5

OBSERVATION AND CORRESPONDENCE

Editors' note

The following sections in this chapter will shock most readers with their descriptions of the appalling and inhuman savagery that modern warfare can generate. How human beings can treat other human beings in the callous ways described is simply beyond belief, and yet modern history reveals many similar examples from other wars.

In the immediate aftermath of the Second World War, strong anti-Japanese sentiment was reflected especially in the popular press. Part of this was the result of Australia having been threatened and attacked by a powerful and determined enemy, but most significantly it focused on the gross ill-treatment of Australian and other Allied prisoners, as well as of civilian populations in the western Pacific. David Sissons served as an interpreter in three of the Australian war crimes trials on the island of Morotai, and in his much later researches into these trials he became aware of episodes where Australian forces also ill-treated Japanese prisoners, mostly in forced marches when the prisoners were in poor physical shape. As a researcher deeply concerned with issues of legality, he sought to apply military law as the supreme arbiter in the cases he examined, whether the accused were Japanese or Australian.

One area that caused him particular concern was what he regarded as discrepancies in the degree of punishment meted out by Australian courts against Japanese servicemen accused of war crimes. He regarded some of the decisions of earlier trial courts as excessive. He researched extensively about the Katayama case, which concerned a Japanese naval junior officer who was ordered by his superior officer to execute an Allied air crew who had crash landed. Katayama personally executed one of the crew members, for which he was condemned to death by an Australian military court. At that time, the death penalty remained an accepted part of judicial punishment in Australia. Despite subsequent representations from Australian and Japanese quarters (including Church representatives, as Katayama was a Christian), the Australian authorities refused to commute the sentence, and he was duly executed.

The Katayama case, amongst others, raises difficult questions of law in cases where subordinates commit atrocities on the orders of a superior officer. According to earlier editions of the leading textbook on military law in the first half of the 20th century, the receipt of orders from a superior officer was sufficient to exculpate a serviceman who had committed atrocities. Editions from the late 1930s, however, reversed this position, placing responsibility onto the person who had committed the atrocity. In the Japanese case, however, the consequences for defying orders from superior officers were extreme and almost certainly resulted in execution.

As the war concluded, and the postwar international system, based on Cold War polarities, was established, Australian attitudes towards Japan gradually softened. By the early 1950s, most of those sentenced to long prison terms had been transferred to Japan and they were eventually released. At the time when Sissons was writing about war crimes, mainly in the 1980s, democracy had become a major premise of the Japanese political system, and a close political relationship between the two countries was developing.

This raises a profound question that is almost impossible to answer in a satisfactory manner: the Asia-Pacific war that began with the Japanese war against China from July 1937, through Pearl Harbor, through the creation of a huge Japanese empire in East and South-East Asia, the atomic bombing of two Japanese cities and fire-bombing of many others, leading to ultimate defeat for Japan and seven years of foreign occupation, caused immense human suffering and physical destruction across the region. Atrocities and war crimes were just one horrible aspect of this history. The war was followed by the establishment of international relationships and institutions that have ensured *relative* peace for three quarters of a century (though they may now be under threat). Our question is the following: in order to create peace and understand its value and opt for a better way to order the world's affairs, is it necessary first to experience the horrors of war?

DUNTROON LECTURE, JULY 1978¹

DCS Sissons

The Australian war crimes trials

Introduction

Under the Australian *War Crimes Act*² a total of 296 trials was held. The first began at Morotai on 29 November 1945; the last ended at Manus Island on 9 April 1951. Table A gives the dates and statistics regarding the number of trials held and the findings and sentences given at each place.³

I have found that nowadays⁴ when I mention Australian war crimes trials, most Australians think of Manus. There could be several reasons for this. To the best of my knowledge only the Manus trials were the subject of articles in Australian learned periodicals.⁵

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1 When David Sissons wrote this lecture, he provided approximately 10 abbreviated footnotes and in-text references to sources. Georgina Fitzpatrick (GF) has extended these and has provided extra footnotes; in particular, to the specific trials discussed in the text. For a full list of the Australian-run trials, see 'Appendix 4: Trials list with National Archives of Australia series and item number', in Georgina Fitzpatrick, Tim McCormack & Narrelle Morris, *Australia's War Crimes Trials, 1945–51* (Brill, 2016, pp. 826–30).

2 *War Crimes Act 1945* (C'th). No. 48 of 1945. An Act to provide for the Trial and Punishment of War Criminals [Assented to 11th October 1945].

3 GF: There was no Table A attached to the lecture but it is likely to be similar to a later published version. See Table A, in David Sissons, 'Sources on Australian investigations into Japanese war crimes in the Pacific', *Journal of the Australian War Memorial*, 30 (April 1997), www.awm.gov.au/articles/journal/j30/wcrimes (accessed 11 January 2019).

4 GF: 'Nowadays' being 1978. Forty years later only a small group of historians and lawyers know that the trials occurred.

5 Two articles in the *Australian Quarterly* and the *Journal and Proceedings of the Royal Australian Historical Society* written by GA Dickinson, the Sydney barrister who served there as the Australian legal advisor to the Japanese defence lawyers. GF: These are G Dickinson, 'Manus Is trials', *Journal and Proceedings of the Royal Australian Historical Society*, vol. 38 (June 1952), no. 1, pp. 66–77; and G Dickinson, 'Japanese war trials', *Australian Quarterly*, vol. 24 (June 1952), no. 2, pp. 69–75.

Another reason may be that the question of whether or not to hold them (an issue on which the Chifley government was deadlocked) was the subject of a debate in the House of Representatives in February [GF: March] 1950 soon after the Menzies government took office.⁶ That debate is relevant to our present discussion in that the remarks of some of the participants indicate that the hatred that had so characterised popular attitudes towards the Japanese in the years immediately following the surrender had by 1950 begun to erode. In 1946, as I propose to demonstrate, there were few people who wished to stand in the path of the clamour in the press urging a none-too-reluctant Confirming Authority to cease dawdling and get stuck into the hanging. In the 1950 debate, however, there was diversity of opinion on both sides of the House. On the Labor front bench Ward wanted the trials to continue while Chifley wanted to call it a day. Among the Labor backbenchers, Tom Burke (the Member for Perth) felt that the trials brought us down to the inhuman level of those whom we were trying. Among the ministerialist backbenchers Squadron Leader Graham (who held the Sydney seat of St George) in the course of a speech that was nothing if not anti-Japanese came down on the same side as Chifley. The crux of his argument was that there had been illegal acts on both sides. He described as an atrocity the action of American and Australian planes when they machine-gunned Japanese in the water as they tried to scramble on to life rafts. He considered that it was a reflection on us that, during the war, we had shown to our school children the newsreel, *Bismarck Convoy Crushed*, in which Damien Parer recorded such exploits in faithful detail. (I have yet to see this film. It is preserved in the National Library's film archives.)⁷

The Menzies government had no alternative but to face up to the issue at which its predecessor had balked. It promptly released 71 suspects against whom sufficient evidence had not yet been collected and ordered the trials to resume. It was in fact more than a year since the last Australian trial. This decision flew in the face of the recommendation of the representatives of the Allied powers that the trials of all Japanese should if possible be completed by the end of September 1949. The British Government (which had ended its own trials in 1948) and the American Government (which overshot the deadline by a mere 10 days) felt that their own interests required them to disassociate themselves from Australia's policy. The British would not allow us to continue to hold trials in Hong Kong. The Americans would not grant us facilities to hold them in Tokyo. And so they were held at Manus — from June 6th 1950 to April 9th 1951.

6 GF: Menzies made a ministerial statement on 24 February 1950 concerning the release of war criminal suspects and the number of cases to be tried at the last set of trials held on Manus Island, *Commonwealth Parliamentary Debates* (CPD), 24 February 1950, vol. 206, pp. 99–102. For the debate on the statement, see CPD, 16 March 1950, vol. 206, pp. 881–990.

7 GF: This is now preserved as part of a compilation of videorecordings; see *At the Front, 1939–1945*, National Film and Sound Archive, 1995.

Imprisonment for long periods while awaiting trial was one of the features of the totalitarian rule that the Allies had been much given to criticising. Furthermore, America and Britain, with greater experience of international politics than Australia, were more interested in preparing against future problems than in fighting old battles. Presumably what weighed heavily with the Menzies cabinet was the manifest injustice that men like Nishimura, the Divisional Commander who had personally initiated the massacre of the Australian prisoners at Parit-Sulong, should escape just when, after years of patient effort, the keystone of a convincing indictment was ready to fall into place. Lower down the line — among the men who worked on nothing but the investigations and the trials — the majors and captains with law degrees in the former Directorate of Prisoners of War and Internees — the men who analysed the transcripts and petitions and wrote the first draft of the submissions to the ministers — this argument was reinforced by another: it would be a travesty of justice if we let the big fish escape when in the months that immediately followed the surrender we had convicted and executed subalterns who had carried out — reluctantly and with no additional barbarities of their own — [executions of] individual prisoners, solely as the result of specific orders from high-ranking superior officers.

To illustrate this and other issues underlying the Australian trials let us look at some of the early cases heard under the *War Crimes Act*. You will see from Table A that, for early trials, there are two groups to choose from. Those held at Morotai and those held at Labuan. My choice fell on the former. There were two reasons for this:

1. For some years, until an enlightened Attorney-General, Mr Enderby, cut through pettifoggery bureaucracy and opened the proceedings of the trials to public inspection, the only material I had to work on was Japanese material. This referred to two Australian trials — both of them at Morotai.
2. The Morotai trials contain more variety. Those at Labuan dealt almost exclusively with the ill-treatment of prisoners in POW camps. The Morotai trials as you will observe from Table B⁸ contain much about this subject; but in addition they deal with other important matters such as the execution of captured airmen and the doctrine of the formation of Commander's criminal responsibility for acts done by his troops without his knowledge — subjects barely touched upon in the Labuan trials.

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8 GF: No Table B accompanied the lecture and it does not appear to be the same as Table B: Australian war crimes trials (classified by victim), included in David Sissons, 'Sources on Australian investigations into Japanese war crimes in the Pacific', *Journal of the Australian War Memorial*, 30 (April 1997). The figures in that table refer to cases involving prisoners of war and, separately, 'Crashed aircrew' but do not marry up with his text above.

The Morotai courts

The effect of the Australian *War Crimes Act* was that except in certain respects (We shall refer to the more important of these later) each war crimes court was — in the way it was selected, in its composition, and in its procedure — essentially a copy of that workhorse⁹ of British and Australian military discipline at the front line — the Field General Court Martial. The important difference between the Field General Court and its peacetime counterpart, the General Court Martial, is that the former is smaller (a minimum of three¹⁰ members instead of five¹¹), the minimum rank of its presiding officer is captain instead of full colonel,¹² and its members may be junior in rank to the accused. Like the United Kingdom Royal Warrant, the Australian War Crimes Regulations sought to moderate the lack of these differences by providing that ‘the Convening Officer should, so far as is practicable, but shall be under no obligation so to do, appoint as many officers as possible of equal or superior relative rank to the accused’.¹³ Similarly they provided that where the accused was a sailor or an airman the Convening Officer should appoint as a member at least one officer from that service if such officers were available.¹⁴ At Morotai the Convening Officer appears to have taken neither of these provisions very seriously. The court that tried Major General Endo¹⁵ (who commanded a brigade) consisted of two colonels who had held only staff appointments, a Lieutenant Colonel who had not been given command of a battalion until after the Armistice, a Captain and a Flight Lieutenant.

There is obvious merit in the philosophy underlying *Australian Military Regulations and Orders* (AMR&O) 503 (2) which provides that, for the trial of a Commanding Officer of a unit, as many members of the court as possible must hold or have held an equivalent command. Endo was charged, in effect, with culpable negligence. It could be argued that only men who had themselves commanded a brigade could assess whether the evidence adduced amounted to this. In 10 of the 25 Morotai trials the accused were naval personnel. In only two of these was there a naval officer on the court.¹⁶ Vice Admiral Ichise was tried by two lieutenant colonels and a major.¹⁷ The absence of naval officers from the courts, however, may not have been

9 GF: Sissons pencilled beside this ‘WW1 statistics’. It is unclear what he would have inserted here.

10 AA 49 (1) (b). GF: The *Army Act* is an Imperial one from 1881 used by the Australians as modified by the *Defence Act* 1903 to 1945 (Cth).

11 AA 48 (3).

12 AMR&O 80 503. GF: *Australian Military Regulations and Orders*.

13 RP 21 (b). GF: This could be Rules of Procedure.

14 SR 164 (8) AO 81 (5). GF: The first element could be Statutory Rules. AO may mean Army Order.

15 GF: Maj. Gen. Endo Shinichi was tried at Morotai (M38). For the trial transcript, see National Archives of Australia (NAA) A471 80977.

16 GF: Sissons is referring to the trials of Lt Yunomura Fumio (M14) and Rear Adm. Hamanaka Kyōho (M20). Commanders Jack Donovan and Oliver Jones sat on the respective courts. See the trial transcripts at NAA A471 80770 and NAA A471 80773 respectively.

17 GF: For the trial of Vice Adm. Ichise Shinichi (M41), see NAA A471 81644.

as serious as at first sight appears. None of the Morotai trials involved fighting ships or the laws and usages of war at sea. All the naval personnel on trial were charged with offences against prisoners of war ashore.

In providing trial by Field General Court Martial the *War Crimes Act* was certainly providing a less elaborate standard of justice than that afforded in 1902 to Morant and Handcock who, so far as I am aware, are the only Australians ever to have stood trial for war crimes.¹⁸ The British General under whom they were serving ordered them to be tried by General Court Martial — not by Field General Court Martial.

At Morotai there were in operation four courts — essentially of three members each. In effect the president and next most senior member in each were permanent and there was some turnover with the third member. The four presidents were a full colonel and three lieutenant colonels. Occasionally (for example, for the trials of the Admiral and the General) a court was augmented to a total of five. For the Admiral, a brigadier was brought in as President.¹⁹

In Table B²⁰ I have designated the courts A, B, C, and D respectively. A purist would, of course, argue that there were 25 Morotai courts, each separately convened; but I don't think anyone who goes through the composition of each carefully will disagree violently with my classification.

As with courts martial, the Convening Officer was free virtually to choose any officers he pleased to serve on the courts. It would have been relatively easy, by selecting known fire-eaters, to make a conviction and the sentence of death foregone conclusions. Most of the Morotai trials were convened by Major General Milford, the General Officer Commanding the Seventh Division. The rest were convened by Brigadier Woodward, the Deputy Adjutant (DA) & Quartermaster General (QMG) at Advanced Headquarters. I have seen no evidence at all of any attempt to stack the courts. Whatever the backgrounds of the members, it can always be argued that from the standpoint of the accused they were inappropriate for ensuring justice in his particular case. If a Staff Officer is selected, it is argued that only someone with extensive experience of command in the field can appreciate the realities of the situation in which the man on trial had to operate. If on the other hand a fighting soldier is selected, it is argued that his rough and ready forthright approach make him impatient of the subtleties of the Defending Officer's argument.

18 GF: Sissons is referring to a notorious and controversial trial under the British military justice system. Australian lieutenants Harry Morant and Peter Handcock were tried during the Second Anglo-Boer War for executing South African civilians.

19 GF: Sissons is referring to Hamaoka's trial (M20) over which Brig. Eric Woodward presided. See NAA A471 80773.

20 GF: See note 8 about his reference to a Table B. Also by 'courts' Sissons is referring to the personnel constituting the members of the court rather than a physical and separate hut acting as a court space.

One of Yamashita's defending officers in his book on that trial²¹ noted that the court (which, of course, was American) consisted entirely of Regular Army generals and that such people are accustomed to their own dictatorial power and prone to regard legal rules as pettifogging technicalities that they must brush aside. From the Morotai transcripts it seems to me that the judges were patient men eager to play by the rules. Of the four presidents,²² two of the lieutenant colonels were regulars.²³ The third Lieutenant Colonel was a citizen soldier first commissioned in 1935.²⁴ The full Colonel was also a citizen soldier. He had served in the ranks in the First World War.²⁵ In the Second World War he had served as Chief Signals Officer on various formation headquarters overseas. Of the three lieutenant colonels, one, the citizen soldier, had commanded a pioneer battalion overseas for the last four months of the war.²⁶ The second had commanded an armoured regiment at home.²⁷ The third had held staff positions at home.²⁸

By contrast for the four-man court at Wewak, General Robertson selected three of his battalion commanders, all of whom had commanded battalions overseas for some years. Their frontline knowledge of conditions did not however result in their passing a lenient sentence. The case before them was cannibalism — a Japanese officer in a half-starved condition eating the flesh of an Australian killed attacking his position.²⁹ The court condemned him to death by a 3:1 verdict. The *Sydney Sun* correspondent filed a report which merely recorded the trial and sentence but at the same time sent a report to his news editor not for publication in which he argued that the sentence was outrageous and suggested that the court was packed. He noted that one of the lieutenant colonels was known as Jap Happy Jack while another member of the court had stated openly that he did not intend to allow the little yellow bastard to escape. The news editor conveyed the letter to External Affairs who took it seriously and passed it to the Attorney-General who also took it

21 GF: General Yamashita Tomoyuki was tried by an American military court in the Philippines soon after the war. It is not possible to identify the book to which Sissons refers.

22 GF: There were actually six presidents. Col George W Watson presided over only one Morotai trial (M14) and so did Woodward (M20). The four main presidents at Morotai were Col James L McKinlay who presided over 11 trials, Lt Col Edward B Ellison who presided over four trials, Lt Col Edward F Aitken who presided over four trials and Lt Col Francis Costello who presided over three trials. In the light of Sissons' earlier division of the Morotai trials into four different courts, these are probably the four men he meant.

23 GF: They were Costello and Ellison.

24 GF: This is Aitken but his 1935 enlistment date into the Citizen Military Forces (Militia) cannot be verified. His service file has not been found in the NAA database.

25 GF: This is McKinlay, who fought at Gallipoli and the Western Front during the First World War, receiving a Military Medal (MM). See his digitised service file at NAA B883 WX3379.

26 GF: This is Aitken. He commanded 2/33 Pioneer Battalion. See his Nominal Roll, Dept of Veterans Affairs online at nominal-rolls.dva.gov.au/ (accessed 16 November 2018).

27 GF: This is Costello who commanded 13 Armoured Regiment, Nominal Roll entry, Dept of Veterans Affairs online at nominal-rolls.dva.gov.au/ (accessed 16 November 2018).

28 GF: This is probably Ellison, whom Sissons identified in Box 32: Morotai as 'Regular Staff'. At the time of his discharge, he was Commanding Officer of 63 Battalion, Nominal Roll entry, Dept of Veterans Affairs online at nominal-rolls.dva.gov.au/ (accessed 16 November 2018).

29 GF: This is Wewak (MW1). For the trial transcript, see NAA A471 80713.

seriously and passed it to Army.³⁰ The Commander on the spot, the Acting General Officer Commanding (GOC) 6 Division also thought the sentence unduly severe and recommended it be commuted³¹ — Sturdee reduced it to five years.

Unlike the Yamashita court there were lawyers among the members of all the Morotai courts. Although not required by any regulation to do so, on each court the Convening Officer always put one (and often two) members with legal qualifications.³² The Staff Officer (Civil Affairs) at Advanced Headquarters, a full Colonel, was a barrister in civil life.³³ He was a member of Court A throughout. The junior legal officers from various neighbouring headquarters — captains and majors who were solicitors in civil life — were rotated as prosecutors, defending officers and members of the courts. After a couple of weeks they were reinforced by three members of the junior bar from the mainland.³⁴ One had been in khaki since 1942; the other two were specially enlisted for the purpose. Two of these and the Staff Officer (Civil Affairs) later became Supreme Court judges.³⁵

In terms of legal requirements there seems to have been no parallel in the Australian legislation to Regulation 5 Paragraph 2 of AO 81/1945 that there should be one member of court with legal qualifications: that, if not, there must be a Judge Advocate.³⁶

From Table B you will observe that each court tended to specialise. Court A, for example, was given all eight cases arising out of the Talaud atrocity.³⁷ This, of course, has obvious advantages from the standpoint of efficiency: the background and much of the evidence is the same for each case. But where the decision of life and death rests with laymen such as jurors or soldiers it weakens the position of the accused, because men may be influenced against a particular defendant by information about the event that would be inadmissible in his own particular trial. This is one of the

30 GF: The original letter by Noel Ottaway, Sydney *Sun* to John Goodge, 3 December 1945 and official responses may be found in NAA A472 W18153 PART 2 and A1067 UN46/WC/8 PART 1. These were files consulted by Sissons. See the Papers of DCS Sissons, Box 34: Wewak, National Library of Australia.

31 GF: This was conveyed to Sturdee by Brig. Alan Lloyd, the Director of Legal Services. See NAA A471 80713, p. 8.

32 GF: Sissons pencilled in a question mark beside this statement but it can be confirmed by this researcher.

33 GF: Col Malcolm P Crisp. Crisp became a judge of the Supreme Court of Tasmania.

34 GF: Sissons pencilled in the margin at this point two of the three names: Travers and Campbell. Capt. John L Travers was Prosecuting Officer for M31 and M38, Defending Officer for M39 and M41 and a member of the court for M44. He became a judge in the Supreme Court of South Australia. Capt. Douglas M Campbell was Prosecuting Officer for M40, Defending Officer for M42, M43 and M44 and Reviewing Officer for M41. He became a Supreme Court judge in Queensland. The third recruit from the junior bar was Capt. Kenneth R Townley (later president of the court for all the Manus Island trials in 1950–51). He was Judge Advocate for six of the early Morotai trials and Reviewing Officer for six more. He also became a judge in the Supreme Court of Queensland.

35 GF: In fact, all four became Supreme Court judges.

36 GF: This is a requirement for the British military courts conducting war crimes trials. The legal instrument is Army Order 81 of 1945 promulgated by Great Britain War Office (1945), Royal Warrant 0160/2498, 18 June 1945.

37 GF: The trials related to the Talaud Island garrison were M6, M7, M8, M9, M10, M12, M13 and M26.

reasons why a person is ineligible to serve on a jury if he has prior knowledge about the case to be tried. Later I shall refer to one of the Ambon cases where I think this may have cost one of the defendants his life.³⁸

Now let us look at the trials. The Talaud atrocity³⁹ is a good place to begin. It includes the very first of the Australian trials of Captain Iwasa Tokio and, since the defendants comprised the participants in the crime at each successive level from the other ranks who struck the blows to the Brigade Commander who failed to prevent it, it provides plenty of scope for us to consider the problem of superior orders which naturally emerges as a defence in every war crimes trial.

The facts, for the most part, were not disputed. The airmen had crashed and been taken prisoner. Colonel Koba Shigeru,⁴⁰ the officer in charge of Japanese troops on the island, in the middle of March 1945 summoned a conference at which he announced that the airmen were to be executed and that the execution was to take place on March 23rd after a formal parade at which new colours were to be presented. These orders were passed on to company commanders before the parade. After the parade each company was marched off under its Company Commander to the place of execution, one prisoner was allotted to each company. Each Company Commander then called out one man from the ranks and ordered him to kill the prisoner with his bayonet.

Iwasa, one of the company commanders was the first to be tried. The transcript of his trial gives an indication of some of the disadvantages under which defendants laboured.⁴¹

In an attempt to ensure equality, Australian Military Regulations require that when the prosecutor is a lawyer the Defending Officer must be a lawyer also. They do not, however, say that they must be men of equal attainments. The prosecutor in Iwasa's trial was a Lieutenant Colonel⁴² with eight years more professional experience behind him than the Defending Officer (Captain John C Brown). This disparity continued throughout most of the Morotai trials. The opportunities for Iwasa and Brown to prepare a defence were scarcely more extensive than those of the dock brief: at Morotai prisoners were first informed of the specifications of the charges against them by their defending officers. Brown was allotted to Iwasa only three days before the trial. In 1949, when the nations of the world assembled at Geneva

38 GF: This is probably referring to Katayama's case (M43).

39 GF: The murder of four prisoners of war at Karakallan; Beo, in the Talaud islands; and Celebes, in March 1945 was the matter being prosecuted in several related trials held at Morotai.

40 GF: His trial was M10. See NAA, A471, 80719.

41 GF: For the trial of Capt. Iwasa Tokio (M9), see NAA, A471, 80718.

42 GF: Lt Col Lyle Byrne.

to revise the 1929 Prisoners of War Convention, they determined on three weeks as the minimum interval between charge and trial (including a period of two weeks for the Defending Officer to prepare his case).

When the trial opened Brown drew the court's attention to the fact that it was a case of first impression and that his defence would involve arguments on the interpretation and constitutional validity of a new statute. The library available to him at Morotai was totally inadequate for the preparation of such a defence and he accordingly applied for a change of venue to the mainland. The court heard counterarguments from the prosecutor and refused the application. Let me quote from the prosecutor's argument:

the fact that this Court is called on to adjudicate upon grave charges makes it no different to the position of any court martial which may be called upon in some outpost of Empire without any more facilities than we have, to adjudicate on an equally serious charge, and to impose possibly an equally serious punishment ... . In this case the ultimate protection is given to the accused by review. The proceedings leave this area to go into the calm and elevated area of thought where library facilities are available, and the possibilities of a mis-carriage of justice are very, very remote in the long run.⁴³

The prosecutor's suggestion that Iwasa's position was just the same as that of any Australian soldier being tried by court martial was ridiculous. Iwasa was being tried for murder, and the likely penalty under the *War Crimes Act* was death. The maximum penalty permissible for an Australian soldier charged with the same offence was life imprisonment. Admittedly in the one or two capital offences in the Australian military code for which a court martial could sentence an Australian soldier to death — mutiny and certain acts of treachery — the review process, in which the matter had to go before cabinet, was so effective that over a period of 40 years and two world wars no Australian soldier had ever been executed.

What then was left of 'the process of review' on which the Morotai prosecutor set such store as 'the ultimate protection' of the accused? In fact, the latter's only safeguard was as we have seen that, under the regulations implementing the *War Crimes Act*, when the prisoner under sentence appealed, the Confirming Officer had to refer his petition and the proceedings of the trial to the Judge-Advocate General (who was a civilian and a King's counsel for advice and report. He was not, of course, bound either to follow that advice, or, when he ignored it, to give his reasons. Nor was the atmosphere in which the review process was carried out as calm as Iwasa's prosecutor made out. The Australian press was howling for blood. The Judge-Advocate General⁴⁴ was working through the transcripts while the *Argus*

⁴³ GF: See NAA A471 80718, p. 16.

⁴⁴ GF: This was J Bowie Wilson.

was carrying headlines like ‘No condemned Japs executed yet’⁴⁵ and commenting on the considerable time he was taking. While Gen. Sturdee was reading the Judge-Advocate General’s reports and deciding between life and death *Smith’s Weekly* was asking why our military authorities were delaying executions ‘where butchers and sadists have been found guilty by court martial’. ‘The Jap,’ it argued ‘won’t take our court martials [sic] very seriously until he sees the condemned men at the rope’s end.’⁴⁶

One other important safeguard denied to the Japanese defendants was one we have referred to already — the protection afforded by the exclusion of evidence from witnesses not available for cross-examination in court. Section 128 of the *Army Act* provides that the rules of evidence to be adopted in proceedings before courts martial (including Field General Courts Martial) shall be the same as those which are followed in civil courts in England. The rule excluding hearsay is part of those rules. The relevant passage from the *Manual of Military Law* explains the extent of this exclusion and the reasons underlying it:

the term ‘hearsay’ is primarily applicable to what a witness has heard another person say with respect to facts in dispute. But it is extended to all statements, whether reduced to writing or not, which are brought before the court, not by the authors of the statements, but by persons to whose knowledge the statements have been brought. The reasons for excluding such statements are first that they are not made on oath; and, secondly, that the person to be affected by the statement has no opportunity of cross examining its author.⁴⁷

In another passage the manual commended this rule as preventing jurors (and members of courts martial) ‘from being misled by statements or documents the effect of which, through the prejudice which they excite, is out of all proportion to their true weight’.⁴⁸ But Section 9 (1) of the Australian *War Crimes Act*, in words identical with those of the United Kingdom Royal Warrant, abandoned this safeguard. It reads:

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

45 GF: 9 January 1946, p. 1.

46 GF: ‘Condemned Japs are still alive. Australian or army policy?’, *Smith’s Weekly* (Syd), 2 February 1946, p. 1.

47 MML, p. 91. GF: This is probably: Australian Military Board, *Manual of Military Law*, Commonwealth Government Printer, 1941. The 1941 edition was used at the trials.

48 MML, p. 75.

Having failed in his application for a change in venue, Brown, rather surprisingly did not ask for more time to prepare his case. As far as I can see, the only occasion when the defence did this was in the Shirozu case.⁴⁹ There, the accused had exercised the right to be defended by Japanese lawyers. The junior counsel were legal officers from the Japanese naval headquarters at Ceram. Senior counsel (private practitioners) were brought from Tokyo. These arrived by air at the end of the first day of the trial. They then sought and were granted an adjournment of one and a half days. (You will remember that in the Yamashita trial the American tribunal rejected a very reasonable request from the defence for more time to prepare the case.)

Iwasa was found guilty of murder. So were the others in the Talaud cases — from Colonel Koba to the other ranks who struck the blows. There was one exception. Asaoka, the only one of the platoon commanders to be charged, was acquitted.⁵⁰ His defence was that he was not in any way involved. The company commanders had selected the executioners, called them out and shouted the commands direct to them. The only fact in dispute in the Talaud trials was whether Koba had, as he alleged, received a signal from Lieutenant Colonel Komura, the Staff Officer at brigade headquarters at Menado 300 miles [480 kilometres] away, ordering the executions. Koba's cipher clerks testified to this effect and as a result Komura, too, was found guilty of murder.⁵¹ In the Talaud cases each of the officers was sentenced to death; each of the other ranks to 10 years imprisonment. Endo, the Brigade Commander (who had been charged with neglecting to take proper steps to ensure that prisoners were treated in accordance with the laws and usages of war) was sentenced to five years imprisonment. Critics of the American Yamashita trial have vigorously attacked the doctrine of the international criminal responsibility on the part of superior commanders for atrocities committed by their troops. It may be that in that trial the court behaved as if it were absolute responsibility and not a responsibility to exercise reasonable care and that they failed to consider evidence of the magnitude of the tactical and administrative problems with which Yamashita as Commander of an entire army group in retreat was dealing. Yamashita was a very busy man facing problems that were superhuman. The Endo trial was quite different. First the prosecutor did not ask for a heavy sentence. Secondly the evidence of both Endo and his Staff Officer indicated that if he wished to give oversight to the treatment of prisoners he had plenty of leisure in which to do so. He had a comfortable house in the hills overlooking Menado and spent most of his time there reading his books.⁵² He left the running of the brigade to his Staff Officer and in fact visited his headquarters only twice between February 1945 and the end of the war.

49 GF: Naval Captain Shirozu appeared in two trials — M41: NAA A471 81644 and M45: NAA A471 81709, parts 1–5. However, as the latter is the mass trial of 91 accused where Shirozu is merely one of such a large number of defendants, Sissons' discussion probably concerns M41.

50 GF: Lt Asaoka Toshio was tried at Morotai (M6). For the trial transcript, see NAA A471 80717.

51 GF: Lt Col Kōmura Takeo was tried at Morotai (M26). For the trial transcript, see NAA A471 80753.

52 GF: The prosecutor, Travers, referred to this in his closing address, NAA A471 80977, p. 111.

But let us return to the first trial. When, on November 30th, the court found Captain Iwasa guilty of murder, this was a very important decision — not only for the defendants in the other Talaud trials but for all war criminal suspects in areas where Australian prisoners had been. It meant that an Australian court had decided against them a vital point of law — whether or not superior orders constituted a good defence. In theory, of course, it mattered only to Iwasa; for a court martial is not a court of record and its decisions do not have the force of legal precedent. Theoretically the same three judges were at liberty to take the contrary view on the same point when they tried Asaoka the following week; and then to revert to their initial view when they tried Misumi.⁵³ But in fact there was no chance of this; for men hearing capital charges are eager to avoid giving the impression that they are lunatics. Similarly, being human, the members of courts B, C, and D would tend to follow suit (particularly those of them who were laymen and therefore not confident of their own mastery of the opposing views on the merits of this defence held by the legal experts).

In the Iwasa trial then, the defence of superior orders was an issue of great importance. It was a point that merited every effort that the Defending Officer could put into it. For although, as you all know, in British criminal law, superior orders have never been a defence, the proposition that superior orders were a defence in *international* law, was certainly arguable. In fact there it was in black and white in the only official textbook of the British and Australian armies — the *Manual of Military Law* — a copy of which lay on the table in front of each judge and in every orderly room throughout the Australian Army. At page 288 in the chapter on the laws of war it read:

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.⁵⁴

That sentence had been there in the manual, unchallenged in every edition since 1914. But now, pasted to the margin was a slip of paper — one of the 1944 amendments — which said the reverse: (I quote)

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 the act in question of its character as a war crime; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent ...

⁵³ GF: Capt. Misumi Michiaki was tried at Morotai (M8). For the trial transcript, see NAA A471 80769.

⁵⁴ GF: This passage was cited by J Bowie Wilson with the same page reference in his review of the case for the Directorate of Prisoners of War & Internees (DPW&I), 15 January 1946, in relation to the trial of Lt Tanaka and Pte Fujisaki (M7). See NAA A471 80768, p. 5. Wilson referenced it as the Australian edition.

The question ... is governed by the major principle that members of the armed forces are bound to obey lawful orders only and that 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.⁵⁵

Despite what the *Manual of Military Law* said on the subject, the issue remained open for the court to decide. For while the appendices to the manual, i.e. the *Army Act* and the *Rules of Procedure* have statutory force, the manual is nothing more than what its authors consider to be the state of the law — a commentary. Superior orders is one of the many gray [sic] areas of international law. It is not covered by written agreements such as the Hague Rules or the Geneva conventions. It was therefore open to the defence to dispute whether there had been a change in international law between 1940 and 1944 and indeed whether there could be such a vital change in such a short period. Why had the War Office changed its mind (and the Americans too — for in the same year they had made a similar volte face). The defence could have pointed out that two things had happened. The first was that Britain's principal academic writer on the subject, Professor Lauterpacht, had changed his stand on the subject. As a later writer has put it, between the 1935 and the 1940 editions of his standard work on international law, Professor Lauterpacht suddenly like Saul on the way to Damascus saw the light. The other thing was that after the end of 1942, when it was becoming increasingly apparent that the Allies were going to be at the administering (rather than receiving end) of international law, a number of conferences of Allied lawyers and Allied officials were held at which views similar to those of Professor Lauterpacht prevailed.

Iwasa's Defending Officer put this argument well — very well for a man with only three days warning and with only a handful of standard textbooks to work on.

In the time that remains to us perhaps we can consider the sentences handed down by the Morotai courts, the advice tendered on each by the Judge-Advocate General and the action taken on that advice by the Confirming Authority, the Acting Commander-in-Chief, Lieutenant General Sturdee.

The Judge-Advocate General (JAG) was Mr John Bowie Wilson, a barrister. He was one of that interesting group who joined the old Australian Intelligence Corps before the First World War. He appears to have transferred to the Legal Corps in 1920. He was appointed JAG in 1935 on retirement from the Citizen Military Forces at the age of 60. He had never served overseas.

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⁵⁵ GF: This passage was cited by Bowie Wilson as a change; see NAA A471 80768, p. 5. The change can be cited as *Amendment 34 of 1944 on superior orders*.

The pattern of the sentences is that the Morotai courts, in the cases where prisoners of war were killed without court martial, followed the doctrine of the 1944 amendment to the manual and found all persons directly involved guilty of murder. They then considered the question of superior orders as a mitigating circumstance when deciding the degree of punishment appropriate. Where the accused was an 'other rank' their practice appears to have been that, provided that it was not he that had urged his superior to issue the order, superior orders were a mitigating factor sufficient to reduce the appropriate punishment from death to imprisonment. Thus in the Talaud cases the court sentenced to 10 years each the sergeants and the privates ordered from the ranks to bayonet the prisoners. Wilson went further and suggested that they should not be punished. Sturdee reduced the sentences to five years.⁵⁶ Where the accused was an officer the attitude of the courts appears to have been that superior orders were no ground for mitigation. In *principle* Wilson took the same view. Take for example his advice on Iwasa's petition:

I am of the opinion that such a flagrant breach of international law as the execution of prisoners of war without proper trial and conviction of an offence should be known to be illegal by all commissioned officers and I therefore cannot advise that the death penalty in the case of Capt Iwasa is too severe.⁵⁷

By using this word 'flagrant', however, Wilson left himself some latitude. He was able to see the situations confronting the five junior officers carrying out the executions⁵⁸ as quite different from those which the company commanders at Talaud faced. The Morotai courts had sentenced these five officers to death.⁵⁹ Wilson advised that they should be acquitted.

I am of the opinion that before an accused can be found guilty of a war crime by obeying an order of a superior officer, there must be something, either from the nature of the order or the circumstances surrounding it, from which the accused should know, or at least be put on enquiry, that such order was illegal.⁶⁰

56 GF: See the cases of Sup Pte Suzuki and Pte Ōishi (both M6), Pte Fujisaki (M7), Sup Pte Gotō (M8) and Sgt Uchino (M12).

57 GF: J Bowie Wilson to DPW&I, AMF minute paper: 'Trial of Japanese war criminal — Capt. T Iwasa', 14 January 1946, NAA A471 80718, p. 5.

58 GF: It is unclear as to which junior officers Sissons refers.

59 GF: The only junior officers who received the death sentence for one set of Talaud killings were Lt Tanaka (M7), Lt Yabe and Lt Nomura (both M12) all executed on 6 March 1946 on the first day when death sentences were carried out. Lt Yunomura was also given the death sentence for executing another group of prisoners, but this was commuted (M14). A possible fifth junior officer, Lt Katagiri (M40) involved in the same incident as Lt Yunomura, was never sentenced to death but given a 10-year sentence. Five more senior officers were also executed — Capt. Misumi (M8), Capt. Iwasa (M9), Col Koba (M10), Maj. Tamura (M10) and Lt Col Kōmura (M26), all on 6 March 1946, except for Kōmura.

60 GF: This quote comes from the trial of Naval Lt Yunomura whom he discusses below and not one of the initial set of Talaud cases discussed up to this point. See, J Bowie Wilson (JAG) to DPW&I, 16 January 1946, in the trial transcript for M14, NAA A471 80770, p. 4.

One of the differences that carried weight with Wilson was that the airmen at Talaud were the battalion's own prisoners and the company commanders must have known that they had not been court-martialled. In the other three cases the prisoners were held by another unit. The officers were told that the sentence had been lawfully imposed by higher authority. In the absence of any suspicious circumstances, that, in Wilson's view, was sufficient for an acquittal. He considered that it was not possible to credit junior officers with sufficient knowledge of either international law or Japanese naval law to make them enquire further.

Sturdee confirmed all five findings and sentences. But changed his mind on one, Naval Lieutenant Yunomura, in the interval between the signing of the confirmation and the issuing of the execution warrants. During that interval Wilson had sent on to him the transcript of the trial of Yunomura's senior officer, Rear Admiral Hamanaka and his advice on it.⁶¹ The Admiral had been sentenced to death for authorising the execution that Yunomura had been ordered to carry out. In the case of the Admiral, however, the court had added a recommendation to mercy. Wilson did not oppose the recommendation to mercy for the Admiral; but used it to reiterate his plea for clemency for Yunomura (someone had conveyed to him that Sturdee had rejected it). The Admiral, he argued, was much more responsible for the execution of the two prisoners than was Yunomura and it would be unjust if Yunomura was executed while the Admiral was reprieved.⁶² Sturdee commuted the Admiral's sentence to 15 years and Yunomura's to five years.

Wilson was on occasion more lenient to junior officers than his own rule. In the trial of Vice Admiral Ichise⁶³ Court B, accepting evidence that the Admiral's Staff Officer and not the Admiral had issued the execution order, acquitted the latter. They also acquitted the two petty officers who had struck the blows. They sentenced to death the naval captain, the lieutenant and the sub lieutenant through whom the execution order was passed down along the chain of command. Wilson argued that the two junior officers, although technically guilty, might be acquitted. He conceded that they knew that no court martial had taken place and that as officers they *ought* to have known that a court martial was necessary. As junior officers, however, he had extreme doubt whether their knowledge of law was of sufficient standard to know this.⁶⁴

Sturdee confirmed the death sentences on all three.

61 GF: This is Morotai (M20), NAA A471 80733.

62 GF: He made this point when reviewing Hamanaka's case (M20). See Bowie Wilson to DPW&I, 11 February 1946, NAA A471 80773, pp. 4–5.

63 GF: This is Morotai (M41), NAA A471 81644. Ichise was tried with five others – Capt. Shirozu, Lt Miyazaki, Sub Lt Shimakawa, PO Tanaka and PO Kakuda.

64 GF: Bowie Wilson to DPW&I, 14 March 1946, NAA A471 81644. pp. 5–6.

I have said that Wilson was on occasion more lenient to junior officers than his own rule — sometimes but not always. In the case of Naval Lieutenant Katayama⁶⁵ although he was not opposed to mitigation, he did not press for the verdict of guilty against Katayama to be set aside although Katayama's position was very similar to the lieutenant in the Ichise trial. Wilson did advise that the finding of guilty and death sentence against another defendant in this trial, Warrant Officer Uemura, be set aside. Uemura had merely been in charge of the escort at the execution.⁶⁶ The only explanation I can give for Uemura's death sentence is that the same court at another trial had heard evidence that he had played a more active part in other atrocities. Sturdee let both sentences stand.

So far as I know Sturdee never commuted a death sentence on his own initiative.⁶⁷ It is ironical that in the only Morotai trials where he commuted the death sentences, Hamanaka and Yunomura, it was of no avail. They were both tried by the Dutch in 1948 and shot.

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65 GF: This is Morotai (M43), NAA A471 80918.

66 GF: Bowie Wilson to DPW&I, 15 March 1946, NAA A471 80918, p. 5.

67 'Check this. I now think he sometimes did in Rabaul cases', 10/6/82.

‘THE TRIALS: WERE THEY JUSTICE OR VENGEANCE?’

DCS Sissons,
Sydney Morning Herald
(16 August 1985)¹

A few months ago, a visiting Japanese author brought me a photograph of a monument erected on Mt Sangane near Nagoya in 1981. It commemorated the men sentenced to death by Australian war crimes courts.

She asked me whether I agreed with the following sentence in the Japanese inscription carved on it: ‘These trials were nothing more than vengeance, the proud victors exercising arbitrary judgment over the vanquished.’ The question called for a ‘yes’ or ‘no’ answer. I am afraid my reply must be more complex.

As a result of the Australian trials, 139² Japanese were executed and 450 served prison sentences. As she was only an infant when the war ended, my visitor was rather vague about the details of the crimes with which these men were charged. The following are some examples.

There was the ill-treatment of prisoners-of-war. At Sandakan camp in Borneo, out of 2,400 prisoners more than 1,000 died. The principal cause was malnutrition but there were no deaths among the guards. At Tantoei camp on Ambon, of 548 only 139 survived. On Hainan Island there were 181 survivors out of 263.

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¹ This is the original manuscript of an article that was published in the *Sydney Morning Herald*, on 16 August 1985. The notes to this version have been prepared by Georgina Fitzpatrick.

² David Sissons corrected this figure to 137 individuals in Table A, ‘Sources on Australian investigations into Japanese war crimes in the Pacific’, *Journal of the Australian War Memorial*, 30 (April 1997), www.awm.gov.au/articles/journal/j30/wcrimes (accessed 11 January 2019).

There were the massacres. About 1,300 set out on the Sandakan–Ranau death marches: only six survived. About 200 members of 2/20³ Battalion were put to death after their surrender on Ambon. The entire native labour force on Ocean Island (about 150 people) were shot some days after the war ended.

There were the executions of survivors from aircraft that had been shot down. It seems to have been the common practice to interrogate these airmen for some weeks and then execute them.⁴ The same fate usually befell any members of long-range reconnaissance parties that were captured.

There was the ill-treatment of local inhabitants. At Nauru, 34 patients at the leper hospital were taken out to sea and drowned. At Tobera in New Guinea, when one native resisted a Japanese overseer five were clubbed to death.⁵

These crimes shocked not only the Australian man in the street but also the distinguished legal authorities formulating Allied policy on war crimes trials. When the Lord Chancellor (Viscount Simon) read the evidence collected by Sir William Webb on the atrocities at Tol Plantation and Milne Bay and on the execution of Flight Lieutenant Newton at Salamaua he was so disturbed that he spent a sleepless night. All were agreed that to allow the perpetrators to escape would be to mock the living and insult the dead. To what extent this is a demand for justice and to what extent a demand for vengeance is difficult to determine.

To the citizens of the Tokyo suburb of Mitaka when their homes were burning, it was unthinkable that the pilots of the planes raining bombs on them should go free. In order to prevent the unthinkable from happening, when an airman parachuted they tied him to a post in the town square so that each citizen could club him until he died.

In choosing war crimes trials, the Allies chose the path of punishment ‘through the channel of organised justice’. Therein lay some difficulties. As the war progressed, it had become increasingly apparent to the legal experts in the United Nations War Crimes Commission that, if the courts to be set up followed the Anglo-American rules of evidence, many war criminals would go free. For example, the evidence against those who killed Flight Lieutenant 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.

3 In his reference to the Laha massacre, Sissons gave the wrong battalion. It was 2/21. See Lionel Wigmore, *The Japanese Thrust*, Australian War Memorial, 1957, p. 420. This matter was tried at two trials at Manus (LN12 and LN24). For the trial transcripts, see National Archives of Australia (NAA) A471 81952 and A471, 81967 respectively.

4 Sissons himself interpreted at three trials concerning the execution of captured airmen. They were held at Morotai in early February 1946. For the trial transcripts of M32, M29 and M34, see NAA A471 80722, NAA A471 81059 and NAA A471 80778 respectively.

5 This was tried at Rabaul (R4), NAA A471 80748.

Australia, accordingly, followed the lead of the other Allies and, in the legislation setting up the courts, authorised them to admit ‘any oral statement or any document appearing on the face of it to be authentic’.⁶

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 innocent⁷ man should go free than that a guilty⁸ man should hang; but this is true only where the innocent man is one of our side. When he is an enemy national, it is not so important.’

In a calmer atmosphere in 1949, the same governments by their 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 prisoners of war, can be tried only by the same courts and according to the same procedure as soldiers of the detaining power.⁹

These 1949 amendments also appear to close the door to any repetition of another discriminatory feature of the Australian trials: whereas the *War Crimes Act* empowered the courts to award the death penalty to enemy troops,¹⁰ 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 headlines of Australian newspapers in the weeks preceding the first executions certainly indicate a widespread thirst for vengeance: ‘No room for mercy here’ (*Herald*, January 21, 1946), ‘20 Japs to die immediately’ (*Argus*, February 1, 1946), ‘Condemned Japs are still alive’ (*Smith’s Weekly*, February 2, 1946). There is also evidence that some people even saw political prestige accruing from promptly stringing up a few guilty Japanese. Some weeks earlier, on November 16, Dr Evatt, our Attorney-General, had cabled from Washington: ‘Cannot understand why first trials of Japanese war criminals have not commenced ... The Americans have already commenced trials and it is a matter for comment that we should not also already have done the same in view of the initiative we took in the field of Japanese criminals.’¹¹

6 The regulation he cites here may be found in *War Crimes Act 1945* (Cth), Section 9 (1).

7 Sissons must have meant guilty.

8 Sissons must have meant innocent.

9 For the conventions cited, see *Convention Relative to the Treatment of Prisoners of War*, Geneva, 27 July 1929 online at ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/305?OpenDocument and *Convention (III) Relative to the Treatment of Prisoners of War*, Geneva, 12 August 1949 at ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=77CB9983BE01D004C12563CD002D6B3E&action=openDocument (both accessed on 8 November 2018).

10 See *War Crimes Act 1945* (Cth), Section 11 (1).

11 Cable from HV Evatt, NAA A1066 H45/590/1.

If, however, one looks deeper there is much evidence of participants at each level endeavouring to operate the war crimes system with restraint.

With one possible exception there are no indications of any attempts to pack the courts. In the case in question, the court had sentenced to death a Japanese officer who, in a starving and fevered condition, had eaten flesh from the corpse of an Australian soldier killed attacking his position.¹² The reaction that this sentence produced in a number of places and the rapid corrective action that ensued is something in which Australians may take some pride.

Noel Ottaway, a Sydney journalist covering the trial, was shocked by the severity of the sentence and, on the ground that the anti-Japanese attitudes of two members of the court were well known, prevailed upon his editor to intervene. The response of the Attorney-General's Department was prompt and sympathetic.¹³

Action was put in train to raise the matter at ministerial level. This, however, proved unnecessary. Quite independently, the Divisional Commander had recommended that the sentence be commuted to imprisonment and the Confirming Authority had acted in accordance with that advice.

The transcripts of the trials suggest that the presidents of the courts were conscientious men eager to play by the rules. Of the 819¹⁴ Japanese who appeared before them, 230 were acquitted on all charges.

Here are a couple of examples. In January, 1946, when the cries for retribution were at their loudest, a court at Morotai acquitted the Commander of a military police unit in the Celebes that had on a number of occasions executed captured air crews. The suspicion against him was very strong, but the actual evidence was inadequate.¹⁵

At Manus in October, 1950, a court acquitted the members of a Japanese court-martial who had sentenced to death as spies members of a Z Special Force patrol in Borneo and had thereby, it was alleged, unlawfully disregarded their duty to try the prisoners in accordance with the rules of international law. In this Manus trial most of the legal debate with the Prosecuting Officer was conducted, not by the Defending Officer, but by the President of the court, who laid great stress on the fact that the members of the patrol were wearing neither their badges of rank nor their identity discs.¹⁶

12 This was tried at Wewak (MW1), NAA A471 80713.

13 For a copy of the initial letter from Noel Ottaway to John Goodge, 3 December 1945, which initiated the subsequent consultations between government departments, see NAA A1066 H45/590/1.

14 In Table A, Sissons corrected this figure to 814 individuals. In that table he enumerated the acquittals at each set of trials, arriving at a total of 280. However, he did not calculate the number of individuals.

15 For the trial transcript for Morotai (M15), 14–16 January 1946, see NAA A471 80756.

16 This was Manus (LN 15), 16–18 October 1950, NAA A471 81956.

There were many cases where the Confirming Authority (initially the Acting C-in-C; for the later trials, the Adjutant General) exercised clemency. In this manner the 225 sentences of death passed by the courts were reduced to 148.¹⁷

This was usually the result of a recommendation by the Judge-Advocate General (JAG), a civilian King's Counsel with quasi-judicial tenure, to whom proceedings were required to be sent before confirmation. The latter requirement was the result of a hard-fought battle by an enlightened civil servant, FR Sinclair, the Secretary for the Army.

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 Executive Council. When the War Cabinet passed regulations delegating this power in war crimes trials to divisional commanders, Sinclair 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 ...'¹⁸

As a result of Sinclair's intervention; a compromise was reached whereby death sentences would be confirmed, not by divisional commanders, but by the Acting C-in-C, who would in all cases seek the views of the Judge-Advocate General (JAG) on both the court's verdict and its sentence.

The public demand for the trial of war criminals continued longer in Australia than in Great Britain and America. For example, while the House of Lords debate in May 1949¹⁹ demonstrated a strong and widespread feeling that the time had come to rule off the ledger, in the Australian House of Representatives in March 1950 the Menzies government was subjected to strong criticism for releasing 71 of the 91 suspects still awaiting trial.²⁰ Nevertheless, in the 1950 debate there was evidence of new attitudes appearing. The Labor Member for Perth, Tom Burke, argued that war crimes trials reduced the victor nation to the level of the war criminals.²¹ The Liberal Member for St George, Sqn Ldr BW Graham, argued that Australia must follow the lead of the Dutch, who in the interests of prosperity and their future security, had put recollections of the bombing of Rotterdam behind them. Graham was one of

17 See note 1. Several men received more than one death sentence. This accounts for the final figure of 137 individuals executed.

18 FR Sinclair to F Forde, Minister for the Army, 6 December 1945, NAA MP 742/1 336/980.

19 United Kingdom. House of Lords, *Debates*, 19 May 1949, (columns) cc. 858–904.

20 Menzies made a ministerial statement on 24 February 1950 concerning the release of war criminal suspects and the number of cases to be tried at the last set of trials held on Manus Island, *Commonwealth Parliamentary Debates* (CPD), 24 February 1950, vol. 206, pp. 99–102. For the debate on the statement, see CPD, 16 March 1950, vol. 206, pp. 881–990; in particular, see the criticisms voiced by Mr E Ward, Labor Member for Sydney, pp. 881–83.

21 CPD, 16 March 1950, vol. 206, p. 892. For Burke's complete speech, see pp. 891–93.

the first in Australia to argue publicly that war crimes were committed by the Allies as well as by the Japanese. He recalled how in 1943 Australian parents had not been ashamed to take their children to see newsreel films of RAAF and USAF planes repeatedly strafing unfortunate 'sub-human Japanese wretches' as they climbed onto life rafts, in the Battle of the Bismarck Sea.²²

Forty years later one is certainly appalled at the double standards of the Allies whereby MacArthur in his communique after that engagement could announce that 'barges and rafts still afloat were strafed and sunk', yet three years later the captain of U-852 and three of his subordinates were executed for machine-gunning the survivors of the *Peleus* in their life-boats.

A characteristic of the debate in the Lords was the belief expressed by many members (particularly those with service backgrounds like Lord Hankey and Admiral of the Fleet, Lord Cook) that young subordinates ordered to commit unlawful acts by their commanders were being treated more harshly by the courts than they deserved. Although there was no similar voice in the Australian parliament, there were people of similar views within the Australian system who tried to do what they could for these unfortunate young men.

As early as November 1945, Brigadier WAB Steele, the Commander of the Australian force that reoccupied Ambon, urged that unless the officers who had ordered executions were tried, their subordinates who struck the actual blow should not be tried.²³

Obviously, this principle could not be adopted in its entirety or most crimes would have gone unpunished. It is unfortunate, however, that the problem underlying this suggestion was not given more thought.

A more practical proposal came in June 1946 from Major General BM Morris, the Area Commander at Rabaul. He urged that the trials should not be delayed, but that confirmation should be deferred until all trials on the one incident were completed.²⁴ This proposal was not adopted either. The following are examples of the kind of problems that occurred.

On April 16, 1946, an Australian court sentenced to death a Japanese Sergeant, a Japanese Private and seven Formosan labourers for shooting 30 sick Chinese prisoners-of-war at Rabaul.²⁵ The Confirming Authority on the advice of the JAG confirmed the sentences, and the sergeant, the private and two of the Formosans were hanged on July 16.²⁶

22 *CPD*, 16 March 1950, vol. 206, p. 891. For Graham's complete speech, see pp. 888–91.

23 This source cannot be identified.

24 This source cannot be identified.

25 This is Rabaul (R55), NAA, A471, 80915.

26 The sentence was promulgated to the men on 16 July but the hangings were carried out early on the morning of 17 July 1946. See the four warrants of execution that were not cancelled, NAA A471 80915, pp. 45–48.

The execution of the other five Formosans was deferred so that they could appear as prosecution witnesses at the trial of Major General Hirota, who, it was alleged, had issued the order to kill the Chinese.²⁷ In April 1947, Hirota was found guilty of this and other crimes and sentenced to seven years' imprisonment. The President of the latter court, Major General JS Whitelaw, thereupon wrote to area headquarters urging that the five Formosans be reprieved. This was referred to the JAG who, while defending the original sentences, urged that such long detention of men condemned to death justified commutation. The Confirming Authority accordingly mitigated the punishment to life sentences.²⁸

Another case was even less satisfactory. On February 28, 1946, three naval personnel were sentenced to death for the execution of four Australian airmen at Ambon.²⁹ Sub Lieutenant Katayama had been in charge of the execution and had himself beheaded one of the airmen. Sub Lieutenant Takahashi had beheaded, another. Warrant Officer Uemura had merely been in charge of the escort and burial party.

The JAG 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 the 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 execution by a senior officer should be considered in mitigation.³⁰

Despite this advice the Confirming Authority confirmed both findings and sentence for all three. In the case of Takahashi and Uemura, this seems a clear breach of Australian Military Regulation 575 (10) which required all members of the military forces to follow the rulings of the JAG on questions of law. Uemura was executed on March 3, 1946. The executions of Takahashi and Katayama were deferred so that they could appear as prosecution witnesses at the subsequent trials of their superior officers.³¹ In his report³² to the Head of the War Crimes Section on the latter trials

27 This trial (R172) was one of the 'command responsibility' trials held in 1947. See NAA A471 81653 PARTS A-D.

28 In R55 the death sentences of five of seven Formosan guards found guilty with two Japanese non-commissioned officers (NCOs) of shooting 30 sick Chinese prisoners of war at Rabaul were delayed. While the other four were hanged on 17 July 1946, the five were kept alive to give evidence in the 'command responsibility' trial of Major General Hirota (R172) held in March and April 1947. Although the JAG, WB Simpson, on reviewing the original case of R55 did not agree that their sentences should be quashed, he did agree that making them wait for their executions for so many months justified commuting their death sentences to life sentences.

29 This was M43. See NAA A471 80918.

30 J Bowie Wilson to Directorate of Prisoners of War & Internees (DPW&I), AMF minute paper: 'Trial of Japanese war criminals', 15 March 1946, NAA A471 80918, p. 5.

31 For example, they appeared as witnesses at the trial of Naval Captain Kawasaki (R184), 30 June - 4 July 1947. For the trial transcript, see NAA A471 81067.

32 Maj. HF Dick to DPW&I, AMF minute paper: 'Sub Lt Katayama Hideo and Sub Lt Takahashi Toyoji', 1 October 1947, NAA MP742/1 336/1/1737. The existence of the report to the DPW&I was cited by Lt Col JT Brock, the Reviewing Officer, in his report on R184, dated 14 July 1947. See NAA A471 81067, p. 22.

(which ended on July 4, 1947), a Legal Officer³³ at Army headquarters advanced three grounds on which Takahashi and Katayama's cases should be reconsidered: one, the reasons already given in the JAG's original advice; two, their 19 months in the condemned cells; three, 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 — recently a naval captain had received only 20 years for ordering the deaths of all prisoners at Aitape.³⁴

Despite the JAG's recent advice in the Formosans' case, the matter was not referred to him. Takahashi and Katayama were shot at Rabaul on October 23, 1947.

The inscription on the monument at Mt Sangane speaks of arbitrary justice. In the light of these examples I cannot deny an arbitrary element. But that the trials were nothing more than vengeance, I do contest.

Throughout the British Commonwealth it is unusual for a court martial to state its reasons when passing sentence. At the first of the Morotai trials, the President, Colonel JL McKinlay (a citizen soldier who in the First World War had served in the ranks and won the Military Medal), felt it appropriate to depart from this tradition. When passing sentence, he said: 'We are not taking our vengeance, but protecting society from the ravages of cruelty and imposing a sentence to act as a deterrent to others who, in the years to come, may be like-minded.'³⁵

He spoke sincerely. I trust that the labours of men like McKinlay, Sinclair and Whitelaw were not in vain and that the Second World War trials will be the subject of careful study not only at our own service academies but also, if this is possible after My Lai, by those in Asia.

*D.C.S. SISSONS, who as a young soldier attended some of the war crimes trials at Morotai, is now a specialist in international relations at The Australian National University.

33 This is Major Herbert Dick with whom Sissons had a long correspondence about Katayama. See, for example, NLA, Papers of DCS Sissons, Box 22: Ambon: Major Dick.

34 This refers to the trial of Naval Capt. Noto Kiyohisa who, with CPO Watanabe Teruo, was accused of ordering the executions of one Australian and two Indonesian prisoners of war. Noto got 20 years and Watanabe seven years. For the transcript for R183 (9–10 July 1947), see NAA A471 81210.

35 The first trial at Morotai was M9 which began on 29 November 1945. For the President's statement, see the trial transcript, NAA A471 80718 p. 71.

SOME OBSERVATIONS ON AUSTRALIAN WAR CRIMES TRIALS INVOLVING CANNIBALISM/ MUTILATION OF THE DEAD

DCS Sissons

A Military Court convened under the Australian *War Crimes Act 1945* sat at Wewak on 30 November and 1 December 1945 to try Lt Tazaki on the following charges:

First Charge

Mutilation of the dead in that he at Soarin No. 1 on or about 19 July 1945 mutilated the dead body of Q148482 Pte John Kraut an Australian soldier.

Second Charge

Cannibalism in that he at Soarin No. 1 on or about 20 July 1945 ate portion of the dead body of Q148482 Pte John Kraut an Australian soldier.

The court consisted of four officers. Their last postings before the cessation of hostilities had been, respectively, Commanding Officer 2/2, 2/3 and 4 battalions and Staff Learner (Major) HQ 6 Division.

The accused pleaded not guilty but was found guilty on each charge. There was evidence (including the accused's own confession) to support the finding.

The court by a majority of 3:1 sentenced the accused to death by hanging. This was a valid sentence under Section 11 of the Act which gave statutory embodiment to the widely accepted view that in international law 'all war crimes may be punished with death or with any more lenient penalty' (*History of the United Nations War Crimes Commission*, p. 31).

Even in the atmosphere of December 1945 there were those who regarded the sentence as unduly severe. For example, the officer administering command of 6 Division, in forwarding the proceedings to the Confirming Authority, recommended commutation of the sentence to imprisonment, giving the following as his reasons:

1. the act was an isolated one so far as the accused was concerned and there is no suggestion of a system or practice on his part;
2. the offence of cannibalism, though disgusting and degrading, is not a crime under English criminal law, and does not represent a violation of any specific prohibition in any international convention, save to the extent that it constitutes maltreatment of the body of a dead enemy;
3. the conditions under which the accused was living afford some sort of palliation of his crime.

Another example was Noel Ottaway, the *Sydney Sun*'s war correspondent covering the trial. He wrote privately to his news editor urging him to take up with the federal government the 'impossible severity' of the sentence. The *Sun* immediately passed on his letter to External Affairs who contacted the Deputy Adjutant-General by telephone on December 17th. The memorandum from the Director of Legal Services (the direct subordinate of the Deputy Adjutant-General) conveying to the Confirming Authority 6 Division's recommendation of commutation was signed on December 18th (although it may have been drafted at an earlier date). On December 19th the Confirming Authority (Lt Gen. Sir Vernon Sturdee) commuted the sentence to five years imprisonment.

It is sometime since I last read the Tazaki transcript (National Archives of Australia (NAA) A471 80713). My recollection is that the Defending Officer (an Australian Army Legal Corps captain) put all his energy into a defence of insanity and did not raise the question whether cannibalism is a war crime. At first sight this would not appear to be capable of denial. Section 3 of the *War Crimes Act* defines 'war crime' as: (a) a violation of the laws and usages of war; (b) any war crime within the meaning of the instrument of appointment of the Board of Inquiry appointed on 3 September 1945 (i.e. the third Webb Inquiry). That instrument lists 35 crimes or groups of crimes including: (xxxiv) cannibalism, (xxxv) mutilation of the dead.

The source of an Australian military court's authority to try a Japanese war criminal is, however, international and not municipal law and is limited to the trial of breaches of international law. An Australian statute cannot create an offence in international law: whether or not cannibalism is a crime in international law cannot be determined merely by the *ipse dixit* of the Australian legislature. This was an argument raised by the Japanese counsel for the defence in the trial of Lt Gen. Adachi (General Officer Commanding (GOC) XVIII Army) at Rabaul in 1947

(transcript NAA A471 81652).¹ This is good law and much easier for Australian judges, trained in a federal system, to accept than for their UK brethren weighed down by the shibboleth of the omnipotence of parliament. At the International Military Tribunal for the Far East in Tokyo it took its Australian president, Sir William Webb, three years to extract from his colleagues the reluctant admission that, if their charter — the product of MacArthur's HQ — sought to create *ex post facto* crimes, then they must disregard it and not be parties to judicial murder.

Adachi's counsel pointed out that the list of 35 crimes in the instrument of 3 September 1939 was the list of 32 crimes produced by the Commission on Responsibilities at the Paris Peace Conference in 1919 to which three additional crimes had been superimposed: (i) planning or waging a war of aggression, (xxxiv) cannibalism, (xxxv) mutilation of the dead. He noted that the instruments appointing Webb's two earlier inquiries (issued on 23 June 1943 and 8 June 1944 respectively) contained the original list of 32 items without these additions. Hence, he argued, the addition had no authority in international law.

At the Adachi trial the Judge Advocate (Lt Col JT Brock) in his summing-up before the court retired to consider its verdict, accepted the argument that the Australian parliament cannot create an offence in international law. He did not, however, accept the proposition that cannibalism was not an offence in international law. There were no grounds for regarding the list drawn up by the 1919 Commission on Responsibility as exhaustive or immutable: Article 3 of the Red Cross Convention of 1929 recognised the duty of belligerents to protect the corpses of enemy dead against pillage and maltreatment.

Brock's argument that maltreatment of the dead is a crime in international law is convincing. It does not, however, convince me that cannibalism was a crime in international law other than as a manifestation of maltreatment. Nor does Webb seem to have regarded it as an independent crime. For at p. 89 of his second report (dated 31 October 1944) he concludes the section on cannibalism with the following sentence:

These further cases of cannibalism will, with your approval, be placed, with other cases dealt with in the Japanese Atrocities Report, before the United Nations Commission in the form desired, as a breach of the Red Cross Convention against *mutilation of the dead* (DCSS emphasis).

Where the prosecution charged a Japanese with cannibalism as well as with maltreatment, I feel the onus was on it to establish the cannibalism itself was regarded as a crime in international law. With some research from the Attorney

¹ The issue of cannibalism arose indirectly in the Adachi trial, as he was charged with 'unlawfully disregard[ing] and fail[ing] to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities ...'.

General's Department in Canberra and from legal historians at the universities they might well have been able to do so. They might have unearthed say a couple of medieval cases where, at the end of a long and terrible siege in which the besieged had eaten the occasional member of the attacking force whose corpse they had managed to capture, and the victor lord had executed the lord of the castle for this crime. With one or two cases like this behind them, the prosecution could have argued (and I should have found it convincing) that the only reason why the prolific 19th and early 20th century writers on international law (including the 1919 Commission) failed to include the crime of cannibalism in their catalogues was, not that they did not regard it as a crime, but that for a couple of centuries conditions had been such that in the wars between civilised powers its occurrence was very rare.

The privations suffered by XVIII Army were conducive to cannibalism. Of its 120,000 members only 20,000 were alive at the war's end. Almost all of these had travelled the entire 2,000 kilometres from Buna to Aitape on foot. Of these 20,000 survivors 70 per cent were hospitalised on their repatriation to Japan. The American landings at Aitape and Hollandia in April 1944 had cut off all supply from the rear and at that time stocks were sufficient only for four months at one-third rations. No regular rations were available after September 1944.² Cannibalism was sufficiently widespread to cause considerable demoralisation. Consequently it was one of the offences for which, in an Emergency Punishment Order issued in October of that year, Adachi prescribed capital punishment.³ In the following five months 70 Japanese were executed after summary investigations by their formation commanders pursuant to this order. In 40 of these cases the charge was desertion or refusal to carry out orders; in the remaining 30 the charge was cannibalism.⁴ But although the prosecution at Adachi's trial did not raise this point, there are grounds for believing that these summary trials for cannibalism were confined to cases where the victim was a fellow Japanese. On 31 December 1944 Australian troops in an engagement on the Danmap River (near Aitape) captured a directive on discipline issued by the GOC of the infantry component of 41 Division (one of the formations comprising Adachi's command). This contained the following clause:

Notwithstanding that there is no provision in the criminal law to this effect, the death penalty shall apply to any person who knowingly eats human flesh (other than that of the enemy) — a most serious crime against humanity.⁵

2 Australian War Crimes Trial (AWCT) R173, Lt Gen. H Adachi, transcript (NAA A471 81652), exhibit 5: 'Lt Gen Adachi's statement (no. 5)'.

3 (AWCT) R173, exhibit 3: 'Lt Gen Adachi's statement (no. 3)'.

4 (AWCT) R173, sheet 105, Lt Col K Tanaka (defence witness).

5 GHQ, SWPA, Allied Translator and Interpreter Section, *Research Reports*, no. 72, supplement no. 2 (23 January 1945), pp. 4, 5, 75. The International Military Tribunal for the Far East also refers to this document on p. 1067 of its judgment.

It is reasonable to suppose that in this directive the subordinate Commander was reproducing either the text or the intent of the Emergency Punishment Order. If so, this would explain why, in his trial, Adachi's counsel never tendered the actual text of the latter.

Other Australian trials involving cannibalism or mutilation of the dead are listed in Table 5.1.

Besides Australian cases, the only trial mentioned in the United Nations War Crimes Commission's *Law Reports of Trials of War Criminals* involving cannibalism was that of Lt Gen. Y Tachibana and others by an American Military Commission in the Marianas in August 1946 (vol. 13, p. 154). In this trial, 14 of the accused were convicted of murdering eight prisoners of war. Some of these accused were also charged with 'preventing an honourable burial due to the consumption of parts of the bodies of the prisoners-of-war by the accused during a special meal in the officers' mess'. They were found guilty of these charges and received sentences ranging from death to five years. To me the avoidance of the word, 'cannibalism', in framing the charges is significant.

18 October 1984

Table 5.1. Australian war crimes trials involving cannibalism/mutilation of the dead

Venue	Accused	Trial & transcript no.	Charges	Finding and sentence of court	Confirmation
Wewak 30/11 – 1/12/45	Lt T Tazaki	M1 80713	1. Mutilation of the corpse of an Australian soldier at Soarin No. 1 about 19/7/45. 2. Cannibalism in connection with same.	Guilty on both charges.	Committed to five years.
Rabaul 28/5/45	L/Cpl H Mena	R101 81048	Same charges as M1 above	Not guilty on both charges.	
Wewak 11/12/45	Sgt Maj. Y Hidano	M5 (No transcript. Summary in A1067 UN46/WC/8, part 1)	1. Murder of a NG native at Kunjama about January 1945. 2. Cannibalism in connection with same.	Not guilty on both charges.	
Rabaul 2/4/46	Lt H Tomiyasu	R36 80783	1. Murder of several unknown Indian POW at Sowam at intervals between May and October 1944. 2. Cannibalism in connection with same.	Guilty on both charges. Death by hanging.	Finding confirmed against advice of the JAG. Sentence commuted to 15 years.

Source. DCS Sissons

THE FATE OF THE JAPANESE GARRISONS AT NAURU AND OCEAN ISLAND

DCS Sissons¹

The Japanese Navy occupied the small phosphate islands, Nauru (0°32'S, 166°55'E) and Ocean Island (0°52'S, 169°55'E) in 1942 and held them throughout the war with garrisons numbering about 4,000 and 500 respectively. From early 1944 they were effectively blockaded and deaths from malnutrition were occurring daily. By the beginning of 1945, however, the troops were managing to survive — on pumpkins they grew and toddy made from the sap of coconut palms. Deaths from dysentery, however, continued.

On Japan's surrender in September 1945, the task of reoccupying these islands and removing the Japanese to concentration areas to await repatriation devolved upon the First Australian Army. Along with the Japanese Army units in Bougainville these troops were moved to a staging camp at Torokina (6°14'S, 155°03'E) while the permanent concentration area in the Fauro group of islands (6°55'S, 156°05'E) was being prepared.

On September 20th about 2,000 of the troops from Nauru were disembarked at Torokina and were marched the 10 miles to the staging camp. They were followed by another 1,250 the next day. These were base troops unaccustomed to marching and debilitated by malnutrition and disease. The temperature was 95°–100°F. They were pressed to maintain marching speed by Australian guards at the rear of each squad. A number succumbed to heat stroke. Exactly how many dead is not known; but survivors estimated the number as 'about 50' or 'a few dozen'.

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1 This essay is the original English text for 'Nauru shubihei no "shi no kōshin"' [The 'Death March' of Japanese soldiers on Nauru and Ocean Island] in I. Hata et al. (eds), *Sekai sensō hanzai jiten* [Encyclopedia of war crimes in modern history] (Tokyo: Bungei Shunjū, 2002).

The remaining 700 from Nauru and the 513 from Ocean Island were disembarked and marched to the staging camp on October 8th. The war diary of the Australian guard unit (9 Battalion) records that this time 12 died on the march.

The misfortunes of the Nauru and Ocean Island garrisons did not end at Torokina. As was well known to the Australian Army, both islands are malaria free. Accordingly these troops had no immunity to the disease and carried with them no suppressive atebirin or quinine. At the end of October they were moved to the concentration area in the Fauro group, a highly malarial region, and were located there alongside the Japanese troops from Bougainville, many of whom were infected. The Australians did not provide them with any suppressive drugs. The inevitable outcome is related by the Director of Medicine at Australian Army Headquarters, Brig. N Hamilton Fairley, in an article in the *Medical Journal of Australia*:

799 Japanese prisoners-of-war from Nauru, a non-malarious island, with their own medical service, were sent to Fauro on 30 and 31 October 1945, after a brief period of staging at Torokina. The first case of malaria occurred on November 8, and was followed by an epidemic involving almost every man. On November 26, four weeks after entering the malarious area, 530 patients were in hospital undergoing anti-malarial treatment. By December 5, thirty-five days after movement to Fauro, 212 deaths [26.5%] had occurred ... . Their enormous death rate again indicated the terrible fate awaiting any group of non-immunes not protected by atebirin or other effective anti-malaria suppressant.

Fairley's figures, however are incomplete; for they deal with only one group numbering 799 of the approximately 4,400 Japanese troops from Nauru and Ocean Island moved to the Fauro area. These 4,400 were distributed among areas 10, 11, 12 and 14. His figures probably refer to Area 11. Furthermore the deaths continued after December 5. The war diary of the Australian guard unit (7 Battalion) records the total deaths each week among all Japanese naval personnel in the Fauro concentration areas. It shows that these peaked at 164 in the week ending December 9 but were still as high as 46 in the last week of that month. According to the Commander of the Ocean Island garrison, during the period of two months from November 20 the deaths among his troops numbered 78 and those among the Nauru garrison exceeded 600.

References

- Hamilton Fairley, N, 'Malaria in the south-west Pacific', *Medical Journal of Australia*, 3 August 1946.
- Katayama, H, 'Rabauru Sempan no Shinsō', in *Dokumento Nihonjin: 8 Anchihyūman*, Tokyo: Gakugei Shorin, 1969, pp. 262–68.

SISSONS' CORRESPONDENCE

Editors' note

We include two sets of correspondence in this chapter to show how Sissons approached research topics and prospective informants. The first set is between Sissons and Major Herbert F Dick, whose interesting personal and career backgrounds are described in a short biography, compiled by Georgina Fitzpatrick. In his letter to Dick as a prospective informant, Sissons outlines the details of what he knew and what he wanted to find out. Reading Sissons' comprehensive descriptions triggered Dick's memory and the outcome is his 'random recollections'. Some of Dick's terminology is offensive by contemporary standards, however, we chose to include Dick's response in its entirety in order to elucidate various issues of the postwar period.

The second set of correspondence is between Sissons and his brother, Hubert, a distinguished medical practitioner working in New York. It gives a graphic illustration of Sissons' extraordinary ability to conduct research in areas far removed from his own expertise. In this case, he was concerned to establish the causes of a high death rate among a group of Japanese prisoners, which is described in Section 5.4 'The fate of the Japanese garrisons at Nauru and Ocean Island'. The group was forcibly marched considerable distances in a debilitated state in conditions of extreme heat, and Hubert concluded that David's research gave him a superior knowledge of the effects of extreme heat on the human body than he had himself.

The other aspect of Sissons' correspondence that is worth noting is his deep concern to consider evidence that not only the Japanese, but also the Australian side in the conflict, were capable of gross mistreatment of prisoners, thus putting himself at odds with the overwhelming majority of Australian opinion in the aftermath of the war that saw Japanese behaviour as uniquely reprehensible under international and military laws.

MAJOR HERBERT FRANCIS DICK

Georgina Fitzpatrick

David Sissons began looking for the former Major in the early 1970s as part of his hunt for anyone who had anything to do with the Katayama case.¹ Dick signed a minute paper in November 1946, when working at Victoria Barracks Melbourne, concurring with the view of Judge-Advocate General William Ballantyne Simpson that Katayama's death sentence should be reviewed, stating: 'I am of opinion that there has been a miscarriage of justice in this case.'² Perhaps it was this intervention that endeared Dick to Sissons.

It turned out that Dick's experience in relation to war crimes was both as a victim and as a Legal Officer in the Australian war crimes trials apparatus after his recovery from prisoner-of-war camp. It is therefore not surprising that, once Sissons had located his whereabouts in the 1970s,³ he wanted to pick Dick's brains, not just for the Katayama case but also for a wide range of his research interests.

Dick, who was born on 2 March 1908 in Melbourne, was already an established lawyer when he enlisted in May 1940.⁴ He went as an officer to Malaya at the end of July 1941, four months before the Japanese attack on Pearl Harbor. Wounded in action on 12 February 1942 as the Japanese forces moved down the Malayan peninsula towards Singapore, he spent the rest of the war as a prisoner. He was 'recovered' from Changi on 5 September 1945 and repatriated from Singapore. He had recovered sufficiently by 9 January 1946 to be 'allotted for duty with HQ

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1 Sub Lt Katayama Hideo was tried, found guilty and sentenced to death by firing squad for his part in the execution of captured Allied airmen. For the trial transcript of M43, see NAA A471 80918. See Chapter 1 in this volume for my discussion of Sissons' obsession with this particular case.

2 Report on submission, 20 November 1946, NAA MP742/1 336/1/1737. So significant was this that Sissons listed it as a point to be made in his 1978 Duntroon lecture, Papers of David Sissons, NLA MS 3092, Box 32: Morotai: Duntroon lecture.

3 There is a telegram, dated 20 September 1973, from Bronwen Sissons to her husband (he might have been on a research trip away from Canberra) letting him know that Dick was a solicitor in Rochester, in rural Victoria, Papers of David Sissons, NLA MS 3092, Box 22: Ambon.

4 See his Attestation form, NAA B883 VX16481.

Vic L of C as [a] Legal Officer' with the rank of Captain.⁵ He was sent to Singapore in May 1946 to work on war crime trial files and, in August 1946, he was appointed Staff Captain in the Directorate of Prisoners of War and Internees in Melbourne. Until the end of 1949, he worked in Rabaul, Tokyo and Hong Kong as a Legal Officer on war crimes trials.

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5 See his Officer's Record of Service, NAA B883 VX16481.

**DCS Sissons: Letter to Herbert F Dick,
5 August 1976**

Department of International Relations

5 August 1976

H.F. Dick, Esq.,
Lindsay Street,
Rochester, Vic. 3561.

Dear Mr. Dick,

Please excuse this long letter from a complete stranger. As a member of the academic staff of this Department I am doing some historical work on the Australian war crimes trials.

Although, thanks largely to the articles written by George Dickinson (of the Sydney Bar) in the Australian Quarterly (June 1952) and the Journals and Proceedings of the Royal Australian Historical Society (Vol. 38, 1952/53) there is available to the public a general record of the Manus Is trials of 1950-1951, little is known about the more numerous and more important Australian trials of 1945-48.

From the details of your service as set out in the Army List your experience in this field as a regimental officer, as a P.O.W., as a DAAG in DPW & I and as an AALC officer participating in some of the trials themselves must be virtually unique.

I wondered whether it might be possible for me to call on you and hear some of your recollections of the Directorate of P.O.W. and Internment and of the trials.

During the War I heard no shots fired in anger, but as a 20-year old sergeant I was attached to the Defending Officers as an interpreter at some of the Morotai trials in January 1946.

At the time I was quite sure that the trials were a necessity and that as a result of them prisoners and civilians were more likely in future wars to be treated with humanity. I thought, however, that some of the Morotai courts were unduly severe in imposing the death penalty on very junior officers and other ranks who had carried out death sentences as a result of specific orders from superior officers and had not aggravated the offence by additional barbarities or indignities.

Now, like Telford Taylor (one of the Nuremberg prosecutors), I am, as a result of Vietnam, less certain.

My interest in the trials as an academic dates from four or five years ago when I translated for my own use part of Gen. Imamura's autobiography. It was there that I first came upon your name. At page 450 he writes:

Finally the last of the ~~Rehaul~~ trials, my own, arrived. Several days after the sentence was handed down, one of the three prosecuting officers, Maj Dick, visited me.

He said that he was unlucky to be involved in the trial. Personally he had no feeling of hostility towards the Japanese Army. He had been seriously wounded in Singapore but had recovered thanks to a Japanese doctor and good treatment by the camp commandant. As a result of his testimony, prosecutions against both had been stopped. He wished to go to Japan.

I told him that I was very disappointed that Cpl "Y" had got twenty years. [On the previous page Imamura related how "Y" had been sentenced to death on several counts including killing an Indian officer, "CHAMURATTO". "Y" had done so because the latter had drugged and then sexually assaulted him. From feelings of shame "Y" had withheld this information from the court. Imamura informed the District Commandant, "ARUPIN" who then had "Y" interrogated by Capt. Backhouse of the ALLC. As a result "Y's" sentence was reduced to 20 years].

I suggested to Dick that he get Cpl "Y" for his servant for the month he was in Rabaul, and see for himself. He did so and promised to recommend remission.

Imamura also devotes seven pages to the case of Lt (Naval) Hideo KATAYAMA. For a couple of years I had to content myself with a Japanese translation of the transcript of Katayama's trial given to me by the Japanese Lutheran clergyman who in 1958 published the diary and the letters written by Katayama in prison at Sugamo, Morotai and Rabaul. Last year, however, the Attorney-General, as a result of representations by Prof. Geoff Sawyer and myself, opened to the general public the case files of all the Australian war crimes trials. These contain the full transcript of proceedings, the advice tendered by the Judge-Advocate General and other officers to the Confirming Authority, and the latter's decision.

You will probably remember the facts of Katayama's case because the same ground was covered in the later trial of Capt. (Naval) Kawasaki in which you were Prosecuting Officer. To refresh your memory, however, I am enclosing a copy of my translation of the Japanese translation of the transcript.

In the original trial the court sentenced all three accused to death. The JAG (Bowie Wilson) advised that in the case of Takahashi and Uemura the finding should not be confirmed and that in the case of Katayama "the fact that he was ordered to carry out the execution by a much superior staff officer should be taken into consideration in mitigating the death penalty".

Sturdee nevertheless confirmed the death sentences against all three. Most junior of them, a warrant-officer (who was at the execution but, unlike the other two accused, had not been one of the executioners), was executed at Rabaul a month later. The execution of the other two, however, was postponed for over a year so that they could give evidence in the trial of Kawasaki (who was not in custody at the time of the first trial).

The Kawasaki trial took place at Rabaul at the end of June 1947. On May 7th Kawasaki's Japanese Counsel had approached the Australian authorities and asked their assistance to procure details of Kawasaki's

service record from the Japanese Navy Ministry to establish that he was at Manila at the time Katayama said that he was in Ambon ordering the executions. Some months earlier (10 July 1946) Katayama, presumably after Kawasaki's apprehension, had facilitated this by retracting his own confession and swearing that, far from participating in the executions, he, Katayama, had not even heard about them until after the War.

The Court were satisfied with Kawasaki's alibi and acquitted him.

In a minute to the DPW & I that you wrote on 1 October 1947 (three weeks before Katayama's execution) you said:

7. I entirely concur in the acquittal of Kawasaki, but this acquittal does not necessarily mean that Katayama and Takamashi took no part in the execution. It means merely that they did not get their orders from Kawasaki. Having seen and heard them give evidence and also considering all the other evidence, I am of the opinion that they did take part in the execution.

You may be interested to know that there is now additional information confirming your opinion. Gen. Imamura in correspondence with Katayama's next-of-kin some years later said that Katayama repeated the original account to him at their first meeting in May 1946. Imamura never doubted it and considered that Katayama departed from it as a result of very bad advice from his naval superiors. Katayama's next-of-kin were also told by Katayama's room-mate in the Rabaul compound (Cdr. Hatakeyama) that his second account was concocted on the advice of Vice Adm Kusaka, the senior naval officer in the compound. Hatakeyama was sentenced to death at Rabaul on 17 July 1947 for war crimes at Ambon in 1942. The JAG (Simpson) advised that the sentence was excessive insofar as Hatakeyama was only a lieutenant at the time and 'was merely the conduit pipe between his Admiral and his fellow accused'. Despite this, the Adjutant General (Anderson) signed a warrant for Hatakeyama's execution on September 10th. On October 7th, however, he had second thoughts and commuted the sentence to 20 years). Hatakeyama said that they had tried to get Chibaya (the Ambon witness who established Kawasaki's alibi) to concoct an alibi for Katayama; but Chibaya had refused to do this.

Your minute of 1 October 1947 continued:

10. It may be argued that Uemura, the least guilty of the three, having been executed, these two criminals should suffer the same fate. I, however, am of opinion that mitigation is desirable for the following reasons:

- (a) I concur in the opinion of the J.A.G. and his reasons.
- (b) I consider it desirable that there should be some uniform standard of punishment according to the degree of guilt. To cite one example only - Capt. Noto was awarded only 20 years' imprisonment for ordering the deaths of "All prisoners on Aitape". These accused were much junior in rank to Noto, and their degree of guilt was, in my opinion, less.

11. Although it is perfectly lawful to keep condemned men alive to appear as witnesses, I think that some notice should be taken of the lapse of time in this case - 19 months.

There is a memorandum by the CLO HQ 8MD Rabaul (Brock) dated 14 July 1947 and minuted by the Brig Comdt 8MD (Neylan) which contains the suggestion that they too felt that the death sentences against Katayama and Takahashi should be commuted.

Naturally I concur whole-heartedly with your minute. You and the other members of your profession in khaki served your country and humanity well. You in your prosecution of Kawasaki and Capt. Williams (presumably J.M. Williams, now a Judge in the N.S.W. Workers' Compensation Commission) in his prosecution of Katayama appear to have been falling over backwards to ensure that the accused had fair trials.

I am amazed that on this occasion, two years after the cessation of hostilities, your recommendation was not accepted. The next item on the file is the bleak signal from the DPW & I to HW 8MD dated 9 October 1947: "I am directed by the Adjt-Gen to refer to our 34958 of 18 Apr 46 advising confirmation of the finding of guilty and sentence".

Imamura at page 468 of his autobiography writes how, before dawn on the morning of the execution (23 October 1947), he roused Backhouse and Upson and asked to be paraded before Neylan, and how at 7.30 a.m. the latter received him and told him that, having already on his own authority delayed the executions for a week in response to the representations of everyone in the compound, he could delay them no longer.

One of the things that now worries me about our War Crimes Act 1945 is its authorization of the Governor-General to delegate his responsibilities as the Confirming Authority. Under this authority Cabinet delegated this power first to the Commander-in-Chief and then, when the Military Board was reinstituted, to the Adjutant-General. In the case of the United Kingdom this provision was not so objectionable since, there, it did not deprive a Japanese prisoner of a right enjoyed by a British military offender under sentence of death. But as I understand it, one of the important points in which Australian and British military law differed, was the provision in the Australian Defence Act, jealously guarded by Cabinets irrespective of their political complexion, that in the case of an Australian serviceman the death sentence could be confirmed only by Cabinet. If it was thought improper for the military to possess this power even in time of war, then I can see no legitimate reason for their conferring on the military such a power in peacetime. In fact this delegation by Cabinet of the confirming function appears to me to be rather sordid. The Labor Cabinet, by the ALP Platform and by years of practice, was committed to the principle that all death sentences should be commuted; but they wanted to hang the war criminals - and so they passed the buck to the C in C. It is particularly in the light of this background that I am surprised that the C in C (and later the Adjutant-General) treated the advice of the JAG so lightly.

It also seems discriminatory that the War Crimes Act made capital offence which, if committed by Australian servicemen overseas, under Australian military law could only be punished by imprisonment. For as I understand it, under Australian military law the only capital offences were mutiny and certain acts of treachery (Defence Act, Section 98).

During the Occupation of Japan, the U.S. 8th Army in the administration of its war crimes jurisdiction appears to have taken very seriously the role of the Confirming Authority in ensuring - to use your own phrase - 'that there should be some uniform standard of punishment according to the

degree of guilt'. Enclosed is a reference to this in an article on the Yokohama War Crimes Trials which appeared in the American Bar Association Journal. 8th Army's second review in 1950 of all the cases tried, 'with the view of equalizing by reduction of the sentences of some of the early cases that are unduly severe by comparison with those of later cases' seems particularly appropriate.

Kawasaki though acquitted in the trial involving Katayama was, you will remember, found guilty of the murder of Pte Schaefer in a similar trial held earlier in June 1947. Here it was established that Kawasaki knowing that no court-martial had been held, passed on the orders for Schaefer's execution to the Garrison Commander. In 1947 the punishment thought appropriate for this was 10 years. Eighteen months earlier the penalty for the very much junior officer, who merely struck the blow, was death.

Sir William Webb in his judgment at the Tokyo trials the following year took into consideration in reducing the sentences of some of the major war criminals the fact that their superior, the Emperor, went unpunished. Katayama's case suggests to me that we were mistaken in proceeding with the trials of junior officers, like Katayama, until their superiors (e.g. Kawasaki) had been tried.

Although certain aspects of it are informative, the case of Katayama as a whole is of no particular significance to my research. It just happens that, because of the material available about it in Japanese, it was the only one that I could study in detail before the Australian archives were opened. Thanks to Imamura and Katayama's friends in high places among the Japanese Christian churches, it is the case best known in Japan. There are, no doubt, other cases that merit even greater sympathy. Katayama chose to be sworn on the bible and then, at his second trial, perjured himself. Personally I regard this as no more serious than if an Australian P.O.W. in similar circumstances lied to a Japanese military tribunal. He did the same in his open letter to 'Dear Christians in Japan' in which he likens himself to the Christian martyrs. As this was part of efforts to secure a remission of sentence, this too is understandable. Very unwisely, however, his family published this letter in serial form in the Japanese Christian weekly, Kirisuto Shimbun, in June 1956 and later in 1958 as an appendix to his diary. They thereby, quite unnecessarily, made it difficult for later writers to confine themselves to his misfortunes without also dealing with his perjury.

If you could spare me a couple of hours I should very much like to pay you a visit and discuss the trials with you. I see from our membership list that you, too, are a member of the Naval & Military Club. Do you come to Melbourne from time to time? If so, could we talk over a meal there? If on the other hand you are too busy during your Melbourne visits, I could easily make the journey to Rochester. The Tourist Bureau here tell me that, because of bad communications between here and Deniliquin, the best way to get to Rochester is via Melbourne. My recollection is that there used to be a bus service from Melbourne to Echuca. Does this still exist, or is rail the best way from Melbourne?

Possibly you might like to make further enquiries about the bona fides of anyone working on such a topic. There are two members of your profession who know me well and who have discussed such matters with me on many occasions over the years. One is John Wright (Prosecutor's Chambers, County Court, Melbourne). He used, I think, to appear on the Bendigo circuit. Perhaps the best Japanese linguist in the AMF, he was the

official interpreter in several of the Morotai trials. The other is Sir Peter Crisp, who until his recent retirement, was a Supreme Court judge in Hobart. He sat on several of the Morotai courts.

Once again I do apologise for burdening you with a letter of this nature.

Yours sincerely,

D.C.S. Sissons,
Fellow.

**Herbert F Dick: Letter to DCS Sissons,
26 August 1976**

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26th August 1976

D.C.S. Sissons Esq.,
Box 4,
CANBERRA. A.C.T. 2600

Dear Mr. Sissons,

I must apologise for the delay in answering your letter of the 5th instant. I had not looked closely at the envelope, and had assumed that it was just another of the numerous circulars that come in the mail.

On opening it a few minutes ago I realized that courtesy demanded an immediate reply. As, however, I am leaving for Melbourne tomorrow and have some loose ends to tidy up I can do no more now than to acknowledge it and to assure you that when I return next week I will read it carefully and write a considered reply.

Yours sincerely,

H.F. Dick

Tel. 223

**Herbert F Dick: Letter to DCS Sissons,
17 September 1976**

STEWART & SONS

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17th September 1976

D.C.S. Sissons Esq.,
Box 4,
CANBERRA. A.C.T. 2600

Dear Mr. Sissons,

As promised in my letter of the 20th ultimo, I read your letter carefully when I returned to Rochester. While I would be very pleased to discuss the matter with you, it would be unfortunate if you were to take the time and trouble to travel over here and then find that I have nothing of interest to tell you. It is therefore better that you should have some advance information about the matters within my knowledge.

I gathered from your letter that you are interested in obtaining background information that does not appear in the official records. I was somewhat astonished by the number and variety of the memories that your letter brought to my mind. It is only natural that after three decades many of the names have escaped my memory, but I am quite clear on the essential points.

The attached random recollections are restricted to matters unlikely to be mentioned in official documents. If, after reading them, you are of opinion that further discussion would assist your research, I will be very pleased to see you.

Against that possibility I advise that I will be in Melbourne during the weekend 2nd and 3rd October next, and could meet you at the Naval & Military Club at a time convenient to yourself. If that does not suit you, and if you still consider a personal visit to be worth your time, some alternative arrangement may be made by correspondence.

I omitted from the recollections details of the precise method by which the Emperor was allowed to escape responsibility, as

1.....

2.....

these may already be known to you. On the other hand, however, the story is so discreditable that even the masochistic Americans may have concealed it. If that is the case I will be pleased to advise you.

Even if the attached recollections are of no value from the angle of research, they should provide some light entertainment, and I will look forward to hearing from you in due course.

Yours faithfully,

A handwritten signature in dark ink, appearing to read 'H.F. Dick', with a long, sweeping horizontal stroke extending to the right.

H.F. Dick

Random Recollections

I became involved in war crime trials because legal firms were reluctant to employ one who had been away for so long and who was considered to be inferior to those who had carried on in the profession.

This led me to transfer to AALC in order to keep the pot boiling. Then, in or about May 1946 GOC 8 Div. asked me to return to Singapore to represent him at discussions with British officials concerning 8 Div. scholarships for Chinese nurses.

My main recollection of these is that I had great quantities of drinks at public expense. For the purpose of the exercise I was attached to 1 Aust. War Crimes Section.

I took no part in the trials, and did not even attend a court as a spectator. I did, however, look over affidavits relating to Changi camp. Many of these were made by officers on whose evidence I would not hang a pariah dog, and I marked them accordingly. These men had not conducted themselves well in action or as prisoners, but I had noted that when TEC took over they made big fellows of themselves, and I suspected that they would go to the extent of giving false evidence from a safe distance. One of my few victories in my many arguments with military brass was the abandonment of proceedings against Capt. Takahashi and some of the guards.

The courts were turning out death sentences like sausages out of a machine. A scaffold was built in Changi gaol to accommodate three victims at a time, and on Tuesday mornings four batches went through the trap.

This was a great tourist attraction, and there were some quite amusing incidents. One that comes to mind was an American girl posing alongside a swinging corpse while her companion photographed her. In another case a tourist started to pull a pair of elegant boots from a suspended admiral, but the hangman's assistant stopped him, saying: "Zorry, Zur, them boots is bespoke".

When I returned to Australia I was shunted to DPW & I and was told to help a major in the preparation of the cases against the generals at Rabaul. It seemed to me incredible that, with so many AALC officers twiddling their thumbs, such a job should be given to an unqualified person. He had the combination of qualities that Ludendorff considered most dangerous. He was stupid and industrious.

I tried to see the Director to point out the absurdity of the situation, but had no success. Whenever I grumbled about this the other officers would say: "Well, the Colonel's got a fair bit to do, you know." The point of this did not become apparent until some time later.

I accordingly spent a lot of hours with other idle officers at a pub in St. Kilda, I think it was called The George, until the Directorate was thrown into a panic by the news that the trials of the Generals were due to begin, and that Badham KC and McKay of the New South Wales Bar were briefed to lead the prosecution.

On finding that no effective preparation had been made the Director called me in, and after a brief discussion a satisfactory arrangement emerged. I would be promoted to the rank of major immediately, and after the completion of the Rabaul trials I would be posted to Japan, and my wife would accompany me. I regarded the sending of families to Japan as a fraud on the taxpayer, but I could not stop the racket, so I considered that I might as well be in it.

My part of the bargain was that I completed the preparation of the cases and briefed the civilian prosecutors. I went to Sydney and conferred with Badham and some Crown Law officers. I naturally had lunch with them, and claimed the cost of this as a travelling expense. The Paymaster, however, refused it on the ground that I should have taken a cut lunch from Marrickville. After a lot of argument, and several months later, I received more than my original claim.

These were the first Australian trials under the new doctrine of Command Responsibility. The senior army officers in Australia did not like the idea, as they considered, with very good reason, that it could operate against them if they were later to be on the losing side.

I did not give it much thought until after I had met and talked with Imamura Hitoshi, whom I consider to have been the most truly noble man I ever knew. His men venerated him as a god.

I remember Ogata, the batman whom he commended to me. While changing for mess I would tell him of the day's events, and if I mentioned that I had seen or spoken to the General he would leap to his feet, stand to attention facing the compound, salute, and shout: "Imamura Taisho! Hai!"

It was his authority that kept the prisoners under restraint, and the civilians used to refer to the Australian Commandant as General Imamura's 2 I/C.

He appeared, always wearing his MC ribbon, as a defence witness at the trials of his subordinates, claiming that as Commander in Chief he was responsible for everything that happened.

This brought home to me the absurdity of the doctrine. The

evidence showed that by reason of allied activity his communications were cut and he did not have the means of knowing what was happening in other sectors.

It was also clear that if he had been able to do so he would have prevented such things from happening.

I remained at Rabaul to prosecute Baba for the Sandakan-Ranau affair, and also acted variously as prosecutor or judge-advocate in sundry other trials.

The form of the oath administered to Coons who testified in person may be of interest: "Longtime mi gat tok-tok long dispela Court mi tok-tok tru. Mi noken gaimon. Long Deo antap mi tok-tok tru. Emtasol."

When summing up to the members I used to start with the blurb about the Court deriving its jurisdiction from the War Crimes Act, but always had a doubt about it.

When I reached Japan I had plenty of time to think further about it. For days, and sometimes weeks, there was nothing to do except read or solve cryptic crossword puzzles.

I read Real's book on the trial of Yamashita. His argument was that MacArthur hated him for having defeated him in the Phillipines, and was determined to hang him through the agency of a hand-picked court. Even allowing for an anti-MacArthur bias this appeared to be substantially right. Yamashita was not directly responsible for any war crimes. His conduct after the fall of Singapore was beyond reproach. In the Phillipines his position was similar to that of Imamura in New Guinea. By reason of allied activity he could not exercise effective command, and he certainly had no control over the forces that carried out the so-called rape of Manila. The only way in which his execution could be given a colour of legality was through the doctrine of command responsibility.

I then remembered a remark made in private conversation by Gen. Yajima. He commented that their real crime had been to lose the war. The significance of this did not strike me until I had read Real's book.

It then occurred to me that we had all the time been confusing jurisdiction with authority.

A war crime is, by definition, a violation of the laws and usages of war, and these are part of the public international law. Jurisdiction to try and punish war criminals must therefore spring from the law that has been violated, namely, international law.

On that basis, therefore, any nation, and certainly any that had ratified the various conventions, has jurisdiction to

deal with any war-crime suspect, regardless of nationality or the place of the alleged crime.

But jurisdiction without effective power is of no value. Taking a contemporary example, the New South Wales courts have jurisdiction to deal with the Bartons, but their power to do so depends on the will of a foreign country.

The various courts therefore derived their authority, and not their jurisdiction, from the respective governments of countries that had been on the winning side.

But all governments were bound by the principles of international law, and could not unilaterally declare new categories of war crimes.

It was not possible, even for a Philadelphia lawyer, to make commanding officers responsible for crimes which they could not prevent. Nothing in the conventions even remotely suggested it. Accordingly, the Americans were themselves guilty of a war crime when they hanged Yamashita, and the Australians were likewise guilty when they imprisoned Imamura.

That, however, brings us back to the comment of Yajima Shosho. They had not lost the war, and so there was no power to punish them.

I was on very friendly terms with Carr K.C., chief of the U.K. prosecution team, and during a walk in a forest near Tokyo near the end of 1947 I put this to him. He listened in his customary courteous way, but as he made no comment I thought that he was not impressed. However, at breakfast on the following morning, he remarked that he had stayed awake for part of the night thinking about it, and finally concurred.

By then, however, the question was of academic interest only. It did not arise in the political trial with which he was concerned, and the only general, Nishimura, with whom I was thereafter concerned, had personally ordered the Parit Sulong massacre.

It is an interesting postscript, however, that when the question of command responsibility later arose in connection with the Vietnam activities the doctrine was expressly repudiated by the American army authorities.

I had a personal interest in the Parit Sulong affair, as I had gone over the bridge in an ambulance truck only a short time before it happened, and many of the victims were from my brigade.

Nishimura was already convicted of crimes, I think in China, and was serving a 20 year sentence. Our last chance of pinning the Parit Sulong affair on him appeared to have gone when we found

that Maj. Morioka, to whom he gave the order, had been killed in an air crash in China in 1943. However it later appeared that Lt Fujita had been present when Nishimura gave the order to Morioka. He made an affidavit to that effect, and Nishimura was subsequently hanged.

It is an interesting commentary on the influence of the Japanese military families that on the morning after he made his statement Fujita was found floating in the Sumida River with a knife between his shoulders.

The cuttings from the American Bar Association Journal gave me my best laugh since the Prime Minister delivered his policy speech late last year. Both the Courts and the reviews were quite funny from my point of view. The situation was well summarized when a newly arrived American lawyer asked for a copy of Whigmore, and one of the older hands told him that it would be no use to him as it was Rafferty's rules there. This had an amusing sequel when, a few days later, the newcomer said that he had looked everywhere, but could not find any book on evidence by any guy called Rafferty.

These matters are outside your line of research, but, as you acted as interpreter, the following incident may interest you. In a case in which there were five accused, one of the court members recorded six findings of guilty. The sixth, to whom he gave the longest term of imprisonment, was the Court interpreter. When asked the reason, he said that he had admitted to more offences than any of the others.

The Australian army brass, always wanting the limelight, were not content to have cases involving our troops heard by the American courts, and moved to have their own courts established in Japan. This came to a head about the middle of 1949. MacArthur agreed, but laid down conditions too stringent for Australia to meet.

It was accordingly announced that the trials of all the remaining accused involving Australian troops would be held at Manus, and I returned to Australia in or about November 1949 with two large boxes filled with fully-prepared prosecution briefs, and then proceeded to while away my time at Albert Park.

The Government, however, had in fact decided to discontinue the trials altogether. Before there was any formal announcement someone leaked the decision, and there was so much protest that Menzies denied it and unblushingly announced that the trials would proceed as scheduled.

The real decision, however, was to hold only a few trials to satisfy the public, and to drop all the other cases. The AG and DPW & I had to decide which cases should go on. The Director knew

little, if anything, of the briefs in the boxes, so the selection was just a lottery. Whether they drew the names out of a hat, or whether they used a pin in the dark, will never be known. In the event, many of the worst of the cases were dropped, and some of the least blame-worthy accused were prosecuted.

I seldom allowed my personal views to affect my judgment, but I was very anxious to hang Nakahara Tokio, whom I regarded as the most vicious of the accused. One charge on which we had conclusive evidence was that of raping a 10 year old Coon girl. On his orders two of his men held her legs apart while he did so. When I learned that he was set free I declined to have anything further to do with the trials.

Looking back from this distance of time it seems that the punishments suffered by the Japanese accused depended on when and where they happened to be tried.

As I remember it, the early trials were held at Darwin, and the blood-thirsty press complained about the allegedly light sentences.

Then, bowing to pressure, CGS convened courts further away and detailed tougher-minded officers for the job. I remember one officer who had a collection of rings and other ornaments taken from dead Japanese. He said that he used to hack their fingers off with a machete. The dead men would not have felt it, but the attitude of mind disclosed tends to support my view. In another instance a court member said that he was not concerned with evidence. It was enough that the accused were Japs. Some of them delighted in watching executions. Later on, when I was prosecuting in Rabaul, I was always able to avoid being nominated as mandatory witness by ensuring that one of these was in court when I anticipated a death sentence. When the President asked me the inevitable question I had my nominee present.

That was the era of quick trials and severe sentences, and those accused who were tried then were unlucky. Many of them would have escaped death, and some may have been acquitted, if they had been tried later. This applies particularly to those who did no more than carry out orders. Many of Noto's subordinates were executed for carrying out his orders, while he escaped death. In his case, however, I think there was diplomatic pressure.

The trial of the generals brought on the scene a different type of officer. Maj.-Gen. Whitelaw was, I think, the finest

Australian officer I met in the whole of my army experience, and Brig. Neylan and Col. Tinsley were also very fair-minded. They set a standard that endured after they had returned to Australia.

I noticed also that in late 1948, when I crossed briefly to Hong Kong to prosecute a few outstanding cases, the attitude of the court members in 1 Aust. War Crimes Section was one of judicial responsibility.

It appeared to me that some general guide lines should be laid down, and just before I returned to civilian life I wrote a memo suggesting that some matters should be raised by the Australian delegates to a convention to be held at Geneva later in 1950. I forget the details, but the question of command responsibility was one of them and also a uniform set of rules and procedures to be followed at future trials.

In this latter regard I was particularly concerned by the application of the domestic law of the nations conducting the trials. Take, for example, the question of superior orders. Under British law it was no defence at all. Dicey saw nothing odd in writing that a soldier was liable to be shot by a court martial if he refused an order or hanged by a judge and jury if he carried it out. This attitude places on a subordinate, sometimes illiterate, the duty of evaluating the legality of an order and facing the consequences if he decides to refuse it. Clearly some further thought should be given to this subject.

I wrote it more in hope than in any real expectation of action being taken on it. I learned later that it did not get beyond the Director's table.

In the long run this did not matter. Events in Vietnam indicated that the Americans, the self-righteous upholders of the laws and usages of war three decades ago, had then thrown them to the winds. And this had the approval and blessing of the true-blue Tories in Australia.

They appear to justify it on the basis of the proposition that the Right must always be right. That has no validity. The nature of an act does not change according to the politics of the nation by which it is perpetrated. I certainly have not derived any satisfaction from the knowledge that the bullets that shattered parts of my carcase were fired from the extreme Right.

**DCS Sissons: Letter to Hubert A Sissons,
25 June 1979**

Department of International Relations
Research School of Pacific Studies

25 June 1979

Dr H.A. Sissons
Department of Laboratories
Hospital for Joint Diseases
1919 Madison Avenue,
NEW YORK. N.Y. 10035
U.S.A.

Dear Hubert,

In my letter to you from the coast, I said that when I returned to Canberra I should write to you in detail about what I had learnt regarding the heavy death-rate among the Japanese garrisons after their movement to the Bougainville area.

To refresh your memory I am enclosing a copy of my letter to you of September 15th.

The Malaria Epidemic

The weight of opinion among the Japanese M.O.s with whom I talked was that the troops from Nauru and Ocean Is did not become infected at Bougainville - but only after their movement to Piedu and Masa Masa Is. This view is based on: (i) their local experience of the incubation period for MT malaria; (ii) their recollection that the PW compound at Torokina was virtually free of mosquitoes. The implication of this for my own argument is that HQ 2 Corps and not (as I previously thought) HQ First Army was the guilty party. There is nothing criminal in sending troops directly from one malaria-free area to another. The responsibility lies with HQ 2 Corps who moved them without drugs into a malarious area already occupied by infected troops.

The 'Death Marches'

When I wrote to you about these, I was thinking about beri-beri as a contributing factor. Before the War the Administration at Nauru was always worried about it and kept up the supply of vitamin B1 artificially with Vegemite.

In Tokyo my first contact on this particular matter was Dr M. Hirao. He was not present at any of the marches, but as an officer on Fleet HQ at Bougainville, he heard about them from participants in the months that followed. He said that there was no doubt among those whom

he spoke to that the cause of death was heat stroke.

Katsuki's letter (enclosed) confirms that heat disorders certainly caused some of the casualties on October 8th. I have also spoken to a Japanese officer, Paymaster Sub.Lt. Shiono, who participated in the march of September 20th. He has no doubt that the cause of death on that day was heat-stroke. He attributes his own survival to the fact that he kept half the water in his bottle for the afternoon. He felt very close to collapsing and remembers that his vision was temporarily disturbed - everything he saw looked purple. In Tokyo I discovered that there was a third 'death march': on September 23rd 4 out of 700 men from Buka Is collapsed along the same stretch of road and died. This was after a journey lasting 24 hours in open landing barges that were so over-crowded that the men had to take shifts to sit down. The sea was choppy (If there was sea-sickness would this strengthen the likelihood of salt depletion and therefore of secondary dehydration? D.C.S.S.). Their bottles were empty when they arrived at Torokina and there was no water for them there. They tried to drink from streams along the route, but the Australian guards would not let them.

The point of the discussion in the following paragraphs is to make sure that I get my terminology right and to find out whether I should be explaining the deaths specifically as heat-stroke or, more cautiously, as heat-effects, and whether I should be seeking the causes in the standards of accommodation, messing, ventilation, and water supply on the ships before disembarkation, as well as in the absence of water-trucks along the route.

Two Australian M.O.s (who according to the 1978 edition of the Medical Directory of Australia are still in practice) may be able to help me, if I go about it in the right way. One, Dr P.L. Jobson, was the S.M.O. of the Australian expedition to Nauru. He was on the vessel from which the first group of Japanese from Nauru disembarked at Torokina on September 20th. This, however, is pretty delicate ground. If the A.A.M.C. was working to R.A.M.C. standards, he should have been very busy throughout the voyage monitoring wet and dry bulb temperatures, testing urine for salt with potassium chromate and silver nitrate, and putting pressure on the ship's captain for every ounce of drinking water that the ship's condensers could produce. If, instead, he was taking the attitude, 'the bloody Japs can look after themselves', and was spending his time playing deck tennis, then he will not welcome my enquiries and will not provide informative answers. The other person who could be helpful is Dr D.R.L. Hart, who set up a Camp Dressing Station at the Torokina PW Compound on September 19th and remained in charge of it until October 3rd. If he kept the prescribed Admission and Discharge Book, all our uncertainties will be at an end.

In order to prepare myself for correspondence with these two men, I have read what I can about heat disorders.

The most relevant discussion that I have so far come upon is in the 'Preventive Medicine' volume of the medical series of the Official History of the Indian Armed Forces in the Second World War. This follows closely H.L. Marriott's Croonian Lectures (reported in British Medical Journal, 1947, Vol. 1, pp. 245, 285, 328). In fact it may well have been written by Marriott, who appears to have been the Indian Army's principal expert on this subject during the War. Also useful was W.S.S. Laddell's 'Disorders due to Heat'. (Royal Society of Tropical Medicine and Hygiene - Transactions, Vol. 51 [1957], p. 189, ff).

I realise how very dangerous it is for a layman to dabble in matters of this nature on the basis of highly specialized articles which he has not the basic physiological background knowledge properly to understand. But I haven't much choice. I can only barge in and rely on you to stop me making a fool of myself.

On reading the sources that I have mentioned, it seems to me that heat disorders can be broken down into three categories: heat-syncope, heat-stroke and heat-exhaustion and that, in the situations that we are considering, cases of each of these could have occurred. In what follows, each sentence should be prefaced 'Am I right in thinking that ...'

It appears that unlike heat-exhaustion, heat-syncope and heat-stroke are not caused by dehydration. Let us take each of these three in turn.

Heat-Syncope

The classic example of heat-syncope is the guardsman collapsing during the Trooping of the Colour.

The physiology is simple: if the circulating blood volume is too small for an expanded vascular bed, there is a poor venous return, and the end result is a rapid pulse, very low blood pressure and syncope ... [It is] an acute condition seen in unacclimatized men and, with no treatment other than rest and removal to a cooler atmosphere, a patient quickly recovers completely (Laddell).

Even if the Japanese on the River Glenelg and River Burdekin had enjoyed adequate sleep, ventilation, food, water and salt, some cases of heat-syncope might well have occurred. The men would have fainted as they marched. No-one besides an M.O. could have distinguished them from heat-stroke cases. If left to themselves they would quickly recover; but if placed at the bottom of a stack of other casualties they would, because unconscious, die of suffocation.

Heat-Stroke

Heat-stroke is overheating from cessation of sweating

caused by a breakdown in the heat-regulating mechanism. Its essential characteristic is a temperature of 107°F or above. The skin is hot and bone-dry to the touch. This dryness of the skin is absolute and distinguishes heat-stroke from any other heat disorder.

Heat-Exhaustion

According to the Indian official history, 'in the majority of cases heat-exhaustion is an expression of dehydration due to the deficiency of water and salt in the body'. The writer divides dehydration into two types: primary dehydration, where only water is lacking; and secondary dehydration, where there is also salt depletion.

It is in connection with heat-exhaustion that I am most confused. How quickly does it produce acute symptoms? The length of the voyage was only 4 days at the most (3 days for the troops from Nauvu).

In the situation under study, I should expect the dehydration to be primary, rather than secondary. 'Sweating without water drinking produces effects mainly of water loss, because sweat is much more dilute than extracellular fluid. Hence in men lost in deserts, and without water, the effects of water depletion overshadow the effects of salt depletion' (Marriott). Furthermore, the ration of salt available to the Japanese for cooking purposes on board was the Australian tropical scale, which was more than adequate. But they may, perhaps, have not been using it all. By Australian standards Japanese put very little salt in their rice. There is also one isolated piece of evidence that perhaps suggests salt depletion. A Japanese engineer officer of the Ocean Is garrison gives the following description of how the man marching beside him collapsed: 'His front foot became locked and he fell forwards on the ground on his instep'. The word he used for 'locked' was hikitsuru, the word commonly used for muscular cramp. According to Laddell, cramps are almost an inevitable consequence of a low concentration of sodium in the extracellular fluid. When someone faints from heat-syncope or heat-stroke, would one expect him to fall in a more relaxed fashion?

Assuming, however, that their systems were not deficient in salt, one should expect that, with sweating, the extracellular fluid would become hypertonic and, by osmosis, would replenish its volume by withdrawing water from the cells. The quantities involved sound fantastic to a layman. If I understand them correctly, the writers of 'Performance in Relation to Environmental Temperature' (Johns Hopkins Hospital Bulletin, Vol. 76, [1945], p. 25, ff) found that, with the temperature at 90°F and the relative humidity 95%, when unacclimatized men carrying 20 pound packs marched 2½ miles at a speed of 3.2 m.p.h., some produced 1310 gm of sweat and the average was 725 gm! How rapidly would this be replaced with water from the cells and what sort of immediate effects

would this produce? Laddell writes that 'the vital processes demands the integrity of the intracellular fluid: intracellular dessication means death'.

Can we make any deductions about which heat disorders were involved from the speed of the patients' recovery? Katsuki says that almost all the cases were able to leave hospital within one or two days. In cases of primary dehydration the patient's condition, according to Marriott, improves within a matter of minutes after water ingestion. In heat-stroke, the authorities appear to be conflicting. According to Laddell, once the temperature is reduced by wet sheets and fanning, convalescence is rapid. But the experience of Austin and Berry in their 'Observations on One Hundred Cases of Heat-stroke' (Journal of the American Medical Association, Vol. 161, [1956], p. 1525, ff), was that, although the greatest threat to life is in the first 24 hours, 'the next 7 days present a constant threat to the patient's life'.

Earlier in this letter I made the assertion that heat-stroke was not caused by dehydration. In this I was relying on the suddenness with which it sometimes appears and on the following comment in the Indian official history: 'In the majority of cases heat-exhaustion is an expression of dehydration due to the deficiency of water and salt in the body ... The mechanism of the production of heat stroke is quite different, it is an acute failure of the heat regulating mechanism of the body'. But the steps taken by the Directorate of Medical Services in London after the two troopships incidents referred to in my letter to Dr Katsuki (enclosed) indicate that they, not unreasonably, felt that there was a correlation. Do you think that Fabricant in his article 'Heat Stroke' (U.S. Armed Forces Medical Journal, Vol. 9, [1958], p. 1106, ff) may have hit the mark:

The degree of hydration may be an important variable in predisposition to heat stroke. Lichten, working with subjects acclimatized to heat for two weeks, demonstrated that there was a rise in the threshold for sweating and also a fall in the rate of sweating in acute water deprivation. The rectal temperature in the dehydrated subjects reached high levels at much lower effective air temperatures than was the case in normally hydrated subjects. Dehydration is said to set the hypothalamic thermostat at a higher than normal level, therefore adding to the vicious circle of hyperpyrexia.

Exhaustion unconnected with Environmental Heat

Katsuki in the last paragraph of the first page of his letter says: 'The causes of death were probably exhaustion

and heat-stroke'. The word he uses for exhaustion is hirō, which according to the dictionary means 'fatigue, weariness, exhaustion'. The order of words in his sentence suggests that more of the deaths were from this than from heat disorders. What is the mechanism involved in succumbing from exhaustion unassociated with environmental heat? Would such a person faint or would he just sink to the ground and say 'I don't care whether you do prod me with your bayonet, I just can't march another step'? Presumably, provided that he doesn't faint, if he is put onto the back of a truck and an insensible person is thrown on top of him, then he will be able, no matter how exhausted he is, to roll the insensible man off him and, by grabbing the side of the truck, raise himself from the floor and thereby prevent more people being tossed on top of him.

I'm sure that Hart would not have bothered to do autopsies on Japanese. Without autopsies, would he have been able at a glance to tell which corpses in the back of a truck were caused by heat-stroke, which by dehydration, which by simple (i.e. 'non-heat') exhaustion, and which by suffocation?

I do apologise for inflicting a letter of such length upon you. Any comments that you can make to stop me making an ass of myself - particularly in the letters I am preparing for Dr Jobson and Dr Hart - will be very much appreciated.

Hubert A Sissons: Letter to DCS Sissons⁶

New York,
August 23rd 1979

Dear David,

A belated reply to your letter of 25th June about your further enquiries with regard to the Japanese deaths following troop movements from Bougainville.

I have been through your letter several times and find the questions hard to answer with any certainty: *your reading has made you much more familiar with information on 'heat effects' than I am* [editors' emphasis].

My finding is that Katsuki is probably correct in ascribing the deaths simply to exhaustion and heat. In a debilitated group of people under the conditions prevailing, it would, I think, be difficult to distinguish between heat stroke and other heat effects; from what you write, one doubts whether a great deal of effort would have been put into either the prevention of the problems (water, etc.), or to a check of what actually went wrong. I expect that all the factors you mention — accommodation, ventilation, supplies of food and water, previous nutritional conditions — all played a part. I really doubt whether, in the end, you will be able to say more than that. But it all makes interesting and absorbing reading.

Love to all,
Hubert

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6 Arthur Stockwin transcribed Hubert Sissons' handwritten reply.

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