REDISCOVERING THE WAR CRIMES TRIALS IN HONG KONG, 1946–48

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In Hong Kong, from 28 March 1946 to 20 December 1948, four British military tribunals tried war crimes cases from across the British colonial territories of Hong Kong, Kowloon and the New Territories, and also from Formosa (Taiwan), China (Waichow and Shanghai), Japan and from the high seas. The author has made the process and the cases publicly accessible online through the Hong Kong's War Crimes Trials Collection website at hkwctc.lib.hku.hk. This paper is a window into the rediscovered Hong Kong war crimes trials and the key issues in international law that they raised. Further advanced research by international experts is currently underway for a book commissioned by Oxford University Press, due for publication in 2013. As such, this article will provide a 'taster' of what is emerging from the research that is currently in progress. The author's intention is to present the Hong Kong war crimes cases on their own merits, to allow them to be understood in their own right. The author does not engage in a comparative study of what was done elsewhere then or in recent years; that would be a major project for another occasion. The author instead seeks to draw out some of the richness and diversity of these cases as they are, and to enlighten our contemporary understanding through a look back at a process that was part of the making of modern international criminal law.

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I INTRODUCTION

From 28 March 1946 to 20 December 1948,[1] four British military courts in Hong Kong adjudicated war crimes cases from across the British colonial territories of Hong Kong, Kowloon and the New Territories,[2] and also from Formosa (Taiwan), China (Waichow and Shanghai), Japan and from the high seas. These were British, but not 'all British' trials — there was, for example, active participation from Canada through seconded personnel and also participation of non-British victims and witnesses, and Japanese defence counsel.

There were a total of 46 trials of 123 individuals. Of the 46 judgments issued, 44 were confirmed against 108 individuals, with 14 acquittals. The majority of cases from Hong Kong, Kowloon and the New Territories concerned the maltreatment of persons taken into the custody of the Kempeitai.[3] These cases raise striking similarities in terms of the modes of arrest, the conditions of detention, the type of torture used against persons in custody and the conduct of

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[1] The first trial began on 28 March 1946 in the Silver Mine Bay trial: *Trial of Lieutenant Kishi Yasuo* (British Military Court in Hong Kong, Case No WO235/993) <http://hkwctc.lib.hku.hk/exhibits/show/hkwctc/documents/item/58> ('*Kishi Yasuo*'). The last judgment, in the matter of detainee abuses in Shanghai, was delivered on 20 December 1948 although only promulgated on 18 February 1949: *Trial of Sergeant Major Yokohata Toshiro* (British Military Court in Hong Kong, Case No WO235/1117) <http://hkwctc.lib.hku.hk/exhibits/show/hkwctc/documents/item/86> ('*Yokohata Toshiro*'). Citations of cases heard before the British Military Court in Hong Kong will adopt the acronym 'BMCHK'.

[2] In 1842, China ceded Hong Kong Island to Great Britain in perpetuity following the Treaty of Nanking ending the Opium War of 1839–42: see *Treaty between Her Majesty and the Emperor of China*, UK–China, signed 29 August 1842, 30 BSP 389 ('*Treaty of Nanking*'). The *Treaty of Nanking* was supplemented by the *Treaty of the Bogue*, UK–China, signed 3 October 1843 and renewed by the *Treaty of Tien-Tsin between the Queen of Great Britain and the Emperor of China*, UK–China, signed 26 June 1858. In 1861, Kowloon (Nine Dragons) was ceded to the United Kingdom in perpetuity following the *Convention of Peking*, UK–China, signed 24 October 1860, ending the Second Anglo-Chinese War. In 1898, the UK leased the New Territories from China for 99 years: see Anthony Dicks, 'Treaty, Grant, Usage or Sufferance? Some Legal Aspects of the Status of Hong Kong' (1983) 95 *China Quarterly* 427.

[3] The Hong Kong Kempeitai trials included: *Trial of Sergeant Matsuda Kenichi* (BMCHK, Case No WO235/846) <http://hkwctc.lib.hku.hk/exhibits/show/hkwctc/documents/item/43> ('*Matsuda Kenichi*'); *Trial of Sergeant Major Yamada Kiichiro and Sergeant Awa Isao* (BMCHK, Case No WO235/887) <http://hkwctc.lib.hku.hk/exhibits/show/hkwctc/documents/item/44>; *Trial of Sergeant Major Ito Junichi* (BMCHK, Case No WO235/914) <http://hkwctc.lib.hku.hk/exhibits/show/hkwctc/documents/item/52> ('*Ito Junichi*'); *Trial of Sergeant Miyasue Suekichi* (BMCHK, Case No WO235/915) <http://hkwctc.lib.hku.hk/exhibits/show/hkwctc/documents/item/53>.

the accused. A second concentration of cases comes out of the Japanese prisoner of war ('POW') camp system in Hong Kong and Formosa.[4] From Hong Kong itself, including Hong Kong Island, Kowloon and the New Territories, there is just one case, but it covers all the POW camps during the occupation.[5] This one case reveals how strikingly similar the treatment of POWs in Hong Kong was to those in the nine Formosa (Taiwan) POW camp cases. Just three cases dealt with the invasion of Hong Kong.[6] Then, there were three cases that took place on ships on the high seas.[7]

As was the norm for British military trials of that time,[8] the judgments were simply verdicts and did not contain reasoned decisions. These were proceedings underpinned by a rule that '[t]he Court shall take judicial notice of the laws and usages of war',[9] and this could also explain the noticeably spartan nature of the arguments on the law. Nevertheless, all the case files contain meticulously recorded official transcripts of proceedings, sworn affidavits and documentary evidence: most have both the opening and closing submissions and almost all contain reviews of the proceedings by Judge Advocates. These reviews are important for understanding the cases. Some of the reviews were detailed evaluations, written by military lawyers tasked to advise the Commander of Land Forces in Hong Kong, as the Reviewing Officer, on whether to confirm the decisions of the Court. These reviews, supplemented by the opening and closing statements, transcripts and exhibits, constitute the record of the proceedings. These reviews are obviously not as detailed as reasoned judgments, and create significant challenges of interpretation. Nevertheless, the challenges are not insurmountable and the files do provide vital information to enable skilled researchers to make informed and enlightening evaluations.

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4 The Formosa trials included: *Trial of Warrant Officer Yabuki Rikie and Two Others* (BMCHK, Case No WO235/937) <http://hkwctc.lib.hku.hk/exhibits/show/hkwctc/documents/item/55>; *Trial of Lieutenant Suzuki Nebuo and Three Others* (BMCHK, Case No WO235/954) <http://hkwctc.lib.hku.hk/exhibits/show/hkwctc/documents/item/56>; *Trial of Lieutenant Tamaki Koji and Two Others* (BMCHK, Case No WO235/982) <http://hkwctc.lib.hku.hk/exhibits/show/hkwctc/documents/item/57>.

5 *Trial of Colonel Tokunaga Isao and Four Others* (BMCHK, Case No WO235/1012) <http://hkwctc.lib.hku.hk/exhibits/show/hkwctc/documents/item/61> ('*Tokunaga Isao*').

6 *Trial of Major General Tanaka Ryosaburo* (BMCHK, Case No WO235/1030) <http://hkwctc.lib.hku.hk/exhibits/show/hkwctc/documents/item/67> ('*Tanaka Ryosaburo*'); *Trial of Major General Shoji Toshishige* (BMCHK, Case No WO235/1015) <http://hkwctc.lib.hku.hk/exhibits/show/hkwctc/documents/item/62> ('*Shoji Toshishige*'); *Trial of Lieutenant General Ito Takeo* (BMCHK, Case No WO235/1107) <http://hkwctc.lib.hku.hk/exhibits/show/hkwctc/documents/item/82> ('*Ito Takeo*').

7 *Trial of Kyoda Shigeru* (BMCHK, Case No WO235/1114) <http://hkwctc.lib.hku.hk/exhibits/show/hkwctc/documents/item/84> ('*Kyoda Shigeru*'); *Trial of Niimori Genichiro* (BMCHK, Case No WO235/892) ('*Niimori Genichiro*'); *Trial of Rear Admiral Sakonju Naomasa and Captain Mayazumi Haruo* (BMCHK, Case No WO235/1089) <http://hkwctc.lib.hku.hk/exhibits/show/hkwctc/documents/item/77> ('*Sakonju Naomasa*').

8 United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (His Majesty's Stationery Office, 1949) vol 15, 20, which points out several exceptions to the normal practice of non-reasoned decisions.

9 *Regulations for the Trial of War Criminals* annexed to *Royal Warrant 1945* (UK) AO 81/1945 reg 8(iii) ('*Regulations Annexed to the Royal Warrant*'). The participation of prosecutors who were not lawyers, such as Majors Ormsby and Cross, may also have had a chilling effect on legalistic excesses. See also Interview with Major Murray I Ormsby (United Kingdom, 21 July and 4 August 2011) 20–1, 26–7 <http://hkwctc.lib.hku.hk/archive/files/int-20110918_af84c07fa3.pdf>.

Customary international law is a body of binding rules that have built up through consistent practice of States (*usus*), accompanied by a sense of being obliged to behave in that particular way (*opinio juris*). Customary international law was well-established as a source of law by the time of the Second World War trials.[10] Customary law can bind in its own right, and can bind States even if they have not ratified a treaty, should that treaty's terms be reflected in customary law. According to the International Military Tribunal at Nuremberg ('IMT at Nuremberg'):

> The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.[11]

The United Nations War Crimes Commission ('UNWCC') observed that '[a]lthough the findings and sentences of British Military Courts trying war criminals do not lay down rules of law in an authoritative way, they are declaratory of the state of the law and illustrative of actual State practice'.[12] This author agrees that the British cases from Hong Kong, including to some extent the Judge Advocate reports, generally form part of the *usus* and *opinio juris* upon which customary international law is established. In some instances, it is clear that the British courts were relying on existing customary international law, for example, in the basic conception of the war crime as a violation of the laws and usages of war that underlies the proceedings.

The case files of the trials of this neglected process of accountability have recently been digitised and made publicly accessible through a Hong Kong Government-funded project at the University of Hong Kong, the Hong Kong War Crimes Trials Collection ('HKWCT Collection'). This paper is a window into the rediscovered Hong Kong war crimes trials and the key issues for international law that they raised. The author's intention is to present the Hong Kong war crimes cases on their own merits. The author does not engage in a comparative study of what was done elsewhere, then or in recent years; that would be a major project for another occasion. The author instead seeks to draw

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[10] To quote from a leading authority of the time, Hersch Lauterpacht (ed), *Oppenheim's International Law* (Longmans, 5th ed, 1937) vol 1, 25 [17] (emphasis added) (citations omitted):

> Custom is the older and the original source of International Law in particular as well as of law in general … International jurists speak of a *custom* when a clear and continuous habit of doing certain actions has grown up under the aegis of the conviction that these actions are, according to International Law, obligatory or right.

Lauterpacht explained the notion of usages in the following terms: 'international jurists speak of a *usage* when a habit of doing certain actions has grown up without there being the conviction that these actions are, according to International Law, obligatory or right … a given course of conduct may be usual without being customary'.

[11] *International Military Tribunal (Nuremberg), Judgment and Sentences*, reproduced in 'Judicial Decisions' (1947) 41 *American Journal of International Law* 172, 219 ('*IMT at Nuremberg Judgment*').

[12] United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (His Majesty's Stationery Office, 1947) vol 1, 110.

out some of the richness and diversity of these cases, as they are, and to allow these cases to stand on their own merits (or demerits). The article begins with the necessary story, not known to everyone, of how there came to be war crimes trials in Hong Kong and examines the legal basis for the proceedings. It is a lawyer's reconstruction, partly from relevant materials in the case files that have been examined, supplemented by the secondary sources. The paper then moves to consider some of the important legal issues, and introduces four cases that present a detailed range of the issues that the Tribunals had to deal with. The article also places the trials in Hong Kong in a wider context, considering trials in China and Japan that concerned Hong Kong, trials held by Australia in Hong Kong, as well as parallel trials of British or Commonwealth nationals for collaboration with the enemy. The article concludes with some general observations about the process.

II HOW THERE CAME TO BE WAR CRIMES TRIALS IN HONG KONG

Having surrendered Hong Kong, Kowloon and the New Territories to Japan on 25 December 1941,[13] Britain reclaimed her colony on 30 August 1945 when the first British naval forces arrived in Victoria Harbour.[14] They were led by Rear Admiral Sir Cecil Harcourt, and comprised 19 ships including the battleship *Anson* and the aircraft carrier *Indomitable*. In anticipation of the formal Japanese surrender at Hong Kong,[15] an interim military administration was established on 1 September 1945, giving the Commander-in-Chief of the returning liberating forces full judicial, legislative and executive powers.[16]

Policy decisions about the prosecution of war crimes in international tribunals, military tribunals and domestic courts had been made at the governmental level some years before the end of the war, with the decisions concerning vanquished Germany eventually extended to cover Japan. Milestones in the long and convoluted process leading to the Hong Kong war crimes trials include the *7 October 1942 Declaration* by United States President Roosevelt[17] and the *17 December 1942 Declaration* by the governments of Belgium, Czechoslovakia, Greece, Luxembourg, the Netherlands, Norway, Poland, the US, the United Kingdom, the Union of Soviet Socialist Republics, Yugoslavia and the French National Committee, condemning German atrocities against the

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13 United Kingdom, *Parliamentary Debates*, House of Commons, 8 January 1942, vol 377, col 89.

14 Rear Admiral C H J Harcourt, 'Proclamation' in Hong Kong, *Hong Kong Government Gazette*, No 1–2, 1 September 1945 ('*Admiral Harcourt Proclamation 1 September 1945*').

15 'Memorandum of Agreements relative to Japanese Surrender at Hong Kong' (HKRS 163-1-214, Hong Kong Public Records Office) (which reveals extensive liaison with the Chinese authorities). The document also provides that

> [t]he British authorities at Hongkong [sic] and the Chinese military authorities will cooperate in investigating and apprehending suspected war criminals who may be in the Hongkong [sic] area at the time of the surrender of Hongkong [sic] or who may thereafter seek refuge at Hongkong [sic], or who may leave Hongkong [sic] seeking refuge in areas under Chinese control.

16 *Admiral Harcourt Proclamation 1 September 1945*.

17 'I now declare it to be the intention of this Government that the successful close of the war shall include provision for the surrender to the United Nations of war criminals': Franklin D Roosevelt, 'Statement of the President' (Press Release, 7 October 1942) reported in [1942] 172 *Department of State Bulletin* 797, 797.

Jews and reaffirming their 'solemn resolution to ensure that those responsible for these crimes shall not escape retribution, and to press on with the necessary practical measures to this end'.[18] Explaining the *17 December 1942 Declaration*, Anthony Eden, the British Secretary of State for Foreign Affairs, explained to the House of Commons that he 'would certainly say it is the intention that all persons who can properly be held responsible for these crimes, whether they are the ringleaders or the actual perpetrators of the outrages, should be treated alike, and brought to book'.[19] This move towards criminal justice was further elaborated by the UK, the US and the USSR in the 1943 *Moscow Declaration*.[20] Those German officers and men who had been responsible for or had taken a consenting part in these atrocities:

> will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be created therein … without prejudice to the case of the major criminals, whose offenses have no particular geographical localization and who will be punished by the joint decision of the Governments of the Allies.[21]

This policy was extended to the Far East, to cover the Japanese.[22] In October 1943, the UNWCC was set up in London to collect lists of criminals, record available supporting proof, and make recommendations as to the tribunals and

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18 *Inter-Allied Proclamation by the Secretary of State for Foreign Affairs* (17 December 1942), quoted in United Kingdom, *Parliamentary Debates*, House of Commons, 17 December 1942, vol 385, col 2083 (Anthony Eden).

19 United Kingdom, *Parliamentary Debates*, House of Commons, 17 December 1942, vol 385, cols 2082–7 (Anthony Eden).

20 *Declaration of the Four Nations on General Securities, Moscow Conference of Foreign Secretaries 1943*, signed 30 October 1943, 3 *Treaties and Other International Agreements of the United States of America 1776–1949* 821 ('*Moscow Declaration*'). There were actually four declarations, all arising out of the Conference of Foreign Ministers held in Moscow from 19–30 October 1943. China attended and joined in the general declaration, which included the commitment to set up an international organisation, which eventually become today's United Nations.

21 Ibid.

22 See the *Inter-Allied Declaration on Punishment for War Crimes*, signed 13 January 1942, cited in Inter-Allied Information Committee, *Punishment for War Crimes: The Inter-Allied Declaration signed at St James's Palace London on 13th January, 1942 and Relative Documents* (His Majesty's Stationery Office, 1942) 3 ('*Inter-Allied Declaration on Punishment for War Crimes*'), which referred not just to Germany but also to 'Associates of the Reich and, in certain countries, by the accomplices of the occupying Power'. It also, at 4, referred to the resolution of the States present:

> to see to it in a spirit of international solidarity that (a) those guilty or responsible, whatever their nationality, are sought out, handed over to justice and judged, (b) that the sentences pronounced are carried out.

China attended this meeting and later accepted the *Inter-Allied Declaration on Punishment for War Crimes*: by way of note, see generally M E Bathurst, 'The United Nations War Crimes Commission' (1945) 39 *American Journal of International Law* 565. At the Cairo Conference (22–26 November 1943), US President Franklin Roosevelt, British Prime Minister Winston Churchill and Generalissimo Chiang Kai-shek of China agreed to a joint declaration that pledged, inter alia, the continuation of the war against Japan until it surrendered unconditionally, foreswore territorial ambitions, return of territories and eventual independence for Korea. It did not mention prosecutions.

the procedure for trying such criminals.[23] The UNWCC's Far East sub-office was set up in November 1944 in Chungking, China and collated evidence about suspected Japanese war crimes.[24]

In the UK, once a decision had been taken to follow the judicial route as opposed to summary executions, there was a rigorous debate on the kind of laws to be applied to the captured enemy accused. It became acute with the two War Crimes Bills that were tabled before Parliament in 1942 and 1943.[25] The Foreign Office's William Malkin is cited as having said that: 'if there is one rule of International Law which is well-established, it is that the members of a hostile invading or occupying army are not subject to the municipal law of the country concerned or to the jurisdiction of its civil courts'.[26] There were also discussions over whether a special court could be established to cover crimes that could not be tried in national courts, or whether the Field General Courts Martial could be used to try suspected war criminals from the Axis powers.[27] As Pritchard puts it, '[t]hose responsible soon accepted it would be unfair and wrong to apply national law to members of the armed services of a foreign state without prior consent'.[28]

By 21 November 1944, the British War Cabinet had determined that 'war crimes committed against British subjects or in British territory should be dealt with by military courts set up in Germany (or wherever else was appropriate)'.[29] The Yalta Conference saw the three Allies — the US, UK and USSR — again commit to the prosecution of Axis leaders.[30] After its defeat following six years

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23 United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (His Majesty's Stationery Office, 1948) 2–3.

24 Bathurst, above n 22, 570. Apparently, about 90 per cent of the allegations of crimes presented to the Sub-Commission came out of the Chinese National Office: see Arieh J Kochavi, 'United Nations War Crimes Commission' in Dinah L Shelton (ed), *Genocide and Crimes against Humanity* (Cengage, 2005) 1102; United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, above n 23, 130.

25 See R John Pritchard, 'Changes in Perception: British Civil and Military Perspectives on War Crimes Trials and Their Legal Context, 1942–1956' in Ian Gow, Yoichi Hirama and John Chapman (eds), *The History of Anglo-Japanese Relations, 1600–2000: The Military Dimension* (Palgrave Macmillan, 2003) vol 3, 242, 243. In newly-liberated Continental Europe, there was not perceived to be such a problem with using municipal law to try German accused after the war and domestic laws were used in, for example, Norway, Denmark and the Netherlands. Pritchard, at 242, assesses the British situation.

26 Ibid. A similar discussion was taking place in the trial of General Tomoyuki Yamashita with the Supreme Court holding, inter alia, that the military commission, appointed to try the petitioner for offences against the law of war, was lawfully created and affirming the principles governing the exercise of its jurisdiction: *In re Yamashita*, 327 US 1 (1946) ('*Yamashita*'). Stone CJ cited *Ex parte Quirin*, 317 US 1 (1942) and other cases. Such a commission could be 'appointed by any field commander, or by any commander competent to appoint a general court-martial, as was respondent by order of the President': at 1.

27 See, eg, United Kingdom, *Parliamentary Debates*, House of Lords, 7 October 1942, vol 124, col 562 (Viscount Maugham); A P V Rogers, 'War Crimes Trials under the *Royal Warrant*: British Practice 1945–1949' (1990) 39 *International and Comparative Law Quarterly* 780, 788.

28 Pritchard, 'Changes in Perception: British Civil and Military Perspectives on War Crimes Trials and Their Legal Context, 1942–1956', above n 25, 243.

29 His Britannic Majesty's Government, 'Conclusions of a Meeting of the War Cabinet' (War Cabinet 152nd Conclusions, London, 21 November 1944, CAB/65/44/23) 244.

30 United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, above n 23, 130.

of war in Europe, Germany signed an *Instrument of Unconditional Surrender* on 7 May 1945,[31] and accepted the terms of the Allies' *Potsdam Agreement*.[32] On 26 July 1945, the *Potsdam Proclamation Defining the Terms for the Japanese Surrender* ('*Potsdam Proclamation*') was announced by US President Harry Truman, British Prime Minister Winston Churchill and Generalissimo Chiang Kai-shek of the Republic of China.[33] Following the nuclear attacks on Hiroshima and Nagasaki, the Japanese Emperor capitulated on 14 August 1945[34] and then formally surrendered on 2 September 1945.[35] In surrendering, the Japanese agreed to the *Potsdam Proclamation*, which included the Allied statement that: 'We do not intend that the Japanese will be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners'.[36] Shortly after, on 19 January 1946, the International Military Tribunal at Tokyo ('IMT at Tokyo') was established by General McArthur as Supreme Commander of the Allied Forces in the Far East.[37]

The core of British investigations moved to Singapore, where the Headquarters of Allied Land Forces in South East Asia ('ALFSEA') formed and controlled investigating teams on an inter-Allied basis for work in the field, coordinated by specialist officers and assisted by Allied officers.[38] The account given in the *History of the United Nations War Crimes Commission* about the machinery of operations in Singapore is illuminating, not least concerning the challenges that had to be overcome.[39]

The files reveal that the UK had another agenda. It also pursued war crimes prosecutions as a means of reasserting its authority and reclaiming prestige over its colonial territories, including Hong Kong.

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31 *Act of Military Surrender*, signed 7 May 1945 <http://www.ourdocuments.gov/Doc.php?flash=true&Doc=78>.

32 *Potsdam Agreement*, US–UK–USSR, signed 1 August 1945.

33 *Proclamation Defining the Terms for the Japanese Surrender*, US–China–UK, signed July 1945, 3 *Treaties and Other International Agreements of the United States of America 1776–1949* 1204 ('*Potsdam Proclamation*'). Soviet Premier Joseph Stalin attended but did not sign the *Potsdam Proclamation* as the USSR did not enter the war against Japan until 8 August 1945. This should not be confused with the *Potsdam Agreement* dealing with Germany.

34 Official Translation of 'An Imperial Rescript', 14 August 1945, in File No WO 235/1021, UK National Archives.

35 *Instrument of Surrender*, Japan, signed 2 September 1945 <http://www.archives.gov/exhibits/featured_documents/japanese_surrender_document/>.

36 *Potsdam Proclamation* [10].

37 *Special Proclamation by the Supreme Commander for the Allied Powers: Establishment of an International Military Tribunal for the Far East* (19 January 1946) ('*Supreme Commander Proclamation 19 January 1946*').

38 See Communication from Rear Supreme Allied Commander South East Asia to the Land Forces Melbourne, CHQ Wellington NZ, CNQ Ottawa, 26 MM Chunking, British Staff Section Tokio, Commander-in-Chief Hong Kong, Government of Burma, [illegible] 1945, in 'War Criminals and Crimes' (HKRS 169-2-147, Hong Kong Public Records Office).

39 United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, above n 23, 381–2; United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, above n 8, 28–9.

We see this from several notes in archival files concerning Japanese crimes against British nationals in China:

> I regard it as a matter of great importance that these matters [the investigation and prosecution of War Crimes in China excluding Hong Kong] should not be left in American hands. British prestige in China appears to have sunk already to a low level and if we are to delegate the duty of punishing the guilty, a very unhappy impression is likely to be produced involving great prejudice to our own people.[40]

> … it seems that British prestige will be adequately upheld in that War Criminals charged with crimes against British subjects are being brought to trial before British courts. Where the cases are predominantly British and involve only a few American victims they will be tried in HONG KONG and the prosecution will be assisted by the Americans. Where the cases are entirely American they will, it is believed, be tried in SHANGHAI. Mixed cases, predominantly American will, it is believed, be tried in YOKOHAMA by American Court with British members.[41]

> In order that British prestige may be upheld in CHINA and FORMOSA, will you please make every effort to ensure that full publicity is given in CHINA & SHANGHAI, and also if possible, in FORMOSA, to reports of all trials in HONG KONG of War Crimes committed against British subjects in SHANGHAI and FORMOSA? It is also most desirable that all reports of trials by American Courts including a British member should give prominence to British participation.[42]

Records show that in the matter of the trial of former Hong Kong Governor-General Isogai Rensuke, the British abandoned efforts to secure either a British judge or a prosecutor on the Nanking Military Tribunal trying him because there would arise issues of reciprocity for the Chinese in British trials, which was not acceptable to them in relation to Hong Kong.[43]

According to Hayashi Hirofumi, a Japanese historian specialising in Japanese war crimes, the South East Asia Command was actually joked as being about 'Save English Asian Colonies'.[44] He asserts that Britain had to demonstrate its prestige to Asian peoples and that it was the protector of local people of its colonies in order to rebuild its empire.[45] He states that 'war crimes trials were

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40 Communication from P H B Kent (Treasury Solicitor) to G Kitson (Far Eastern Department, Foreign Office), 15 February 1946, in File WO 32/15509, UK National Archives.

41 Ibid.

42 Communication from Commander-in-Chief, Allied Land Forces South East Asia to the War Office, 24 May 1946, in File WO 32/15509, UK National Archives [Japanese War Crimes against British Subjects in CHINA]; Communication from Director of Personal Services, War Office to Allied Land Forces South East Asia Head Quarters, 14 June 1946, in File WO 32/15509, UK National Archives; Communication from War Office to Foreign Office, Treasury Solicitor and Judge Advocate General's Office, 20 March 1946, in File WO 32/15509, UK National Archives [War Crimes against British Nationals in Far East — Policy].

43 Communication from Commander of Allied Land Forces South East Asia to the British representative in Nanjing in File WO 235/135, UK National Archives:

> further pressure believed undesirable because Chinese would be in a position to claim reciprocal rights in HONG KONG although would welcome Chinese Member on BRITISH Courts elsewhere … in view above suggest BRIT observer only should attend ISOGAI rpt ISOGAI trial not member or prosecutor.

44 Hayashi Hirofumi, *Comment on the British War Crimes Trials* (16 November 1997) <http://www32.ocn.ne.jp/~modernh/eng06.htm>.

45 Ibid.

one of the most important chances to make a display of her prestige'.[46] He too finds examples in the archival files, such as a letter from M E Dening, the Chief Political Adviser to Lord Mountbatten, counselling the Foreign Office that

> [i]f circumstances should arise wherein we recover Malaya and in particular Singapore, not by force of arms but by act of surrender, then we should to my mind, carry out our reoccupation with the maximum degree of efficiency and the maximum display of force. This is necessary not because the stigma which attaches to our loss of these territories is by no means forgotten, but because we must impress upon local inhabitants that we are now possessed of force and organisation which were so conspicuously lacking at the time of our defeat. … Politically it is vitally important that our return to territories occupied for so long by Japanese should take place in a manner most calculated to impress the inhabitants with the security we are capable of providing.[47]

Hayashi's research reveals that Foreign Secretary Bevin wrote to the Secretary of State for War, advocating action as 'our reputation in Germany and the Far East is certainly dependent to a great extent upon the expedition and efficiency with which these trials are carried through'.[48] Hayashi notes:

> The Treasury Solicitor, who acted as legal adviser to the War Office, insisted at a meeting on 16 October 1945 that [in relation to Malaya] 'the criminals should be brought back to Malaya on account of the important effect on prestige'.[49]

Additionally, the Colonial Office was 'very anxious to see responsible Japanese brought to trial [for atrocities committed in the Gilbert and Ellice Islands] and considered it an opportunity to sustain Empire Prestige'.[50] The Hong Kong trials seem clearly to fall within this pattern.

III THE LEGAL BASIS FOR THE TRIALS

The introductions in successive editions of the British *Manual of Military Law* affirm that the British had long accepted the existence of laws and customs or usages of war.[51] However, while military discipline and powers of the occupier

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46 Ibid.

47 Peter Dennis, *Troubled Days of Peace: Mountbatten and South East Asia Command, 1945–1946* (Manchester University Press, 1987) 11–12, cited in Hayashi Hirofumi, 'British War Crimes Trials' (2001) 13 *Nature–People–Society: Science and the Humanities* <http://www32.ocn.ne.jp/~modernh/eng08.htm>.

48 Letter from Foreign Secretary Bevin to the Secretary of State for War, 29 September 1945, in File WO 32/12640, UK National Archives, quoted in Hayashi, above n 47.

49 Hayashi, above n 47, quoting Note Recording the Treasury Solicitor's Intervention at a Meeting on 16 October 1945 in File WO 203/5593, UK National Archives.

50 Letter from British Minor War Crimes Liaison Section, Tokyo to War Crimes Legal Section, South East Asia Land Forces, 6 June 1947, in File WO 325/5, UK National Archives, quoted in Hayashi, above n 47.

51 Chapter XIV of the *Manual of Military Law 1894* drew expressly from Vattel, Kent, Heffter, Halleck, Baker, Phillimore and the *Lieber Code*: *Manual of Military Law* (Her Majesty's Stationery Office, 3rd ed, 1894) ('*Manual of Military Law 1894*'). See also *Manual of Military Law* (His Majesty's Stationery Office, 5th ed, 1907) ('*Manual of Military Law 1907*'); *Manual of Military Law* (His Majesty's Stationery Office, 6th ed, 1914) ('*Manual of Military Law 1914*'); *Manual of Military Law* (His Majesty's Stationery Office, 7th ed, 1929) ('*Manual of Military Law 1929*'). Between the *Manual of Military Law 1894* and the *Manual of Military Law 1929*, the title of ch XIV changed from 'The Customs of War' (1894), to 'The Laws and Customs of War on Land' (1907), to 'The Laws and Usages of War on Land' (1914), which lasted throughout the period under review.

within an occupied territory were clearly asserted in early editions, this cannot be said for the concept of prosecutions for war crimes, which only appeared in 1914.[52] That having been said, the prosecution of violations of the laws and usages of war — what we today call war crimes — was, by the time of the Second World War, already well established in British military law.

The version of the *Manual of Military Law* that was relied on for the post Second World War *Royal Warrant* prosecutions, including in Hong Kong, was the 1939 reprint of the *Manual of Military Law 1929* supplemented by the 1936 replacement of ch XIV on *The Laws and Usages of War on Land* and the 1944 amendment on superior orders.[53] However, the trials, including in Hong Kong, were conducted using physical copies of the *Manual of Military Law 1929*, which had been reprinted in 1939; the reprint did not include the two amendments referred to above. In other words, the 1939 reprint was not a consolidated document, although the two amendments were British law and were in fact applied in the trials.[54] According to ch XIV of the *Manual of Military Law 1929 (as amended)*, the punishment of war crimes by the enemy's military personnel or civilians could be dealt with 'by military courts or by such courts as the belligerent may determine. In every case, however, there must be a trial before punishment, and the utmost care must be taken to confine the punishment to the actual offender'.[55]

The direct source of law for all British trials in the aftermath of the Second World War, including in Hong Kong, was the *Royal Warrant* of 18 June 1945, which had annexed to it the *Regulations for the Trials of War Criminals* ('*Regulations Annexed to the Royal Warrant*'). The *Royal Warrant* was adopted before the *London Agreement of 8 August 1945*,[56] *Control Council Law No 10* of 20 December 1945[57] and General MacArthur's order establishing the IMT at Tokyo.[58] The *Royal Warrant* authorised the British Army's exercise of jurisdiction over captured enemy personnel suspected of violations of the laws

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52 The first time the prosecution of war crimes emerged was in the *Manual of Military Law 1914*. Retaliation, in extreme circumstances, was viewed as a legitimate basis on which to conduct warfare, ie, 'military vengeance' as an 'extreme right of war' for an 'outrage' committed by the other side: *Manual of Military Law 1894*, above n 51, ch XIV, 310 [31].

53 The *Manual of Military Law 1929* underwent two amendments before being replaced in an 8th Edition: (1) an amendment to ch XIV (see *Manual of Military Law 1929*, ch XIV (Amendment No 12 of 1936)); and (2) an amendment to para 443 (see *Manual of Military Law 1929*, ch XIV (Amendment No 34 of 1944)). The *Manual of Military Law 1929* was revised after the war: see *Manual of Military Law* (Her Majesty's Stationery Office, 8th ed, 1952).

54 In the 1939 reprint, the space where the text of ch XIV should have been was blank, with an explanation referring the reader to *Amendment No 12 of 1936* (it appears to have been rushed to reprint because of the outbreak of war). In consideration of this complex situation, this article employs the term *Manual of Military Law 1929 (as amended)* when referring to the *Manual of Military Law 1929* and the two amendments of 1936 and 1944 collectively. It employs the terms *Manual of Military Law 1929 (Amendment No 12 of 1936)* and *Manual of Military Law 1929 (Amendment No 34 of 1944)* when referring to the amendments separately.

55 *Manual of Military Law 1929 (Amendment No 12 of 1936)*, above n 54.

56 *Niimori Genichiro* (BMCHK, Case No WO235/892); *Kyoda Shigeru* (BMCHK, Case No WO235/1114).

57 'Control Council Law No 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity' (1946) 3 *Official Gazette of the Control Council for Germany* 50.

58 *Supreme Commander Proclamation 19 January 1946*.

and usages of war. Nevertheless, some of the cases tried in Hong Kong were not to do with the laws of war on land and involved vessels on the high seas (the *Lisbon Maru*,[59] the *Toyoma Maru*[60] and the *Tone* and *Behar*[61]). To date, the author has not identified files in the archives to explain how this extension of the laws and usages of war on land to the high seas was justified.

The British Army's understanding of the laws and usages of war on land, including war crimes, was to be found in the *Manual of Military Law 1929 (as amended)*. This understanding was deeply rooted in international law — in particular, but not exclusively, in the *Hague Convention (IV) respecting the Laws and Customs of War on Land* and its annexed *Regulations respecting the Laws and Customs of War on Land* (collectively, *Hague Convention IV and Its Annexed Regulations*),[62] and the *1929 Convention relative to the Treatment of Prisoners of War* ('*1929 POW Convention*').[63] At the Hong Kong war crimes trials, the parties would in fact rely on a range of legal sources. For example, the prosecution in the trial of Lieutenant General Ito Takeo cited the '*Manual of Military Law 1929*, ch XIV, para 56(c)', expressly drawing from the *Red Cross Convention* ch 1 art 1 and the *Hague Convention IV and Its Annexed Regulations* s 1 ch 1 art 1 condition 1.[64] Although the *Manual of Military Law 1929 (as amended)* was meant as a guide, the Hong Kong cases show that the parties relied heavily on it as a source of law.[65] For example, the amendment on superior orders in *Manual of Military Law 1929 (Amendment No 34 of 1944)* was cited as a source of law in several trials.[66] The *Manual of Military Law 1929* was specifically cited as source of law for war crimes in the prosecution's opening

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59 *Kyoda Shigeru* (BMCHK, Case No WO235/1114); *Niimori Genichiro* (BMCHK, Case No WO235/892).

60 *Niimori Genichiro* (BMCHK, Case No WO235/892).

61 *Sakonju Naomasa* (BMCHK, Case No WO235/1089).

62 *Hague Convention (IV) respecting the Laws and Customs of War on Land*, opened for signature 18 October 1907, 205 ConTS 277 (entered into force 26 January 1910) annex ('*Regulations respecting the Laws and Customs of War on Land*') (collectively, '*Hague Convention IV and Its Annexed Regulations*').

63 *Geneva Convention relative to the Treatment of Prisoners of War with Annex*, opened for signature 27 July 1929, 118 LNTS 343 (entered into force 19 June 1931) ('*1929 POW Convention*'). As already observed, the study of older versions of the *Manuals of Military Law* reveals the great influence of classical authorities.

64 Prosecution Opening Address in *Ito Takeo* (BMCHK, Case No WO235/1107) exhibit E, 3, slide 251.

65 Note the commentary on *Trial of Kapitanleutnant Heinz Eck* (British Military Court for the Trial of War Criminals, Case No 1, 20 October 1945) in United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, above n 12, vol 1, 19 ('*Peleus Trial*'):

> The British *Manual of Military Law* is not a legislative instrument; it is not a source of law like a statutory or prerogative order or a decision of a court, but is only a publication setting out the law. It has, therefore, itself no formal binding power, but has to be either accepted or rejected on its merits, ie according to whether or not in the opinion of the Court it states the law correctly.

66 See, eg, Prosecution Closing Address in *Trial of Colonel Tamura Teiichi and Two Others* (BMCHK, Case No WO235/1021) exhibit C(1), 6, slide 259 ('*Tamura Teiichi*') <http://hkwctc.lib.hku.hk/exhibits/show/hkwctc/documents/item/63>, citing *Manual of Military Law 1929 (Amendment No 34 of 1944)*, above n 54, ch XIV, [443].

statement in the trial of Major General Tanaka[67] and as authority for the burden of proof in the trial of Major General Shoji Toshishige.[68]

The procedure is examined in more detail in Part IV of this paper, but in essence, the procedure for Field General Courts Martial, regulated in the *Army Act 1926* and the *Rules of Procedure for Trials by Court Martial* under the *Army Act 1926*[69] applied to the extent amended by the *Regulations annexed to the Royal Warrant*[70] and other secondary legislation, such as the instructions issued by General Headquarters, ALFSEA ('*ALFSEA Instruction No 1 (2nd ed)*').[71]

The regime that applied in Hong Kong was an expedited and simplified adversarial procedure, with relaxed rules of evidence, compared to what applied in the civilian system (courts of ordinary jurisdiction). ALFSEA General Headquarters in Singapore was responsible for the investigation and bringing to trial suspected war criminals within British jurisdiction in South East Asia. prosecutors were given files that Singapore felt were sufficiently investigated, and required to go to trial on the strength of that.[72] The General Officer Commanding Land Forces Hong Kong was appointed under warrant by the ALFSEA Commander-in-Chief to convene war crimes courts in Hong Kong and to review and confirm courts sentences.[73] This power was derived from the *Regulations Annexed to the Royal Warrant*, where senior officers were given the power to convene military courts to hold war crimes trials.[74] For each panel, the Convening Officer would select a lieutenant colonel to serve as Presiding Officer, supported by one major and one captain. The Presiding Officer had to

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67 Prosecution Opening Address in *Tanaka Ryosaburo* (BMCHK, Case No WO235/1030) exhibit E, slide 263. See also at transcript 526, slides 267–8, which reads: '*Manual of Military Law* ch XIV, para 56, annex to *Hague Convention* s 1 ch 1 art 1 cond 1'. For more examples, see the discussion below at Part IV(F).

68 Prosecution's Reply to Defence Opening Address in *Shoji Toshishige* (BMCHK, Case No WO235/1015) transcript 110, slide 119 (arguing no case to answer and citing 'the *Manual of Military Law*, the chapter on evidence, chapter 6 in the manual itself. Paragraph 12, page 72').

69 *Army Act 1881*, 44 & 45 Vict, c 58, reprinted in the *Manual of Military Law 1929*, above n 51, 418 ('*Army Act 1881*'); *Rules of Procedure 1926* (amended 31 December 1928), reproduced in *Manual of Military Law 1929*, above n 51, 611 ('*Rules of Procedure 1926*').

70 There were several amendments to the *Regulations Annexed to the Royal Warrant*: Army Order 127 of 1945; Army Order 8 of 1946; Army Order 24 of 1946; Army Order 108 of 1947; and Army Order 116 of 1949.

71 *Allied Land Forces South East Asia, War Crimes Instruction No 1 (2nd ed)* in File WO 32/12197, UK National Archives ('*ALFSEA Instruction No 1 (2nd ed)*'), as amended by Amendment No 1 of 12 June 1946, Amendment No 2 of 27 June 1946, Amendment No 3 of 16 July 1946, Amendment No 4 of 21 November 1946, Amendment No 5 of 4 December 1946, Amendment No 6 of 22 January 1947, Amendment No 7 of 14 March 1947 and Amendment No 8 of 26 March 1947.

72 Interview with Interview with Major Murray I Ormsby (United Kingdom, 21 July and 4 August 2011) 20–1, 26–7 <http://hkwctc.lib.hku.hk/archive/files/int-20110918_af84c07fa3.pdf>.

73 *Regulations Annexed to the Royal Warrant* reg 4 set out the standard:

> If it appears to an officer authorized under the Regulations to convene a Military Court that a person then within the limits of his command has, at any place whether within or without such limits, committed a war crime he may direct that such a person if not already in military custody shall be taken into and kept in such custody pending trial in such manner and in the charge of such military unit as he may direct.

74 *Regulations Annexed to the Royal Warrant* reg 2.

have legal qualifications unless the Convening Officer deemed it unnecessary.[75] The accused were provided with counsel, and most were eventually to have Japanese counsel; they were, however, assisted by British Advisory Officers.[76]

IV OVERVIEW OF SOME OF THE LEGAL ISSUES ARISING IN THE HONG KONG CASES

A *Jurisdiction of British Military Tribunals over War Crimes in Hong Kong, Formosa (Taiwan), China (Shanghai and Waichow), Japan and on the High Seas*

The terms of the *Royal Warrant* and reg 1 of the *Regulations Annexed to the Royal Warrant* were understated, yet allowed for extraterritorial jurisdiction, including universal jurisdiction. The British war crimes courts in Hong Kong exercised jurisdiction over war crimes, defined as 'a violation of the laws and usages of war committed during any war in which His Majesty has been or may be engaged at any time since the 2nd September, 1939'.[77]

Jurisdiction was therefore not tied to British territory, but rather to the engagement of His Majesty in war, anywhere in the world, and the commission of war crimes in that war. There was nothing on the face of it to limit the crimes to those committed by Germans or Japanese, but the reality is that this was in fact so limited.

The Hong Kong, Kowloon and New Territories cases were brought on the basis of territorial jurisdiction or quasi-territorial jurisdiction.[78] The grounds for the exercise of extraterritorial jurisdiction — over Japan, Formosa, China and on the high seas — were that the crimes were committed against British or Commonwealth citizens (invoking the notion of passive personality jurisdiction). None of the trials were conducted in absentia. Some of the suspects were captured within the Hong Kong command and others were sent to Hong Kong to stand trial from elsewhere in Asia, including occupied Japan.[79]

B *Subject Matter Jurisdiction*

The British military tribunals in Hong Kong had jurisdiction only over 'violation[s] of the laws and usages of war' committed during any war in which Britain was engaged since 2 September 1939.[80] This unhelpfully terse wording

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75 Ibid reg 5(b). See also *ALFSEA Instruction No 1 (2nd ed)*, above n 71, [43]. Subsection (g) of the *Regulations Annexed to the Royal Warrant* specified the responsibilities of the legal member of the panel.

76 See *ALFSEA Instruction No 1 (2nd ed)*, above n 71, app N ('*Japanese Defense Counsel and Interpreters*'). Appendix N explained that the Japanese Government provided a second wave of Japanese defense counsel and interpreters as a reinforcement to the original team who were retained by the British authorities. All Japanese defense counsel and interpreters had the status of Japanese Surrendered Personnel. On the role of the Advisory Officers, see at [48], [49] (these rules were amended through Amendment No 5). On the authority for 'Raising and WE of Courts', see at [26] (inserted through Amendment No 7).

77 *Regulations Annexed to the Royal Warrant* reg 1.

78 For some background on the differing status of the territories within the British colony known collectively as 'Hong Kong', see sources cited in above n 2.

79 See discussion below nn 124–7 and surrounding text.

80 *Regulations Annexed to the Royal Warrant* reg 1.

appears to have been a rejection of the listing system originally employed in the *Treaty of Versailles*,[81] and that was then being discussed for the IMT at Nuremberg to try the leaders of vanquished Germany. Perhaps, as Meron has asserted, '[t]he international legal community had also learned that a Versailles-like catalogue of war crimes was not workable, at least not while international legal norms were still undergoing considerable development'.[82]

The British understanding conveyed in the *Manual of Military Law 1929 (as amended)* was that the laws of war were the 'rules respecting warfare with which, according to International Law, belligerents and neutrals are bound to comply'.[83] It provided an explanation of what was meant by the concept of 'laws and usages of war':

> The laws of war consist therefore partly of customary rules, which have grown up in practice, and partly of written rules, that is, rules which have been purposely agreed upon by the powers in international treaties. Side by side with these customary and written laws of war there are in existence, and are still growing, usages concerning warfare. While the laws of war are legally binding, usages are not, and the latter can therefore, for sufficient reasons, be disregarded by belligerents. Usages have, however, a tendency gradually to harden into legal rules of warfare, and the greater part of the present laws of war have grown up in that way.[84]

The *Manual of Military Law 1929 (as amended)* divided war crimes — the 'technical expression for such an act of enemy soldiers and enemy civilians as may be visited by punishment or capture of the offenders'[85] — into four broad groups. These were violations of the recognised rules of warfare by members of the armed forces; illegitimate hostilities in arms committed by individuals who are not members of the armed forces; espionage and war treason; and marauding. Specific examples were provided — use of poisoned or otherwise forbidden arms and ammunition; killing of the wounded; refusal of quarter; bombardment of hospitals and other privileged buildings; ill-treatment of POWs; ill-treatment of inhabitants in occupied territory; abuse of the Red Cross flag and badge, etc.[86] The *ALFSEA Instruction No 1 (2nd ed)*, governing the procedure for trials within its area of command, supplemented this and provided further insight into what were considered the main offences constituting war crimes:

1. Shooting and killing without justification.
2. Shooting and killing on the false pretence that the prisoner was escaping.
3. Assault with violence causing death, and other forms of murder or manslaughter.
4. Shooting, wounding with bayonet, torture and unjustified violence.

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81 *Treaty of Peace between the Allied and Associated Powers and Germany* signed 28 June 1919, 225 ConTS 188 (entered into force 10 January 1920) ('*Treaty of Versailles*').

82 Theodor Meron, 'Reflections on the Prosecution of War Crimes by International Tribunals' (2006) 100 *American Journal of International Law* 551, 559.

83 *Manual of Military Law 1929 (as amended)*, above n 54, [1].

84 Ibid ch XIV, [2] (citations omitted).

85 Ibid ch XIV, 340 [441].

86 Ibid ch XIV, 341 [443].

5 Other forms of ill-treatment causing the infliction of grievous bodily harm.
6 Theft of money and goods.
7 Unjustified imprisonment.
8 Insufficient food, water, clothing.
9 Lack of medical attention.
10 Bad treatment in hospitals.
11 Employment on work having direct connection with the operations of the war, or on unhealthy or dangerous work.
12 Detaining Allied personnel in an area exposed to the fire of the fighting zone.
13 Making use of POWs or civilians as a screen; and such cases as attacks on hospitals or hospital ships, and on merchant ships without making provision for survivors.
14 Interrogation by 'third degree' or other forcible methods.[87]

In line with the acts described in the *Manual of Military Law 1929 (as amended)* and *ALFSEA Instruction No 1 (2nd ed)*, the Hong Kong cases reveal that the concept of war crimes was used in practice to encompass this same broad range of core acts in armed conflict and occupation such as: unlawful arrest and detention; unlawful killing; torture; cruel, inhuman or degrading treatment; abuse of POWs (ranging from forced labour to poor working conditions to poor conditions of detention, as well as abuse of civilians in internment camps). Consistent with the practice of the time, sexual violence cases were peripheral, although the rape of a number of nurses at St Stephen's Hospital, the Jockey Club and local civilians at Blue Pool Road during the fall of Hong Kong were included in one of the Hong Kong island invasion cases.[88] At this stage of the research process, it is not yet clear why there were no prosecutions of Japanese conduct during the taking of Kowloon and Victoria; there are many reports of murder of civilians, looting, plunder, serious abuse and sexual violence.[89] It is also not yet clear why there were no prosecutions in relation to the maltreatment of civilians interned at the camp at Stanley Prison.[90]

Some of the widespread and systematic abuses that the cases reveal, particularly the conduct of the Kempeitai against civilians, could have been also legitimately tried as crimes against humanity. However, para 6 of *ALFSEA Instruction No 1 (2nd ed)* indicates the 'crimes against the laws of humanity' should be subsumed within war crimes. The cases also clearly show that the maltreatment of POWs across Hong Kong and Formosa was widespread and

87 *ALFSEA Instruction No 1 (2nd ed)*, above n 71, [4].

88 *Ito Takeo* (BMCHK, Case No WO235/1107). The evidence on the identity of the troops committing the acts was very weak and the defence was able to create sufficient doubt as to who was in charge of the operation. Lieutenant General Ito was acquitted of these charges.

89 See, eg, Affidavit of Ramon Muniz Lavalle, 11 March 1943, reprinted in Kenneth Cambon, *Guest of Hirohito* (P W Press, 1990) app 1 <http://fourthmarineband.com/cambon8.htm>; Philip Snow, *The Fall of Hong Kong: Britain, China and the Japanese Occupation* (Yale University Press, 2003) 79–90; Charles G Roland, 'Massacre and Rape in Hong Kong: Two Case Studies Involving Medical Personnel and Patients' (1997) 32 *Journal of Contemporary History* 43.

90 See, eg, G C Emerson, *Hong Kong Internment, 1942 to 1945: Life in the Japanese Civilian Camp at Stanley* (Hong Kong University Press, 2008) ch 1; Jean Gittins, *Stanley: Behind Barbed Wire* (Hong Kong University Press, 1982).

systematic, although there is nothing emerging from the files that suggests a genocidal intent behind the abusive conduct of the Japanese.

When discussing the subject matter jurisdiction of the war crimes courts in Hong Kong, it is essential to consider briefly how it was that British law could be applied to Japan and its nationals. The process was undeniably about the victors sitting in judgment on the vanquished, but that does not sufficiently capture the reality of the situation. As observed earlier, the references to the 'laws and usages of war' were to international law in its treaty and customary form (for Lauterpacht, the *Manual of Military Law 1929 (as amended)* referred to violations of international law, not English municipal law).[91] This is, however, not entirely true, for the Hong Kong trials show, in those instances where law was actually referred to, that the parties relied on the principles and approaches of domestic criminal law, with concepts of murder and manslaughter, causation and others feeding into their understanding of the notion of the war crime in international law. There are examples of counsel citing English precedents, especially *Archbold Criminal Pleading, Evidence and Practice*.[92] This means that what was actually used in these courts is probably correctly described as a hybrid of international and domestic law. This does not fit in with Lauterpacht's understanding, cited earlier, or with Baxter's interpretation of the British military cases from the Second World War. Baxter argued that the Judge Advocates and legal members, 'with rare exceptions', emphasised the international substance of the proceedings, even declaring distinctions between murder and manslaughter to be irrelevant.[93] This is not apparent in the Hong Kong cases.

In the Hong Kong cases, there was no dispute on the applicability of treaties to which Japan was a party, such as *Hague Convention IV* of 1907[94] and the 1929 *Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field* ('*1929 Sick and Wounded Convention*').[95] These, in any

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91 Hersch Lauterpacht, 'The Law of Nations and the Punishment of War Crimes' (1944) 21 *British Year Book of International Law* 58, 64.

92 *Trial of Colonel Noma Kennosuke* (BMCHK, Case No WO235/999) transcript 242, slides 248–51 <http://hkwctc.lib.hku.hk/exhibits/show/hkwctc/documents/item/59> ('*Noma Kennosuke*'). Defence counsel challenged the charge sheet for duplication, which was inadmissible under British law, citing Archbold's 29th edition at page 47: see John Frederick Archbold, Robert Ernest Ross and T R Fitzwalter Butler (eds), *Archbold's Pleading, Evidence and Practice in Criminal Cases* (Sweet & Maxwell, 29th ed, 1934) 47. He also challenged the general, vague and non-specific nature of the charge, citing *R v Yates* (1920) 15 Cr App R 15, and also the compatibility of the handling of hostile witnesses under British law. In the trial of Matsuda Keniichi, both prosecution and defence closed with references to Lord Hale: *Matsuda Keniichi* (BMCHK, Case No WO235/846) transcript 78–9, slides 93–4 <http://hkwctc.lib.hku.hk/exhibits/show/hkwctc/documents/item/43>. *Archbold's* was also cited in 'Prosecution's Closing Address' in *Trial of Major Uete Taichi and Six Others* (BMCHK, Case No WO235/1105) exhibit V, slide 822 <http://hkwctc.lib.hku.hk/exhibits/show/hkwctc/documents/item/46> ('*Uete Taichi* ').

93 R R Baxter, 'The Municipal and International Law Basis of Jurisdiction over War Crimes' (1951) 28 *British Year Book of International Law* 382, 383.

94 Japan signed *Hague Convention IV* on 18 October 1907 and ratified it on 13 December 1911 with a reservation made to art 44: see *Hague Convention IV and Its Annexed Regulations*.

95 *Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field*, opened for signature 27 July 1929, 118 LNTS 303 (entered into force 19 June 1931) ('*1929 Sick and Wounded Convention*'). Japan signed on 27 July 1929 and ratified on 18 December 1934. The UK signed on 27 July 1929 and ratified on 23 June 1931.

event, would have applied to Japan as customary international law.[96] It is widely known that Japan was not a party to the *1929 POW Convention*, which improved upon some of the earlier conventions to which Japan, the UK and other states had been party (see below). The objections stemmed from a particularly Japanese understanding about POWs.[97] The military honour code called *Bushido* discouraged soldiers from becoming captive, and urged sacrifice rather than capture:

> To be strong, understand honour and shame. For the honour of your native community and your family name, meet their expectations by making your best effort. Do not disgrace yourself by becoming a prisoner; do not leave behind a name soiled by becoming a prisoner.[98]

Furthermore, in 1934 Japan explained that under the *1929 POW Convention*, POWs could not be as severely punished as Japanese soldiers, and that this would involve a 'revision of the Japanese Military and Naval Disciplinary Codes to put them on an equal footing, a revision which was undesirable in the interests of discipline'.[99] The IMT at Tokyo observed that one of the reasons for Japan's non-ratification was that

> such ratification would double the range of enemy planes making raids on Japan in that the crews could land on Japanese territory after completing their mission and be secure in the knowledge that they would be treated as prisoners of war.[100]

Nevertheless Japan was bound in treaty law to a number of other relevant conventions affirming many of the same provisions and principles that were in the *1929 POW Convention*, and reflected in customary international law. Japan was a party to the *1929 Sick and Wounded Convention*,[101] which did in fact

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96 Quincy Wright, 'The Law of the Nuremberg Trial' (1947) 41 *American Journal of International Law* 38, 59; R R Baxter, 'Multilateral Treaties as Evidence of Customary International Law' (1965–66) 41 *British Year Book of International Law* 275, 280–6. See below n 109 for further discussion of the laws and customs of war.

97 Yoshito Kita, 'The Japanese Military's Attitude towards International Law and the Treatment of Prisoners of War' in Ian Gow, Yoichi Hirama and John Chapman (eds), *The History of Anglo-Japanese Relations, 1600–2000: The Military Dimension* (Palgrave Macmillan, 2003) vol 3, 255, 256–60. See also Lord Russell, *The Knights of Bushido* (Cassell, 1958) 53–8; Meirion Harries and Susie Harries, *Soldiers of the Sun: The Rise and Fall of the Imperial Japanese Army* (Random House, 1994) 18; Eiko Ikegami, *The Taming of the Samurai: Honorific Individualism and the Making of Modern Japan* (Harvard University Press, 1995); John W Dower, *War without Mercy: Race & Power in the Pacific War* (Pantheon Books, 1986) 48–52; John Toland, *The Rising Sun: The Decline and Fall of the Japanese Empire 1936–45* (Random House, 1970).

98 Kita, above n 97, 256–7, quoting *Senjin-kun* (Japan) ch 2, no 8.

99 B V A Röling and C F Rüter (eds), *The Tokyo Judgment: The International Military Tribunal for the Far East (IMTFE) 29 April 1946 – 2 November 1948* (APA–University Press Amsterdam, 1977) 418–9 ('*The Tokyo Judgment*').

100 Ibid 393–4.

101 Japan signed on 27 July 1929 and ratified on 18 December 1934; the UK signed on 27 July 1929 and ratified on 23 June 1931; China signed on 27 July 1929 and ratified on 19 November 1935; the US signed on 27 July 1929 and ratified on 4 February 1932; Australia signed on 27 July 1929 and ratified on 23 June 1931; New Zealand signed on 27 July 1929 and ratified on 23 June 1931; Canada signed on 27 July 1929 and ratified on 20 February 1933.

apply.[102] Japan was a party to the 1906 *Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field* ('*1906 Sick and Wounded Convention*'),[103] which was incorporated by reference into the *Hague Convention IV and Its Annexed Regulations*.[104] The *1906 Sick and Wounded Convention* applied as treaty law during the War in Asia, as all the participants were party to it.[105] A critical treaty should have been the *Hague Convention IV* of 1907 with the Martens Clause,[106] to which Japan was a party. However, the *Hague Convention IV and Its Annexed Regulations* contained a *si omnes* clause and did not in fact apply to the War in Asia as treaty law, since China was not a party.[107] It did, however, apply as customary law.[108]

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102 There was no *si omnes* clause proper in the *1929 Sick and Wounded Convention*. Article 25 provided that if a belligerent is not a party to the *Convention*, the *Convention* nonetheless continues to apply to all belligerents that are a party (to the exclusion only of the belligerent that is not a party). For discussion on whether this was a *si omnes* clause, see Frits Kalshoven, 'The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit' (1999) 2 *Yearbook of International Humanitarian Law* 3, 6–10.

103 *Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field*, opened for signature 6 July 1906, 202 ConTS 144 (entered into force 9 August 1907) ('*1906 Sick and Wounded Convention*'): signed by Japan and Korea on 6 July 1906 and ratified on 23 April 1908 with a reservation to art 28. Article 28 states that:

> In the event of their military penal laws being insufficient, the signatory governments also engage to take, or to recommend to their legislatures, the necessary measures to repress, in time of war, individual acts of robbery and ill treatment of the sick and wounded of the armies, as well as to punish, as usurpations of military insignia, the wrongful use of the flag and brassard of the Red Cross by military persons or private individuals not protected by the present convention. They will communicate to each other through the Swiss Federal Council the measures taken with a view to such repression, not later than five years from the ratification of the present convention.

104 *Hague Convention IV and Its Annexed Regulations* art 21.

105 The UK ratified on 16 April 1907; China signed on 6 July 1906 but did not ratify; the US ratified on 9 February 1907. Australia, New Zealand and Canada were bound by reason of their being British Dominions at the time. There was a *si omnes* clause contained in art 24, so this treaty did not apply as treaty law due to China not being a party.

106 *Hague Convention IV and Its Annexed Regulations* Preamble.

107 *Hague Convention IV and Its Annexed Regulations* art 2:

> The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting powers, and then only if all the belligerents are parties to the Convention.

The US and UK ratified on 27 November 1909 and while China was initially not a party, it ratified on 10 May 1917. Australia, New Zealand and Canada were bound by reason of their being British Dominions at the time.

108 The International Military Tribunal at Nuremberg ('IMT at Nuremberg') famously declared that 'by 1939 the rules laid down in the *Hague Convention IV* were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war': *IMT at Nuremberg Judgment*, above n 11, 248. The International Military Tribunal for the Far East ('IMT at Tokyo') chose to follow the position of the IMT at Nuremberg on matters of law concerning the legality of exercise of jurisdiction over the accused and also agreed that the crimes set out in the *Charter of the International Military Tribunal* were 'the expression of international law' existing at the time of the IMT at Nuremberg's establishment: see *The Tokyo Judgment*, above n 99, 28; *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 82 UNTS 280 (signed and entered into force 8 August 1945) annex art 8 ('*Charter of the International Military Tribunal*').

Japan also gave certain formal assurances, via neutral states, about how it would treat Allied POWs.[109] In one instance, the Japanese Government assured the Swiss Foreign Minister that Japan 'observes strictly the *Geneva Convention* of 27th July 1929, relative to the Red Cross, as a state signatory of that *Convention*'.[110] The IMT at Tokyo was to hold that these assurances constituted legal obligations: each was a solemn agreement binding the Government of Japan as well as the governments of the other combatants: to apply the provisions of the *1929 POW Convention* to POWs and civilian internees alike; to take into consideration the national and racial customs of those prisoners and internees when supplying them with food and clothing as required by the *1929 POW Convention*; and not to force internees to work.[111]

There is no doubt that Japan did have a policy about POWs, and the documentary evidence from the Hong Kong trials indicates that it did not start off by ordering or permitting killings and maltreatment. But, it did start off having a different approach to certain aspects of the generally accepted POW regime. From the cases in the HKWCT Collection, it is clear that Japan did draw conceptually from the *Hague Convention IV and Its Annexed Regulations*, and the *1929 POW Convention*. Japan set up a regime for the creation and administration of camps, the use of labour of POWs and the disciplining of POWs.[112] To take an example, reg 2 of the *Hong Kong Administrative Regulations* provided that POWs 'shall be treated by the authorities with the spirit of humanity; and their personality shall be respected'.[113] We do not have any comment on this from the Hong Kong courts, but the IMT at Tokyo held that on the surface, the system seemed to be appropriate: 'however, from beginning to end, the customary and conventional rules of war designed to prevent inhumanity were flagrantly disregarded'.[114] It stated further that certain legal changes made by Japan in the area of POWs and civilian internees were not a

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109 André Durand, *History of the International Committee of the Red Cross: From Sarajevo to Hiroshima* (Henry Dunant Institute, 1984) 543, 521.

110 Communication from Japanese Foreign Minister Togo Shigenori to Swiss Minister in Tokyo, 29 January 1942; Howard S Levie (ed), *Documents on Prisoners of War, International Law Studies* (US Naval War College, 1979) vol 60, 463.

111 *The Tokyo Judgment*, above n 99, 424.

112 See, eg, Court-Approved Translation of Extract from 'Prisoner of War Camp Regulation' (Imperial Ordinance No 1182, 23 December 1941) in *Tokunaga Isao* (BMCHK, Case No WO235/1012) pt 3, slide 581; Court-Approved Translation of Extracts from 'Detailed Prisoners of War Treatment Regulation' (Ministry of War Transmission No 29, 21 April 1943) in *Tokunaga Isao* (BMCHK, Case No WO235/1012) pt 3, slide 582; Court-Approved Translation of Extract from 'Prisoner of War Labour Regulation' (Ministry of War Ordinance No 22, 20 May 1943) in *Tokunaga Isao* (BMCHK, Case No WO235/1012) pt 3, slide 583 (Amendments, Additions and Deletions, Ministry of War Ordinance No 30, 1943); Court-Approved Translation of Extract from 'The Collection of Various Regulations concerning' in *Prisoner of War Punishment Law* (Japan) Law No 41 of 1943, in *Tokunaga Isao* (BMCHK, Case No WO235/1012) pt 3, slide 608; Court Approved Translation of Extract from 'The Administrative Regulations for the Prisoners of War, the Prisoners of War Camp, Hong Kong', 1 April 1942, in *Tokunaga Isao* (BMCHK, Case No WO235/1012) pt 3, slides 584–607.

113 Court-Approved Translation of Extract from 'The Administrative Regulations for the Prisoners of War, the Prisoners of War Camp, Hong Kong', 1 April 1942, in *Tokunaga Isao* (BMCHK, Case No WO235/1012) pt 3, slide 587.

114 *The Tokyo Judgment*, above n 99, 385.

sign of a change of attitude and did not suffice to secure the enforcement of the laws of war.[115]

The situation was complex. Some of the Japanese witnesses who testified in Hong Kong did raise the issue of the Japanese laws that bound them, including in the matter of how to treat POWs. Colonel Tokunaga, Commandant of all the POW camps in Hong Kong, testified how he had been briefed in Tokyo prior to deployment. He was instructed that the treatment of POWs should be carried out in accordance with international law: he was instructed to 'treat them philanthropically; they should not be ill treated'.[116] Colonel Tokunaga claimed that on arriving in Hong Kong, he instructed his guards that 'POWs should be treated according to the International Law — humanely'[117] and that this instruction was repeated to new staff.[118] He told the Court, under cross-examination, that he instructed his staff 'that POWs should be treated with kindness and fair manner according to International Law … [a]lthough we are Japanese, I instructed them at that time to treat the POWs with the Japanese philanthropic way, according to the Japanese spirit'.[119] Questioned on the ambiguity and tension between the statements about the Japanese attitude towards POWs and philanthropy, he explained that he meant that 'they should be treated with kindness … The spirit of kindness does not mean to do nothing against an illegal act'.[120] These assertions were repeated far too frequently and consistently across the cases to be dismissed out of hand as a mere fabrication. Yet, the record of the Hong Kong trials shows the remarkably widespread and consistent abuse of POWs. These examples of assertions of Japanese laws and superior orders reveal that it was not a simple case of a nation that did not recognise the concept of POWs. Japan was, as already noted, a signatory to the leading treaty of 1929, the *1929 Sick and Wounded Convention*, where the concept of humane treatment for sick and wounded POWs was enshrined. Neither was it a simple situation of a nation ordering its army to abuse POWs. There remains to be written, in the English language at least, a definitive study of this issue that can answer the perplexing issues of why and how such atrocities happened.

C *Personal Jurisdiction*

The exercise of war crimes jurisdiction over individuals was occasionally challenged. For example, the defence in the trial of Inouye Kanao cited Wheaton's '*International Law*' that 'justice inclines to the view that war crimes

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115 Ibid 421.

116 Testimony of Colonel Tokunaga Isao in *Tokunaga Isao* (BMCHK, Case No WO235/1012) pt 1, transcript 421, slide 462. See also Cross-Examination of Colonel Tokunaga Isao in *Tokunaga Isao* (BMCHK, Case No WO235/1012) pt 1, transcript 489–90, slides 530–1.

117 Testimony of Colonel Tokunaga Isao in *Tokunaga Isao* (BMCHK, Case No WO235/1012) pt 1, transcript 421–2, slides 462–3.

118 Ibid pt 1, transcript 490, slide 531.

119 Ibid pt 1, transcript 491, slide 532.

120 Ibid.

are not attributable to individuals'.[121] However, the only case where jurisdiction was denied involved a conviction that was set aside and the accused sent for retrial in the civilian courts for treason because the accused, although of Japanese ethnicity, was born in Canada.[122]

The unrestricted personal jurisdiction of the applicable law permitted the bringing of charges against members of the Imperial Japanese Army, including the Kempeitai, the Imperial Japanese Navy and civilians who worked with them, such as interpreters, merchant seamen, medical unit staff and employees of a private Japanese company that used POWs as forced labour. Jurisdiction was exercised only over Japanese personnel, who included some Formosans (Formosa was, during the Second World War, a Japanese overseas territory). Commonwealth and British nationals who committed similar acts, for example, those local Hong Kong detectives who assisted the Kempeitai in torture, were tried for treason in the civilian courts (see later discussion). All the cases were intrinsically linked to the Second World War, or the period of Japanese occupation. Most cases involved just one location, although one case tracked the activities of an accused across several territorial jurisdictions — Hong Kong, China and the high seas.[123]

One hundred and twenty three men were eventually tried for war crimes by the British courts in Hong Kong. The Hong Kong Annual Report of 1946 shows that in July 1946, of the 10 000 Japanese captured in Hong Kong after the surrender, 239 were held as suspected war criminals.[124] Japanese Surrendered Personnel suspected of war crimes were sent to Hong Kong from across Asia. For example, towards the end of 1946, 58 Japanese and Formosans were sent to stand trial in relation to atrocities against POWs in Formosa, and 10 Japanese were sent from Japan to Hong Kong in relation to crimes committed in Shanghai against British nationals.[125] During 1947, 55 Japanese located in China were brought to Hong Kong, and 92 detained Japanese were repatriated.[126] This international collaboration in the investigation and prosecution of war crimes was part of the scheme worked out during the war years, described earlier in this paper. While 123 persons went on trial, the rest were eventually repatriated as there was insufficient evidence.[127]

D *Temporal Jurisdiction*

The Preamble to the *Royal Warrant* and art 1 spoke of any war that the King had 'been or may be engaged at any time after the 2nd September, 1939'.[128] An issue raised in three of the cases was when His Majesty stopped being 'engaged in war' with Japan. The three cases — the execution of a downed British pilot in

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121 Henry Wheaton and Arthur Berriedale Keith, *Wheaton's Elements of International Law* (Stevens, 7th ed, 1944), cited in Closing Statement of the Defence in *Trial of Inouye Kanao* (BMCHK, Case No WO235/927) transcript 143, slide 157 <http://hkwctc.lib.hku.hk/exhibits/show/hkwctc/documents/item/88> ('*Inouye Kanao*').

122 *Inouye Kanao* (BMCHK, Case No WO235/927).

123 *Niimori Genichiro* (BMCHK, Case No WO235/892).

124 *Hong Kong Annual Report* (Hong Kong Government Printer, 1946) 72.

125 Ibid.

126 Ibid 94.

127 Ibid 72.

128 *Regulations Annexed to the Royal Warrant* Preamble.

Japan,[129] the killing of local Chinese civilians at Lantau Island's Silver Mine Bay[130] and the killing of local Chinese civilians at the Tsun Wan Gendarmerie[131] — involved killings that took place before the formal surrender but after the capitulation of the Emperor.

Did His Majesty stop being 'engaged in war' with Japan after the capitulation following the atomic bombings of Hiroshima and Nagasaki (14 August 1945), after the formal surrender of Japan (2 September 1945), or when the *San Francisco Agreement*[132] was inked (8 September 1951)? What about occupation in customary law and the *Hague Convention IV and its annexed Regulations* — how did that relate to being 'at war', when the concept of occupation relies on the assertion of control by the conqueror over the contested territory and not being 'at war'? In the trial of Ito Junichi, the prosecution argued that although the killings in question took place on 17 August 1945

> no question arises as to the Court's jurisdiction to hear a case describing events after the surrender because the *Royal Warrants* have provided for Courts to be set up to try suspects for offences committed in any war in which Great Britain finds herself engaged in since September 1939; and the surrender, though a cessation of hostilities, does not mean legally an end of the War. That must be produced by an enactment specifically revoking the one which laid down that a state of war existed.[133]

The defence in the Silver Mine Bay trial argued that if a state of war no longer existed, which the defence suggested the prosecution was implying, 'it cannot also be true that the accused persons committed crimes in violation of the laws and usages of war' since a war crime can only be committed during a war.[134]

In the three cases noted above, full trials were held, leading to verdicts. The courts obviously took jurisdiction. From this, one can surmise that the panels took the view of the prosecution in the trial of Ito Junichi, that the state of armed conflict did not cease simply because the fighting stopped, whether from the

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129 *Tamura Teiichi* (BMCHK, Case No WO235/1021).

130 *Kishi Yasuo and 14 Others* (BMCHK, Case No WO235/993).

131 *Ito Junichi* (BMCHK, Case No WO235/914); *Retrial of Sergeant Major Ito Junichi* (BMCHK, Case No WO235/1048) <http://hkwctc.lib.hku.hk/exhibits/show/hkwctc/documents/item/89> ('*Ito Junichi Retrial*').

132 *Treaty of Peace with Japan*, opened for signature 8 September 1951, 136 UNTS 45 (entered into force 28 April 1952) ('*San Francisco Agreement*').

133 Prosecution Closing Address in *Ito Junichi* (BMCHK, Case No WO235/914) exhibit H, slide 30.

134 Defence Closing Address in *Kishi Yasuo* (BMCHK, Case No WO235/993) exhibit J, 1, slide 736. In support of its submission, the defence cited: L Oppenheim, *International Law: A Treatise* (Longmans, 4th ed, 1926) vol 2, 430; Manfred Lachs, *War Crimes: An Attempt to Define the Issues* (Stevens & Sons, 1945) 40.

Emperor's capitulation on 14 August 1945, after the formal surrender of 2 September 1945.[135]

E *Procedure*

The *Royal Warrant* procedure in the Second World War trials is described in the UNWCC's *Law Reports of Trials of War Criminals*[136] and their *History of the United Nations War Crimes Commission*,[137] as well as by Rogers in his 1990 *International and Comparative Law Quarterly* article.[138] The *Royal Warrant* was amended twice — the first amendment allowed joint indictment of a group of persons[139] and the second allowed for in absentia trials, provided the Court was satisfied that this would not lead to injustice to the accused.[140] *British Ordinance No 47* of 30 August 1946[141] made *Control Council Law No 10* — with its crimes against humanity provisions — enforceable in the British zone in Control Council administered Europe.[142] However, the *Royal Warrant* trials in Asia remained simply war crimes trials, although para 6 of the *ALSEA Instruction No 1 (2nd ed)* indicates that the concept included crimes against humanity.

Evidentiary rules in military proceedings were the same as in the civilian system, the so-called 'courts of ordinary criminal jurisdiction in England', which followed the common law.[143] The *Manual of Military Law 1929 (as amended)* contained a fine chapter on the law of evidence. However, for the war crimes trials, such as in Hong Kong, the rules were relaxed. The *ALFSEA Instruction No 1 (2nd ed)* that was used in Hong Kong and elsewhere in the ALFSEA area of

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135 See *R v Bottrill*; *Ex parte Kuechenmeister* [1947] 1 KB 41. This case was about the continued internment of enemy nationals under the Royal prerogative. It affirmed the position, in English law, that the ending of a state of war is only possible when the King makes peace with the one-time enemy state; it is only the King who has such powers. A certificate to the effect that the Crown is still at war is conclusive evidence of the continuing state of war, even if international law might regard the state of war as having ended, for example, by unconditional surrender of the enemy or assumption of supreme authority over that state by the Government of His Majesty or His allies. The peace with Japan was only entered into through the *San Francisco Agreement*, so the UK was technically at war with Japan all through the lifetime of the Hong Kong war crimes trials.

136 United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, above n 12, 105–10.

137 United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, above n 23, 462–3.

138 See Rogers, above n 27, 786–97.

139 *Regulations Annexed to the Royal Warrant* reg 8(ii), as inserted by Army Order 127 of 1945: 'In any such case all or any members of any such unit or group may be charged and tried jointly in respect of any such war crime and no application by any of them to be tried separately shall be allowed by the Court'.

140 *Regulations Annexed to the Royal Warrant* reg 3, as inserted by Army Order 8 of 1946.

141 Arieh J Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* (University of North Carolina Press, 1998) 168:

> Pursuant to [*Control Council*] *Law No 10*, the British issued a special ordinance (No 47) concerning crimes against humanity. According to this ordinance, which came into effect on 30 August 1946, German courts in the British zone of Germany were authorized to exercise jurisdiction in all cases of crimes against humanity committed by Germans against other German nationals or stateless persons.

142 British Zone of Germany, *Military Government Gazette*, No 13, 19 November 1946, 306, cited in United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, above n 23, 463.

143 *Rules of Procedure 1926* r 73(A).

command emphasised the summary nature of these adversarial proceedings, and required that this be 'borne in mind by all concerned, to the end that justice be administered promptly and efficiently'.[144] The authority for such relaxation lies in the *Regulations Annexed to the Royal Warrant*, which contained rules such as the following:

> At any hearing before a Military Court convened under these regulations 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 such statement or document would not be admissible as evidence in proceedings before a Field General Court-Martial, and without prejudice to the generality of the foregoing in particular …[145]

Hearsay statements, so famously discredited in the English law of evidence, could now be admissible. Following on from this, *ALFSEA Instruction No 1 (2nd ed)* provided the following guidance to investigators on the nature of evidence:

> The regulations for the trial of War Criminals permit in certain cases the use of hearsay evidence, and Investigating Officers may accept any statements which may be likely to assist in any subsequent investigation, but the statement should make it clear whether the witness is speaking of matters which he said or heard himself, or of matters which he has been told and, if the latter, the source of his information.[146]

These would have a great impact on the testimony given during trials. For example, during the trial of Major General Tanaka, the prosecution objected to the questioning of Captain Ushiyama Sukeo by defence counsel on something that he did not have firsthand knowledge of. The Presiding Officer overruled the objection, citing how reg 8(1) of the *Regulations Annexed to the Royal Warrant* 'allowed both sides considerable latitude in producing evidence, which in normal Courts will be regarded as hearsay, and it is for the Court to estimate the value, if any, of such evidence'.[147] Regulation 8 also very notably loosened up the rules on documentary evidence. It contained a provision that the Court could accept, 'as evidence of the facts therein stated, any depositions or any record of any military Court of Inquiry or (any summary) of any examination made by any officer detailed for the purpose by any military authority'.[148] The Hong Kong cases show that affidavits were readily admitted in lieu of oral testimony, and that documents were easy to admit as evidence. With affidavit evidence, the defence was denied the right to cross-examine, and this is obviously a matter that goes to the fairness of the proceedings. Even more striking was the adoption of a

144 *ALFSEA Instruction No 1 (2nd ed)*, above n 71, [40].
145 *Regulations Annexed to the Royal Warrant* reg 8(i).
146 *ALFSEA Instruction No 1 (2nd ed)*, above n 71, app B [5].
147 Testimony of Captain Ushiyama Sukeo in *Tanaka Ryosaburo* (BMCHK, Case No WO235/1030) transcript 212, slide 225.
148 *Regulations Annexed to the Royal Warrant* reg 8(i)(d).

rule allowing for a presumption of reliability of Allied military personnel affidavits; these were not reciprocated for the defence.[149]

In terms of witness protection, it is notable that an amendment to the *ALFSEA Instruction No 1 (2nd ed)* provided for the presidents of war crimes courts 'dealing with cases in which a named victim was of British nationality to request reporters at the trial to suppress the names of British victims in order to avoid unnecessary distress to their families' and that charge sheets naming British victims would not be released to the press without express instructions from ALFSEA headquarters.[150] It will of course be immediately apparent that this did not apply across the board, most notably to locals. The applicable law permitted closed sessions 'in the national interest or in the interests of justice, or for the effective prosecution of war crimes generally, or otherwise',[151] and the public were sometimes excluded, for example during the testimony of British victims of sexual violence during the fall of Hong Kong.[152] This facility does not appear to have been extended to the local women who testified in open court.[153]

On arraignment, accused persons were required to enter a plea, in accordance with detailed rules set out in rr 32 and 35(A) of the *Rules of Procedure for Trials by Court Martial* under the *Army Act 1926*. The guilty plea procedure was laid out in rr 35(B), 37(B)–(F) of the *Rules of Procedure for Trials by Court Martial* under the *Army Act 1926*. This guilty plea procedure was an issue in the first trial of Sergeant Major Ito Junichi, where he pleaded guilty but the Court proceeded to conduct a hearing that was not consistent with the prescribed procedure.[154] In this case, the accused asserted that his conduct was defensible, or at least justified, by raising two claims: that the taking of life was legitimate or lawful, and that he was following superior orders. In addition to procedural flaws, the Judge Advocate observed that it must have been apparent, at an early stage of the proceedings, that the defence was suggesting that the accused received orders to execute prisoners and the Court should have reversed the guilty plea to not guilty at that point, and not right at the end as was done.[155] The accused was later retried on the basis of a not guilty plea and was convicted.[156] Another case with a guilty plea was that of Sergeant Major Yokohata Toshiro.[157] The Court rejected Toshiro's plea after it heard his character witness, Major Albert Edward Kyte. Instead, the proceedings continued on the normal basis of a not guilty plea. Major Kyte, the Officer Commanding British Minor War Crimes Liaison Section in Tokyo, testified that his experience of interrogating the accused was 'the first

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149 Ibid reg 8(i)(b): 'any document purporting to have been signed or issued officially by any member of any Allied or enemy force or by any official or agency of any Allied, neutral or enemy government, shall be admissible as evidence without proof of the issue or signature thereof'.

150 *ALFSEA Instruction No 1 (2nd ed)*, above n 71, [20a]. The rule was modified by Amendment No 1, 12 June 1946.

151 *Regulations Annexed to the Royal Warrant* reg 8(v).

152 Ibid reg 8(v); *Rules of Procedure 1926* r 43(A); *Army Act 1881* ss 53(5)–(7).

153 Elizabeth A Fidoe and Amy Williams testified in camera, Lee Yeuk Lan did not: see *Ito Takeo* (BMCHK, Case No WO235/1107).

154 *Ito Junichi* (BMCHK, Case No WO235/914) <http://hkwctc.lib.hku.hk/exhibits/show/hkwctc/documents/item/52>.

155 Judge Advocate's Report in *Ito Junichi* (BMCHK, Case No WO235/914).

156 *Ito Junichi Retrial* (BMCHK, Case No WO235/1048).

157 *Yokohata Toshiro* (BMCHK, Case No WO235/1117).

time that [he] ever interrogated a Japanese kempei who was honest, frank and apparently regretted his actions'.[158] The Court gave no reason for rejecting the guilty plea. In his petition against the conviction and the 15 year sentence imposed,[159] the accused argued that despite making a guilty plea, and showing genuine remorse and helpfulness (confirmed by the testimony of Major Kyte), this was rejected and he received an unduly severe sentence that did not take that into account. These cases could have contributed to the evolution of modern international criminal procedure had they been available.[160]

There was no 'appeal' as we know it today. Nevertheless, petitions to the Confirming Officer (Commander of Land Forces in Hong Kong) to aid his conduct of the obligatory review were possible. The Confirming Officer was advised by Judge Advocates in Singapore, who could only conduct file reviews as they were not on hand to observe or provide advice during the proceedings. The Judge Advocates made recommendations for confirmation, rejection or amendment. In a 2011 interview with the author, Major Murray Ormsby, a former military judge and prosecutor involved with the Hong Kong trials, explained that there was no need for Judge Advocates to be present or advising anyone during the trial or in summing up, because the Presiding Officer in Hong Kong was always a lawyer.[161]

F *Superior Orders*

The Hong Kong cases abound with examples of subordinates claiming that they were under orders and obliged to comply with those orders. This was not just amongst the lower ranks, but also applied to officers, such as the colonels in charge of POW camps, who claimed they conducted themselves in accordance with Japanese law and the orders of their superiors.

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158 Testimony of Major Albert Edward Kyte in *Yokohata Toshiro* (BMCHK, Case No WO235/1117) transcript 5, slide 12.

159 Petition in *Yokohata Toshiro* (BMCHK, Case No WO235/1117) slide 7 (scan 0738).

160 For instance, at the International Criminal Tribunal for the Former Yugoslavia ('ICTY'), a guilty plea was originally entered by Erdemović and accepted by the Trial Chamber: *Prosecutor v Erdemović* (*Judgement*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-96-22-T, 29 November 1996) ('*Erdemović Trial*'). However, this plea was ultimately rejected by the Appeals Chamber, by four votes to one, on grounds that the plea was not informed: *Prosecutor v Erdemović* (*Judgement*) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-22-A, 7 October 1997). He had, inter alia, raised superior orders and duress at the same time as claiming he was guilty of killings. Rule 62 of the *Rules of Procedure and Evidence*, then applicable, provided inadequate guidance on this point: International Criminal Tribunal for the Former Yugoslavia, *Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia*, Doc No IT/32/Rev.9 (adopted 5 July 1996) r 62. The case also raised issues of mitigation arising from superior orders and admissions of guilt. The jurisprudence which has emerged from the Hong Kong trials, for example in the trial of Sergeant Major Ito Junichi, had it been readily available at the time of the *Erdemović Trial*, could have informed the ICTY proceedings: see *Ito Junichi* (BMCHK, Case No WO235/914).

161 Major Ormsby did acknowledge that there was one presiding officer who was not a lawyer: Interview with Major Murray I Ormsby (United Kingdom, 21 July and 4 August 2011) 40 <http://hkwctc.lib.hku.hk/archive/files/int-20110918_af84c07fa3.pdf>. No file has been uncovered that deals with this, but such an appointment may have been authorised under reg 26 of the *ALFSEA Instruction No 1 (2nd ed)* and consistent with *Regulations Annexed to the Royal Warrant*, reg 5, as inserted by Army Order 24 of 1946.

These trials were on the frontline of the superior orders controversy and it is indeed a shame that we do not know the views of the Court through reasoned decisions. It is of significant interest to note that former judge and prosecutor, Major Ormsby, rigorously decried the fairness of the concept as applied to the Japanese (he had, at the time of the trials, argued for the doctrine, as part of his task as a prosecutor).[162] It is of course notorious how, during the war, the British changed their provision on superior orders. They had entered the war with a military manual containing a recently reaffirmed statement on superior orders that

> [i]t is important, however, to note that members of the armed forces who commit such violations of the recognised rules of warfare as are ordered by their Government or by their commander are not war criminals and cannot therefore be punished by the enemy. He may punish the officials or commanders responsible for such orders if they fall into his hands, but otherwise he may only resort to the other means of obtaining redress which are dealt with in this chapter.[163]

Paragraph 443 had been introduced into the *Manual of Military Law 1914* and held through the *Manual of Military Law 1929* passing intact through the replacement of Chapter XIV in 1936.[164] This was consistent with Oppenheim's influential treatise on international law, which had stated the rule in international law as being absolute:

> In case members of forces commit violations ordered by their commanders, the members may not be punished, for the commanders are alone responsible, and the latter may, therefore, be punished as war criminals on their capture by the enemy.[165]

Correspondence dated 1944 from Sir Henry MacGeagh (Judge Advocate General) to Sir David Maxwell Fyfe (Solicitor-General) shows that it was replaced to bring it up to date with the different position taken by the then leading international lawyer of the day, Professor Lauterpacht, and in light of the Soviet trials taking place in Kharkov.[166]

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162 Interview with Major Murray I Ormsby (United Kingdom, 21 July and 4 August 2011) <http://hkwctc.lib.hku.hk/archive/files/int-20110918_af84c07fa3.pdf>.

163 *Manual of Military Law 1929 (Amendment No 12 of 1936)*, above n 54, ch XIV, [443].

164 *Manual of Military Law 1914*, above n 51, ch XIV, [443]; *Manual of Military Law 1929*, above n 51, ch XIV, 341 [443]; *Manual of Military Law 1929 (Amendment No 34 of 1944)*, above n 54, ch XIV, 341 [443].

165 Lassa Oppenheim, *International Law: A Treatise* (Longmans, 1905) 264. Paragraph 443 of the *Manual of Military Law 1914* was originally framed by General Edmonds in consultation with Professor Oppenheim: see File WO 32/11170, UK National Archives.

166 See Letter from Henry MacGeagh (Judge Advocate General) to David Maxwell Fyfe (H M Solicitor General), 21 December 1943, in File WO 32/11170, UK National Archives. In 1940, just four years after ch XIV of the *Manual of Military Law* was last replaced, Professor Lauterpacht changed the statement on superior orders in Hersch Lauterpacht (ed), *Oppenheim's International Law* (Longmans, 6th ed, 1940) vol 2, 453. The changing of the law on superior orders was also discussed in United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, above n 23, 274–88.

The position became one of no defence:

> 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. Undoubtedly, a court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces and that the latter cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received. The question, however, is governed by the major principle that members of the armed forces are bound to obey lawful orders only and 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.[167]

This new position of 'no defence of superior orders' was not uncontroversial even in the UK,[168] but came to be reflected in the statutes of the IMT at Nuremberg and IMT at Tokyo as well as in *Control Council Law No 10*.[169] Vanquished Germany[170] and Japan[171] were held to the standard now claimed to

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167 *Manual of Military Law 1929 (Amendment No 34 of 1944)*, above n 54, ch XIV, [443].

168 In the context of the House of Lords debates in 1950 on the *Peleus Trial* and on the pending revision to the *Manual of Military Law* in 1952, several contrasting comments were made regarding the extent to which the defence of superior orders could be relied upon. Note in particular the assertions by the Earl of Cork and Orrery, the Lord Chancellor, Lord Simon and Lord Wright: United Kingdom, *Parliamentary Debates*, House of Lords, 25 April 1950, vol 166, cols 1110–26; *Peleus Trial* (British Military Court for the Trial of War Criminals, Case No 1, 20 October 1945). Furthermore, note the Earl of Cork and Orrery's allegation that the change in the law was made 'at the whims of so-called international lawyers' who 'altered certain rules and regulations to suit their own ends with, as some people think, not very much regard to justice, and certainly with no foresight as to eventualities in the future': United Kingdom, *Parliamentary Debates*, House of Lords, 5 February 1952, vol 174, cols 1018–19. See also United Kingdom, *Parliamentary Debates*, House of Lords, 14 May 1952, vol 176, cols 956–1012.

169 *Charter of the International Military Tribunal*; *Supreme Commander Proclamation 19 January 1946*, annex ('*Charter of the International Military Tribunal for the Far East*'). See also 'Control Council Law No 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity', above n 57, art 2(4)(b).

170 *Wehrstrafgesetz* [Military Penal Code] (Germany) 1842 § 47 provided for a qualified superior orders defence: there would be no responsibility for a subordinate unless the subordinate knew, while committing the act, that the act was a misdemeanour or a crime. This made the superior responsible in the situation where he issued unlawful orders. The German *Military Penal Code* was updated in 1926 and was originally based on the Prussian Military Code of 1845: *Wehrstrafgesetz* [Military Penal Code] (Germany) 1926, § 47.

171 See Kita, above n 97, 268–70. Kita argues that the Japanese military tradition was of absolute obedience to superior orders. Kita states, at 268–9, that any order from a superior, according to the Gunjin Chokuyu, was to be interpreted as an exercise of the Imperial prerogative:

> As a result, Japanese soldiers developed a fixed idea of orders from their superiors as being direct orders from the Emperor, 'the living god'. It was, therefore, inconceivable that any order could be illegal.

be reflective of international law.[172] In the trial of Colonel Nakano Junichi and two others, defence counsel, in closing, eloquently argued that while the British changed their law in 1944:

> It is a thing so well known as to come under the heading of matters of which Judicial Notice is taken and which need not be proved, that in the Japanese army, the subordinates were bound absolutely and unconditionally to obey superior orders. This latter principle was well-known to be guiding rule [sic] covering every part of the Japanese army long before the war and during the war.[173]

He criticised the newly adopted British position, pointing out that the law only changed in 1944, with the implication that whatever was done before 1944 was in accordance with the British law of the time.[174] The defence counsel also quoted from the judgment of the IMT at Nuremberg,[175] that ex post facto punishment is abhorrent to the law of all civilised nations, and argued that the correct law to apply should be that which existed prior to 1944.[176] A more nuanced argument was put forward by the defence in the Silver Mine Bay trial. There, counsel admitted that international practice, if not international law, had changed in the conceptualisation of superior orders, but the fact of there being such orders, exacerbated by the reality of the rigid Japanese system and the backgrounds of the accused, warranted understanding from the Court.[177]

The cases in the HKWCT Collection record numerous in-court explanations of how, under the rigid Japanese military system, subordinates had no choice but to obey orders. Major Ando Tadashi was a Japanese officer from the Formosan Army, called as a prosecution witness in the trial of Colonel Tokunaga Isao and four others to provide expert evidence about the structure and operations of the Japanese Army. He testified how in the Japanese Army, orders are to be obeyed: '[I]f the order comes from the direct superior the subordinate should obey that order because the superior officer knows about the legality of the order. In

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The Tokuho provided that a Japanese soldier must obey an order from his superior and, regardless of its content, must not refuse or object to it. The Guntai Naimusho required habitual obedience to the orders of superiors and did not permit soldiers to question their orders. Exceptionally, a subordinate could refuse to carry out an illegal order and ask for its reconsideration, but once the final decision was taken, the subordinate was bound to obey. Modern Japanese law, as set out in the *Army Penal Code* (Japan), severely punished protests and insubordination. Kita concludes, at 269, that

> [b]ased on various military regulations and severe punishments, the Japanese military nurtured customs demanding absolute obedience to orders, regardless of their content. It was almost impossible for soldiers to refuse any order even if he recognized its illegality.

172 *Manual of Military Law 1929 (Amendment No 34 of 1944)*, above n 54, ch XIV, [443]. The footnote to para 443 cites 'most writers upon the subject', although only identifying Lauterpacht's amendment to *Oppenheim's International Law* (Longmans, 6th ed, 1940) and the *Llandovery Castle Case* (1921) 2 Annual Digest of Public International Law Cases 436.

173 Defence Closing Address in *Trial of Colonel Nakano Junichi and Two Others* (BMCHK, Case No WO235/1044) exhibit GGGG, slide 444 <http://hkwctc.lib.hku.hk/exhibits/show/hkwctc/documents/item/72> ('*Nakano Junichi* ').

174 Ibid.

175 See *IMT at Nuremberg Judgment*, above n 11, 217.

176 *Nakano Junichi* (BMCHK, Case No WO235/1044).

177 Defence Closing Address in *Kishi Yasuo* (BMCHK, Case No WO235/993); 'Defence Closing Statement' in *Kishi Yasuo* (BMCHK, Case No WO235/993) exhibit AJ, 13–14, slides 748–9.

special cases the subordinate can express his opinion in a roundabout way'.[178] He affirmed that any order given by an officer to any subordinate, whether he is a non-commissioned officer or soldier, must be obeyed at once without question.[179] Similarly, counsel for Major Uete Taichi and six members of the accused argued in closing that

> [i]n the Japanese Army the orders of a superior are absolute and are considered as supreme. His subordinates are not allowed to argue whether his orders are right or wrong even though it is a matter which is against their will. They could merely express their opinion, even in such cases it is very rare their opinion would be admitted. Therefore, the subordinates usually must obey the orders automatically and blindly.[180]

Consistent with the explanation given by Kita,[181] it seems the Japanese accused did not regard themselves as criminally culpable if they complied with orders, ie they continued to view superior orders as a defence to their actions. For example, Captain Mayazumi Haruo, the Captain of the destroyer *Tone*, pleaded not guilty although he acknowledged his critical — and unwilling — role in the killings of the survivors of the *Behar*. He testified about how he attempted to have the order to kill the survivors changed. As he explained in his petition against sentencing:

> I did however try my very best in asking that the order be changed. There was no alternative case open to me, for in the Japanese Navy and Army it was impossible to appeal to any person other than the superior Officer who issued the orders. If I had not obeyed the order I would have laid myself open for punishment for insubordination. I could not help obeying the orders in the long run. Moreover, I expressed my opinion which was an unprecedented act in the Japanese Navy … I acted against my conscience, like a machine forced by the strong will of another officer.[182]

From the cases, it seems that duress appeared as part of the superior–subordinate relationship — there were no 'life or death' situations. The penalties mentioned by witnesses for disobeying orders were disciplinary in nature. There seems not to have been pressure going beyond that which is implicit in a superior–subordinate relationship in the Japanese Army. For example, Major General Tanaka said that Japanese troops were trained to obey orders and that if a soldier disobeyed an order, he would be charged with mutiny or manslaughter under the *Army Penal Code*.[183] Colonel Tokunaga, Commandant of all POW camps in Hong Kong, raised a cultural consideration for the obeying of unlawful orders. He testified about the killing of four recaptured Canadian POWs who had escaped from North Point camp during a

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178 Testimony of Major Ando Tadashi in *Tokunaga Isao* (BMCHK, Case No WO235/1012) pt 1, transcript 400, slide 441.

179 Ibid pt 1, transcript 408, slide 449.

180 Defence Closing Submission in *Uete Taichi* (BMCHK, Case No WO235/1105) exhibit T(1), 10.

181 See above n 171 and accompanying text.

182 Petition of Captain Mayazumi Haruo in *Sakonju Naomasa* (BMCHK, Case No WO235/1089) slide 21.

183 Testimony of Major General Tanaka Ryosaburo in *Tanaka Ryosaburo* (BMCHK, Case No WO235/1030) transcript 169, slide 182.

typhoon on or around 19 August 1942.[184] After being recaptured, they were subject to serious abuse, and were executed. Colonel Tokunaga claimed that this was further to the order of the Chief of Staff, Major General Arisue Yadoru. Colonel Tokunaga explained the circumstances of this order and why he had to obey. Repeated incidences of escaping POWs had resulted in the Governor-General of the territory, his superior, becoming 'very indignant'.[185] The POWs themselves were subjected to increasingly severe treatment with every escape attempt. Colonel Tokunaga claimed that each time POWs escaped, those guarding the POWs were also 'reprimanded' or 'punished'.[186] There was a sense that if POWs escaped, there would be 'loss of face' for many people, from the POW camp staff to the Governor-General.[187] Colonel Tokunaga himself was 'reprimanded' after each escape, and 'punished' after the fourth escape attempt.[188] It was apparently Major General Arisue who ordered that the recaptured POWs be executed. Colonel Tokunaga claimed that he 'thought at that time that if these four escapees were executed without trial, it would cause trouble later'.[189] He claimed to have expressed concerns about this course of action vis-a-vis the applicable international law. But when his superior dismissed them, he went ahead. Thus, it was fear of 'loss of face', rather than any fear for his life, that led the Colonel to pass on an order that he believed to be unlawful, resulting in the execution of the Canadians.

G *Modes of Responsibility*

The only mention in the *Regulations Annexed to the Royal Warrant* to a mode of responsibility was in reg 8(ii), which went towards the controversial contemporary notion of joint criminal enterprise ('JCE'):

> Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group may be received as prima facie evidence of the responsibility of each member of that unit or group for that crime. In any such case all or any members of any such unit or group may be charged and tried jointly in respect of any such war crime and no application by any of them to be tried separately shall be allowed by the Court.[190]

Rule 16 of the *Rules of Procedure for Trials by Court Martial* under the *Army Act 1926* allowed for the joint trial of several co-accused 'for an offence alleged to have been committed by them collectively'. There were many such trials in Hong Kong, the largest being the first trial, which was for the Silver Mine Bay massacre (15 accused in total).[191] Nevertheless, all the Hong Kong trials, whether individual or joint trials, involved the accused being charged with 'being

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184 Testimony of Colonel Tokunaga Isao in *Tokunaga Isao* (BMCHK, Case No WO235/1012) pt 1, transcript 441, slide 482.
185 Ibid.
186 Ibid.
187 Ibid.
188 Ibid.
189 Ibid.
190 *Regulations Annexed to the Royal Warrant* reg 8(ii), as inserted by Army Order 127 of 1945.
191 See *Kishi Yasuo* (BMCHK, Case No WO235/993).

concerned in' war crimes. The British military authorities used this broad notion of 'being concerned in' war crimes to draw in all forms of perpetration, ranging from command responsibility to negligence to direct perpetration. This was explained by the prosecution in the trial of Colonel Noma Kennosuke, which appears to be a command responsibility case (the Colonel having been the Commander of all the Kempeitai in Hong Kong). He was nevertheless charged with 'being concerned in' criminal acts, but by way of his command responsibility. According to the prosecution:

> It is well to understand clearly what is meant by this expression 'concerned in', since it is the basis of the indictment. By saying accused [sic] was 'concerned in' the alleged misdeeds is meant that he was so senior in rank and appointment, and yet so closely tied to the Kempeitai personnel in the chain of command, that whatever operations they undertook, his planning and guidance were present and paramount. And when those operations are tinged with illegality, then accused [sic] can be said to be 'concerned in' the misdeeds and charged on that basis. As to whether he was culpably concerned — ie to such an extent as to render him guilty of this charge and thereby deserving punishment, you can decide that considering the evidence side by side with the legal responsibility a CO incurs for his underlings [sic] criminal acts.[192]

This shows the grotesquely all-encompassing nature of this concept.

An equally peculiar brew of seniority, strict liability and command responsibility was presented in the prosecution's closing address in the trial of Captain Ushiyama Yukio. Here, the prosecutor submitted that the expression 'being concerned in' applied because the accused was 'senior in rank and appointment at the Western Kempeitai HQ', and the fact that he was in command of all Kempeitai personnel made him 'unquestionably' responsible for their actions.[193] According to the prosecutor's understanding:

> When actions of subordinates were the negation of legality [as] would be the case when tortures and ill-treatment are frequently perpetrated, then clearly, Ushiyama could be said to be concerned in the misdeeds and charged accordingly.[194]

The use of this umbrella term is of course directly relevant to the continuing controversy over the doctrine of JCE.[195] It is now widely recognised that the

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192 Prosecution Closing Address in *Noma Kennosuke* (BMCHK, Case No WO235/999) exhibit EEE, 1, slide 706.

193 Prosecution Closing Address in *Trial of Captain Ushiyama Yukio and Three Others* (BMCHK, Case No WO235/1041) exhibit W, slide 405 <http://hkwctc.lib.hku.hk/exhibits/show/hkwctc/documents/item/71> ('*Ushiyama Yukio*').

194 Ibid.

famous decision of the ICTY Appeals Chamber in *Prosecutor v Tadić* was not based on a comprehensive survey of the extant practice.[196] The Hong Kong cases could indeed have been relied on as evidence of state practice.

As noted elsewhere in this paper, many of the trials held in Hong Kong raised the issue of subordinates being ordered by superiors or required by law, to commit, through act or omission, certain acts that led to them facing war crimes charges. Several of these cases raise fascinating issues to do with euphemisms and ambiguous instructions, illustrating how language can be used to secure the commission of war crimes. A good example of this genre was the murder of downed British pilot Fred Hockley in Japan.[197] Several hours before the Japanese Emperor's capitulation on 15 August 1945, Hockley was shot down in his aeroplane and forced to bail out. 'He landed uninjured at Chiba-Jen [where] he was captured by members of a civil defence unit, and turned over to the 426th Regiment, a part of the 147th Division'.[198] After the 426th Regiment reported Hockley's capture to the 147th Division, he was to be transported to the Division for interrogation.

The situation then became uncertain after the Emperor's speech of capitulation. Hockley was murdered that night, on the basis of instructions that went out from the Divisional Headquarters to 'dispose of' (*shochi seyo*) Hockley themselves. The prosecution argued that the word '*shochi se*', or whatever it was that was uttered, had a strong implication that Hockley should be killed. By the time the order got to the direct perpetrator, there was no ambiguity: he was ordered to kill. The language used was '*shokode shochi seyo*' which meant 'to kill'.

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195 Joint criminal enterprise ('JCE') is widely regarded as having been invented by the Appeals Chamber of the ICTY in *Prosecutor v Tadić* (*Judgement*) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) [189]–[229] ('*Tadić Appeal*'). It is a mode of liability whereby members of a group are considered to have individual criminal liability for crimes committed pursuant to a common purpose or which were foreseeable as a result of pursuing a common purpose. In the *Tadić Appeal*, the Appeals Chamber divided the jurisprudence from Second World War trials into three categories of JCE, all of which had three features: multiple persons, a common plan and participation in the common plan. Basic JCE (or JCE I) involved all co-defendants acting pursuant to a common design, and possessing the same criminal intention. Systemic JCE (or JCE II) involved concentration camp cases, where groups of persons acted pursuant to a concerted plan. The controversy about JCE lies in the third category, described as extended JCE (or JCE III). In such situations, the accused did not personally commit the crime, or it was not a component of the common plan. It was, nevertheless, a predictable consequence of the execution of the common plan and the accused was either reckless or indifferent to that risk.

196 For some criticisms of the *Tadić Appeal* in this regard, see Jens David Ohlin, 'Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise' (2007) 5 *Journal of International Criminal Justice* 69; Marco Sassòli and Laura M Olson, 'The Judgment of the ICTY Appeals Chamber on the Merits in the *Tadic* Case' [2000] 839 *International Review of the Red Cross* 733.

197 See *Tamura Teiichi* (BMCHK, Case No WO235/1021).

198 Judge Advocate's Report in *Tamura Teiichi* (BMCHK, Case No WO235/1021) slide 6.

The defence disputed the meaning of the word '*shochi*', arguing:

> that the word meant 'to dispose of, to take measures or steps, to act or … to deal with' and there is not the 'slightest suggestion that it could mean to kill'. The word used, according to [the defence], was '*shochi seyo*' which had no implication that the victim would be killed. Instead, he was to be treated in accordance with the rules.[199]

According to the Judge Advocate, the Court went to great trouble in enquiring what expression was actually used and what meaning should be attached to it. He advised that

> [i]t seems fairly clear that the original expression used was '*Shochi se*', an ambiguous word which apart from the meanings referred to above may have a sinister import … Reviewing the evidence against Hirano as a whole I think that the Court were [sic] justified in believing that when he issued instructions to the unit he intended that Hockley should be killed. The unsatisfactory nature of Hirano's own evidence and particularly his evasive answers on pp 88–94 of the record go some way to strengthen the prosecution case.[200]

Other cases where the language of war crimes came into play include the orders to the Captain of the Japanese heavy cruiser *Tone* to 'dispose of the rest' and 'immediately dispose of the prisoners', meaning the majority of the survivors of the sunken *Behar* (see later discussion of this case in Part V);[201] and the order allegedly made to Sergeant Major Ito Junichi to take 'suitable steps' and 'finally deal with' two local Chinese in the custody of the Kempeitai.[202]

The decisions in these Hong Kong cases came in the wake of the US Supreme Court *In re Yamashita* ('*Yamashita*') judgment upholding the conviction of the Japanese General on the basis of command responsibility. Several cases involved the parties referring to the judgment.[203] But beyond mere recitation of the judgment by the parties from time to time in opening and closing statements, there was virtually no debate over the meaning of the concept. For example, in the closing arguments in the trial of Major General Tanaka, the prosecution cited *Yamashita* as authority for his proposition that the Commander:

> must take such appropriate measures as are within his power to see that inhumane acts do not occur. Thus while isolated instances may occur which are not in the power of the Commander to prevent, when the abuses are widespread it argues that properly effective measures have not been taken.[204]

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199 Ibid.

200 Judge Advocate's Report in *Tamura Teiichi* (BMCHK, Case No WO235/1021).

201 *Sakonju Naomasa* (BMCHK, Case No WO235/1089).

202 *Ito Junichi* (BMCHK, Case No WO235/914) <http://hkwctc.lib.hku.hk/exhibits/show/hkwctc/documents/item/52>; *Ito Junichi Retrial* (BMCHK, Case No WO235/1048).

203 See, eg, Prosecution Closing Statement in *Tanaka Ryosaburo* (BMCHK, Case No WO235/1030) exhibit R(1), 18, slide 382, citing *Yamashita*, 327 US 1, 66 (1946); *Hague Convention IV and Its Annexed Regulations* art 1; Prosecution Closing Statement in *Ushiyama Yukio* (BMCHK, Case No WO235/1041) exhibit W, 2, slide 406), citing *Yamashita*, 327 US 1, 66 (1946); Prosecution Closing Statement in *Nakano Junichi* (BMCHK, Case No WO235/1044) exhibit HHHH, 2, slide 454, citing *Yamashita*, 327 US 1, 66 (1946).

204 Prosecution Closing Address in *Tanaka Ryosaburo* (BMCHK, WO235/1030) exhibit R(1), 18, slide 382.

The defence counsel did not make submissions about the concept of command responsibility in international law, although he did make submissions on the facts, arguing that the accused had in fact complied with his duties under international law.[205]

Major Uete Taichi raised an interesting issue that, in the Japanese army, commanders are not responsible for people just because they are subordinates. His argument was based on the structure of the Japanese Army. He told the Court that

> [t]he basic principle of supervision in the control of the Japanese army is that the superior will only supervise and control his direct subordinates. This principle is followed in turn by everyone and the whole scheme of supervision would be complete. The army commander-in-chief would only supervise the chief commandant which was his direct subordinate to him. The chief commandant likewise was responsible to supervise only his direct subordinate which was the branch camp commandant. It was the responsibility of the branch camp commandant to supervise or control he [sic] sub-branch camp commandant and the staff under his camp. If the army commander-in-chief would dare to supervise the branch camp commandant directly disregarding the position of the chief commandant he would be breaking the line of chain [sic] which could never be allowed. It is the same in the case of the chief commandant if he would dare to supervise or caution directly the sub-branch commandant or the staff there.[206]

In some cases, the alleged existence of a command relationship was weakly evidenced. The invasion cases (the trials of Major General Tanaka Ryosaburo, Major General Shoji Toshishige and Lieutenant General Ito Takeo) saw the Commanders alleging that the crimes, if they had been committed, were perpetrated by persons for whom they were not responsible.[207] The evidence was not as strong as one would have wished in relation to the identity of the troops responsible for the atrocities during the invasion. This explains the acquittal of Major General Shoji Toshishige, and the partial acquittal of Lieutenant General Ito Takeo, where in making his closing address, the prosecutor dropped the charges in relation to the killings at Tytam Tuk pumping station, the rape of European and Chinese nurses at the Jockey Club emergency hospital, the rape of Chinese women and murder of Chinese males at Blue Pool Road and the killing of British soldiers in the area around the Maryknoll Mission and the St Stephen's Hospital massacre:

> After very carefully sifting the evidence in respect of those atrocities committed in the five different places just mentioned, the Prosecution feels that there is such a large element of doubt as to which Japanese troops were involved that it can in no way inculpate the accused.[208]

The evolution of the concept in international criminal law has thrown up particular challenges in the area of the mental element. Was it about strict liability? Or was it about actual knowledge or implied knowledge? Was it 'must

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205 Defence Closing Address in *Tanaka Ryosaburo* (BMCHK, Case No WO235/1030) exhibit Q(1), 8–9, slides 358–9.

206 *Uete Taichi* (BMCHK, Case No WO235/1105) transcript 559–60, slides 620–1.

207 *Tanaka Ryosaburo* (BMCHK, Case No WO235/1030); *Shoji Toshishige* (BMCHK, Case No WO235/1015); *Ito Takeo* (BMCHK, Case No WO235/1107).

208 Prosecution Closing Address in *Ito Takeo* (BMCHK, Case No WO235/1107) 3, slide 372.

have known' or 'should have known'? The submissions did occasionally engage with these issues. The mens rea of command responsibility was discussed in the trial of Major Uete Taichi and six others, where the prosecutor argued that the Court should accept that

> the superior is liable for illegalities of which he was aware and failed to stop. You may agree that he may have become 'aware' either by actually ordering — or by permitting — or by countenancing. And what I suggest with respect is an obvious deduction, he is also liable where he wilfully ignores the danger signal. This responsibility is even more stringent than if you follow the judgement of the American Supreme Court in *re Yamashita*.[209]

After citing from *Yamashita*, the prosecution submitted that 'this does not make the proof of actual knowledge in the accused an essential [element] in the Prosecution's case'.[210]

Knowledge and a notion of moral responsibility as legal responsibility were raised in relation to Lieutenant General Kinoshita. The reviewing Judge Advocate advised that the accused, a Commander in the Shanghai Kempeitai, could be said to be responsible for and concerned in the numerous acts of cruelty practised by his subordinates, since he knew of the treatment meted out to prisoners.[211] In relation to one charge of torture, Kinoshita was the senior officer on the scene and yet he did nothing whatsoever to alleviate the victim's suffering. As to what he did not actually know, the Judge Advocate advised that 'It was certainly his duty to know and he himself admitted that even without that knowledge he owed a moral responsibility. I consider that the Court was justified in convicting Kinoshita of all the Charges'.[212]

In the trial of Colonel Noma, the prosecutor alluded to the limits of the doctrine, pointing out that 'some would, might even contend, there is an absolute liability'.[213] The prosecutor, however, set out a vision that was not about strict liability and emphasised knowledge, whether actual or implied. He argued, without expanding how far it would go, that there definitely would be responsibility of the Commander in the following circumstances:

> 1 Where he orders the criminal acts;
> 2 Where he knows of them, and either permits them or fails to take adequate measures to prevent their continuance.
>
> And as a projection of the second case, if he has warning of wrongdoing and does not investigate, the Prosecution claims once again, that he incurs a criminal liability. You will see then that, knowledge in the accused is the essential factor here; it is submitted that as [sic] the only real point that you have to decide.[214]

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209 Prosecution Closing Address in *Uete Taichi* (BMCHK, Case No WO235/1105) exhibit V(1), 1, slide 818.

210 Ibid.

211 *Trial of Lieutenant General Kinoshita Kiichi and Sergeant Yoshida Bunzo* (BMCHK, Case No WO235/1116) <http://hkwctc.lib.hku.hk/exhibits/show/hkwctc/documents/item/85> ('*Kinoshita Kiichi*').

212 *Kinoshita Kiichi* (BMCHK, Case No WO235/1116) 213–4.

213 Prosecution Closing Address in *Noma Kennosuke* (BMCHK, Case No WO235/999) exhibit EEE, 1, slide 706.

214 Ibid.

Noma was a case where the prosecutor was able, in summing up, to trace the issue of the knowledge of the accused through the evidence. He argued that 'the corner stone, the very crux of this whole case is knowledge of the accused; or the proof of warning recklessly disregarded'.[215] Among the issues raised by the prosecutor was what information the accused had so as to put him 'on enquiry as to the practices of his underlings',[216] including complaints that were lodged with the Governor about the conduct of the Kempeitai and conveyed to him, and his own personal visits to the places of detention where torture was carried out and the close proximity of his own office to one such location.[217] The defence did not challenge this presentation of the law of command responsibility. It argued that the accused was worried about the possibility of torture and other abuse of persons in custody and he took all the steps within his power to prevent them occurring, including meting out severe punishment on subordinates.[218] His subordinates either did not tell him about misdeeds or sought to conceal them.[219] Counsel for the accused submitted that 'the accused then, being kept in ignorance of any such illegal acts of his subordinates, cannot be said to have acquiesced in such illegalities … the accused left no stone unturned in his efforts to carry out the supervision of his men'.[220] Counsel asked, 'is he yet to be blamed for not knowing about their misdemeanours?'[221]

In his closing address in the trial of Lieutenant General Ito Takeo, the prosecutor cited *Yamashita* as authority for arguing for a duty to prevent crimes by subordinates and submitted that 'he must take such appropriate measures as are within his power to see that inhumane acts not occur'.[222] There is a suggestion of strict liability in relation to widespread abuses: 'Thus, while isolated incidents do occur which are not in the power of a commander to prevent, when the abuses are widespread it argues that properly effective measures have not been taken'.[223] Here too, the prosecutor linked law to facts to point out that the accused fully realised that his troops were capable of misdeeds, citing a speech that he made to his subordinates about compliance with the laws of warfare. For the prosecutor, simply giving warnings was not enough:

> Bearing in mind what I have quoted from the law on this subject, it is maintained that he must take really effective measures to prevent breaches of the conventions. He cannot be excused by proving simply that he warned his troops against committing acts in contravention of the conventions.[224]

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215 Ibid exhibit EEE, 2, slide 707.

216 Ibid.

217 Ibid exhibit EEE, 3, slide 708.

218 Defence Closing Address in *Noma Kennosuke* (BMCHK, Case No WO235/999) exhibit DDD, 29, slide 700.

219 Ibid.

220 Ibid 29–30, slide 700–1.

221 Colonel Noma was convicted and sentenced to death. The case against him was a strong one, but we cannot know how much of the guilt assigned to him related to culpability for not knowing matters that he should have known: ibid.

222 Prosecution Closing Address in *Ito Takeo* (BMCHK, Case No WO235/1107) exhibit EEE, 5, slide 374.

223 Ibid.

224 Ibid.

The prosecutor emphasised the duty to punish as a constructive measure that would be expected of a diligent Commander:

> It is pointed out that the effectiveness of any regulation, convention or law corresponds directly to the sanction behind it. In this case surely, the sanction would be the inevitability of punishment in the event of contravention of the instructions. Obviously, punishment for the infractions was not inevitable because, in fact, no punishments were awarded. The measure which could have been taken, therefore, was an assurance of punishment in the event of failure to observe the rules. There can be no doubt that the measure was neither enforced nor so much as threatened … As a responsible commander, the Accused is accountable for preventable misdemeanours by troops under his command. The precautions he alleges to have taken were palpably insufficient. He, as a commander, therefore cannot escape the consequences of the acts of his subordinates.[225]

On the issue of reporting unlawful acts to superiors up the chain of command within the POW camp command structure, Major Uete argued that it was

> [n]ot permissible that the branch camp Commandant ever dared to make a report to the chief Commandant, to make protest concerning the duty which was confirmed to his responsibility. This basis is very well stipulated in the Internal Service Regulations of the Army, which says no permission is allowed for anyone to make a report of each and every trifle [sic] matter to his superior in order to evade his responsibility which was to be confined on himself.[226]

It is tempting to speculate that, despite the efforts of the British prosecutors, the doctrine of command responsibility caused some sympathy on the bench. This is because, in general, the senior officers who were convicted received surprisingly light sentences in comparison to the lower ranks. For example, all bar one of the top Commanders of the POW camps on Hong Kong and Formosa who were convicted received term imprisonment as opposed to death sentences,[227] and none of the commanders of the invasion of Hong Kong who were convicted received the death penalty.[228] In all these cases, the Commanders either denied that they were the commanders of the persons who committed the

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225 Ibid.

226 *Uete Taichi* (BMCHK, Case No WO235/1105) transcript 559–60, slides 620–1.

227 Colonel Tokunaga's death sentence was commuted to life imprisonment (the Judge Advocate suggested this was most likely influenced by a petition from Dr Selwyn Clarke, the Chief British Medical Officer in Hong Kong): Judge Advocate's Report in *Tokunaga Isao* (BMCHK, Case No WO235/1012) slide 6. Colonel Sazawa also escaped the death penalty (the Judge Advocate took the view that this could be because '[t]here is some evidence to suggest that at times the accused … had behaved with a certain degree of co-operation'): Judge Advocate's Report in *Trial of Colonel Sazawa Hideo and Two Others* (BMCHK, Case No WO235/1029) transcript 2, slide 4. Colonel Nakano only received 20 years (the absence of comment from the Judge Advocate indicates he saw nothing noteworthy about that): Judge Advocate's Report in *Nakano Junichi* (BMCHK, Case No WO235/1044) slides 6–7. The only one of the four POW camp commandants to be executed was Major Uete, who only served in that capacity from April to September 1945: Returned Death Warrant in *Uete Taichi* (BMCHK, Case No WO235/1105) slide 7.

228 Major General Shoji was acquitted of all the allegations against him (no case to answer): *Shoji Toshishige* (BMCHK, Case No WO235/1015) transcript 115, slide 124. Major General Tanaka and Lieutenant General Ito were partly acquitted, and ultimately were sentenced to 20 and 12 years respectively: *Tanaka Ryosaburo* (BMCHK, Case No WO235/1030) transcript 244, slide 259; *Ito Takeo* (BMCHK, Case No WO235/1107) transcript 214, slide 247.

atrocities, denied that they knew about those atrocities or denied that they had autonomy of action (ie, they were acting under superior orders). The latter may certainly also have had an impact on the attitude of the officers sitting on the panel, since it was just in 1944 that their own law, reflected in the *Manual of Military Law 1929 (Amendment No 34 of 1944)*, was changed on this point.

H *Sentencing Issues*

Consistent with para 450 of the *Manual of Military Law 1929 (as amended)*, the *Regulations Annexed to the Royal Warrant* permitted several forms of punishment following conviction although they were more specific. These punishments could range from death (either by hanging or by shooting) to imprisonment for life or any less term to confiscation or restitution to a fine.[229] The final outcome from the Hong Kong trials was 21 death sentences (originally 24, but three were commuted), 14 acquittals and 87 terms of imprisonment ranging from six months to life.

Given the three-man composition of the Hong Kong courts, imposition of the death penalty required unanimity.[230] As a matter of policy, execution of death sentences was deferred if testimony of convicted persons proved to be of use in other trials.[231] *ALFSEA Instruction No 1 (2nd ed)* was detailed in this area of executions.[232] In Hong Kong, convicted war criminals were executed by judicial hanging by the hangman at Stanley Prison, in presence of the Assistant Provost Marshal HQ Land Forces, a medical officer detailed by Medical HQ Land Forces, a member of A Branch HQ Land Forces, a military witness and an interpreter.[233] Major Ormsby, in his interview with the author, spoke of having to witness several such executions as the representative of the prosecution.[234] The bodies of executed Japanese war criminals were buried at sea off Hong Kong: 'The policy is that these bodies will be disposed of so that no Japanese memorial can be made of the remains. They will therefore be buried at sea'.[235]

Thanks to a policy of appeasement and rapprochement with Germany and Japan in the transition from the Second World War to the Cold War, those imprisoned in Hong Kong were eventually to benefit from substantial sentence

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229 *Regulations Annexed to the Royal Warrant* reg 9. See also *Rules of Procedure 1926* r 118(c).

230 Ibid.

231 Communication from Rear Supreme Allied Commander South East Asia to the Land Forces Melbourne, CHQ Wellington NZ, CNQ Ottawa, 26 MM Chunking, British Staff Section Tokio, Commander-in-Chief Hong Kong, Government of Burma, [illegible] 1945, in 'War Criminals and Crimes' (HKRS 169-2-147, Hong Kong Public Records Office).

232 *ALFSEA Instruction No 1(2nd ed)*, above n 71, [33], apps F–I.

233 See Communication from the Commander-in-Chief Adm, Land Forces Hong Kong to the Officer in Charge, Stanley Prison, 26 July 1946 in 'Execution of War Criminals and Prisoners Convicted of High Treason' (HKRS 125-3-146, Hong Kong Public Records Office) [Death Warrant]. The subject of this communication was the death warrants for Lieutenant Kishi and Lieutenant Matsumoto of the Imperial Japanese Army.

234 Interview with Major Murray I Ormsby (United Kingdom, 21 July and 4 August 2011) <http://hkwctc.lib.hku.hk/archive/files/int-20110918_af84c07fa3.pdf>.

235 Communication from the Commander-in-Chief Adm, Land Forces Hong Kong to the Officer in Charge, Stanley Prison, 26 July 1946 in 'Execution of War Criminals and Prisoners Convicted of High Treason' (HKRS 125-3-146, Hong Kong Public Records Office).

reviews and reduction, then repatriation to Japan and early release. The files suggest that by the end of the 1950s, no Japanese were still serving terms pursuant to the sentences imposed by the Hong Kong war crimes courts. John Pritchard, an expert on war crimes trials during the Second World War, describes the changing political environment, and the move towards closing the book on the story of the war crimes:

> Petitions signed by hundreds of thousands of Japanese citizens and presented to the British Embassy in Tokyo begged London to cease its degrading and inhumane treatment of people who had been made sacrificial scapegoats for a war that all right-thinking people now deplored. The treatment of war criminals came to be regarded as a litmus test by which each Allied country's desire for cordial relations with the new Japan might be measured. Remarks made by church officials and others in the United Kingdom supporting the early release of war criminals on the grounds of Christian charity were greatly welcomed by the Japanese.[236]

In 1947, the British Government agreed to the representations of General Douglas MacArthur, Supreme Allied Commander in Japan, and began to scale down British war crimes operations and repatriate all surrendered Japanese personnel held in custody.[237] By 1949, the policy had developed further: prisoners would be repatriated, provided the Supreme Commander agreed.[238] In April 1949, the Far Eastern Commission in Washington recommended to all member governments that the investigation of minor war crimes should be completed by the end of May 1949, and that the minor war crimes trials themselves should be completed, if possible, by 30 September 1949, and the UK agreed to the recommendations.[239]

Mirroring arrangements for Europe, a sentence review board was set up for the Far East — Number 2 War Crimes Sentences Review Board ('Far East Review Board') — in January 1949.[240] Its objective was to review Far Eastern war crimes sentences 'to ensure uniformity of punishment for similar offences'.[241] The British Secretary of State for War's direction, transmitted through the chain of command to the Commissioner of Prisons in Hong Kong, was that at the discretion of the Prison Governor, the prisoners would 'be eligible for a further one third remission of his final sentence, for "Good Conduct"'.[242] Pritchard reports that on the recommendations of the Far East Review Board, 109 sentences were reduced by the British Secretary of State for War (for example, all life imprisonment sentences were reduced to 21 years).[243]

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236 R John Pritchard, 'The Gift of Clemency Following British War Crimes Trials in the Far East, 1946–1948' (1996) 7 *Criminal Law Forum* 15, 24.

237 Ibid 17–18.

238 Ibid 26, citing the Head of the Japan and Pacific Department of the Foreign Office.

239 Ibid 18, citing the Head of the Japan and Pacific Department of the Foreign Office.

240 Ibid 35.

241 Far East Land Forces Commander-in-Chief, 'Japanese War Criminals — Remissions of Sentences' (HKRS 163-1-1236, Hong Kong Public Records Office).

242 Ibid. At this stage, the policy on those serving life sentences had not been determined yet, so this directive did not apply to them. Some Japanese POWs in detention at Stanley Prison were granted remission for good conduct such as Honda Isamu, Kiya Tsueno and Matsumura Yoshio.

243 Pritchard, 'The Gift of Clemency Following British War Crimes Trials in the Far East, 1946–1948', above n 236, 35.

According to Pritchard, massive pressure from Japan in the 1950s led to a Cabinet decision on 28 July 1955

> that a sentence of fifteen years' imprisonment should be substituted for convicted war criminals who either originally had been sentenced to imprisonment for life by the courts or since then had had their death sentences commuted to life. This was the moment at which the Cabinet ruled that the 'quantum' for a life sentence for war crimes should henceforth be reduced to a period of fifteen years other than in exceptional (for which read 'politically hypersensitive') circumstances. … The effect of this policy is that virtually no Japanese war criminals convicted by British war crimes courts remained in custody longer than ten years; all had been released by the beginning of 1957.[244]

On 10 November 1949, there were 86 Japanese persons serving their sentences at Stanley Prison in Hong Kong: 29 were from the Australian war crimes courts, 55 from war crimes courts established by the *Royal Warrant*, and one from the Supreme Court of Hong Kong.[245] All of the prisoners petitioned in November 1949 to be sent back to Japan to serve their sentences.[246] Their sentences were reviewed by the War Office Review Board in 1949, and again when the Japanese Government sought remission. Once in Japan, many repatriated war criminals benefited from a policy of amnesty: General MacArthur, on 7 March 1950, announced 'that within *his* command, those sentenced to less than ten years imprisonment would be released on parole'.[247]

There are a number of examples from the Hong Kong files that illustrate how the policy of remission worked. In the 1949 round of reviews, quantum of life sentence was set at 21 years' imprisonment, with no further reduction of sentence for Colonel Tokunaga because

> [t]his is one of the worst cases of a callous and vindictive senior officer in charge of prisoners-of-war who was not interested in their welfare. He ordered the executions, without trial, of some the said prisoners-of-war. He was very fortunate in having the death sentence commuted.[248]

On 3 February 1954, Anthony Eden could find no reason for reducing the sentence of Major General Tanaka, who had been convicted of atrocities in relation to the invasion of Hong Kong.[249] He recalled the earlier Cabinet decision fixing 'quantum' of 15 years for life sentences, and accepted that with allowance for good conduct, Tanaka may be released on 1 January 1957, having spent 10 years in confinement.[250] It came up again on the recommendation of the

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244 Ibid 47–8.

245 Hand written note, 10 November 1949 in 'Japanese War Criminals — 1. Question of Legal Position Re Hanging and Detention of … 2. Legislation to Provide for Detention of … after Conclusion of Peace Treaty' (HKRS 163-1-210, Hong Kong Public Records Office).

246 Ibid.

247 Pritchard, 'The Gift of Clemency Following British War Crimes Trials in the Far East, 1946–1948', above n 236, 29 (emphasis in original).

248 Far East Land Forces Commander-in-Chief, 'Japanese War Criminals — Remissions of Sentences' (HKRS 163-1-1236, Hong Kong Public Records Office).

249 Ibid.

250 Ibid.

Japanese in 1956 repeating points that were rebutted at trial.[251] This recommendation compared his sentence with that of Lieutenant General Ito Takeo, who was partly acquitted and Major General Shoji who was acquitted. The request was carefully reviewed, with the assessment that the plea for clemency did not put forward adequate grounds for setting aside the finding of the military court and the 20-year sentence.[252]

V SELECTION OF CASES

Due to constraints of space, just four cases have been selected from the 46 simply to provide an insight into the range of factual and legal issues that were adjudicated. The summaries are formed from review of the case files, including transcripts, affidavits and Judge Advocate reports. They are supported by secondary literature where such exists and other files, for example at the UK National Archives and the Hong Kong Public Records Office. Shorter summaries of all the cases can be found at the website of the HKWCT Collection. These four cases will be new to international criminal lawyers, but research reveals that work has been done in other disciplines on studying and publishing the events as a part of the wider historical and socio-political landscape.[253] There is also some literature from those who were directly engaged in these historical events, whether as survivors or participants in the legal proceedings.[254]

A *The Shanghai (Bridge House et al) Cases*[255]

When Shanghai fell to the Japanese, foreign nationals came under their control, including British and Commonwealth nationals. They came to be under the watch of 1600 Kempeitai, operating through eight stations. Some of these stations had places of detention in which civilian prisoners were held: Bridge House, Myrburgh Road Gaol (the former Union Jack Club), Haiphong Road Camp and 94 Jessfield Road, Shanghai.

Although the two cases in this matter were the last war crimes cases to be tried in Hong Kong, the files show that the abuse of Allied Nationals, including Commonwealth and British citizens, in occupied Shanghai, had been a matter of

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251 Far East Land Forces Commander-in-Chief, 'Japanese War Criminals — Remissions of Sentences' (HKRS 163-1-1236, Hong Kong Public Records Office). The note concerned Tanaka's 20 year sentence.

252 Ibid.

253 See, eg, Tony Banham, *The Sinking of the* Lisbon Maru*: Britain's Forgotten Wartime Tragedy* (Hong Kong University Press, 2006); Eric Niderost, 'Hotel from Hell' [2011] (Winter) *World War II Quarterly* 2; National Ex-Services Association, *The Sinking of the* SS BEHAR*: Operation 'Sayo I'* <http://www.nesa.org.uk/fb/bcc.behar1.htm>; David Miller, 'A Very Reluctant Mass Murderer' (1998) 143(3) *Royal United Services Institute Journal* 53.

254 See, eg, Peter Clague, *Bridge House: The True, Chilling Story of a Shanghai Chamber of Horrors* (South China Morning Post, 1983); Henry F Pringle, *Bridge House Survivor: Experiences of a Civilian Prisoner of War in Shanghai and Beijing 1942–1945* (Earnshaw Books, 2009); Peter Vine, 'Experiences as a War Crimes Prosecutor in Hong Kong' (1995) 35 *Journal of the Hong Kong Branch of the Royal Asiatic Society* 205, which can also be found at: Suzannah Linton and Hong Kong University Libraries, *Published Accounts* (2010) Hong Kong's War Crimes Trials Collection <http://hkwctc.lib.hku.hk/exhibits/show/hkwctc/accountsoftrials>.

255 *Kinoshita Kiichi* (BMCHK, Case No WO235/1116); *Yokohata Toshiro* (BMCHK, Case No WO235/1117).

concern for some time. In particular, the death of 43 year old William Hutton, Chief Inspector in the Shanghai police force, received attention at an early stage — Hutton's fate at the hands of the Shanghai Kempeitai was the first case which brought to light the maltreatment of British subjects in Shanghai and it was concluded that 'William Hutton was murdered: dying as a result of torture by [the] Japanese'.[256]

There seems to have been some delay caused by the involvement of the Chinese authorities: the file was originally handed over to them after initial investigations.[257] Major J F Crossley, commanding the No 9 War Crimes Investigation Team in Shanghai asserted that

> [a]s this case is of such interest and importance to all British subjects who were in SHANGHAI at the time it is felt very strongly that it should be tried before a British Court at HONG KONG this is in accordance with instructions which I have received from HQ Allied Forces South East Asia and both the Consul General in SHANGHAI and the United Kingdom representative to the United Nations War Crimes Commission Mr Lambe agree on this point. We have consulted with the Chinese authorities here but they state they have not the power to give permission for this case to be tried in HONG KONG.[258]

He sought permission to take over the case from the Chinese, citing that they had in the past consented to the transfer of accused persons to Hong Kong and allowed the Americans to hold trials in China. Nevertheless, it seems that the case was actually prosecuted because of the extraordinary efforts of Hutton's elderly father in Scotland. *The Argus*, an Australian newspaper, reported on Hutton Senior's tireless three years of work which led to the case eventually being prosecuted in Hong Kong.[259]

The first case was brought against Lieutenant General Kinoshita Kiichi, who was the General Officer commanding the Shanghai Kempeitai, responsible for the training, discipline and control of all Kempeitai and the control and supervision of all places of detention. Lieutenant General Kiichi's co-accused was Sergeant Yoshida Bunzo, who was the direct perpetrator of torture that was allegedly carried out pursuant to superior orders at Bridge House and elsewhere. The second case, the trial of Sergeant Major Yokohata Toshiro, alleged against the accused direct perpetration. All three persons accused in the two cases were formally charged with 'being concerned in' war crimes.

The trial of Lieutenant General Kinoshita Kiichi concerned the torture to death of Hutton, alleging how he lost his mind as a result of the torture and eventually died. The prosecution charged that in addition to Hutton, a Chinese male, Vong, a civilian resident of Shanghai, was also tortured to death. Other named individuals were also allegedly abused in detention. This case raised issues of causation of death, superior orders, command responsibility and the contours of 'being concerned in' war crimes. The accused, Lieutenant General

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256 List of Charges against Japanese in respect of Crimes Committed against British Subjects in Occupied China and Manchuria in File WO 32/15509, UK National Archives.

257 Communication from Major J F Crossley to the British Military Attaché, Nanking, 19 June 1945, in File WO 32/15509, UK National Archives.

258 Ibid.

259 'Old Scots Pensioner Avenged Son's Death', *The Argus* (Melbourne), 7 December 1948, 6.

Kinoshita Kiichi and Sergeant Yoshida Bunzo were convicted and sentenced to life imprisonment and 12 years imprisonment respectively.[260]

The trial of Sergeant Major Yokohata Toshiro also concerned the abuses at Bridge House, and raised interesting issues concerning the guilty plea and sentencing. Sergeant Major Yokohata Toshiro entered a guilty plea, admitting that he had engaged in various forms of torture, such as water torture and electrocution of persons in custody at Bridge House. This plea has already been examined elsewhere in this paper.

At trial, the defence did not actively 'defend' but raised the good character of the accused. He was said to be a Nichirenist, a devout Buddhist and to have been deeply ashamed of his actions. Three main arguments were raised:

1 The accused acted on the instructions of his superiors, specifically that his superior, Sergeant Major Tomura, ordered the torture in order to produce evidence of espionage in order to satisfy his own superiors, and in relation to the treatment of specific detainees such as B S Frank and H F Pringle;
2 The accused was completely repentant for what he did and readily confessed to his crimes; and
3 Punishment would have a very harsh impact on his family.[261]

The defence stressed in its submissions for mitigation that 'Japanese military training emphasises one thing above all others. That is, that when an order, legal or illegal, is given by a superior officer, the order will be implicitly obeyed'.[262] It stressed the importance of repentance and the potential for reformation and

> it is now recognized that a man's environment plays a large part in causing him to commit crime, and that the penalty for any crime committed should be considered in the light of the character of the convicted man as well as in the act perpetrated by him.[263]

The accused was convicted and sentenced to 15 years in prison.

B *The Kinkaseki Mine, December 1942 – May 1945, Formosa (Taiwan)*[264]

This case is important for being one of the earliest ever cases of civilian involvement in war crimes, raising issues of what we would today call corporate social responsibility. The nine accused were all civilian employees of the Kinkaseki Nippon Mining Company. The charge sheet accused them of:

> COMMITTING A WAR CRIME, in that they at KINKASEKI, FORMOSA, between December 1942 and May 1945, being on the staff of the KINKASEKI Nippon Mining Coy [Company], and as such being responsible for the safety and welfare of the British and American Prisoners of War employed in the mine under their supervision, were, in violation of the laws and usages of war, concerned in

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260 *Kinoshita Kiichi* (BMCHK, Case No WO235/1116).

261 Plea in Mitigation on behalf of Sergeant Major Yokohata in *Yokohata Toshiro* (BMCHK, Case No WO235/1117) transcript 2, slide 150.

262 Ibid transcript 2, slide 150.

263 Ibid.

264 *Trial of Toda Mitsugu and Eight Others* (BMCHK, Case No WO235/1028) <http://hkwctc.lib.hku.hk/exhibits/show/hkwctc/documents/item/65> ('*Toda Mitsugu*').

> the ill-treatment of the aforesaid Prisoners of War, contributing to the death of some of them and causing physical sufferings to the others.[265]

The evidence at trial revealed what we today would call forced labour in inhuman, slave-like conditions. Emaciated, weak and sick POWs from the nearby camps, already thoroughly abused, were forced to march each day up into the mountains and down into the mine to work. On their arrival at the mine, they would be put under the authority of the mining company's staff — the accused. The conditions in the mine were highly dangerous, with slippery surfaces, rockfalls, pools of sulphuric acid and collapsing structures. The POWs were given wholly inadequate physical protection and equipment, and were forced to work in extreme heat and in the dark, sometimes barefoot and unprotected. They suffered from the heat, dehydration, lack of oxygen, from falls and slips and the total lack of medical care. When they did not produce the required quota of copper, they were severely beaten by the guards. At the end of the day, they would be forced out of the mine, up into the mountains and down again to the POW camp, to face another round of cruelty and abuse under different hands.

The critical issue here was the proper allocation of responsibility for the POWs, who were formally in the hands of the enemy (Japan), but then went into the hands of the privately owned mining company when at the mine. Was it the fault of the military POW camp staff or the fault of the civilian employees of the Kinkaseki Mining Company that this situation arose? The verdict of the Court was that the General Manager and the Chief of the Mining Department were guilty as charged, the Liaison Officer was not guilty, while the six foremen working in the mine and were in charge of the operation were guilty except for the words 'contributing to the death of some of them'.[266]

There was no dispute that it was unlawful to force POWs to work in these conditions. The General Manager of the mine, Toda Mitsugu, had, in 1942, answered in the affirmative in responding to a request from the Army seeking information about needs for POW labour.[267] This was how the POWs came to be sent to the Kinkaseki mine to work. Toda argued that the original letter was really an order from the Japanese Army, tying into the theme of his defence that it was the Army that was, throughout the arrangement, responsible for the safety and wellbeing of the workers.[268] But the verdict obviously shows that the Court did not believe this.

Interestingly, members of the Japanese Army in Formosa presented evidence for the prosecution in this case, and argued that the responsibility for the conditions in the mine was not theirs but that of the civilian employees of the Kinkaseki Mining Company. Although their evidence is obviously suspect for self-interest, the verdict indicates that it was accepted as reliable by the Court. In his affidavit, Colonel Yokota Hiroshi, the liaison between the mining company and the Army, stated that the conditions in the mine were nothing to do with the

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265 Ibid slide 3.

266 *Toda Mitsugu* (BMCHK, Case No WO235/1028) transcript 285, slide 293.

267 Communiqué 3426 in *Toda Mitsugu* (BMCHK, Case No WO235/1028) exhibit W1, slide 459.

268 Testimony of Toda Mitsugu in *Toda Mitsugu* (BMCHK, Case No WO235/1028) transcript 113, slide 12; transcript 110, slide 118; transcript 140, slide 148; transcript 141, slide 149.

military.[269] Colonel Nakano, one-time Commandant of all the camps, testified that when the POWs were in the custody of the mining company employees, they were responsible for their safety and wellbeing. He also testified that the POW camp guards had no authority over the POWs when they were working in the mine.[270] Colonel Yokota, Staff Officer at the GOC Taiwan Army, testified along the same lines and said that after he visited the mine, he made no suggestions about the conditions since that was the business of the company, as laid down in regulations[271] Colonel Sazawa Hideo, another former Formosa POW camps Commandant, testified that it was the responsibility of the mining company to ensure that the POWs were not made to do dangerous work, were properly equipped for the work they had to do, were not made to do too much work that they could not do and were not ill-treated by those persons who were directly supervising the work.[272] The military witnesses referred to a set of regulations which provided that the Nippon Mining Company 'was responsible for instructing the labour of POWs, according to the orders of the Camp Commandant' during labour at the camp, while the POW camp commandant shall be held responsible for 'supervision and guard' of the POWs even during labour at the camp 'during the fore-mentioned labour hours, the NIPPON Mining Company shall be held responsible for the POW labours'.[273] The military position was that while the POWs were in the mine, the mining company was responsible for them.

The prosecution did not deny the responsibility of the military Commander of the Kinkaseki camp. 'I do not doubt that in the least', the prosecutor said in his closing address. 'Nor do I doubt in the very least that it was the Government, through the Army, [that] first thought of employing POW labour in various civilian companies'.[274] But this case was just brought against civilians, and those civilians who worked the POWs in the Kinkaseki mine in the atrocious conditions already outlined, and who 'could not disclaim all liability'.[275] Members of the Japanese army were elsewhere charged in relation to the conditions in the POW camps, including Kinkaseki camp, and other forms of unlawful forced labour where the military alone was involved.

The Court convicted these civilian accused (bar the Liaison Officer) on the basis of the prosecution's case that the POWs were formally in the hands of the Japanese Army up to the point when they got to the mine, and from then they

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269 Affidavit of Colonel Yokota Hiroshi in *Toda Mitsugu* (BMCHK, Case No WO235/1028) exhibit V(1), 2, slides 380–1.

270 Testimony of Colonel Nakano Junichi in *Toda Mitsugu* (BMCHK, Case No WO235/1028) transcript 93–4, slides 101–2.

271 Affidavit of Colonel Yokota Hiroshi in *Toda Mitsugu* (BMCHK, Case No WO235/1028) exhibit V(1), slides 380–2.

272 Testimony of Colonel Sazawa Hideo in *Toda Mitsugu* (BMCHK, Case No WO235/1028) transcript 58, slide 66.

273 *Japanese Regulations concerning the Supervision of Labour of POWs in Kinkaseki Mine* in *Toda Mitsugu* (BMCHK, Case No WO235/1028) exhibit G2, slide 431. The defence alleged that there was a new version that they said replaced these rules, but there was no evidence supporting that replacement.

274 Prosecutor's Closing Statement in *Toda Mitsugu* (BMCHK, Case No WO235/1028) unknown exhibit, 11, slide 459.

275 Ibid.

went into the hands of the employees of the privately owned mining company who were responsible for the conditions and treatment from then on.

C *The* Tone *and the* Behar[276]

The charge, against two naval officers, was that:

> On the High Seas at or about midnight of the 18th or 19th March 1944, the accused Rear Admiral SAKONJU Naomasa as Commanding Officer of the 16th Squdron [sic], South-West area Fleet, and the accused Captain MAYAZUMI HARUO, as Officer-in-command of MIJMS. 'Tone', were, in violation of the laws and usages of war, together concerned in the killing of approximately sixty-five survivors from the sinking of the British mv 'Behar', being members of the crew or passengers on the said vessel.[277]

With the war starting to turn against Japan, a conference was held on 23 February 1944 at the Japanese South-West Area Fleet Headquarters in Penang. Operation Sayo No 1 was a secret operation to disrupt Allied lines of communication and supplies in the Indian Ocean. The objective was not to attack Allied warships, but to attack and either sink or capture merchant ships.

Flowing from this decision, a small squadron of three Japanese cruisers set out under the command of Rear Admiral Sakonju, leading from the flagship, the *Aoba*. Captain Mayazumi Haruo, a committed Christian, was in command of the heavy cruiser *Tone*, which was part of the 7th Squadron, but at the time attached to the Rear Admiral's 16th Squadron for the Operation Sayo No 1. Prior to departing, Captain Mayazumi received orders (the Judge Advocate observed that it was never clear if the orders were from the Fleet or Admiral Sakonju) that where possible, Allied ships were to be captured and taken to a friendly port. Where this was not feasible (for example, if captured more than 200 miles from the Cocos Islands), the ship was to be sunk. The minimum number of prisoners was to be taken for intelligence purposes.

The Hain Steamship Company's cargo vessel *Behar* was less than a year old and on a voyage back to the UK from Newcastle in Australia via India carrying zinc and nine passengers, supported by 98 crew members (comprising 18 merchant navy officers, 61 Indian, two Chinese crew, and 17 DEMS personnel).[278] On 9 March 1944, the *Tone*, under Captain Mayazumi, encountered the *Behar* in the Indian Ocean, between Fremantle and Colombo,

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276 *Sakonju Naomasa* (BMCHK, Case No WO235/1089).

277 Charge Sheet in *Sakonju Naomasa* (BMCHK, Case No WO235/1089) slide 6.

278 National Ex-Services Association, above n 253:

> It was normal wartime practice to defensively arm merchant ships and supply them with a 'DEMS' [Defensively Equipped Merchant Ships] crew to man the guns, these men came from the Royal Navy and the Army. The Royal Artillery providing a Maritime Regiment contingent. The 'BEHAR' was well equipped, the defensive armament consisting of 4 inch and 3 inch dual purpose guns, Oerlikon guns, machine guns and rocket launcher. In addition, but unusual for a merchant ship, she was fitted with ASDIC for the detection of submarines and carried depth charges. Four Royal Navy Asdic operators were carried to operate the ASDIC set. … To avoid any diplomatic embarasment [sic] should a ship visit a neutral country, which often would be the case, the ship could not have onboard armed service personnel, so to get round this problem, the 'DEMS' personnel were signed on as 'deckhands,' and no trace of their service identities existed in the ship's articles which lists all the crew and in which capacity engaged.

West-South-West of the Cocos Islands group. Captain Mayazumi took the view that the vessel was too far out to be captured as a prize and opted to sink her. The *Tone* attacked and sank the *Behar*. Contrary to instructions, Captain Mayazumi took between 104 and 114 survivors (figures vary) on board, where they were maltreated and abused, kept in very poor conditions, but were not killed.[279] Those of interest were interrogated and tortured.

From the flagship, the Rear Admiral ordered through signals that the *Tone* was 'to dispose of all save the minimum number of prisoners according to the plan'.[280] Captain Mayazumi failed to comply with this and a further order to 'immediately dispose of the prisoners'.[281] He kept all the captives alive on the pretext that they were 'still under interrogation' until the entire squadron arrived at Batavia on 15 March 1944.[282] There was a conference on board the *Aoba*, and at trial, conflicting reports emerged about discussions concerning the survivors. Operation Sayo was cancelled, and the *Tone* left for Singapore on 18 March 1944. It was only then that most of the survivors of the *Behar* on board were killed. Captain Mayazumi Haruo argued, inter alia, that he protested to no avail against those orders from the start and until his arrival at Batavia. He had no choice but to execute the order when the *Tone* left Batavia for Singapore.

At trial, the Rear Admiral claimed that the instruction to dispose of prisoners was in accordance with Fleet orders. He did not deny making the signals to the *Tone*. However, he added that Captain Mayazumi made no 'serious effort' to see him on arrival at Batavia. He claimed that, as the risk of possible enemy retaliation had ceased (the *Behar* had sent an SOS signal before being sunk), he had ordered that the prisoners be landed. He presumed that his order was complied with. The Rear Admiral also pointed out that the actual killing occurred when the *Tone* departed for Singapore, when there was no longer a chain of command between him and Captain Mayazumi, who was solely responsible. The 72 remaining survivors of the *Behar*, mainly Indian crew, were massacred at sea on 18 March 1944.

The Rear Admiral was convicted and sentenced to death by hanging. Captain Mayazumi was convicted but only sentenced to seven years imprisonment, no doubt reflecting the mitigating nature of his conduct. This case therefore raises a most interesting perspective on superior orders and duress, and also issues of naval warfare in a process controlled by the *Army Act 1926* and its *Rules of Procedure for Trials by Court Martial* under the *Army Act 1926* (further to provisions in *ALFSEA Instruction No 1 (2nd ed)*, one of the judges was from the Royal Navy and the Rear Admiral was defended by a former judge of the Japanese Naval Military Court).[283]

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279 See, eg, Affidavit of James Goodwin in *Sakonju Naomasa* (BMCHK, Case No WO235/1089) exhibit H, slide 528; Affidavit of A B Angus Macleod in *Sakonju Naomasa* (BMCHK, Case No WO235/1089) exhibit K, slide 534; Affidavit of Captain Percy Green in *Sakonju Naomasa* (BMCHK, Case No WO235/1089) exhibit F, slide 521.

280 Judge Advocate's Report in *Sakonju Naomasa* (BMCHK, Case No WO235/1089) slide 10.

281 Ibid.

282 Ibid.

283 *ALFSEA Instructions No 1 (2nd ed)*, above n 71, [6a]: '[i]f the accused belongs to the naval or air forces of an enemy or ex-enemy Power the Convening Officer should appoint or detail, if available, at least one naval officer or one air force officer as a member of the Court as the case may be'.

D *The Sinking of the* Lisbon Maru[284]

This was one of the more notorious incidents of the Second World War in Asia. On 1 October 1942, the *Lisbon Maru* was on the high seas en route from Hong Kong to Japan, carrying 1816 British POWs, 778 Japanese troops and other passengers and 1676 tons of freight.[285] That morning, it was struck by torpedoes fired by an Allied destroyer, which tore a hole in its stern.

The prosecution argued that Lieutenant Wada, the officer in charge of the POW draft, ordered the POWs to remain in their holds, and sick POWs, who had been on deck, were taken in the No 1 and No 2 holds. Later, after the water started to enter the ship, the Japanese on board were evacuated. Apart from the ship's officers and crew, Lieutenant Sugiyama, Lieutenant Wada, 26 guards for the POWs and the POWs themselves were left on board. The *Lisbon Maru* was towed onto a sandbank with the object of beaching her. The hatches in the holds where the POWs were held were then closed at 2100 hours resulting in ventilation that was clearly inadequate for the number of men there. During the night, conditions deteriorated. A few men fainted due to lack of fresh air, stench and heat. No food or water was provided to them (their last meal was on the evening of 30 September 1942).

The next morning, sometime after 0800 hours, a few POWs succeeded in breaking out from No 2 hold, and opened a steel bulkhead door leading to the No 4 hold. They were fired at by the Japanese guards and the POWs retreated into the holds. At 0855, Lieutenant Sugiyama, Lieutenant Wada, the 26 POW guards and the ship's officers abandoned ship. At about this time, the POWs came out of the holds. Some POWs jumped into the water and some remained on board until the ship sank. Some allegedly drowned in the sea. The ship had set sail without adequate life-vests, although the prosecution acknowledged that the accused had protested to the Embarkation Office at Hong Kong that the boats and rafts provided inadequate accommodation. Despite that, the ship was passed by the Inspector of Shipping and the Captain received his orders to sail.

There were two cases concerning the *Lisbon Maru*: that of the civilian Master of the troop carrier (Kyoda Shigeru),[286] and that of the interpreter (Niimori Genichiro).[287] Lieutenant Wada was never tried as he was apparently killed during the war. Kyoda Shigeru's role raised interesting legal issues. Although a civilian, he was in the service of the Imperial Japanese Army. He was not the one who ordered the battening down of the hatches or abuse of POWs. As the Judge Advocate described the situation, Lieutenant Sugiyama was the senior Army officer on board and accordingly was the officer commanding troops in transit.[288] The officer in charge of the POW draft was Lieutenant Wada. The vessel was under requisition by the Army. The status of the accused was that of a civilian attached to the Army. Kyoda Shigeru's defence was that a civilian

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284 *Kyoda Shigeru* (BMCHK, Case No WO235/1114); *Niimori Genichiro* (BMCHK, Case No WO235/892). See also Banham, *The Sinking of the* Lisbon Maru, above n 253.

285 Judge Advocate's Report in *Kyoda Shigeru* (BMCHK, Case No WO235/1114) transcript 1, slide 7.

286 *Kyoda Shigeru* (BMCHK, Case No WO235/1114).

287 *Niimori Genichiro* (BMCHK, Case No WO235/892).

288 Judge Advocate's Report in *Kyoda Shigeru* (BMCHK, Case No WO235/1114) transcript 2, slide 8.

Master of a Japanese troopship under Army requisition had no authority to issue any orders to Japanese Army personnel on board his ship, though he could tender advice. He was bound to obey orders issued to him by Army officers acting in the course of their duty and concerning matters within the scope of his own duties. The Army officer commanding troops in transit had considerable authority and responsibility on board a troopship, having exclusive jurisdiction in the following matters, inter alia, so far as his troops were concerned: (a) issue of rations; (b) sanitation; (c) safety precautions while in transit; (d) distribution and use of life-jackets, life-boats and other life saving gear; and (e) abandoning ship in case of necessity.

Kyoda Shigeru was convicted, with special findings by the Court that 'two' and not 'many' POWs died in the hold due to their weakened conditions and not from suffocation, and 'others' and not 'many others' were trapped and drowned when the ship sank.[289] It also did not accept the allegation that he failed to 'provide for the use of the POW available lifeboats and life jackets, as a result many of them were drowned when the ship sank and many more underwent mental and physical sufferings'.[290] Clearly, his circumstances as alleged by the defence were taken into account in mitigation. The Judge Advocate observed that the defence of the accused to the charge of battening down the hatches 'was in effect that of obedience to Superior Orders'.[291] He noted that 'such obedience is not a valid defence where the order is obviously unlawful. In this case the accused knew what consequence would result from closing the hatches and those consequences constituted a violation of laws and usages of war'.[292]

Charged in a separate proceeding was a different kind of accused, the interpreter, Niimori Genichiro. He was the Chief Interpreter to the POW camp staff in Hong Kong, and was the personal interpreter to Colonel Tokunaga, the officer in charge of the POW camps. Genichiro was in demand because of his good command of English (he had apparently spent several years in the US) and his formal duties consisted of translating orders from the officer in charge of the POWs, and he travelled on transport ships (specifically the *Lisbon Maru* and *Toyama Maru*). The charges and findings against him (there were seven separate war crimes charges, spanning several jurisdictions) indicate that he did much more than translate and interpret.

In relation to the *Lisbon Maru*, the charge sheet alleged that he 'took part or had a part' in the ill-treatment on the *Lisbon Maru* which included battening down of the hatches, issuing orders to the POWs in the holds below and threatening them with shootings.[293] The prosecution alleged that even if the accused was not formally responsible for the wellbeing of the POWs, he was still 'concerned' in the said ill-treatment.[294] In any case, the prosecution argued that the accused had 'minor responsibility' over the POWs once he was on board the

289 *Kyoda Shigeru* (BMCHK, Case No WO235/1114) transcript 395, slide 427.
290 Ibid.
291 Judge Advocate's Report in *Kyoda Shigeru* (BMCHK, Case No WO235/1114) transcript 4, slide 10.
292 Ibid.
293 Charge Sheet in *Niimori Genichiro* (BMCHK, Case No WO235/892) slide 4.
294 Prosecution Closing Address in *Niimori Genichiro* (BMCHK, Case No WO235/892) transcript 289–301, slides 298–310.

Lisbon Maru.[295] He made certain statements purporting to have authority, or indicating that he had authority, over the POWs outside his ordinary interpreting tasks. On one occasion, he also asked non-commissioned officer Fujima for extra food for the POWs. On the question of his actual involvement, the prosecution argued that on top of the identification evidence against the accused, there was evidence that the accused took part in the whole scheme of battening of the holds, chasing the POWs down, threatening them, actually shooting them and covering the hatches to the holds.[296] He was alleged to have actually committed these acts.

Furthermore, the prosecution sought to establish, through witnesses, that the accused actually ordered the sentries to fire on the POWs.[297] Certain guards of the POWs had allegedly told one witness, out of court, that the accused ordered them to shoot at the defenceless POWs. The prosecution sought also to hold the accused liable for a variety of other cruel acts, including pouring buckets of urine into the hold where the POWs were held.

Niimori was found guilty as charged, but not for being 'responsible for the well-being of the said Prisoners of War' on the *Lisbon Maru*.[298] He was sentenced to 15 years' imprisonment, but it is not clear how much of that was attributable to the *Lisbon Maru*, since he was convicted of other charges included in the indictment.

VI OTHER CONNECTED PROCEEDINGS

A *Traitors, Quislings and Renegades*

British policy in relation to British subjects who 'have assisted the enemy' was described in a report which came out of a conference at the Home Office on 18 May 1944 on the problems arising in connection with the surrender of British renegades under the draft German armistice.[299] British subjects, such as the broadcaster William Joyce, were tried in the UK.[300] In Hong Kong, the British did hold trials of unknown numbers of local Hong Kong Chinese, Indians and

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295 Ibid.

296 Ibid.

297 Ibid.

298 *Niimori Genichiro* (BMCHK, Case No WO235/892).

299 Secret Correspondence containing annex I ('*Minutes of Conference on 18 May 1944*') annex II ('*Report on Surrender of British Subjects in Enemy Territory Who Have Assisted the Enemy*'), annex III, annex IV ('*Draft Directive concerning United Nations' Renegades and Quislings*') (HKRS 211-2-41, Hong Kong Public Records Office) [Questions as to the Treatment of [Illegible] in the Far East].

300 William Joyce, also known as 'Lord Haw-Haw', was an American citizen in possession of a valid British passport who broadcast English language radio programmes which were hostile to Britain. He was convicted of high treason in Britain in 1945 and executed on 3 January 1946: See *Joyce v DPP* [1946] AC 347; Susan Gardiner, 'Trial of William Joyce' (1995) 145 *New Law Journal* 1386; James Comyn, 'William Joyce 1945–1946' (1989) 153(48) *Justice of the Peace and Local Government Law* 774.

Commonwealth nationals for collaboration with the enemy as treason.[301] There was a *Defence Regulation 27*, also called the 'Quisling Directive', on which prosecutions were based in addition to trials under the *Treason Act 1351* (UK).[302]

The files show possible treason action against five released POWs who appear to have been repatriated to stand trial in the UK.[303] One such trial was of Major Cecil Booth, before a court martial in Mayfair, London, which opened on 27 August 1946 and saw his acquittal on all charges on 12 September 1946.[304]

The Hong Kong Public Records Office contains details of several treason trials. These cases were heard in the regular civilian courts. In Hong Kong, there was apparently sensitivity about the fact that only Chinese and Indians were being prosecuted for treason, and no 'non-Asiatic British subjects'.[305] Yet, it appears that the first case for treason was of one Charles Alfred Gehring, a Red Cross employee, who was tried along with five other local residents, for allegedly 'directing Japanese artillery fire across Hong Kong Bay in the first week of the war, and with having denounced nationals to the Japanese in 1942'.[306] One particular notorious person was George Wong, a local detective who worked with the Kempeitai in Kowloon and was sentenced to death.[307] Other examples were Lau Kwing Wan who worked with Kempeitai,[308] and So Leung who was a special detective working for the Kempeitai.[309] Tsui Kwok Ching was not actually a British national, but the Court held that his 'long residence in Hong Kong entitles us to expect from him a higher degree of allegiance than we might expect from one who had been here only a short

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301 Among the files of interest in the Hong Kong Public Records Office in this area are 'Arrest of Civilians Alleged by Service Departments to have been Guilty of Subversive Activities Collaboration with the Japanese Etc' (HKRS 169-2-267, Hong Kong Public Records Office); 'Questions as to the Treatment of Collaborators in the Far East' (HKRS 211-2-41, Hong Kong Public Records Office); 'Collaboration with Enemy' (HKRS No 169-2-266, Hong Public Records Office).

302 Communication from Commander-in-Chief, Hong Kong, to the Colonial Office, 2 April 1946 in 'Arrest of Citizens Alleged by Service Departments to have been Guilty of Subversive Activities, Collaboration with the Japanese Etc' (HKRS 169-2-267, Hong Kong Public Records Office) [Indian Collaborators to the Colonial Office]. See also Directive concerning Renegades and Quislings in 'Civilian Labour Dispute — Tsun Wan' (HKRS 169-2-68, Hong Kong Public Records Office).

303 'Collaboration with Enemy' (HKRS No 169-2-266, Hong Public Records Office). See also Signal Form from Commander-in-Chief Hong Kong to War Office in File WO 203/5296B, UK National Archives.

304 Tony Banham, *We Shall Suffer There: Hong Kong's Defenders Imprisoned 1942–1945* (Hong Kong University Press, 2009) 272–5.

305 Communication from Commander-in-Chief, Hong Kong, to the Colonial Office, 2 April 1946 in 'Arrest of Citizens Alleged by Service Departments to have been Guilty of Subversive Activities, Collaboration with the Japanese Etc' (HKRS 169-2-267, Hong Kong Public Records Office) [Indian Collaborators to the Colonial Office]. This communication, marked 'Secret', details two such individuals: the first for trading with the enemy and the second for treasonable statements in toasting the Japanese Emperor and in anticipation of a successful invasion of Australia and for compelling the French Consul to apologise to a Japanese officer.

306 'Treason Charge in Hong Kong', *The Courier-Mail* (Brisbane), 21 February 1946, 2.

307 'George Wong' (HKRS No 41-1-1338, Hong Kong Public Records Office). He was tried in June 1946, claimed to have been acting under duress, to have actually been an undercover agent for the Red Army and eventually convicted and sentenced to death.

308 Ibid.

309 'So Leung' (HKRS 41-1-1376, Hong Kong Public Records Office).

while'.[310] The files show that a number of Indians — such as those who worked with the Taikoo Sugar Company as guards, with the Kempeitai and in the prisons — were tried in Hong Kong. Others were brought back from India to testify as witnesses in such trials.[311] In April 1946, archival materials show that six Indians were being detained in Hong Kong.[312] A final example is of Inouye Kanao, who was born in Canada and joined the Japanese military as an interpreter and was convicted first of war crimes.[313] That conviction was later overturned when his nationality was confirmed, and he was then retried at the Supreme Court in Hong Kong for treason.[314]

On 17 May 1946, the *Chinese Collaborators (Surrender) Ordinance 1946* (Hong Kong) was enacted in Hong Kong to provide, with proper safeguards, an expeditious procedure for surrendering to the Chinese authorities persons sheltering in Hong Kong who, during the war period, had collaborated with the Japanese in China.[315] It is not known if this was ever used. There seems to have also been a practice of deporting 'undesirables'; for example, those from Malaya were sent back.[316]

B *Australian Trials in Hong Kong*[317]

The process under the Australian *War Crimes Act 1945* (Cth) was very similar to the *Royal Warrant* procedure, although instructions were issued by Military Headquarters dividing accused persons into Categories A, B and C and trials took place before differently composed courts.[318]

The Australian War Crimes Section was established in Singapore in December 1945 to oversee investigations into war crimes against Australians in Malaya, on the Burma–Siam Railway and in the Dutch East Indies.[319] It worked particularly closely with the ALFSEA investigative authorities in Singapore; Australian courts were set up in Singapore, and Australian personnel participated

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310 'Tsui Kwok Ching' (HKRS 41-1-1349, Hong Kong Public Records Office).

311 'Collaboration with Enemy' (HKRS No 169-2-266, Hong Public Records Office).

312 'Renegades and Quislings: Papers Re Indians Whose Presence in Hong Kong is Required for … Trials' (HKRS 163-1-235, Hong Kong Public Records Office); Communication from Commander-in-Chief, Hong Kong, to the Colonial Office, 2 April 1946 in 'Arrest of Citizens Alleged by Service Departments to have been Guilty of Subversive Activities, Collaboration with the Japanese Etc' (HKRS 169-2-267, Hong Kong Public Records Office) [Policy regarding Indian Civilian Collaborators outside India, to [illegible], New Delhi]. The named individuals, as described, included ex-constables, watchmen, merchants, special political detectives and informers.

313 *Inouye Kanao* (BMCHK, Case No WO235/927).

314 'War Criminals — Inouye Kanao' (HKRS 163-1-216, Hong Kong Public Records Office).

315 *Hong Kong Annual Report*, above n 124, 67.

316 'Collaboration with Enemy'(HKRS No 169-2-266, Hong Public Records Office).

317 A detailed study of the Australian trials in Hong Kong is forthcoming: see Georgina Fitzpatrick, 'Australian Courts at Hong Kong', to be published as one of eight historical essays accompanying a complete set of 300 Law Reports in *Australia's Post World War II War Crimes Trials: A Systematic and Comprehensive Law Reports Series* (Martinus Nijhoff, forthcoming).

318 *War Crimes Act 1945* (Cth). See generally David Sissons, 'Sources on Australian Investigations into Japanese War Crimes in the Pacific' (1997) 30 *Journal of the Australian War Memorial* <http://www.awm.gov.au/journal/j30/sissons.asp>.

319 United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, above n 23, 388.

in trials by the British that included crimes against Australian POWs.[320] Cases from Japan with an Australian flavour were belatedly transferred to Hong Kong. A media report quoted an Australian official as saying that:

> American civilian defence counsel were trying to hold on to 'cushy jobs' as long as possible, thereby delaying cases. The officials said also that the American and British judicial systems were different, and American defence attorneys only confused British courts. Over 40 Australian cases involving 60 Japanese, will be transferred to Hong Kong.[321]

We do know from the UNWCC that from Singapore, the Australian War Crimes Section moved following the end of the trials in Rabaul and the closing of 8th Military District headquarters, and pursuant to an agreement reached for the establishment of Australian courts in Hong Kong.[322]

The first Australian trial in Hong Kong began on 24 November 1947.[323] Among the Australian trials were those of Admiral Tahara Suzumi ('Puss in Boots') and 15 associates including Matsukawa Chuzo ('Heavy Harry'), Tajuma Tanaki ('Friendly Fred' and later 'Hateful Harry') and Shigetada Otsuki ('Gordon Coventry'), for war crimes at a POW camp on Hainan Island.[324] At this camp, 81 Australians out of a total of 126 died and 70 Dutch died.[325] All the accused were convicted of inhumane treatment of the 500 Allied POWs on Hainan Island.[326] Another case, that opened on 21 May 1948 at Kowloon, concerned three Japanese accused (two members of the Imperial Japanese Navy and one civilian) charged with the murder of an Australian Methodist missionary, the Reverend Leonard Neil Kentish, on 5 February 1943 at Dobo in the Aru Islands.[327] One case concerned the Burma–Siam 'death' railway.[328] Another case involved the killing by Lieutenant Colonel Kondo Hideo and Iwasaki Yoshito 'by a gas bomb of Flt-Lieutenant, AD Nelson, RAAF and Sergeant F Engelsman, NEI Air Force, at Toeal, Kai Island, South New Guinea, in October or November 1944'.[329] Both men were convicted and hanged at Stanley Prison.[330] The cases were covered closely by the Australian media.

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320 Ibid.

321 'Lengthy War Trials: Transfer of Australian Cases to Hong Kong', *The West Australian* (Perth), 11 September 1947, 9.

322 United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, above n 23, 389.

323 Ibid.

324 'Jap War Criminals Face Charges of Torturing POW', *The Canberra Times* (Canberra), 7 January 1948, 1. The case is briefly discussed in D C S Sissons, 'The Australian War Crimes Trials and Investigations (1942–51)' (Report, War Crimes Studies Center, University of California, Berkeley, 2006) <http://socrates.berkeley.edu/~warcrime/PT.htm>.

325 'Jap War Criminals Face Charges of Torturing POW', above n 324, 1.

326 'Japanese General Convicted', *The Canberra Times* (Canberra), 23 June 1948, 2.

327 The capture, maltreatment and death of Reverend Kentish is recounted at Department of Veteran's Affairs, *War Crimes* (2000) Australia's War 1939–1945 <http://www.ww2 australia.gov.au/vevp/warcrimes.html>.

328 See James McClelland, *Proceedings of an Australian Military Court: War Crime Trial of Kuroda Elichi, Sergeant Major, Imperial Japanese Army, for Ill Treatment of Australian POWs on the Burma Death Railway, Held at Hong Kong 16th Day of July, 1948* (Silverdale, 1994).

329 'Jap Hanged for Murder', *The Canberra Times* (Canberra), 2 October 1948, 1.

330 Ibid.

In total, 13 Australian war crimes trials were held in Hong Kong.[331] The Court sat at Ma Tau Chung camp.[332] It closed down on 15 August 1948, with the Australian War Crimes Section leaving Hong Kong despite there being outstanding cases; this was apparently because of 'accommodation problems' (the British administration in Hong Kong wanted the property back).[333]

C *Tokyo Tribunal*

The indictment against the Japanese leadership included charges relating to Hong Kong. The IMT at Tokyo took evidence about atrocities in Hong Kong.[334] The judgment referred to atrocities tried in Hong Kong: the events surrounding the armed attack that commenced on 8 December 1941;[335] the St Stephen's College massacre of sick and wounded as well as the rape and murder of nurses;[336] the *Lisbon Maru* atrocity;[337] and to the killing of the captured seamen from the sunken British vessel *Behar* on board the Japanese cruiser *Tone*.[338]

D *Other Trials of Japanese Connected with Hong Kong*

1 *Lieutenant General Takashi Sakai*

The trial of Takashi Sakai before the Chinese War Crimes Military Tribunal of the Ministry of National Defence in Nanking in August 1946, raised issues of Japanese conduct in Hong Kong.[339] Sakai had, at the time of the invasion of Hong Kong, been Regimental Commander of the 29th Infantry Brigade; he was the 'Conqueror of Hong Kong'. At his trial, the invasion of Hong Kong seems only to have been considered from the war crimes perspective, rather than the crime against peace.[340] The judgment, in original language in the Taiwanese National Archive, contains an annex with details of 22 atrocities in Hong Kong

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331 See National Archives of Australia, *World War II War Crimes — Fact Sheet 61* (2012) <http://www.naa.gov.au/about-us/publications/fact-sheets/fs61.aspx>; Australian War Memorial, *Table B: Australian War Crimes Trials (Classified by Victim)* <http://www.awm.gov.au/journal/j30/trials.asp>, cited in Sissons; 'Sources on Australian Investigations into Japanese War Crimes in the Pacific', above n 318; Australian War Memorial, *Table A: Statistics — Australian War Crimes Trials* <http://www.awm.gov.au/journal/j30/wcrimes.asp>, cited in Sissons, 'Sources on Australian Investigations into Japanese War Crimes in the Pacific', above n 318.

332 'Australian War Crimes Court at Ma Tau Chung Camp No 2' (HKRS 156-1-1226, Hong Kong Public Records Office).

333 Hand written note, 10 November 1949 in 'Japanese War Criminals — 1. Question of Legal Position Re Hanging and Detention of … 2. Legislation to Provide for Detention of … after Conclusion of Peace Treaty' (HKRS 163-1-210, Hong Kong Public Records Office).

334 *The Tokyo Judgment*, above n 99, 378.

335 Ibid.

336 Ibid 399.

337 Ibid 410.

338 Ibid 413.

339 Summary of the 'Judgment of the Military Tribunal, Nanking, regarding Takashi Sakai, 27 August 1946' [trans] in File WO 311/563, UK National Archives. The case is further summarised in United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (His Majesty's Stationery Office, 1949) vol 14, 1–7.

340 'From the wording used in the Judgment, it would appear that the accused was found guilty of crimes against peace for the reason that he had taken part in the war of aggression against China' rather than for the invasion of Hong Kong: ibid 4.

and Kowloon that the Court found Takashi Sakai permitted his subordinates to carry out.[341] These included some which were indeed tried in Hong Kong, such as the St Stephen's Hospital massacre, and incidents of sexual violence (rape) and murder of civilians at No 2 Blue Pool Road, Hong Kong, on 22 December 1941.[342] This annex to the judgment was compiled on the basis of, in many instances, just a single witness who provided evidence to British investigators by way of affidavit, and this was sufficient to convict.[343]

Sakai pleaded not guilty. He claimed that he had acted upon the orders of his government, and was just a soldier conducting military operations. In relation to the charges concerning atrocities, he claimed that he was not responsible for the acts of his subordinates as he had no knowledge of these acts. He was convicted of participating in the war of aggression (crime against peace)[344] and of 'inciting or permitting his subordinates to murder prisoners of war, wounded soldiers and non-combatants; to rape, plunder and deport civilians; to indulge in cruel punishment and torture; and to cause destruction of property' (war crimes and crimes against humanity).[345] The judgment convicted him, in relation to Hong Kong, of the following:

> Between December 17th–December 19th 1941, in Hong Kong: Massacre of about 30 prisoners of war at Lyumen [sic] and massacre of about 24 prisoners of war at West Point Fortress, among whom, the names which can be identified were: Gunner McDonald and Volunteer Kwok. December 19th: Massacre of personnel of British medical unit — 20 persons in all. December 24th–26th: rape of seven nurses and mutilation of three nurses. Massacre of 60–70 wounder [sic] prisoners of war. December 18th–28th: plunder of valuable collection of books from libraries.[346]

The Court held that:

> In inciting or permitting his subordinates to murder prisoners of war, wounded soldiers, nurses and doctors of the Red Cross and other non-combatants, and to commit acts of rape, plunder, deportation, torture and destruction of property, he had violated the *Hague Convention concerning the Laws and Customs of War on*

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341 The author is here relying on an informal translation of the original judgment that is held by the National Archives Administration in Taiwan: *Judgment of War Criminal Takashi Sakai* [Michael Liu trans] (on file with author). This judgment is more comprehensive than the report of the case which appears in the report of the United Nations War Crimes Commission, with an annex of incidents that did not appear there. The author thanks Professor Roger Clark, Professor Jingsi Wang and Judge Muchin Shih for their assistance in making this document available, and Michael Liu for his translation.

342 Among those who provided affidavits were R M Lavalle, the representative of the Argentinean consulate in Hong Kong, and several local Chinese witnesses, some of whom appear to have actually appeared as witnesses before the tribunal in Nanjing.

343 Sakai's career in China spanned from Northern China to Canton to Hong Kong. The largest number of crimes were committed in the province of Canton.

344 The court, inter alia, noted that during his military campaign, Sakai 'incit[ed] and permit[ed] his subordinates to [commit atrocities]': 'Summary Translation of Sakai Trial', quoted in United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, above n 339, 2. 'Granted that the defendant participated in the war on the orders of his Government, superior order [sic] cannot be held to absolve the defendant from liability for the crime': at 5.

345 Ibid 2.

346 Ibid 1–2.

> *Land* and the *Geneva Convention of 1929*. These offences are [war crimes] and crimes against humanity.[347]

On the issue of command responsibility, the judgment noted that it was an accepted principle that 'a field Commander must hold himself responsible for the discipline of subordinates', and 'it is inconceivable that he should not have been aware of the acts of atrocity committed by his subordinates during the two years when he directed military operations in Kwantung and Hong Kong'.[348] Sakai admitted 'a knowledge of murder of prisoners of war in the Stevensons [sic] Hospital, Hong Kong'.[349] The tribunal observed that '[a]ll the evidence goes to show that the defendant knew of the atrocities committed by his subordinates and deliberately let loose savagery upon civilians and prisoners of war'.[350] The UNWCC report noted that the principle that a commander is responsible for the discipline of his subordinates, and that consequently he may be held responsible for their criminal acts if he neglects to undertake appropriate measures or knowingly tolerates the perpetration of offences on their part, is a rule generally accepted by nations and their courts of law in the sphere of the laws and customs of war.[351] It observed that this was in line with the jurisprudence created with regard to this rule, in particular on the occasion of war crimes trials held after the Second World War.[352]

He was sentenced to death.[353]

2 *Lieutenant General Isogai Rensuke*

Former Hong Kong Governor Lieutenant General Isogai Rensuke was tried before a Chinese military court at Nanking for atrocities committed in China and Hong Kong. The case was based in part on evidence prepared by a Hong Kong war crimes investigation team and he was charged with 'causing the wholesale arrest and deportation of Chinese civilians from Hong Kong'.[354]

An unreported translation of the judgment and a report by the official British observer, found in the UK National Archives, shows that the Hong Kong charges comprised the bulk of the charges against Isogai.[355] He was acquitted of the charge alleging that he pursued a policy of public sale of opium in Hong Kong,

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347 Summary of the 'Judgment of the Military Tribunal, Nanking, regarding Takashi Sakai, 27 August 1946' [trans] in File WO 311/563, UK National Archives. Note that Japan was not a party to the *1929 POW Convention*.

348 Ibid 7.

349 Ibid.

350 Ibid.

351 Ibid.

352 Ibid.

353 United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, above n 339, 2: 'For [Sakai's] participation in a war of aggression the accused was found guilty of a crime against peace. In regard to the atrocities he was found guilty of war crimes and crimes against humanity'.

354 *Annual Report on Hong Kong for the Year 1947* (His Majesty's Stationery Office, 1948) 95.

355 File WO 325/135, UK National Archives. The file contains, inter alia, a report by Captain F V Collison of No 14 War Crimes Investigation Team, Hong Kong, to his Officer in Charge concerning the trial, which he attended as the official British observer. It also contains a 'rough translation' of the judgement of the Chinese Military Tribunal at Nanking, dated 22 July in the 36th year of the Chinese Republic (1947): *Isogai Rensuke Trial Judgment*, in File WO 325/135, UK National Archives. *ALFSEA Instructions No 1 (2nd ed)*, above n 71, [44] regulated the presence of Allied observers in British courts in ALFSEA.

and cleared of responsibility for the torture by the Kempeitai in Hong Kong during his governorship. He was convicted of the charge that 'he allowed his subordinates to arrest and deport non-army personnel' to Bias Bay continuously, and without taking care about the safety of those being 'banished', 'causing the old, weak, females and children to be homeless, resulting in deaths from starvation and exposure'.[356] The Court noted that the accused had changed his explanation on the 'banishments'; during the trial he 'suddenly denied his former evidence and said that such 'banishments' were to get rid of thieves and robbers and to transport the Hong Kong residents back to their native villages. Such concealment cannot be believed'.[357] The 'banishment', with no attention to the safety of those being relocated, was described as being a war crime in violation of art 46 of the *Hague Convention IV and Its Annexed Regulations* and Chinese laws. The Court accepted that his motive for these activities was due to the shortage of food in Hong Kong.[358]

He was convicted and sentenced to life imprisonment.

3 *Lieutenant General Kuichi Tanaka*

Another former Hong Kong Governor, Lieutenant General Kuichi Tanaka was tried in Canton. He was found guilty and executed.[359] The case has not been reported and no other accounts have been located.

4 *General Tanaka Hisakasu and Five Others*

The trial of General Tanaka Hisakasu, Governor-General of Hong Kong and Commanding General of the Japanese 23rd Imperial Expeditionary Army in China, and five others (Major General Fukuchi Haruo, Chief of Staff of the Governor-General of Hong Kong, Lieutenant Colonel Kubo Nishigai, Major Watanabe Masamori and Captain Yamaguchi Koichi and Captain Asakawa Hiroshi) before a US Military Commission in Shanghai in September 1946, also concerned Hong Kong.[360]

This case concerned their participation in an unlawful trial of an American POW (Major Houck) in April 1945. He had been shot down while conducting an air raid on Hong Kong Harbour, during which eight Chinese civilians were killed. He was arrested and tried by a military court for 'violating the *Japanese Airmen Act*, which condemned bombing, strafing or attacking the private property of a non-military nature with the intent of destroying, damaging or burning'.[361]

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356 *Isogai Rensuke Trial Judgment*, in File WO 325/135, UK National Archives, 2.

357 Ibid 3.

358 Ibid 4.

359 'Tanaka Executed', *The Canberra Times* (Canberra), 31 March 1947, 1. See also Snow, above n 89, 305.

360 *Trial of General Tanaka Hisakasu and Five Others* (United States Military Commission, Shanghai, Case No 33, 3 September 1946) in United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (*His Majesty's* Stationery Office, 1947) vol 5, 66.

361 Matthew Lippman, 'Aerial Attacks on Civilians and the Humanitarian Law of War: Technology and Terror from World War I to Afghanistan' (2002) 33 *California Western International Law Journal* 1, 26.

The Court unanimously convicted the pilot and sentenced him to death. Lippman assesses that in reaching this decision, the Court:

> appeared to rely on the failure to provide the accused a lawyer or an opportunity to prepare his defense or to secure evidence, the absence of witnesses to corroborate the documentary record, the defendants' disregard of the accused's claim of innocence and the summary nature of the proceedings.[362]

The accused pleaded not guilty. All apart from Asakawa were convicted.

VII CONCLUDING OBSERVATIONS

The Hong Kong war crimes trials project provides an exciting and rich window into the roots of modern international criminal justice. The cases are a source for much multidisciplinary research in the future, including continuing archival research at the UK National Archives where there are many undiscovered, connected files that can cast light on policy decisions and administrative issues concerning these trials, the process leading up to them and the ramifications. For lawyers, there are of course undeniable challenges that arise from the absence of reasoned judgments, but these are not insurmountable.

The cases in the HKWCT Collection are also valuable for those seeking to understand the reasons for Japanese brutality during the war. As already noted, studies in Japan and elsewhere have persistently raised the issue of the distinctive Japanese attitudes as being major contributing factors towards the extreme treatment that POWs endured in Japanese custody.[363] The judges of the IMT at Tokyo opined that the extensive and grave POW abuse was attributable to the basic training of the Japanese military that created the prevailing negativity about POWs, the notion that 'surrender to the enemy is shameful' and instilled in soldiers a contemptuous attitude for all who surrendered.[364] In the cases involving POWs from camps in Hong Kong and Formosa, Japanese accused attempted to explain the complicated cultural context. For example, Colonel Tokunaga gave a lengthy statement in court about how the prevailing attitude towards POWs affected their treatment by the Japanese.[365] He was keen to emphasise that 'the general line of thought of a Japanese concerning POWs is quite different from the line of thought of an American and a European'.[366] He gave several pertinent examples of how this attitude expressed itself in reality. Stressing that this differing attitude was not reserved for those in military service, but held widely in society, he mentioned that women and children were also of the belief that it was 'better to die than to become a POW'.[367] Indeed

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362 Ibid 26–7.

363 Kyoichi Tachikawa, 'The Treatment of Prisoners of War by the Imperial Japanese Army and Navy Focusing on the Pacific War' (2008) 9 *NIDS Security Reports* 45 provides a helpful overview of the various attempts within different disciplines to understand or explain the Japanese abuse of POWs. In addition to the psychological/cultural reasons, other relevant factors cited by the Japanese experts include lack of education and training, the extreme circumstances of the war, poor leadership, unclear instructions, brutality of training, revenge, communication problems and personal frustrations.

364 *The Tokyo Judgment*, above n 99, 425.

365 Testimony of Accused Colonel Tokunaga Isao in *Tokunaga Isao* (BMCHK, Case No WO235/1012) pt 1, transcript 459, slide 500.

366 Ibid.

367 Ibid.

many did just that during the war. Colonel Tokunaga also recalled the reaction of a member of the Japanese Diet upon seeing meat being transported to a POW camp. This senior official did not agree with the delivery of provisions 'saying that the Japanese people are suffering greatly from a shortage of food, why should such a large amount of meat be given to the POWs'.[368] Similarly, Colonel Tokunaga explained how fruits bought from Formosa for distribution in the Hong Kong POW camps were considered to be too extravagant for the POWs. The officer who made the purchase was reprimanded for this action. Even more extreme was the example of the closure of St Theresa's Hospital in Hong Kong, where sick and wounded POWs were being treated. The Chief of the Medical Department of the War Ministry inspected the facility, concluded it was excellent and therefore determined that it was 'necessary to have St. Theresa's Hospital closed'.[369] This was because such treatment was too good for the POWs; he justified the closure by asking '[w]here in the Japanese army could such ideal treatment be found?'[370] This sort of mentality could have trickled down and led to the kinds of abuse that were the subject of the trials in Hong Kong and elsewhere in Asia.

The legal framework provided for a summary adversarial proceeding, but with numerous safeguards, such as the provision of notice of grounds of arrest and the evidence against an accused and arraignment before the Court.[371] Examination of the cases indicates that this was a robust and rigorous legal proceeding, offering a broadly fair trial in difficult circumstances. These were not 'kangaroo courts', especially when one considers that this took place immediately after a devastating war that had ravaged Asia, in a time where there were no computers, no satellite communications, no internet facilities or libraries for research, no specialised international criminal lawyers, etc. The summary nature of the proceedings emphasised expeditious trials, and *ALFSEA Instruction No 1 (2nd ed)* obliged with provisions such as one stating that trial would not be delayed for the attendance of unimportant witnesses.[372] The transcripts show the judges being rigorous in ensuring the accused were treated fairly and often making special efforts with Japanese counsel. For example, defence counsel in the trial of Warrant Officer Omura Kiyoshi and four others was given two additional days to prepare his case. The Presiding Officer assured him that 'the Court does not wish you to feel that you have been hampered in any way by lack of time or facilities bearing on your defence, and it also appreciates the fact that you only have one interpreter who is working all day in Court'.[373] The file for the trial of Major General Tanaka shows the Court also being supportive of the defence's efforts in Japan to locate an elusive English-speaking Japanese officer whom an important prosecution witness said he encountered, and Nakamura Tokuo who interpreted for the accused when he spoke to the persons gathered at the Repulse

368 Ibid.

369 Ibid transcript 459–60, slides 500–1.

370 Ibid.

371 *Rules of Procedure 1926* rr 14, 15(A), 87(B).

372 *ALFSEA Instructions No 1 (2nd ed)*, above n 71, [52].

373 *Trial of Warrant Officer Omura Kiyoshi and Four Others* (BMCHK, Case No WO235/1112) transcript 227, slide 270 <http://hkwctc.lib.hku.hk/exhibits/show/hkwctc/documents/item/83> ('*Omura Kiyoshi*').

Bay Hotel at the time of the takeover of Repulse Bay.[374] The records show that time — and assistance — was given to the defence to find witnesses, and have documents translated.[375] The trial of Major General Tanaka showed that his Japanese counsel was struggling with the adversarial British system, and reveals numerous instances of patience on the part of the Court.[376]

The records do not show abuse of the accused or counsel in court, although in the very first case, the Silver Mine Bay trial, there was a clear indication of racial prejudice. Here, the Presiding Judge told the two members of the accused who were sentenced to death that they were members of a black and evil race, but even that did not excuse the heinousness of their crimes.[377] Even so, that was the very first trial after the war ended, and it does not appear to have been repeated in other cases. There are examples of the Japanese praising the proceedings, the prosecution and the Court. The trial of Hong Kong's so-called 'No 1 War Criminal', Colonel Noma, saw his defence counsel express his 'sincere thanks for the considerate and fair way in which the trial has been conducted over this long period' and publicly thank the prosecuting officer and his advisory officer for helpful assistance.[378] Following his conviction and 12 year sentence, Lieutenant General Ito Takeo enthusiastically thanked the Court for the thoroughness of his trial. But, he went further:

> Before the trial commenced, in fact, I had worried of the procedure. Once the case started, however, I began to feel more at ease with the President and the members of the Court because of the way the trial has been conducted. In a word this must be attributed to the wonderful personality of the President and other Members of the Court as well. At this stage when the Court has given its sentence, I wish to express my gratitude.[379]

One may of course take that praise for the proceedings with a 'pinch of salt' given that he had just escaped the death penalty, but these comments do not appear to be related to the outcome.

On the other hand, we cannot claim there were no problems, particularly if we look at them through the lenses of human rights standards of our day and age. There are some obvious weaknesses. The accused were mostly defended by Japanese lawyers who were not familiar with the British adversarial system. In fact, Major Ormsby, perhaps the last surviving prosecutor from the Hong Kong war crimes trials, has emphatically underscored the weakness and passivity of Japanese defence counsel as a major problem with the fairness of the trials.[380] Translation and interpretation problems arose regularly. For example in the trial

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374 The English speaking officer could not be located, but the interpreter was found and provided an affidavit affirming the accused's account that he did not threaten the persons gathered there: *Tanaka Ryosaburo* (BMCHK, Case No WO235/1030) exhibit N(1), slide 347.

375 *Omura Kiyoshi* (BMCHK, Case No WO235/1112) transcript 227.

376 *Tanaka Ryosaburo* (BMCHK, Case No WO235/1030).

377 *Kishi Yasuo* (BMCHK, Case No WO235/993) transcript 531, slide 558.

378 Defence Closing Address in *Noma Kennosuke* (BMCHK, Case No WO235/999) exhibit DDD, 1, 672.

379 Post Sentence Statement of the accused in *Ito Takeo* (BMCHK, Case No WO235/1107) transcript 214, slide 247.

380 Interview with Major Murray I Ormsby (United Kingdom, 21 July and 4 August 2011) 13–14 <http://hkwctc.lib.hku.hk/archive/files/int-20110918_af84c07fa3.pdf>.

of Colonel Noma, Colonel Kanazawa Asao faulted interpretation for inconsistencies in his statement.[381] In the trial of Rear Admiral Naomasa and Captain Mayazumi Haruo, during the examination in chief of the accused, the interpretation was so bad as to be unintelligible.[382]

There were conflicts of interest with multiple co-accused (in the Silver Mine Bay trial, there were 15 of them) running conflicting defences but all having the same single defence counsel, Captain M Croft. The most senior of them was Lieutenant Kishi, who said that he had orders from his immediate superior to defend against attack and use weapons to that end and acted in accordance with those orders following the attacks on the Japanese garrison at Silver Mine Bay.[383] His 14 subordinates raised a combination of alibis, denial of any wrongful actions, superior orders, mistaken identity and outright denial of involvement.[384] In the Hockley case, Mr Murata Kiichi had to defend several of the co-accused arguing conflicting positions on the nature of the instructions that were given in relation to what to do about the captured pilot Fred Hockley after the Emperor's capitulation.[385]

There was excessive reliance on affidavit evidence, denying the accused the opportunity to cross-examine. Sergeant Major Yokohata complained in his petition against the verdict that because the prosecution filed a number of affidavits, he was denied the opportunity for cross-examination.[386] The defence in the trial of Colonel Nakano expressed solidarity with the many complaints about the volume of affidavit evidence in these trials, and complained about how most of the prosecution's case was built on affidavit evidence which was untested by cross-examination and 'cannot be held to have the same weight as evidence spoken in the court'.[387] The statistics in the Kinkaseki Mine case were particularly egregious: just seven live witnesses testified as to the facts, while 24 affidavits were submitted.[388]

The charges using the vague 'being concerned in' concept appear to have, unsurprisingly, raised problems with specificity. Defence counsel would challenge that but to no avail. For example, in the trial of Sergeant Hanada Zenji and three others, the defence challenged the vagueness of the indictment.[389] At a late stage of the prosecution's case, defence counsel in Noma challenged the charge sheet for duplication and the vague and non-specific nature of the

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381 *Noma Kennosuke* (BMCHK, Case No WO235/999) transcript 25–6, slides 30–1.

382 *Sakonju Naomasa* (BMCHK, Case No WO235/1089) transcript 244, slide 247.

383 Defence Closing Statement in *Kishi Yasuo* (BMCHK, Case No WO235/993) exhibit AJ, 1–19, slides 736–54.

384 Ibid.

385 *Tamura Teiichi* (BMCHK, Case No WO235/1021).

386 Petition in *Yokohata Toshiro* (BMCHK, Case No WO235/1117) transcript 12, slide 19.

387 Closing Statement in *Nakano Junichi* (BMCHK, Case No WO235/1044) 8, slide 451.

388 *Toda Mitsugu* (BMCHK, Case No WO235/1028, 28 May 1947).

389 *Trial of Sergeant Hanada Zenji and Three Others* (BMCHK, Case No WO235/895) <http://hkwctc.lib.hku.hk/exhibits/show/hkwctc/documents/item/50> ('*Hanada Zenji*'). In support of its challenge, the defence cited *Manual of Military Law 1929*, above n 51, ch V, [35] and *Rules of Procedure 1926* rr 8, 13(B), 12(B)(2), 23(A): *Hanada Zenji* (BMCHK, Case No WO235/895) slide 11.

charge.[390] He alleged he had raised with the prosecutor the problem of the abstract and vague charge sheet and had asked that it be rewritten with the specific charges mentioned clearly and separately, although he acknowledged that the abstract of evidence was concrete enough. The prosecutor had told him that there would be no trouble in that case, but that if the defence thought it essential they could ask for the charge sheet to be rewritten. Nothing was done, but as the trial proceeded, it became clear that the charge sheet contained duplication and generality, and would not be permissible in British legal practice. The prosecutor's account was that he told defence counsel that he was perfectly at liberty to make any application he thought fit, but that he considered that 'an abstract of evidence together with statements of every witness proposed to be called by the prosecution constituted enough particulars for anybody'.[391] The President of the Court's response was:

> It may be perfectly true that the charge would not stand in strict British law, nor possibly in a court martial, but this charge which has been approved by the Legal Section, ALFSEA, is perfectly in accordance with the charges in such cases. It is by no means any more vague than all the others nor contains more duplicity then charges in similar cases. So the charge is not going to be amended.[392]

Nevertheless, the Hong Kong war crimes trials records do show that over the course of the trial, these vague and imprecise war crimes allegations were substantiated by disclosure of evidence, and the defence did come to be on sufficient notice as to what the prosecution was alleging. An example can be seen in the trial of Colonel Noma, where perusal of the court file shows that the defence was sufficiently on notice as to what was being alleged of the Colonel.[393]

There were no appeals as we know the concept today. Judge Advocates always reviewed convictions and sentences, but never observed the proceedings. These reviews were conducted in Singapore, and most were mundane and did not stand out as being particularly ably conducted. Despite the limitations of this method, the Judge Advocates were able to report to the Commander of Land Forces Hong Kong, who also received petitions from the accused. He would then endorse or not endorse the judgment and any punishment imposed.

Sentencing was certainly inconsistent, within the Hong Kong trials and also when compared to the other British trials in Malaya, Singapore, North Borneo, Burma etc.[394] In his petition against the verdict and sentence, Sergeant Major Yokohata complained about the unfairness of his 15 year sentence compared to

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390 *Noma Kennosuke* (BMCHK, Case No WO235/999) transcript 242–5, slides 248–51. In support of its challenge, the defence cited Best, Archbold, and the Court of Appeal in *R v Harris*: see W M Best, *The Principles of the Laws of Evidence: With Elementary Rules for Conducting the Examination and Cross-Examination of Witnesses* (Sweet & Maxwell, 11th ed, 1911); John Jervis et al, *Archbold's Pleading, Evidence and Practice in Criminal Cases* (Sweet & Maxwell, 26th ed, 1922); *R v Harris* [1927] 2 KB 587.

391 *Noma Kennosuke* (BMCHK, Case No WO235/999) transcript 244, slide 250.

392 Ibid.

393 Ibid slide 249.

394 There is some disagreement on this: see Pritchard, 'The Gift of Clemency Following British War Crimes Trials in the Far East, 1946–1948', above n 236, 44 (emphasis in original) ('The great distances between the different military commands in the Far East had *not* led to serious differences in standards or practices so far as I can discern').

the 12 year sentence imposed on the unrepentant Sergeant Yoshida Bunzo in the connected Bridge House case[395] tried before a differently composed war crimes panel.[396] Unlike the trial of Yokohata Toshiro, the trial of Yoshida involved maltreatment to death, and the unrepentant accused there received a lighter sentence. Sergeant Major Toshiro's sentence was not altered. The discrepancies were a source of official Japanese complaints, and as has been already discussed, after the trials programme was completed, the British authorities embarked on an exercise to standardise the sentences that were imposed across the board. According to Pritchard, the last Japanese war criminal in British custody 'was released on 30 January 1957 after clemency was approved in December 1956'.[397]

Despite the flaws and the ongoing nature of the research work that is still being done, the impression of this author is that in the circumstances, the British Army in Hong Kong provided a surprisingly fair and just process of accountability. The approach was summary and practical, with reliance on common sense and solid evidence rather than convoluted legal arguments. The facts spoke louder than the law in these cases. The Hong Kong cases seem to demonstrate that even when victors sit in judgment on the vanquished, and operate rather freely of the law and its practitioners, they can conduct the proceedings in a broadly fair way. Perhaps this is the lesson for our generation: war crimes trials can be conducted in a way that is fair and expeditious without being excessively legalistic and unduly complicated.

In their entirety, the cases provide the state practice or *usus* that is critical for the process of formation and identification of customary international law. The fact that in the explosion of international criminal law that has occurred since the establishment of the Yugoslavia and Rwanda tribunals, these cases and the British sister proceedings in Singapore, Malaya, North Borneo and Burma, as well as the Australian, Chinese and Dutch trials in the post-Second World War era have not been consulted, must call into question the correctness of what is claimed to have been the law emerging from the post-Second World War trials. It seems obvious, but in need of assertion, that state practice is not just to be found in the Nuremberg, Tokyo or *Control Council Law No 10* tribunals, nor just in the ad hoc scattering of European domestic trials that are unequally relied on.

395 *Kinoshita Kiichi* (BMCHK, Case No WO235/1116).

396 Petition in *Yokohata Toshiro* (BMCHK, Case No WO235/1117) slide 7, scan 738.

397 Pritchard, 'Changes in Perception: British Civil and Military Perspectives on War Crimes Trials and Their Legal Context, 1942–1956', above n 25, 253.