (a German national) was arrested by the Military Police on suspicion of assisting the Allies. In the course of his interrogation by a sergeant-major he was blindfolded, tied to a tree, prodded with a pistol and told that he would be shot. He was then held on the ground and a towel was placed over his face. Water was then poured over the towel. This continued for more than an hour, during which time he swallowed much water and nearly suffocated. He was kept handcuffed for more than a month and interrogated twice daily—always with attendant beatings. He was required to sleep in the open, in irons. In R5 the sergeant-major was convicted of torturing and sentenced to death. This was commuted by the Confirming Authority to 15 years imprisonment. In this trial there was no judge-advocate and none of the members of the court had legal qualifications. As a result, a procedural irregularity disadvantageous to the accused occurred: the Defending Officer's closing address, instead of following that of the Prosecuting Officer, preceded it.¹²⁰

Infiltration Parties

Nine trials arose out of the execution or torture of captured members of infiltration parties.¹²¹

THE OTAKWA PARTY

In November 1944 a patrol of five Australian other ranks and two natives was disembarked from a Dutch minesweeper into a small boat in the Eilanden River in Dutch New Guinea to conduct a three-day patrol to ascertain whether there were Japanese troops in the Otakwa area. The party was ambushed and all but the Australian signals sergeant were killed in the encounter. He was taken to the Japanese outpost at Kaparapoka (which consisted of two Japanese subalterns, two N.C.O.s and about sixteen native troops) and was confined there until executed by firing squad in mid-March. In M23 the outpost commander, a glass-moulder in civil life, aged 27, stood trial for murder. In his defence he claimed that he received orders by wireless from 5 Division at Kai to execute the prisoner. The court sentenced the subaltern to death. The J.A.G. did not recommend mitigation: ' [He] should have known that it is illegal in International Law to execute a prisoner without trial and the fact that he had received orders from superior authority to carry out the execution is not considered of itself to be a defence, more particularly when the accused is the senior officer in charge of the party'.

He was executed at Morotai on 3 March 1946.¹²²

THE AINBAI PARTY

In January 1943 a party of 'M' Special Force consisting of a Dutch N.C.O., an Australian signals sergeant and two Indonesians was despatched to establish a long-term intelligence post in the Hollandia area of Dutch New Guinea. By September they had reached Ainbai in the vicinity of Aitape. The Dutch N.C.O. was killed in an ambush on October 4th. The remainder of the party retreated but were betrayed to the Japanese by natives about a fortnight later. They were executed at Aitape on October 24th. When the Americans captured Hollandia in April 1944 photographs of the execution were found on the dead body of a Japanese officer and natives identified as the executioner of one of the Indonesians, Yunome, a member of the Navy's native affairs detachment at Aitape, which consisted of 4 Japanese civilians (of rank equivalent to sub-lieutenant) and half-a-dozen Formosan other ranks. Yunome was one of a number of Japanese sick captured by the Americans at Hollandia on April 25th. Among his belongings was his diary in which he described the interrogations (at which he was the interpreter) and the execution. In R143 he was charged with the murder of the Indonesian. The case advanced for the defence was that in decapitating the prisoner he was acting under the command of his detachment commander who, in turn, was carrying out an order received by wireless from the Commander, 2 Special Base Force at Wewak (Rear-Admiral Kamada), to execute the prisoners. Yunome was sentenced to death on 28 June 1946. With this the J.A.G. concurred: 'In my opinion the finding and sentence are valid. It was within the knowledge of the accused that the victim of his sword had had nothing in the way of a trial'.¹²³ The carrying out of the sentence was, however, deferred in case Yunome should be required as a prosecution witness in other trials.

The detachment commander Yasuno (who himself executed one of the prisoners) and the other executioner appear not to have survived the war. Rear-Adm Kamada was in Dutch custody awaiting trial for murders in Borneo (for which he was sentenced to death and executed on 18 December 1947). In July 1947, in R183, Kamada's Senior Staff Officer at Wewak (Captain Noto) and Watanabe, the chief petty officer in charge of the garrison platoon at Aitape, were charged jointly with the murder of the three prisoners. At this trial the defence tendered an affidavit from Kamada that he had ordered the executions and that his order was pursuant to the finding and sentence of a Military Punishment Tribunal consisting of himself, his chief-of-staff and a civilian lawyer (convened in accordance with Combined Fleet Confidential Ordinance Nos 68 and 69 of 1941), which had examined the interrogation reports and on that basis found the prisoners guilty of espionage. Noto testified that he had received the order verbally from Kamada and had conveyed it verbally to Watanabe through a warrant officer in charge of a barge departing from Wewak for Aitape at that time. Watanabe testified that he had received the order in this manner and that the prisoners were in his custody, but that, when Yasuno represented to him that since his detachment had captured the prisoners and conducted the interrogations it should provide the executioners, he had consented to this. In addressing the court the judge-advocate advised that: (i) if there had been a trial of the three prisoners the actions of Noto and Watanabe would not amount to murder; (ii) 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. The court found Noto and Watanabe guilty of murder and sentenced them to 20 and 7 years respectively. The legal officer reporting on the case recommended some mitigation of sentence in the case of Noto because of: (i) the sentences imposed in other cases in respect of officers holding similar appointments; (ii) Noto's having taken up his posting only a few days previously; (iii) the fact that there had been some form of prior investigation.

The J.A.G. concurred in the finding and expressed the view 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'. (These are more rigorous criteria than the J.A.G. enunciated in his advice the previous year in reviewing the case arising out of the execution of Chinese civilians in New Ireland (R127, *v. supra*, p 23). There, although there was no suggestion in the evidence that any of these requirements had been met, he had advised that the findings of guilty should not be confirmed—presumably because in that case the judge-advocate had, in his opinion, misdirected the court in stipulating that an essential element of 'trial' was the presence of the accused and the right to speak and call witnesses). He suggested that Noto's sentence be mitigated to 7 years. The Confirming Authority, however, confirmed both sentences unchanged.¹²⁴

The legal officer reporting on the Noto trial suggested that, in the light of the evidence tendered and sentences imposed in that trial, the death sentence on Yunome should be reconsidered. The matter was referred to the J.A.G. who on 29 September 1947 suggested commutation of Yunome's sentence to 10 years. This was effected by the Adjutant-General on October 9th.

Another case revolving around the essential requirements of 'trial' for persons accused of spying or war treason was S11, Maj Katsumura et al, in which the Commander of the Bogor Detachment of the Military Police (Maj Karsumura) and five of his N.C.O.s were charged with the unlawful execution of a group of three escaped P.O.W.s (2 Australian, 1 Dutch) in hiding and a woman member of the Dutch underground who had been harbouring them. The P.O.W.s had escaped from a P.O.W. camp at Batavia in May 1942 and had remained at large for more than a year. The Bogor Detachment on 12 August 1943 captured the three hiding in a concealed cellar in the house of a Dutch resident and on September 5th executed them and the woman by decapitation. Katsumura, the N.C.O. in charge of the execution party, and the four executioners were tried by an Australian court at Singapore in September 1946 on a charge of 'committing a war crime in that they at or near Bogor on 5/9/43 in violation of the laws and usages of war were concerned in the unlawful killing' of the four victims.

The Prosecution contended that the victims had been executed without trial in contravention of Article 30 of the *Hague Rules* 30 which provides that 'a spy taken in the act shall not be punished without previous trial'.

The Defence case was that the men had engaged in anti-Japanese activity, had obtained and passed on Japanese military information, were in possession of arms and incriminating documents and had resisted arrest and that the woman had aided them and conveyed military information to them. The Defence further contended that trial had actually taken place in accordance with the procedure laid down in a directive titled *Ki Operation* issued by the C-in -C. 16th Army in July 1943. Witnesses testified that the gist of the directive was as follows. (i) Instead of being referred to a court martial as in the past, each case of obstruction of military operations or the possession of 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; (ii) 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.

Katsumura testified that following the arrest of the prisoners he had despatched the completed pro forma and the attached testimony to Military Police H.Q. at Batavia which on September 3rd notified him that the C-in-C's sanction had been obtained and instructed him to perform the executions.

The Defence argued that that in these circumstances the accused was entitled to believe that 'a trial by documents' had been performed which satisfied the requirements of Hague Convention Article 30.

The Australian court made the following finding: 'The Court finds you not guilty. The court in its finding is guided by the amendment to Para 443(as amended), Manual of Military Law, Page 288, Australian Edition'.

The full text of Para 443 is reproduced at p. XXX supra. In the context of the Court's finding the operative portion is the phrase 'not obviously unlawful'. Accordingly, the finding of the Court means that it decided that the defendants had reasonable grounds for concluding that the *Ki Procedure* for trial in absentia constituted a trial as required by the *Hague Rules* and that the procedure had in fact been faithfully carried out.

The Court made its finding on 30 September 1946. On reading it, 1 Aust War Crimes Section, the unit at Singapore administering the trials and directing the prosecutions, the same day cabled Army HQ Melbourne seeking guidance on two points: (a) Whether proceedings in absentia without any representation constitutes a trial under Hague Convention Article 30; (b) Whether superior orders constitutes a legal defence where the order is unlawful but not obviously so. Whether, in fact, the prosecution must prove that the accused knew or should have known that the order was unlawful.

With the assistance of the Director of Legal Services, the D.P.W.& I (a barrister in civil life) despatched an opinion on November 13th in which he cited the recent ruling of the J.A.G. in case of Lt.Gen Ito et al, R127 (*v. supra* p. XX). The gist of the D.P.W.& I's opinion is as follows:

(a) For a trial under Article 30 of the Hague Convention, it is not necessary that the accused be present or represented before the tribunal which determines the verdict and sentence. If, however, on account of the special status of the accused or for any other reason any Convention additional to the Hague convention becomes applicable to the case it must further be determined whether or not such additional Convention prohibits the trial in absentia of persons subject thereto.

(b) The principle applicable to the defence of 'superior orders' is that stated in MML Para 443 (as amended)... The 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 mind as to his legality that he should refuse to carry it out.¹²⁵

THE TAMBISAN PARTY

In February 1944 a subaltern and two sergeants, members of an Australian reconnaissance party that had been introduced by submarine were captured in the vicinity of Tambisan in the Sandakan district in Borneo. On the completion of the investigation by the local Military Police they were in August sent to Jesselton for judicial examination preliminary to trial by court martial on a charge of espionage. The trial took place at Jesselton in December. They were sentenced to death and hanged. In LN15 the Corps Commander who convened the trial, the officer who conducted the preliminary examination and who prosecuted, and the two surviving members of the court were charged with murder and (as an alternative charge) with unlawfully disregarding their duty to try the three accused persons in accordance with the rules of International Law. The Australian court found all the accused not guilty. Although, as is the custom with military tribunals, it did not state its reasons, these are apparent in the frequent questioning addressed to the Prosecuting Officer by the President that are a feature of this case. There were two key issues—judicial immunity and whether the Australians were wearing uniform or had disguised themselves as civilians. In the words of the President: 'I take it that the question for us is not merely whether we consider the decision of the court-martial to be wrong, either in law or in fact, but surely there must be some evidence—if there is jurisdiction in that court—there must be some evidence of a wicked mind in the court and, of course, the Convening Officer, the Prosecutor also—if the Prosecutor can be said to have had any part in it'.

The Prosecution argued that there was evidence of a wicked mind on the part of all concerned in that the evidence before the court martial that the men were not spies was so overwhelming that no reasonable man could honestly arrive at a contrary conclusion. The relevant provision of the Hague Convention provided that a person could be considered a spy only if he were acting clandestinely or on false pretenses and that a soldier not wearing a disguise could not be considered a spy. The three Australians were wearing the regulation 'jungle-green' Australian Army uniform and were openly carrying arms, yet at every stage of the Japanese investigations and trial it was stated that they were not wearing uniforms. This was either deliberately accepting a palpable falsehood or being maliciously remiss in making no attempts to ascertain from informed sources what the Australian Army's combat uniform was. But among the evidence adduced at the Japanese investigations was testimony that the Australians were wearing neither their badges of rank nor their identity disks. Here again, the attitude of the Australian court and the importance which it attached to this issue can be gauged from the President's questioning:

Now it is a matter of common knowledge...that Australian soldiers were required to wear at all times identity discs and were also required to carry a pay-book....Also they were required to wear the badges of rank to which they were entitled....Would not each of the accused be entitled to say to himself: I know that normally an Australian soldier wears an identity disc, that normally an Australian officer or N.C.O. wears his badges of rank?¹²⁶

Captured Air-Crews

Of the RAAF airmen shot down in New Guinea (excluding New Britain) and the Netherlands East Indies 66 were executed and only 15 (of whom 12 were from the same aircraft) survived the war.¹²⁷

TANDJONG PRIOK

The three survivors from a RAAF Catalina were beheaded at the execution ground of the Judicial Section, 16 Army H.Q. at Tandjong Priok on 5 February 1945. This was the subject of trial S14¹²⁸ in which the court passed the following sentences: on the G.O.C. 16 Army who ordered that they be executed secretly without trial—death; on his Staff Officer Intelligence (Lt-Col) who recommended this and conveyed the order—death; on his Chief Legal Officer (Lt-Col)—15 years; on the officer in charge of jail, who conducted the execution (Lt, judicial branch)—10 years; on the executioner (Sgt-Maj)—7 years. The conviction and sentence of the Chief Legal Officer was not confirmed, the J.A.G. advising that mere knowledge that the G.O.C. had ordered the execution and failure to take any steps to prevent it was insufficient to sustain the charge.

AMBON

In M43¹²⁹ three naval personnel were sentenced to death for the execution of four survivors from a R.A.A.F. Mitchell bomber at Ambon on 16 August 1944. Sub-Lt Katayama had been in charge of the execution party and had himself executed one of the airmen. Sub-Lt Takahashi had

beheaded another. They were officers of the Volunteer Reserve aged 25 and 21 at the time of the offence. W.O. Uemura had been in charge of the escort and burial party. The J.A.G. advised that the findings and sentences against Takahashi and Uemura should not be confirmed, since Takahashi could not be expected to know that the order for execution was illegal and Uemura's mere presence did not amount to participation in the crime. As regards Katayama, he advised that the fact that he was ordered to carry out the executions by a senior officer should be considered in mitigation. Despite this advice, the Confirming Authority confirmed the findings and sentences against all three. In the case of Takahashi and Uemura this seems a clear breach of Australian Military Regulation 575(10) which bound all members of the Australian Military Forces to follow the rulings of the J.A.G. on questions of law. Uemura was executed on 3 March 1946. The executions of Takahashi and Katayama were deferred so that they could appear as Prosecution witnesses at the subsequent trials of superior officers. In his report on the latter trials to the Director of P.O.W. & Internees, the Prosecuting Officer on 1 October 1947 advanced three grounds on which Takahashi and Katayama's sentences should be reconsidered. First, the reasons given in the J.A.G.'s original advice; second, their 19 months in the condemned cells; third, the need for some 'uniform standard of punishment according to the degree of guilt'. He noted that sentences passed in early 1946 were severe by 1947 standards—e.g. (Naval) Captain Noto's recent sentence of only imprisonment (*v. supra*, p 27). But despite the J.A.G.'s recent recommendations for reprieves following that trial and the Hirota trial (*v. supra*, p 18) the matter was not resubmitted either to him or to the Confirming Authority; and Takahashi and Katayama were executed at Rabaul on October 23rd.

Failure on some occasions to provide overall uniformity of punishment proportionate to guilt is a disturbing feature of the Australian trials. It was foreseen and criticised from the outset by some senior officers involved in the trials. Brig W.A.B. Steele, the commander of the force that reoccupied Ambon, urged that unless the officers who had ordered executions were tried, their subordinates who struck the actual blows should not be tried. In June 1946 the Area Commander at Rabaul, Maj-Gen B.M. Morris, urged that confirmation should be deferred until all trials relating to the one incident were completed. It appears to the author that, in so far as the power to confirm (and at the same time to mitigate) sentences and the power to mitigate a sentence already confirmed were centralised at a high level, the means were there to do more in this direction than was done.

Double Jeopardy

It is a rule of the common law that a person must not be put twice in peril ('double jeopardy') for the same offence. This rule is specifically applied to courts-martial by *Rules of Procedure* No.36, which enables an accused to offer a plea in bar *autrefois* acquit on the ground that he has been previously convicted or acquitted of the offence. In the Australian *Regulations for the Trial of War Criminals*, however, Regulation 4 directs that Rule No.36 shall not apply and Regulation 9 provides that 'an accused shall not be entitled to offer any plea in bar'. At Rabaul in May and June 1946 the G.O.C. 8 Military District availed himself of Regulation 4 to order re-trials of defendants on charges on which they had already been acquitted.

On May 29th a court at Rabaul found Fukushima, a Formosan guard, not guilty on the charge of 'Murder in that he at Ranau, Borneo, on or about 4 Jul 45 murdered Pte Richard Bird of the Australian Imperial Force'. At the trial (R121), two of the survivors of the Sandakan death march went into the witness box and testified that they had witnessed Fukushima at the parade of working parties knock Bird to the ground, repeatedly kick him on the head and body and leave him where he lay, that they had found Bird severely injured lying in the same position when their working party returned to camp in the evening, and that Bird during the night. The Judge-Advocate in his closing address explained that in law 'A person is guilty of causing death even if he merely accelerates the other's death, and it is no excuse that the person here killed must have died very shortly from some other cause'. The court, nevertheless found Fukushima not guilty. (Presumably they either doubted the witnesses' veracity or believed that Fukushima's assault had not accelerated Bird's death or that someone other than Fukushima had assaulted Bird while he lay unattended). The G.O.C. immediately convened another court (of different members) which on May 31st found Fukushima guilty on the same charge and sentenced him to death (R122). At the second trial the Prosecution produced a third Australian witness who testified that he had witnessed the assault by Fukushima, that on return to camp he had observed the injuries on Bird's face and the congealed blood in one ear and that the following morning he had seen Bird's body stripped for burial and observed extensive bruising on the trunk.

As the second trial resulted in a conviction, its Proceedings had to be sent to the Judge-Advocate-General for his report and advice to the Confirming Authority. On examining these the J.A.G. noticed a remark by the Defending Officer in his opening address that 'the accused was tried yesterday on this charge and acquitted'. As a result, on July 24th he advised the Confirming Authority that the second court 'had no jurisdiction and that the proceedings cannot be confirmed'. He argued that the common law rule of *autrefois acquit* could be abrogated only by statute and that, since the Australian *War Crimes Act* did not do so, any Regulation made under its authority that so purported was *ultra vires*. The Confirming Authority, following this advice, on September 3rd minuted the Proceedings 'Not Confirmed'.

The J.A.G.'s advice to the Confirming Authority on R122 is dated July 24th. The following day he recommended that the finding and sentence of trial R137 should be confirmed, unaware that the defendant had been found not guilty on the same charge in an earlier trial.

On June 8th a court at Rabaul had found Sgt.Maj KARUBE Saburo not guilty on the following charges: (1) Ill-treatment of a P.O.W. in that he at Komareya, New Britain, about 7 Feb 45 ill-treated a number of Indian P.O.W.; (2) Ill-treatment of a P.O.W. in that he at Komareya ill-treated 2/Lt Hari Kishan Das of 1 Bn Hyderabad Inf, a P.O.W. The prosecution case consisted of two affidavits. The first was by the victim, 2/Lt Hari Kishan Das dated 3/10/45 stating inter alia that Sgt.Maj Karube had beaten him with his hands, hit him twice on the temples and then kicked him. The second was by Abdul Hashin, a mess cook, dated 16/11/45 identifying a photograph of the defendant as that of a person known to him as KARUBE Saburo. The trial Judge Advocate accordingly advised the court as follows: 'There is no evidence of the identification of the accused with the person referred to in this statement presented by the Prosecution and my advice to the court is that there is no case to answer', whereupon the court on June 8th entered a finding of not guilty. On June 11th the Prosecution interrogated Karube who, in the course of the interrogation, stated inter alia that he was Sgt.Maj KARUBE Saburo of 2 Special Land Service, that he was with

the Production Unit at Komoriyama from January to March 1945, and that he knew an Indian 2/Lt named Das. On June 12th the G.O.C. convened a court of three (including two members of the previous court) to try Karube on the same charge. The court assembled on June 13th (R137). The Prosecution tendered, in addition to the two previous affidavits, the transcript of the June 11th interrogation. The Defending Officer made no mention of the fact that the accused had already been acquitted on the same charge and put him into the witness box as a Defence witness. In the course of the cross-examination by the Prosecution that ensued, Karube admitted to having beaten 2/Lt Das. The court found him guilty and sentenced him to three years imprisonment. As Karube's first trial resulted in an acquittal its Proceedings were not tendered to the J.A.G. For this reason and because there was no reference to in the Proceedings of R137 the J.A.G. was unaware that the latter was a re-trial. Accordingly on July 25th he advised the Confirming Authority as follows: 'The proceedings appear to me to be in order. The evidence tendered was all admissible under the War Crimes Act and there was evidence from which the court could be satisfied of the guilt of the accused. In the circumstances I see no reason why the finding and sentence of the court should not be confirmed'. Confirmation was signified on September 3rd. Karube served his sentence and was released on 12/6/49.

SERVING OF PRISON SENTENCES: LOCATIONS & EVENTUAL REMISSIONS

Those convicted by the Australian courts at Singapore and Hong Kong served their sentences in the same prisons as those convicted by the British courts until transferred with them to Sugamo Prison in Tokyo in August 1951. Those convicted by Australian courts elsewhere were confined first at Rabaul (until March 1949) and then at Manus until transferred to Sugamo in July 1953. The Australian authorities carried out no systematic review of prison sentences like that in the United Kingdom where in 1949 the length of all sentences being served was reviewed by the War Crimes Sentences Review Board - Far East, which adopted a standard scale of punishment according to the relative gravity of the offence (8 grades ranging from 'ill-treatment causing death' to 'minor torture...not sufficient to cause severe injury') and the relative degree of responsibility of the accused (3 grades: major, intermediate, minor) and initiated action under A.O. 81/1945 §12 for the reduction of all sentences that exceeded this standard. In 1951 the Australian Government enacted Statutory Rule No 11 authorising good conduct remissions of one quarter of the sentence for those serving sentences of 5-25 years and after 30 years for those serving life sentences. The first to gain such remissions, those sentenced at Labuan to 12 years on 9 January 1946, were released on 8 January 1955. In April 1955 following the practice in other Commonwealth countries this was amended to authorise release after serving 10 years or one third of the original sentence—whichever was the less. In 1957 this was further amended and the last prisoners (including those sentenced to life imprisonment in 1951) were released on 4 July 1957.

CRIMES NOT BROUGHT TO TRIAL

A number of the crimes investigated were not brought to trial. The following are a few examples.

On 16 February 1942 at Banka Is twenty-two Australian Army nurses, survivors from the Vyner Brooke, who had surrendered, were put to death. They were marched into the sea in line and machine-gunned. The commander of the unit responsible was serving in Manchuria at the war's end and was not repatriated by the Russians until 1948. He was arrested and gaoled in Sugamo Prison on 6 June 1948 but committed suicide two days later.¹³⁰

In August 1942 a group of nine Australian civilians (men, women and a child) were executed on the beach at Buna and at Popondetta, nearby, two women missionaries were bayoneted to death beside a prepared grave. The commander of the unit responsible was killed in an air-raid at Salamaua in August 1943 and most of the unit perished in the course of the New Guinea campaigns.¹³¹

On 18 March 1943 an Australian bomber was shot down while making an attack on the Japanese positions at Salamaua. Two members of the crew, Flt-Lt W.E.Newton and Flt-Sgt J.Lyon swam ashore and were captured by 5 Sasebo Special Naval Landing Force. In July the diary was captured of an eye-witness of Newton's execution at Salamaua a few days later. This described the execution and named the executioner. Newton's body was recovered the following October when Salamaua was recaptured. Lyon's body was recovered at Lae in July 1948. The autopsy showed that he had been bayoneted while his hands were tied. Newton's executioner was killed in action in the Philippines. The area commander (Rear-Adm) and his Chief-of-Staff (Cdr), suspected of ordering the executions, committed suicide in April and May 1947 respectively.¹³²

On about 16 March 1943 the destroyer *Akikaze* en route for Rabaul took aboard about 26 civilian internees (for the most part German priests, Brothers and nuns and their leader, the Roman Catholic Bishop of Central New Guinea; and two small children) at Kairiru Is. The following day it embarked another twenty (Dutch nuns and priests; Australian and German planters; Protestant missionaries) at Lorengau (Admiralty Is). At sea between Kavieng and Rabaul they were executed one by one. In the course of his interrogation in December 1946 one of the ship's officers describes the slaughtering (which, he said, took 2 hours 50 minutes) as follows:

Each internee passed beneath the forward bridge on the starboard side and came upon two waiting escorts. Here they were blindfolded with a white cloth and supported by each arm. By this time the interrogation of the second person was begun. Meanwhile, beneath the bridge of the quarter-deck on the starboard side, both wrists of the first person were firmly tied and he was again escorted to the execution platform. On the execution platform, they were faced toward the bow, suspended by their hands by means of a hook attached to a pulley, and at the order of the commander, executed by machine gun and rifle fire. After the completion of the execution the suspension rope was slackened and it had been so planned that when the rope binding the hands was cut, the body would fall backwards off the stern due to the speed of the ship. Moreover, boards were laid and straw mats spread to keep the ship from becoming stained . . . Thus, in this way, first the men and then the women were executed. The child going on toward five years old was thrown alive into the ocean.¹³³

As there were U.S. nationals among the victims, the Australian War Crimes Section in Tokyo, having completed its investigation, on 18 July 1947 handed the matter over to the American authorities, who appear to have taken no further action.

The ill-treatment of United Kingdom P.O.W. on Ballale Is was one of the cases ready for trial in December 1949. In December 1942 527 United Kingdom P.O.W were sent to Ballale Is (off Bougainville) to construct airfields there. They were forced to remain in their huts during an air raid and as a result about 280 were killed. Another 147 died as a result of ill-treatment. The remainder were bayoneted to death. Although the senior Japanese officer throughout was in custody and, among the 42 cases ready for trial, it was one of the 17 cases listed as murders in which a conviction was likely and a death sentence appropriate, it was not proceeded with when Cabinet in January 1950 decided to confine the trials at Manus to cases in which there were Australian victims. The War Office in London had informed the Australian authorities that it did not intend to bring the case to trial but would have no objection if Australia did so.¹³⁴

Among the cases under investigation in January 1950 were several arising out of executions of a total of about 30 Australian and United States airmen and P.O.W by 18 Army in the Madang and Wewak areas at various times between June 1943 and late 1944. Some of these cases were ready for trial but did not satisfy Cabinet's criteria on two grounds in so far as in each case a death sentence was considered 'possible' rather than 'likely' and the weight of the evidence indicated that the victims were Americans rather than Australians.¹³⁵

Similarly a number of executions at Rabaul did not come to trial. At the site of the Japanese Navy's cemetery at Matupi an Australian war graves unit in May 1946 found the bodies of 24 Caucasians, all bearing signs of execution, buried in seven contiguous trenches. Four could be identified: two American airmen, an Australian naval telegraphist and an Australian civilian. In June 1949 a Japanese rating testified that he had witnessed the execution of 12 Allied airmen there in November 1943 in the presence of high ranking naval officers whom he named. In the course of the investigations that followed, one admiral committed suicide and a number of other ranks and officers admitted to participating in, or witnessing, executions at that location between August 1942 and April 1944. On at least two occasions some of the victims were civilians—six Australians in October 1942; some Australians, a Swiss and a Finn in April 1944. After Cabinet's decision to terminate all war crimes investigations, the task of casualty identification and reburial continued. The Imperial War Graves Commission in June and July 1950 searched twelve acres at the foot of Matupi crater. They found five graves containing the bodies of 15 Australian airmen, 12 American airmen and one Australian civilian, all bearing signs of execution. It would appear that, over all, at Matupi the Navy executed upwards of a hundred Caucasians (including at least 19 civilians).¹³⁶ On the basis of these new discoveries the Minister for the Air in October 1950 (while the Manus trials were still in progress) proposed to Cabinet that the suspects for the Madang and Rabaul executions be re-arrested and brought to trial. Cabinet, however, reaffirmed its previous decision.¹³⁷

END NOTES

- ¹ Australian War Memorial AWM226 Item 1: Proceedings of a Court of Inquiry... Vol.1, Terms of Reference.
- ² Australian War Memorial AWM226 Item 1: Proceedings of a Court of Inquiry... Vol.1, New Britain Report (24 pp)
- ³ AAA MP742/1 336/1/1086 'Tol Massacre'
- ⁴ NAC Series A3688/27, 247/R1/3..
- ⁵ Report (NAC A10943), . Transcript (NAC A6236),. Exhibits (NAC A6237).
- ⁶ Report (A10950, 1. Transcript: Vol 1 AWM226, 6; Vol 2 A10951, 1).
- ⁷ . NAC A10952, 1.
- ⁸ . NAC A1066, H45/580/2.
- ⁹ . *ibid.*
- ¹⁰ . Report & Appendices (NAC A11049, Rolls 1 &).
- ¹¹ . A2937, 222.
- ¹² . Webb to Minister for the Army, 15 October 1945, *ibid.*
- ¹³ . Mansfield to Webb signal of 17 October and letter of 19 October 1945.(NAC A6238, 3).
- ¹⁴ . Adjt.Gen to Chairman Aust War Crimes Commission 24 October 1945. (NAC A4311, 752/1 Part).
- ¹⁵ . Webb to Mansfield 20 October 1945 (NAC A6238, 3).
- ¹⁶ . NAC A1066, H45/580/1/2.
- ¹⁷ . NAC A1067, H45/590/3.
- ¹⁸ . NAC A1838/T184, 3103/10/13/1 Part 1.
- ¹⁹ . To Dominions' Secretary, Cable No 209, 1 August 1945 (NAC A5954, Box 453)..
- ²⁰ . To Dominions' Secretary, Cable No 230 (*ibid.*).
- ²¹ . From Dominions' Secretary, Cable No 303 (*ibid.*).
- ²² . Foreign Relations of the United States, Vol 6 (The British Commonwealth, the Far East), pp 902-907.

23. From Australian External Affairs Officer, London, Cable No 279 (NAC A1066, H45/580/6/3).
24. To Minister for External Affairs, Cable No 261 (ibid.).
25. 'Discussion Held on 24th September, 1945' (ibid.).
26. To Acting-Secretary, External Affairs, Teleprinter D.2158 (ibid.).
27. To Secretary, External Affairs, 22 October 1945 (ibid.).
28. From Acting-Secretary, External Affairs, Teleprinter, 25 October 1945 (ibid.).
29. 'First List of Major Japanese War Criminals' (NAC A2937, 'Australian Lists of Major Japanese War Criminals').
30. NAC A1066, H45/590/3.
31. NAC A1067, UN46/WC/1.
32. Sir William Webb to Gen MacArthur, 11 February 1948 (National Library of Australia, J.G.Latham Papers, 1009/32/337). Webb had a private meeting with Evatt on 20 March 1946 (NAC, A5954, Box 1891, 'Japanese Surrender File No 4', Teleprinter CS 573 20 March 1946). No record of what transpired at this meeting has been found.
33. MacArthur to Chief-of-Staff U.S.Army, Cable, 25 January 1946, Foreign Relations of the United States, 1946, Vol 8 (The Far East), pp 395-397.
34. From External Affairs Officer, London, Cable No 103, 15 February 1946 (NAC A1067, UN46/WC/1).
35. From Australian Political Representative, Tokyo, Cable No 143, 6 April 1946 (NAC A5954, Box 1891 'Japanese Surrender File No 4').
36. To Australian Political Representative, Tokyo, Cable No 123, 9 April 1946 (NAC A1067, UN/46/WC/1).
37. International Military Tribunal for the Far East, International Prosecution Section, 'Minutes of a Meeting of Associate Prosecutors, 4.30 pm, Monday, 8th April 1946, Room 610'. I am much indebted to Prof K.Awaya of Rikkyō University for showing me this document.
38. Roling, B.V.A. & Ruter, C.F. (eds.), The Tokyo Judgment (Amsterdam, 1977), Vol 1, p 478.
39. In addition to those Rules of Procedure excluded in the Royal Warrant, Statutory Rule No 164 also excludes the application of Rules of Procedure 14, 32 and 36,
40. M44, Kawazumi, T et al (NAC A471 81068). See further criticism of Section 9 and other provisions of the Act in the article 'Japanese War Crimes Trials' by Maj G.Dickinson (LL.B), Advisory Officer to the Japanese Defence Team at Manus, published in Australian Quarterly, Vol 24, No 2, June 1952.
41. M36, Capt Yamamoto, S et al (NAC A471 81663).
42. Cable from British Commonwealth Occupation Force to Department of Defence Z121, 22 December 1949 (NAC A816 19/304/447).
43. Secretary for the Army to Minister for the Army, 6 Dec 1945 (NAC A472 W28681).

44. Secretary for the Army to C-in-C, 25 Jan 1946 (*ibid.*).
45. Cable from Oldham (London) to External Affairs, 12 October 1945 (NAC A1066 H45/590/1).
46. Adjutant-General to Adv H.Q. A.M.F. and H.Q. 1st Aust Army 151625, 26 Nov 1945 (NAC A1066 A45/590/1).
47. NAC A816 19/304/447. Department of Defence, Archives & Historical Section, unregistered files AG Coord 218 & 219. See also NAC A2700, A2703 and A4639 (agenda and minutes of the Chifley and Menzies Cabinets).
48. Trial R5, Sgt-Maj Furukawa,T, had no judge-advocate and there is no indication in the transcript that any member of the court had legal qualifications (NAC A471 80745).
49. M11, Capt Nakata,T et al; M37, Sgt-Maj Shoji,K et al; R5, Sgt-Maj Furukawa,T (NAC A471 80911, 80754 and 80745).
- 50 NAC A471 Part B Ex. D Frames75-359, 'The Dossier Concerning the Examination of the Case against Kunito Hatakeyama and Kenichi Nakagawa (English Translation 14/6/1946.
- ⁵¹ For the history of this question see particularly: Y.Dinstein,The Defence of Obedience to Superior Orders (Leyden: Sijthoff, 1965), pp 38-40; J.H.Morgan, 'Nuremberg and After', Quarterly Review, April 1947, p 318 ff; Committee of Enquiry into Breaches of the Laws of War, Interim Reports -- Memorandum on 'The Plea of Superior Orders' (Cabinet Papers G.T.7806. Public Record Office, London, CAB 24 85 Y/K 6169, pp 32-41); H.Lauterpacht,'The Law of Nations and the Punishment of War Crimes', British Yearbook of International Law, 1944, pp 58-95.
- ⁵² H.Lauterpacht, Oppenheim's International Law (6th Ed. 1940), vol 2, pp 184-5)
- ⁵³ NAC A471 81212 Part B, Ex. D Fr 75-359, 'The Dossier Concerning the Examination of the Case against Kunito Hatakeyama and Kenichi Nakagawa (English Translation 14/6/1946).
- ⁵⁴ NAC A471 81212.!
- ⁵⁵ NAC A471 81951.
- ⁵⁶ It was not until some weeks later, in connection with another case, the Defence Team at Manus received from its Tokyo office the affidavits of two U.S.Army sergeant interpreters who had interpreted for Sylvester. On 8 September 1950 at Tokyo Sgt F.K. Oshima deposed that:

- ... Capt Sylvester sometimes required those being interrogated by him to stand at attention before him, or against a wall or a screen; this would continue at times for as much as two hours, and was sometimes accompanied by the admonition, 'Go on standing at attention until you change your mind', or 'Continue until you regain your memory'...
- Four or five times I have seen Capt Sylvester produce handcuffs and exhibit them to the witness with the threat of using them , and on some occasions he also made out a warrant and exhibited it to the witness, telling him that he was going to call the police to take him to Sugamo Prison. This latter performance was repeated very often, at times when the Captain was displeased with the witness 'answers; he would say on such occasions, 'You are lying, and I'm going to have you put in prison until you tell the truth'...
- It was Capt Sylvester's practice also to show to a witness an affidavit, or what he alleged to be an affidavit, of another person connected with the matter, saying that that affiant's testimony contradicted what the witness was saying, and that the witness had better change his statement and 'tell the truth'

On 11 Sept 1950 Sgt T.Saito swore an affidavit to the same effect:

... When a witness interrogated by Capt Sylvester answered in such words as 'it may be' or 'it might have been so', the Captain would put in the witness' statement 'it was so'. If the witness refused to sign such a statement, I have seen him threatened by the Captain, who would say that the witness would not be allowed to return home until he signed...

⁵⁷ NAC A471 81952.

⁵⁸ NAC A471 81967

.

59. LN2, Lt-Gen Nishimura,T et al (NAC A471 81942).

60. R176, Lt-Gen Baba,M (NAC A471 81613).

61. M28, Capt Hoshijima,S (NAC A471 80777).

62. M35, Hayashi,Y et al (NAC A471 80779).

63. R125, Capt Yamamoto,S et al (NAC A471 81029). This was the retrial of M36 in which the findings and sentences were not confirmed (v. supra p 10).

64. R102, Hayashi,Y (NAC A471 81015).

65. R151, Kitamura,K et al (NAC A471 81213).

66. M17, Capt Takakuwa,T et al (NAC A471 80771).

67. M16, Sgt Hosotani,N (NAC A471 80714).

68. M18, Nagahiro,M et al (NAC A471 80772).

69. R122, Fukushima,M (NAC A471 81218).

70. M19, Sgt Iwabe,S et al (NAC A471 81216). M22, Goto,T et al (81970). M21, Sgt Okada,T et al (80705). M25, Sgt-Maj Beppu,Y et al (80913).

71. M24 Sgt-Maj Murozumi,H et al (NAC A471 80776).

72. M11, Capt Nakata,T et al (NAC A471 80911).

73. M37, Sgt-Maj Shoji,K et al (NAC A471 80754).

74. M2, Sgt-Maj Sugino,T (NAC A471 80716).

75. M3, Matsumoto,H et al (NAC A471 81214).

76. M4, Hirota,S et al (NAC A471 81204).

77. NAC A471 81201-3, 81242-4, 81246-8, 81250-1, 81300-1, 81639-41, 81655, 81659.

78. NAC A471 81638, 81660, 81662.

79. S12, Lt-Col Nagatomo,Y (NAC A471 81655).

80. M45, Nav Capt Shirozu,W et al (NAC 471 81709).

81. HK3, Nav Capt Tahara,S et al (NAC A471 81950).

82. R175, Gen Imamura,H (NAC A471 81635).
83. R173, Lt-Gen Adachi,H (NAC A471 81652).
84. R72, Lt Hironaka,T et al (NAC A471 80985).
85. R90, Capt Ikeba,T et al (NAC A471 81007).
86. R41, Lt Mitsuba et al (NAC A471 80787).
87. R142, Sgt-Maj Kaminaka,T (NAC A471 81040).
88. R33, Sgt-Maj Hasegawa,J et al (NAC A471 80732).
89. R38, L/Cpl Maeda,B (NAC A471 80784).
90. R55,Sgt Matsushita,T et al (NAC A471 80915).
91. R172, Maj-Gen Hirota,A (NAC A471 81653).
92. Regulation 19 of the Australian Regulations for the Trial of War Criminals (which is similar to Army Act §57(2) and A.O.81/1945 §12) enabled a confirmed sentence to be mitigated, remitted or commuted by a General officer holding a Command or rank not inferior to that of the original confirming officer.
93. R62, L/Cpl Tokawa,M (NAC A471 80908).
94. R65, L/Cpl Tokawa,M (NAC A471 81069).
95. D P.O.W&I to Actg Adjt-Gen, 9 July 1946 (AAV MP742/1 336/1/1205).
96. R176, Lt-Gen Baba, M (NAC A471 81631).
97. R173, Lt-Gen Adchi, H (NAC A471 81652).
98. R175, Gen Imamura, H (NAC A471 81635).
99. R172, Maj-Gen Hirota, A (NAC A471 81653).
100. R174, Lt-Gen Kato, R (NAC A471 81065).
101. R51, Lt-Cdr Suzuki,N et al (NAC A471 80796).
R52, Nav Lt Sakuma,W et al (NAC A471 80797).
R53, Nav Lt Sakata,J et al (NAC A471 80798).
R68, Nav Lt Miyasaka,D et al (NAC A471 81071).
R70, Nav Lt Yamaguchi,N et al (NAC A471 80983).
102. R93, Lt-Cdr Nakayama,H (NAC A471 81010).
103. HK10, Sub-Lt Sakata,T et al (NAC A471 81661).
104. R54, Sub-Lt Sakoda,H et al (NAC A471 80799).

105. R26, Sgt-Maj Ohashi et al (NAC A471 80750).
106. R8, Sgt-Maj Kitada, Y (NAC A471 80741).
107. R7, Sgt Tagai, T (NAC A471 80743).
108. R127, Lt-Gen Ito, T et al (NAC A471 81030).
109. R29, Lt-Gen Kawakubo, S (NAC A471 80736).
110. R31, Capt Shinohara, E et al (NAC A471 80734).
111. R26, Sgt-Maj Ohashi, S et al (NAC A471 80750).
112. R35, W.O. Matsumoto, T (NAC A471 80782).
113. R3, Sgt-Maj Inagaki, M (NAC A471 80731).
114. R30, Col Kikuchi, S (NAC A471 80735).
115. R1, Sgt Yaki, Y (NAC A471 80747).
116. Australia, Statutory Rules, 1945 No 164 (Regulations for the Trial of War Criminals), Section 17.
117. Rabauru Keiykai, Rabauru (privately printed, 1980),
p 164.
118. R69, W.O. Hatakeyama, Y (NAC A471 80982).
119. HK1, Rear-Adm Tamura, R et al (NAC A471 81645).
120. R5, Sgt-Maj Furukawa, T (NAC A471 80745).
121. M23 (80774), D1 (80708), R143 (81041), R183 (81210), LN5 (81945), LN9 (81947), LN20 (81964), LN21 (81961).
122. M23, Capt Kato, K (NAC A471 80774).
123. R143, Nav-Civ Yunome, K (NAC A471 81041).
124. R183, Nav Capt Noto, K et al (NAC A471 81210).
- 125 . AWM226 18
126. LN15, Lt-Gen Yamawaki, M et al (NAC A471 81956).
127. 'History of the Directorate of P.O.W & Internees', pp 446-7 (AWM 780/1/6).
128. S14, Lt-Gen Harada, K et al (NAC A471 81632).
129. M43, Nav Lt Katayama, H et al (NAC A471 80918).

130. AAV, MP742/1, 336/1/1976.

131. AAV, MP742/1, 336/1/1055.

132. NAC, A705, 166/1/102.

133. AAV, MP742/1, 336/1/1444.

134. AAV, MP742/1, 336/1/1460.

135. NAC A705 116/1/400.

136. NAC, A703 (Department of Air), 614/1/7. AAV, MP742/1, 336/1/1955 & 336/1/1965.

137. NAC A4639 Vol 1 Agendum 2B.

ABBREVIATIONS

A.H.Q. Army Headquarters, Melbourne

D.P.W.& I Director[ate] of Prisoners of War & Internees at A.H.Q.

G.O.C. General Officer Commanding

H.Q. Headquarters

NAB National Archives of Australia, Brisbane Office

NAC National Archives of Australia, Canberra Office

NAM National Archives of Australia, Melbourne Office

P.O.W. Prisoner(s) of War

U.N.W.C.C. United Nations War Crimes Commission

SELECT BIBLIOGRAPHY

Location Symbols

Documents referred to in this bibliography are held at the following locations: where the Series number bears an A prefix, at the Canberra office of National Archives; where the Series number bears an MP or B prefix, at the Melbourne office of National Archives; where the Series number bears a J prefix, at the Brisbane Office of the National Archives; where the Series number bears an AWM prefix, at the Australian War Memorial, Canberra.

File Titles

File titles may be ascertained by logging into *RecordSearch*, the National Archives of Australia data base, at <www.naa.gov.au/the_collection/recordsearch.htm> and keying in the Series number followed by the Item number.

Principal Sources

The following collections constitute the principal sources used in the preparation of this paper.

TRIAL PROCEEDINGS
(Series A471)

The original Proceedings of each trial contain the following: (i) convening order; (ii)

stenographic record; (iii) exhibits tendered; (iv) findings and sentences; (v) report on trial to Convening Officer by formation Legal Officer; (vi) petitions to confirming Authority against finding/sentence; (vii) Judge-Advocate-General's advice to Confirming Authority; (viii) confirmation; (ix) certificate of promulgation; (x) where death sentence is confirmed, execution warrant and death certificate. Proceedings vary in length from some thirty folios (Hidano A471, Item 83839) to 23.5 cm of shelf space (Nagatomo A471, 81655).

On completion the Proceedings were sent for custody to the Commonwealth Attorney-General's Department, where each, on arrival, was allotted its six-figure item number in Series A471, the series containing the Proceedings of all courts-martial of the three Australian armed services. The Proceedings of the war crimes trials are interspersed among these in small clusters between items 80713 and 81969. Each item number can be ascertained from A3193/XM, an alphabetical index to Japanese defendants. Alternatively, each item number is indicated in the Registers of Proceedings for each trials series (*v.infra*).

A digital image of the Proceedings (unabridged) of each trial is available in the National Archives of Australia's data base, *RecordSearch*, (http://www.naa.gov.au/the_collection/recordsearch.html)

REGISTERS OF PROCEEDINGS
Series AWM226 Items 15, 16 & 17

The original Registers of Proceedings of each of the six trial series comprise three ledgers (35 cm width x 29 cm height):

Vol 1 (AWM226 Item 15)

M Series—Morotai, Ambon, Wewak, and Labuan (Trials M1-29, 31-32, 34-35);
D Series—Darwin (Trials D1-3).

Vol 2 (AWM226 Item 16)

R Series—Rabaul (Trials R1-188 plus two aborted trials)

Dates and places of execution (or death in custody) of each accused sentenced to death at:(i) Morotai, Labuan and Darwin; (ii) Rabaul; (iii) Singapore; (iv) Hong Kong; (v) Los Negros (i.e.Manus Is)

Vol 3 (AWM226 Item 17)

S Series—Singapore (Trials S2-14, 16-18, 20-24, 26-28 plus one aborted trial)
HK Series—Hong Kong (Trials HK1-13)
LN Series—Los Negros (i.e. Manus Is) (Trials LN1-26).

On the arrival of each transcript at Army Headquarters from the court, a trial number (e.g.M1) would be allocated, beside which would be entered vertically at the left hand edge of a verso page the names of each accused. Thereafter there would be entered at the appropriate times, in a series of vertical columns extending across the verso and recto page, precise details of the findings, sentences confirmations, dispositions and file movements, including the following: (i) Name, rank, Australian War Criminal Registration Number; (ii) Charge (omitted in M Series); (iii) Place and date of the trial; (iv) Sentence of court; (v) Dates to and from Directorate of Legal Services (HK and S Series only); (vi) Dates to and from Judge-Advocate General; (vii) Dates to and from Confirming Authority, name and appointment of Confirming Authority, date and details of confirmation; (viii) Date of promulgation of sentence; (ix) Date to and from 2nd Echelon; (x) Date Proceedings transferred to Attorney-Generals Department; (xi) 6-figure item number in Series A471; (xii) Item number of corresponding Court Correspondence file in Series MP742/1 (LN Series only); (xiii) Remarks Column (Here from time appears such information as next-of-kin informed, date and cause of death in custody, date of transfer to custody of another Allied Power, date of outwards correspondence with Department of External Affairs, etc).

DEPARTMENT OF THE ARMY CENTRAL REGISTRY FILES
(MP742/1 Items 336/1/*)

The correspondence files of the war crimes section of the Directorate of PW & Internees (DPW&I) that passed through the Central Registry, Department of the Army were registered, for the most part, in the 336/1/ [War Crimes] block of Series MP742/1. The appropriate Registration Booklet, Series B1801, registers in chronological sequence 2168 papers of this description (336/1/1 to 336/1/2196) and records the subsequent movement of each, including the combination of papers on the same matter into files bearing the registration number of the latest of the constituent papers. Some 560 such files are extant. Their titles and registration numbers are listed on the National Archives of Australia's data-base, *RecordSearch*, (http://www.naa.gov.au/the_collection/recordsearch.html). Of these files the bulk fall into two categories designated by DPW&I as 'Investigation Files' (209 extant items) and 'Court Correspondence Files' (some 250 extant items). A catalogue of the former according to the place where the crime was committed and an alphabetical listing of the latter by name of the accused are available in MP742/1 Item 336/1/2125. Another useful finding aid for the 336/1/* files is the list, 'W.C.Files P/A in Central Registry and Archives on 21 June 62' available in AWM226 Item 37

FIRST WEBB INQUIRY
(Commissioned 23/6/43; Reported 15/3/44)

Report	A10943 Item 2
Transcript	A6236 (whole Series)
Exhibits	A6237 (whole Series))

Address by Counsel Assisting

A10948 Item 1 Parts 1 to 6

Office Files J1889 Items BL43895/1 to 19, 22 to 25; A10952 Item 3 (part of); A10953 Item 1 (part of)

SECOND WEBB INQUIRY
(Commissioned 23/6/44; Reported 31/10/44)

Report

A10950 Item 1

Transcript

Vol 1 AWM226 Item 6; Vol 2 A10951 Item 1

Office Files A10952 (whole Series); A10953, Item 1 (part of); A6328 Item 10; J1889 Items B43895/26 & 27

THIRD WEBB INQUIRY
(Commissioned 3/9/45; Reported 31/1/45)

Report (incl Appendices)

A11049 Rolls 1&2

Office Files (Numbered)

A6238 (whole Series)

Office Files(Unnumbered)

A10953 (whole Series); AWM226 Items 91 to 94

Other Sources

Additional sources are indicated in the individual end-notes.

