

Command on Trial

Japanese Officers, War Crimes, and Command Responsibility

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Introduction

The 1941–1945 war in the Pacific between Japan and the Allies was a brutal conflict, in which members of the Japanese military committed many crimes against Allied soldiers and civilians. Prisoners of war (POWs), civilians in areas occupied by the Japanese military, and guerrilla fighters were illegally tortured and killed. Captives were provided with inadequate food and medicine, housed in poor accommodation, and forced to work in arduous conditions, even when sick. The Allies received information about these crimes during the war and repeatedly warned that the perpetrators would face justice. After Japan's unconditional surrender in August 1945, the Allies set out to fulfil this promise by punishing those who had committed war crimes, using the mechanism of war crimes trials.

At the trials, the Allies were determined not only to prosecute direct perpetrators of atrocities, who were usually enlisted soldiers, non-commissioned officers, and civilian auxiliary employees, but also officers who had been in a position of command when war crimes were committed. They were conscious that even if comparatively junior personnel had been directly responsible for offences, their crimes nevertheless had been carried out within a military hierarchy. That is, Allied authorities believed that the structure of the Japanese military had allowed the crimes to occur, and thus, that pursuing guilt for war crimes should extend to those who had been in positions of command. For the trials to become a lasting precedent and a lasting deterrent, officers – as well as direct perpetrators – needed to be held accountable.

To achieve this goal, the Allied authorities made use of a major new legal doctrine: that of command responsibility, which is the focus of this book. The new doctrine was developed by extending to military tribunals legal concepts and principles that existed in domestic criminal and civil law. It was used to hold commanding officers responsible for the crimes of their subordinates, even in cases where the officer had not ordered the crimes to occur or did not know that the crimes had happened. Command responsibility, which came to be used

throughout the war crimes trials held after the Second World War in Europe and Asia, was first applied in the Allied trials of Japanese war criminals.

In addition to achieving justice for victims and punishing the guilty, the trials were designed to act as a deterrent to misconduct in any future conflicts. When the Second World War began, the laws, rules, and customs of war had not yet been clearly defined, and it was questionable to what extent they could be applied either to nation-states or to individuals.¹ The post-war trials offered an opportunity to establish an international consensus on how wars should be fought. Holding military officers liable for the crimes of their subordinates would mean, in theory, that officers would take greater care to prevent, halt, or punish the commission of war crimes in the future. Within this greater goal of deterrence, Allied legal personnel also hoped that the trials themselves would serve as a form of broad precedent for future war crimes trials programs.²

Literature on the trials of alleged Japanese war criminals has focused primarily on the trial of senior Japanese civilian and military leaders before the International Tribunal for the Far East (IMTFE), also known as the Tokyo trial, but scholarship on the national trials has recently become more plentiful. Works on the national trials generally focus on individual prosecuting countries. Many of these works are concerned with the question of whether the trials were fair, though Aszkielowicz and Chamberlain examine the political significance of the trials on the prosecuting countries. Two works examine the trial programs of multiple nations. Piccigallo's pioneering work discusses each Allied government's trial processes, rules, procedure, and outcomes, comparing the different approaches and results. Wilson, Cribb, Trefalt, and Aszkielowicz cover the national trials from the early planning and investigation stages through to conviction, punishment, and release of those convicted. They argue that at both an international and national level, politics and justice were intimately connected at all stages of the war crimes trial program. In addressing whether the post-war trials were fair, they acknowledge different understandings of fairness, making use of the distinction between 'procedural' and 'substantive' justice.³ In procedural justice, which is usually the chief concern of domestic criminal trials, the focus is on the steps taken to achieve the result itself. Substantive justice, by contrast, aims for an outcome where the right people are investigated, prosecuted,

1. Sandra Wilson, Robert Cribb, Beatrice Trefalt, and Dean Aszkielowicz, *Japanese War Criminals* (Columbia University Press, 2016), 29–31.

2. National Archives and Records Administration, College Park MD (hereafter NARA), RG331, Supreme Commander of the Allied Powers, Legal Section, Administrative Division, War Crimes File, 1945–49, Publications, 'The Yokohama War Crimes Trials: December 1945–September 1947', Box 1350, 15.

3. Wilson, Cribb, Trefalt, and Aszkielowicz, *Japanese War Criminals*, 4–10.

found guilty, and given an appropriate sentence for the right crime.⁴ *Japanese War Criminals* points out that for the Allies, substantive justice, rather than procedural justice, was the clear goal. In this book, I show how the doctrine of command responsibility was used to achieve that goal.

Though existing works have examined command responsibility trials in the Pacific, most of these analyse the trials of high-ranking officers, and such studies rarely situate such trials within the broader aims of the Allied post-war trial program.⁵ Such works acknowledge the national trials of Japanese war criminals as the foundation of the doctrine and largely treat the first command responsibility trial, that of Lieutenant-General Yamashita Tomoyuki, as basic precedent. Accordingly, there is a considerable body of scholarly work on Yamashita's trial, and its implications and consequences.⁶ Taken as a whole, the most striking feature of the literature on the Yamashita proceeding is the level of disagreement among the authors as to why Yamashita was convicted. Beyond the Yamashita trial, three other command responsibility cases have received broad scholarly attention: two US trials of multiple high-ranking German officers conducted in Germany, known as the Hostages Trial (1947–1948) and the High Command Trial (1947–1948), and the US prosecution of the Japanese Admiral Toyoda

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4. On substantive justice, see Wojciech Sadurski, *Giving Desert Its Due: Social Justice and Legal Theory* (Reidel, 1985), 49–56.
 5. John Pritchard, 'The Historical Experience of British War Crimes Courts in the Far East, 1946–1948', *International Relations* 6 (1978): 311–26; Suzannah Linton, ed., *Hong Kong's War Crimes Trials* (Oxford University Press, 2013); Sharon Chamberlain, *A Reckoning: Philippine Trials of Japanese War Criminals* (University of Wisconsin Press, 2018); Barak Kushner, *Men to Devils, Devils to Men: Japanese War Crimes and Chinese Justice* (Harvard University Press, 2015); Dean Aszkielowicz, *The Australian Pursuit of Japanese War Criminals, 1943–1957: From Foe to Friend* (Hong Kong University Press, 2017); Georgina Fitzpatrick, Tim McCormack, and Narrelle Morris, *Australia's War Crimes Trials, 1945–51* (Brill-Nijhoff, 2016); Caroline Pappas, 'Law and Politics: Australia's War Crimes Trials in the Pacific, 1943–1961' (unpublished PhD thesis, University of New South Wales, 1998); Michael Carrell, 'Australia's Prosecution of Japanese War Criminals: Stimuli and Constraints' (unpublished PhD thesis, University of Melbourne, 2005); Jamie Fellows, 'Law at a Critical Juncture: Retribution and Criminal Responsibility at the US Army War Crimes Trials in the Philippines, 1945–1957' (unpublished PhD thesis, James Cook University, 2020); Fred L. Borch, *Military Trials of War Criminals in the Netherlands East Indies, 1946–1949* (Oxford University Press, 2017).
 6. A. Frank Reel, *The Case of General Yamashita* (University of Chicago Press, 1949); Richard L. Lael, *The Yamashita Precedent: War Crimes and Command Responsibility* (Scholarly Resources, 1982); Allan A. Ryan, *Yamashita's Ghost: War Crimes, MacArthur's Justice and Command Accountability* (University Press of Kansas, 2012); Anne-Marie Prévost, 'Race and War Crimes: The 1945 Trial of General Tomoyuki Yamashita', *Human Rights Quarterly* 14 (1992): 303–38; Courtney Whitney, *The Case of General Yamashita: A Memorandum* (Supreme Commander of the Allied Powers, Government Section, 1949); George F. Guy, 'The Defense of General Yamashita', *United States Academy of Legal Studies* 6 (1950): 215–36; Bruce Landrum, 'The Yamashita War Crimes Trial: Command Responsibility Then and Now', *Military Law Review* 149 (1995): 293–302.

Soemu (1948).⁷ For the most part, analysis of these other command responsibility trials have treated the outcome of the trial as either reinforcing or altering the interpretation of command responsibility as applied in Yamashita: that is, that the trials collectively form some kind of precedent.

In contrast, this book examines the trials of junior and middle-ranking Japanese officers, who constituted the great majority of defendants in command responsibility trials. The trials are from the US, Australian, UK, and Philippine programs because documentation of these proceedings is the most fully available. Records of the other three sets of trials – the French, Chinese, and Netherlands Indies proceedings – are either inadequate in the first place, or are currently unavailable.⁸ This book closely examines twenty command responsibility trials for the four main types of crime for which command responsibility was relevant – summary execution, massacre, torture, and mistreatment of captives – and analyses the use of the doctrine in trials pertaining to those crimes.

Identifying trials that used command responsibility can be a difficult task. The charges against accused officers rarely mentioned command responsibility, even when it was the basis of the case. Instead, officers were commonly charged with directly committing a crime, even when it was their subordinates who had carried out the offending action, or else they were charged with the vague accusation that they had been ‘concerned in’ a crime. Moreover, the national trials of the four countries examined here did not need to, and frequently did not, publish a reasoned decision for their judgments. These factors mean that, in order to determine whether or not command responsibility was the basis of a trial, it is necessary to analyse the entire record of the trial and all associated legal activities: that is the transcript itself, plus legal reviews, petitions, and affidavits from witnesses and potential witnesses.⁹

7. Kevin Jon Heller, *The Nuremberg Trials and the Origins of International Criminal Law* (Oxford University Press, 2011), 263–71, 392–94; Guénaél Mettraux, *The Law of Command Responsibility* (Oxford University Press, 2009), 220–23, 231–37, 263; Peter MacGuire, *Law and War: International Law and American History* (Columbia University Press, 2010), 126, 132–34; Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press, 2010), 386–87; L. C. Green, ‘Command Responsibility in International Humanitarian Law’, *Transnational Law and Contemporary Problems* 5 (1995): 36–37.

8. The French and Nationalist Chinese trial records are brief. The Netherlands Indies trial records opened in January 2020 but closed because of the COVID-19 pandemic, and at the time of research, offered limited services.

9. For other legal studies that use this approach, see Suzannah Linton, ‘Introduction’, in *Hong Kong’s War Crimes Trials*, ed. Suzannah Linton (Oxford University Press, 2013), 2; Gideon Boas and Lisa Lee, ‘Command Responsibility and Other Grounds of Criminal Responsibility’, in *Australia’s War Crimes Trials 1945–51*, ed. Georgina Fitzpatrick, Tim McCormack, and Narrelle Morris (Brill, 2016), 171–72; Jamie Fellows, ‘Law at a Critical Juncture: The US Army’s Command Responsibility Trials at Manila, 1945–1947’, *American Journal of Legal History* 60 (2020): 192–222; Nina B. Jørgensen, ‘On Being “Concerned” in a Crime: Embryonic Joint Criminal Enterprise?’, in *Hong Kong’s War Crimes Trials*, 149, 156.

One of the key findings of this study is that the new doctrine was applied much more widely than is generally recognised. Because trial records usually do not specifically identify command responsibility cases, it is difficult to arrive at an overall number of officers who were prosecuted under the doctrine. I estimate that approximately 25 to 35 per cent of lower-ranking officers – that is, lieutenants through to colonels, and equivalent ranks in the navy – who appeared as defendants in the US, Australian, UK, and Philippines trials of suspected Japanese war criminals were tried under command responsibility.¹⁰ This estimation is based on an examination of more than two hundred trials of lower-ranking officers from the four jurisdictions treated in this book. Therefore, command responsibility was one of the central mechanisms of the Allied war crimes trials, rather than a specialised tool used only or primarily to try senior officers.

Furthermore, this study shows that the doctrine of command responsibility was applied inconsistently in the Allied trials in the Asia-Pacific region, not only across the different national jurisdictions, but also within each country's trial program. The circumstances of the trials and of the war were partly responsible. First, the new doctrine turned out to be a more complex legal tool than had initially been expected. Although command responsibility sounded in principle like a relatively simple and natural extension of war crimes law and domestic criminal law, in practice it proved to be exceedingly complicated, with the result that trials applied the doctrine inconsistently and unpredictably. Second, the scope of the trials was vast, in the number of proceedings, their geographical locations, the range of offences prosecuted, and the length of time it took to complete the program. As a result, different interpretations and applications were likely to appear, opportunities for communication among different court-rooms was limited, and over time, what the trials meant to the Allies, and indeed to the Japanese population, evolved alongside broader political and diplomatic developments. Third, there was an overwhelming desire amongst many tribunal members to secure convictions, the effect of which was to override attention to the complexity of cases.

Beyond these immediate difficulties, however, lay an even greater obstacle to the goal of producing consistent results in command responsibility proceedings: namely, the fact that the Allies did not enter the trials with any agreed understanding of what behaviour could and should be expected of a commander. The legal proceedings raised difficult questions about what command was, and what it had or should have meant in the context of the Pacific War. At the deepest level there was simply no moral or philosophical consensus on these matters among the Allied authorities. Exercising command had been no simple matter in a conflict that had been fought over great distances by large and disparate forces,

10. For a table of ranks, see Appendix A.

Establishing Courts and the Principle of Command Responsibility

By the first half of 1942, Allied governments had begun to receive reports that Japanese soldiers had committed war crimes against Allied soldiers and civilians. In March 1942, the UK government informed the House of Commons that in December 1941, the Japanese army had captured and massacred fifty British soldiers in Hong Kong.¹ Reports of atrocities continued to arrive. In April 1943, the International Red Cross warned the Australian government that war crimes were probably occurring in Japanese-run prisoner of war (POW) camps but could not confirm the information due to the limited access the Japanese government had given it to the camps. The Australian government suppressed this information to limit damage to civilian and military morale.² Also in April 1943, the US government received reports from US and Philippine escapees of POW camps about crimes committed during the April 1942 Bataan Death March, but, like the Australian government, it suppressed the news until six months later.³

Throughout 1944 and 1945, as the Allies took back Japanese-occupied territory in Southeast Asia and the Pacific, they gathered more evidence of war crimes, and it became clear that crimes had been widespread. The question for Allied authorities became how to respond to such atrocities. Taking immediate action during the war would likely lead to reprisals against Allied captives. Therefore, cataloguing the evidence and pursuing justice after the war ended seemed to be the best option, though exactly how justice would be achieved was not clear at the time.⁴

1. 'Japanese Barbarism at Hong Kong', *Tweed Daily* (NSW), 12 March 1942, 4.

2. Dean Aszkielowicz, *The Australian Pursuit of Japanese War Criminals 1943–1957: From Foe to Friend* (Hong Kong University Press, 2017), 26.

3. John Dower, *War Without Mercy: Race and Power in the Pacific War* (Pantheon, 1986), 39.

4. Sandra Wilson, Robert Cribb, Beatrice Trefalt, and Dean Aszkielowicz, *Japanese War Criminals: The Politics of Justice After the Second World War* (Columbia University Press, 2017), 43.

By the end of the conflict, Allied governments had decided that prosecuting suspected war criminals in courtrooms was the best way of achieving their goals. The decision to prosecute was only the first of a long series of determinations that were necessary before courts could be set up. The various Allied powers had to decide what the scope of the trials would be, what procedures they would follow, and who would be tried. The result was a mix of one international tribunal and many national military tribunals. I argue in this chapter, however, that all the prosecuting authorities were determined from the beginning to equip themselves to deal with every level of the Japanese military, rather than contenting themselves with prosecuting only the direct perpetrators of atrocities. I show that the principle of command responsibility was at the forefront of legal planning, and it influenced the structure and form of the trials.

For Allied authorities, the principle of command responsibility was essential because the whole of the Japanese military was potentially culpable for war crimes. Many legal personnel seem to have believed that virtually all members of the Japanese military were guilty.⁵ Allied authorities treated the Japanese military, and especially the army, almost as if it were a criminal organisation. It was hence vital to be able to prosecute military personnel from anywhere in the chain of command. This attitude can be seen in the statements of William Webb, Australian jurist, war crimes investigator, and president of the International Military Tribunal for the Far East (IMTFE). Webb did not participate in the national trials as a jurist, but had investigated potential war crimes in New Guinea on behalf of the Australian government during the conflict itself.⁶ In 1945 he argued that the purpose of the national trials was to demonstrate the kind of war that Japan had fought, and to show that criminal actions at an individual level had been perpetrated throughout the chain of command.⁷ Webb's position makes it clear that he, like other prominent Allied figures, thought that responsibility for the Pacific War and the crimes that occurred during the conflict, existed throughout the Japanese military's chain of command and possibly extended to the whole of Japan.

The idea that commanders could be held criminally responsible for the conduct of their subordinates was not new at the end of the Second World War. In 1474 the Archduke of Austria had used the same basic premise to prosecute and execute an enemy nobleman for crimes committed by mercenaries in the town of Breisach in the Rhine Valley, in what was then the Holy Roman Empire.⁸ The US military took the same approach in the aftermath of the Civil War in

5. Wilson, Cribb, Trefalt, and Aszkielowicz, *Japanese War Criminals*, 90.

6. Aszkielowicz, *The Australian Pursuit of Japanese War Criminals*, 3–4.

7. National Library of Australia (hereafter NLA), Folder 28, Box 3. 'Webb Cable to External Affairs,' No day/month, 1945, Papers of D. C. S. Sissons 1956–2006.

8. Guénaél Mettraux, *The Law of Command Responsibility* (Oxford University Press, 2009), 1–5.

1865 to try a former Confederate officer who had been in command of POWs, alleging that the officer had participated in a conspiracy to injure the health and lives of the prisoners.⁹ An 1895 British parliamentary report on violence against Armenian Christians in the Ottoman Empire suggested that a local military commander must have known that atrocities were taking place and asserted that his failure to act to prevent the crimes made him criminally culpable.¹⁰ In all of these examples, however, the commander in question had had some degree of personal involvement in the crime, by either ordering or actively encouraging it – command responsibility meant an officer was held responsible for the orders he gave. Furthermore, these instances were all isolated events, not part of a broad trend, and the legal principles used against the commanders were not embedded in any wider system of related laws.¹¹ The command responsibility trials in the Pacific in the mid-twentieth century, by contrast, operated within a complex web of international and domestic law.

The system that the Allies created to deal with suspected Japanese war criminals was founded on a mix of existing international treaties, laws and customs, existing domestic court procedure and doctrines within the relevant countries, and a foundational belief amongst the Allies that they had a broad mandate to punish and reform Japan. This foundational belief provided Allied authorities with justification to interpret or modify existing treaties, customs, laws, and procedures as they saw fit. They waived existing procedural requirements governing how evidence could be applied and weighed in court, and which legal defences could be used. They also created new legislation and legal norms, and applied them retroactively. To bring senior leaders to justice, the prosecuting authorities reinterpreted and extended the scope of international treaties to broaden the range of defendants who could be brought to court. Taken as a whole, these changes meant that all suspects, from low-ranking enlisted soldiers through to senior civilian and military leaders, not only could face trial, but also were liable for harsher sentences than if the changes had not been made.¹²

The trials of Japanese war crimes suspects extended the concept of command responsibility beyond its previous limits by applying it to officers who had not directly ordered or participated in a crime. Without the adjustments to normal procedure that are discussed in this chapter, it would have been extremely

9. Lewis L. Laska and James M. Smith, 'Hell and the Devil: Andersonville and the Trial of Captain Wirz, C.S.A. 1865', *Military Law Review* 68 (1975): 125.

10. Jan Martin Lemnitzer, 'International Legal History: From Atrocity Reports to War Crimes Tribunals – The Roots of Modern War Crimes Investigations in Nineteenth Century Legal Activism and First World War Propaganda', in *War Crimes Trials and Investigations: A Multi-Disciplinary Approach*, ed. Jonathan Waterlow and Jacques Schuhmacher (Palgrave Macmillan, 2018), 132–34.

11. Mettraux, *The Law of Command Responsibility*, 5.

12. Wilson, Cribb, Trefalt, and Aszkielowicz, *Japanese War Criminals*, 26–30.

difficult to do this. The changes made to normal court procedure highlight Allied assumptions about how the Japanese military had committed war crimes. Though individuals, often low-ranking enlisted men, were the actual perpetrators of the crimes, Allied authorities clearly believed that commanding officers were potentially collectively guilty for allowing the crimes to occur in the first place, or for failing to stop them from happening.

Early Warnings and an Early Framework

In setting up war crimes trials in Asia and the Pacific, the Allies followed the fundamental principle they had already established to deal with Nazi war crimes. In January 1942, Allied leaders had issued the St James Declaration, which proposed the use of 'organised channels of justice' to prosecute German war criminals. The government of Nationalist China quickly extended the St James Declaration to Japanese military personnel.¹³ In August 1942 the US president, Franklin D. Roosevelt, issued the first of multiple warnings to the Japanese government that war criminals would be pursued once the conflict ended. Other Allied governments echoed these statements, which eventually culminated in the Potsdam Declaration of 26 July 1945, setting out the terms for Japanese surrender. The Potsdam Declaration stated that 'stern justice' would be meted out to war criminals: it made no distinction regarding rank.¹⁴

It was initially unclear to Allied authorities how the justice that was first envisaged in the St James Declaration and later in the Potsdam Declaration would be meted out. War crimes trials had been held in various places after the First World War, but the results were widely considered to have been unsatisfactory. German authorities had prosecuted German war crimes suspects in the German Supreme Court in Leipzig in 1921. Only seventeen suspects were tried. Ten were found guilty and received light sentences, ranging from a few months to four years.¹⁵ At the insistence of the French and UK governments, the Ottoman government tried approximately two hundred of its own officers and low-level officials for the massacre of Armenians during the war, of whom three were executed. The Turkish government had forewarned many other suspects,

13. 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), 87–91.

14. Philip R. Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945–51* (University of Texas Press, 1979), 4.

15. *History of the United Nations War Crimes Commission*, 47. See also Jürgen Matthäus, 'The Lessons of Leipzig: Punishing German War Criminals after the First World War', in *Atrocities on Trial: Historical Perspectives on the Politics of Prosecuting War Crimes*, ed. Patricia Heberer and Jürgen Matthäus (University of Nebraska Press, 2008), 3–23; James F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (Greenwood Press, 1982), 133–39.

allowing them either to destroy evidence or to escape before they were arrested.¹⁶ By 1926, both the Belgian and the French governments had tried and sentenced German suspects in their domestic courts in absentia, which meant that the accused never faced their punishment.¹⁷ The fact that both the German and the Ottoman governments conducted trials of their own war criminals contributed to the relatively low number of suspects prosecuted and the lenient sentences for most of those found guilty.¹⁸ For the Allied governments in 1945, the main lesson taken from these trials was, therefore, that this time they must administer justice themselves.

At the London International Conference on Military Trials in June 1945, representatives of the USSR, France, the US, and the UK clarified how and on what basis justice would be meted out to Nazi war criminals. US representative and Associate Justice of the Supreme Court of the United States, Robert Jackson, argued that the only viable option was to try accused war criminals before a dispassionate court.¹⁹ Jackson's recommendation was in stark contrast to ideas previously floated by both Roosevelt and UK Prime Minister Winston Churchill, who had – apparently genuinely – considered drafting a list of senior Axis war criminals who would be arrested on sight and summarily executed.²⁰

Jackson's comments at the conference changed the tone of the discussion about war crimes. He insisted that the prosecuting powers begin from the principle that courts would be used because they are examples of the highest principles of Western justice, and that as many war criminals as possible would be prosecuted, including civilian leaders who had advocated war. Jackson's recommendation that suspects be tried in war crimes courts met the St James Declaration's call for a channel of organised justice. It was a breakthrough in designing Allied policy that built on the initial calls for justice and formulated them as concrete legal principles. Having a legitimate foundation was important for the trials, as the Allied authorities, especially US authorities, sought to use them to show Japan's population that the war, and the actions of the Japanese military, had been illegitimate.²¹ The representatives of the USSR, the UK, the US, and French gov-

16. Alan Kramer, 'The First Wave of International War Crimes Trials: Istanbul and Leipzig', *European Review* 14 (2006): 444–46.

17. Willis, *Prologue to Nuremberg*, 145; R. John Pritchard, 'The Parameters of Justice: The Evolution of British Civil and Military Perspectives on War Crimes Trials and Their Legal Context (1942–1956)', in *International Humanitarian Law: Prospects*, ed. John Carey, William V. Dunlop, and R. John Pritchard (Brill, 2006), 289–90.

18. Timothy McCormack, 'From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime', in *The Law of War Crimes: National and International Approaches*, ed. Timothy McCormack and Gerry Simpson (Kluwer Law International, 1997), 48–50.

19. Wilson, Cribb, Trefalt, and Aszkielowicz, *Japanese War Criminals*, 19.

20. Wilson, Cribb, Trefalt, and Aszkielowicz, *Japanese War Criminals*, 28.

21. Wilson, Cribb, Trefalt, and Aszkielowicz, *Japanese War Criminals*, 20.

Summary Execution

During the Second World War, Japanese military personnel carried out summary executions in several different circumstances. A summary execution takes place when there is no trial before a sentence is carried out, or when a trial does take place, but the conduct of the trial is so improper that no result can be classed as a genuine judicial finding. Without a proper trial, the execution is classified as murder, rather than as a legitimate punishment. Japanese soldiers summarily executed Allied airmen who were captured after crash-landing in Japanese-occupied territory.¹ At prisoner of war (POW) camps, Japanese guards sometimes illegally killed captives. These executions were usually carried out as an example of what could happen if prisoners broke camp rules, especially if they escaped, stole food, or communicated with people outside the camp.² Civilians in occupied territories could be killed if they were suspected of being spies or guerrillas, or during military reprisals for guerrilla attacks.³

Summary executions differed from massacres for two interrelated reasons. Summary executions were generally carried out as a form of quasi-judicial punishment for real or perceived breaches of Japanese laws and rules. For this reason, there were only a small number of victims, usually under ten. Massacres, on the other hand, were used to dispose of potentially dangerous groups, as in

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1. Tristan Moss and Georgina Fitzpatrick, 'Crimes Against Captured Airmen', in *Australia's War Crimes Trials 1945–51*, ed. Georgina Fitzpatrick, Tim McCormack, and Narrelle Morris (Brill-Nijhoff, 2016), 239; Timothy Lang Francis, 'To Dispose of the Prisoners: The Japanese Execution of American Aircrew at Fukuoka, Japan, During 1945', *Pacific Historical Review* 66 (1997): 469–501.
 2. National Archives of Australia (hereafter NAA), War Crimes Trial of Ichise Shinichi, and Five Others, archived at [<https://recordsearch.naa.gov.au/SearchNRRetrieve/Interface/ViewImage.aspx?B=722845>]; NAA, War Crimes Trial of Hoshijima Susumu, archived at [<https://recordsearch.naa.gov.au/SearchNRRetrieve/Interface/ViewImage.aspx?B=1900164>]; National Archives (UK), Kew (hereafter TNA), WO 235/862, Trial of Takasaki Shinji and One Other.
 3. Sharon W. Chamberlain, *A Reckoning: Philippine Trials of Japanese War Criminals* (University of Wisconsin Press, 2019), 29–35; Geok Boi Lee, *The Syonan Years: Singapore Under Japanese Rule 1942–1945* (National Archives of Singapore, 2005), 308.

the Singapore *sook ching* massacre of February–March 1942, in which at least 5,000 Chinese civilian men were killed because they were considered likely to rebel against the Japanese occupation.⁴ Massacres also occurred when there were large numbers of inconvenient prisoners, as in the killing of approximately 150 wounded Australian soldiers at Parit Sulong, Malaya, on 23 January 1942, at a time when Japanese forces were rapidly advancing towards Singapore and did not have enough men or material to care for such a large number of prisoners.⁵

Allied prosecutors brought large numbers of Japanese suspects to trial for summary executions. Command responsibility served as an important tool in prosecuting officers who had been in command of the soldiers who had actually carried out such killings. Many commanders were held responsible for the orders they had given to execute prisoners. These prosecutions reflected a foundational understanding of command responsibility: the officer was held criminally responsible for a command he had given. Some officers chose to admit their responsibility, probably in an attempt to protect other personnel by discouraging investigations into their fellow officers and asserting that their subordinates had acted under superior orders. In these circumstances, Allied prosecutors could rely on assessments of responsibility and guilt that derived from domestic criminal law and common understanding. In other cases, however, officers were prosecuted for their failure to prevent, halt, or punish subordinates who had apparently carried out an execution independently of the commander's orders. The interpretation of command responsibility on which this approach was based had first been used in the Yamashita trial. In such cases, Allied war crimes investigators and prosecutors seem to have used command responsibility because they strongly suspected that a superior officer had ordered or in some other way had sanctioned the execution but had no evidence to prove it.

In this chapter I show that in using command responsibility to achieve justice for the victims of summary executions, prosecutors, and, in many cases, tribunals, held Japanese officers to extremely high standards that pushed the limits of what could reasonably be expected of the commander of a combat force. As demonstrated in the previous chapter, command responsibility had been used for the first time in the Yamashita trial because, in the view of prosecutors, Yamashita's subordinates had committed crimes on such a wide scale that either Yamashita must have known and done nothing, or he had been criminally negligent in failing to uncover the crimes. In most of the summary execution trials,

4. Hayashi Hirofumi, 'The Battle of Singapore, the Massacre of Chinese and Understanding of the Issue in Postwar Japan', *The Asia-Pacific Journal: Japan Focus* 7 (2009): 2; Yuma Totani, *Justice in Asia and the Pacific Region, 1945–1952: Allied War Crimes Prosecutions* (Cambridge University Press, 2015), 145–47.

5. Lynette Ramsay Silver, *The Bridge at Parit Sulong: An Investigation of Mass Murder* (The Watermark Press, 2004); Gilbert Mant, *Massacre at Parit Sulong* (Kangaroo Press, 1995).

by contrast, commanders were held criminally responsible for a single execution. Thus, there usually was no established pattern of criminal behaviour that should have alerted a commander to the fact that his subordinates were committing war crimes. The decision to hold such officers responsible for a single, isolated crime which they had not personally committed, and possibly in the absence of evidence that the commander had ordered the execution, is perhaps the most prominent example of the 'stern justice' that Allied governments had foreshadowed in the 1945 Potsdam Declaration. The severe punishment meted out to many officers who were found guilty reflects an understanding of command that assumed complete control over subordinates.

Holding commanders absolutely liable for isolated crimes reflected two elements of the war crimes trials. First, Allied personnel working on the trials often harboured an underlying suspicion that officers had in fact ordered the executions, even when insufficient evidence was presented in court to support this level of involvement. As a result, command responsibility was deployed in a way that allowed Allied courts to punish accused officers as if they had ordered the execution to take place. The suspicion or assumption that accused officers had ordered the crime made such an approach appear acceptable. Second, in cases where there was no such suspicion, holding an officer strictly or absolutely liable for the crimes of his subordinates gave the Allies an opportunity to create a lasting deterrent, in keeping with one of the key goals of the trials.⁶

The summary execution trials highlight the difficulty of defining what command was, and how that definition affected responsibility for war crimes. Many of the lower-ranking officers charged with command responsibility for summary executions seem to have had little control over what happened: the evidence presented in court often showed that the killings were isolated events that frequently were perpetrated as retribution for Allied attacks and Japanese losses. Though the accused repeatedly testified that they had had limited control over the crimes and that the circumstances in which executions took place had been chaotic and uncertain, the tribunals nearly always found that the accused officer nonetheless had exercised or could have exercised some kind of control over the situation. The assessment of the tribunals, in deeming that an officer had had control over a summary execution, points towards an understanding of command as absolute. The summary execution trials also highlight the fact that the tribunals could interpret and apply command responsibility in a variety of ways to reach the desired outcome, or to respond to different conceptions of command amongst tribunal staff. Overall, the summary execution trials suggest that the post-war proceedings were incapable of achieving uniformity in

6. *Report of Robert H. Jackson, U.S. Representative to the International Conference on Military Trials, London, 1945* (Washington DC: US Department of State, 1949), 46–49.

defining what command was and what it entailed, and in turn, how command responsibility should be interpreted and applied.

Trials for Summary Executions of Captured Airmen

Many Allied trials of Japanese military personnel for summary executions resulted from the killing of Allied flight crew who had crashed in Japanese-occupied territory during the war. Such trials held special importance for Allied authorities because wartime Japanese military regulations had legitimised the killing of downed aviators.⁷ The Allies wished to reject this line of argument decisively by labelling such killings as summary executions, and to bring those who had ordered them to account. Yet, direct evidence of commanders' complicity was often lacking. In these circumstances, command responsibility was a very useful doctrine for prosecutors, who might need to do no more to secure a conviction than to prove that an officer had been formally in charge of subordinates who had carried out the execution.

The first Japanese executions of crashed Allied flight crew occurred early in the war. On 18 April 1942, sixteen US bombers launched from an aircraft carrier in the western Pacific and bombed six cities across Japan in the famous Doolittle Raids, so named after the commanding officer, Lieutenant-Colonel James Doolittle. Following the raids, one bomber landed in the Soviet Union, and fifteen crash-landed in Japanese-occupied China, where Japanese forces captured eight fliers.⁸ Three of the captured airmen were charged before a Japanese military tribunal with strafing and bombing civilians. They were found guilty and executed in October 1942. A post-war Allied tribunal found that the Japanese military proceedings had been illegitimate, on the grounds that legal representation for the defendants had been inadequate, meaning that any verdict reached by the Japanese court should be considered void and that the resulting executions were effectively murders. Unlike many other Allied trials for the summary execution of captured airmen, those tried for killing the Doolittle fliers were sentenced to terms of imprisonment of five to nine years, principally because the accused were deemed to have acted under the superior orders of then Prime Minister Tōjō Hideki.⁹

7. Philip R. Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945–1951* (University of Texas Press, 1979), 69–74; Jonathon F. Vance, 'Doolittle Raid', in *Encyclopedia of Prisoners of War and Internment*, ed. Jonathon F. Vance (Grey House Publishing, 2nd ed., 2006), 109–10.

8. Kramer J. Rohlfleisch, 'Drawing the Battle Lines in the Pacific', in *The Army Air Force in World War II: Plans and Early Operations January 1939 to August 1942*, vol. 1, ed. Wesley F. Craven and James L. Cate (Chicago: University of Chicago Press, 1983), 442–44.

9. Piccigallo, *The Japanese on Trial*, 71–73.

To enable the prosecution of the Doolittle fliers, in August 1942 the Japanese military authorities retrospectively amended their military law, so that aircrew who attacked civilian targets could be tried as war criminals and could be sentenced to death or to terms of imprisonment of at least ten years.¹⁰ For the remainder of the conflict, the Japanese military either expressly or implicitly relied on this law, known to Allied prosecutors as the 'Enemy Airmen's Law', to execute other captured aviators, in many cases without a trial, contrary to Japanese military law.¹¹ The Japanese military's refusal to grant ordinary prisoner-of-war protections to flight crew had been foreshadowed before the outbreak of war with the Western Allies. At a meeting of the International Committee of the Red Cross in Tokyo in 1934, the Japanese government considered whether to ratify the 1929 Geneva Convention, which outlined the proper treatment of captured military personnel. Though the Japanese Foreign Ministry was amenable to the 1929 provisions, the navy and army were not. In submissions to the emperor, naval officials took the view that the expanded protections would greatly increase the chance of Japan being aerially bombed in any future conflict, as enemy aviators would know that they would be treated well even if they bailed out over Japan.¹² For the Japanese navy, opting out of the treaty served as a potential deterrent to aerial bombing, because it theoretically gave the Japanese military the authority to treat captured airmen as they saw fit.

Though the first Japanese executions of captured Allied fliers occurred early in the war, most took place from the latter half of 1944 onwards, and especially in 1945. The increase in executions can be attributed to two factors. First, Japanese resentment of Allied fliers increased, because Allied bombing of the Japanese home islands had become markedly more frequent and effective. Intensive attacks on the Japanese home islands did not begin until late 1944. Bombings at first were not particularly destructive. From early 1945, however, the US air force began to carpet-bomb Japanese cities with incendiaries, with the intent of burning entire city districts, instead of individual military targets.¹³ These new tactics meant that large portions of Japanese cities were devastated, and

10. A translation of the document into English is available as the 'Enemy Airmen's Law', National Archives and Records Administration, College Park, MD (hereafter NARA), RG125, Supreme Commander of the Allied Powers, War Crimes Branch, Misc. 1944-49, Box 10, 'PACMIRS, War Crimes Info (2)'; Piccigallo, *The Japanese on Trial*, 69-74; Vance, 'Doolittle Raid', 109-10; United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (His Majesty's Stationery Office, 1948), vol. 5, 1-5.

11. Francis, 'To Dispose of the Prisoners', 480-81.

12. Sarah Kovner, *Prisoners of the Empire: Inside Japanese POW Camps* (Harvard University Press, 2020), 34-35.

13. See E. B. Kerr, *Flames Over Tokyo: The U.S. Army Air Force's Incendiary Campaign Against Japan, 1944-1945* (D. I. Fine, 1991).

3

Torture

During their occupation of the Asia-Pacific region, Japanese military personnel carried out many brutal interrogations of local people who were suspected to be insurgents or spies. Interrogators questioned and sometimes tortured civilians, including Westerners, who were believed to have carried out acts of resistance through direct or indirect support of guerrilla forces, by spying for the Allies or by providing captives with supplies or intelligence. Prisoners of war (POWs) who had attempted to escape might be tortured for information on how they had escaped, and to find out whether anyone outside the camp had assisted them. Recently captured POWs might also face torture in attempts to extract military or technical intelligence about the enemy. In rare cases, torture was perpetrated for no clear reason. This chapter shows how command responsibility was used to prosecute Japanese officers whose subordinates had carried out torture.

The application of the doctrine of command responsibility to torture cases reflected the distinct nature of the crime. Torture perpetrated during an interrogation differed from the harsh beatings that POWs and civilian internees sometimes faced during their captivity. In interrogations, torture was primarily carried out to extract information, not as punishment, although the ill-treatment of individuals during interrogation would still have served as punishment for suspected activity in resistance groups, as well as acting as a deterrent to others contemplating acts of resistance. The difference between the torture carried out in interrogations and the ill-treatment that occurred at camps was acknowledged at the trials: officers accused of responsibility for crimes committed during interrogation were charged with torture, while officers charged with crimes against prisoners were, almost invariably, charged with ill-treatment.

In many cases, victims had been tortured repeatedly over multiple days, if not weeks, and a sustained pattern of torture had been used in interrogating victims. Because the crimes were committed over a prolonged period and were an intentional part of maintaining Japanese rule, tribunals had little difficulty in

connecting the substantive crimes of the subordinate to the expected or required behaviour of the commander. Tribunals assumed a close connection between the crimes of the subordinate and the superior officer's role in enforcing Japanese rule. On this basis, some prosecutors attempted to expand an officer's liability for his subordinates' actions into a substantive crime: that is, they argued that the commander's failure to act was itself a part of the initial crime. Though this expanded version of command responsibility was theoretically valid, tribunals appeared cautious to accept it, likely because of the complexity of such arguments. In the end, no substantial refinement of the doctrine of command responsibility emerged from torture trials to give prosecutors, and perhaps more important, defence lawyers, a clear understanding of when a commander could be held liable for the crimes of his subordinates, or in what form that liability arose.

Torture and Torture Trials

Many of the defendants in torture trials were members of the Kenpeitai, the Japanese military police. The role of the Kenpeitai had been broad, ranging from maintaining discipline in the Japanese army to training local pro-Japanese armies and policing occupied areas. Kenpeitai members also carried out counter-espionage operations and questioned recently captured prisoners.¹ The Tokkeitai was the equivalent organisation within the Japanese navy. During the war, both organisations had low numbers of personnel relative to the size of territory they policed. As a result, regular army and navy personnel were occasionally seconded to the command of the military police, as seen in the *Sook Ching* massacre in Singapore in early 1942.² Because the Kenpeitai and Tokkeitai had such a prominent role in investigating and subduing guerrilla movements, policing civilians in occupied areas and interrogating POWs, Allied militaries after the end of the conflict had a general policy of arresting these personnel immediately, on suspicion they had committed war crimes, even if no specific evidence was yet available.³

1. Raymond Lamont-Brown, *Kempeitai: Japan's Dreaded Military Police* (Sutton Publishing, 2002), 40–43; Joyce C. Lebra, *Japanese-Trained Armies in Southeast Asia* (Heinemann Education Books, 1977), 71, 97, 123.
2. Lamont-Brown, *Kempeitai*, 35–37; Peter Post, 'Policing Society', in *The Encyclopedia of Indonesia in the Second World War*, ed. Peter Post (Brill, 2009), 148–60; 'Kenpeitai', in Post, *The Encyclopedia of Indonesia in the Second World War*, 529–30.
3. Sandra Wilson, Robert Cribb, Beatrice Trefalt, and Dean Aszkielowicz, *Japanese War Criminals: The Pursuit of Justice After the Second World War* (Columbia University Press, 2017), 48; Fred L. Borch, *Military Trials of War Criminals in the Netherlands East Indies 1946–1949* (Oxford University Press, 2017), 155.

The torture trials suggest that the Japanese military had been consistent in the methods of torture used against victims. Physical beating with sticks was common, as were punching and kicking. Victims were routinely bound with rope and suspended from ceilings and rafters. The so-called water cure was widely used, in which victims were forced to drink large amounts of water before having their stomachs stomped on to induce vomiting. Victims were also frequently waterboarded, a form of torture in which water is poured over a cloth covering the victim's face, causing the sensation of drowning. Less regular forms of torture included shocking victims with electricity and burning them with lit cigarettes or hot irons.⁴

The most likely reason for the consistency in how torture was carried out was that both Kenpeitai and Tokkeitai members had had some degree of training in interrogation techniques. A captured Japanese handbook on interrogating prisoners explicitly stated that torture was the least reliable method of gaining information and should only be used as a last resort. The fact that the handbook acknowledged the use of torture suggests that some Japanese military personnel had had instruction on how to carry it out.⁵ To what extent the direction to use torture as a last resort was followed in practice is unclear from the trials: the evidence presented implies that torture was the first step, rather than the final measure. It would have been unnecessary, however, for witnesses, prosecutors, or defendants to point out that other methods of interrogation had been used first: simply questioning a prisoner is not a war crime, nor would evidence of it be considered to mitigate the act of torture. Similarly, interrogations where torture was not used would not have resulted in trials.

Due to the fearsome reputation of both the Kenpeitai and the Tokkeitai for carrying out torture and harshly treating suspected resisters, it was not difficult for the prosecution to argue that commanding officers had known their subordinates were perpetrating war crimes, or had openly permitted their subordinates to commit crimes.⁶ Despite the reputation of the military police, however, prosecutors rarely argued that Kenpeitai commanding officers had directly ordered their subordinates to torture. Since any version of the doctrine of command responsibility could, and often did, result in severe punishment, there was probably little incentive to rely on an argument that would require more evidence, of a kind that might be difficult to find. There was ample evidence of crimes of torture, and the doctrine of command responsibility was vague enough that simply being

4. See for example The National Archives of the UK (hereafter TNA), WO 235/872, *UK v Toyoda Akiichi*; TNA, WO 235/953, *UK v Ogata Tsuyoshi*.

5. TNA, WO203/5620, *Treatment of Prisoners of War by Japanese*, General Information on POWs, Enclosure No. 1, 'Notes on Interrogation of POWs', undated.

6. Sandra Wilson, 'War Crimes Trials and the Politics of Justice: The Case of Kinoshita Eiichi, 1945–57', *Historical Research* 92 (2019), 637–38.

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COMMAND ON TRIAL

JAPANESE OFFICERS, WAR CRIMES, AND COMMAND RESPONSIBILITY

'In this exceptional book, Paul Taucher not only shows how inconsistently justice was carried out in the trial of Japanese military men eighty years ago, but also makes us think about just what constitutes "military command" and what it means or should mean in times of war and peace today.'

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'Paul Taucher's authoritative and compelling study charts the history of command responsibility in war crimes trials in the Asia-Pacific. While revealing the role it played in delivering the Allies' goal of comprehensive and necessary justice, it shows how these trials failed to provide a clear understanding of the doctrine, underscoring why it remains so incoherent.'

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Between 1945 and 1951, the Allies prosecuted over 5,700 suspected Japanese war criminals across the Asia-Pacific region before one international and many national tribunals using a new legal doctrine known as command responsibility. Command responsibility holds officers criminally liable for the crimes of their subordinates even if they did not order the crimes to occur. Allied authorities believed that the structure of the Japanese military had allowed the crimes to occur and that pursuing guilt for war crimes should extend beyond enlisted soldiers who were the direct perpetrators of war crimes to those who had been in a position of command.

Command on Trial shows that the application of command responsibility in the courtroom was highly unstable and open to manipulation, especially in the trials of lower-ranking officers, resulting in outcomes that were legally, morally, and philosophically inconsistent. A clear illustration of the pitfalls of command responsibility, this book shows that the trials – and command responsibility – did not achieve comprehensive justice and left unanswered the question of who was actually responsible for many of the war crimes that were perpetrated.

Paul Taucher is lecturer at the College of Law, Arts and Social Sciences, Murdoch University, and a fellow of the Indo-Pacific Research Centre.

Cover image: Hideki Tojo, former Japanese General Premier and War Minister, takes the stand. U.S. National Archives and Records Administration.

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