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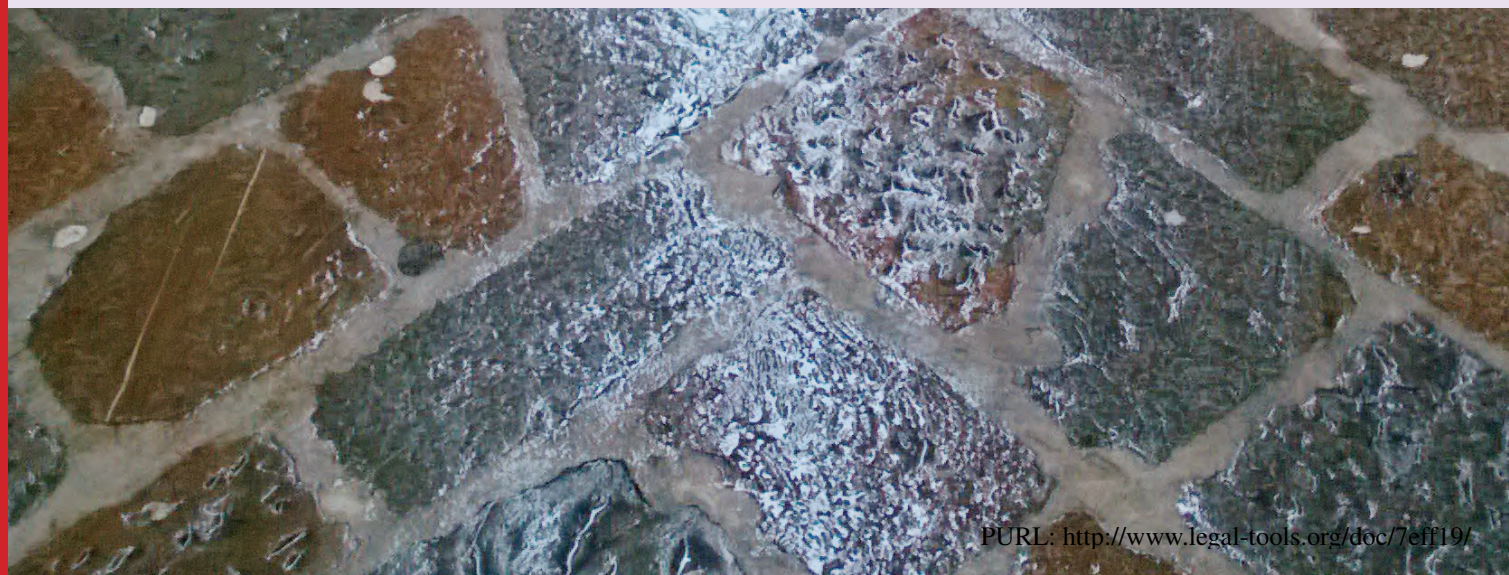

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Obscuring the Historical Origins of International Criminal Law in Australia: The Australian War Crimes Investigations and Prosecutions of Japanese, 1942–1951

Narrelle Morris*

32.1. Introduction

As the Second World War slowly drew to a close in 1945, the Australian Government faced the difficult task of following through with numerous promises that it had articulated to the Australian public that it would vigorously pursue and bring all suspected Japanese war criminals to justice. While this laudable goal was loudly reiterated time and time again, the actual policies and practices by which Australia investigated and prosecuted Japanese for war crimes – what can be said to be part of the historical origins of international criminal law in Australia itself – have been, by comparison, relatively obscure. Indeed, the numerous war crimes investigations from 1942 and 300 Australian war crimes trials involving 812 principally Japanese accused war criminals that took place in Morotai, Wewak, Labuan, Rabaul, Darwin, Singapore, Hong Kong and on Manus Island from 1945 to 1951 had almost passed from popular memory until recently when, all of a sudden in this past decade, there has been a long overdue boom in war crimes studies in Australia. At this late stage, there are obvious difficulties involved in properly gathering together, understanding and analysing Australia's policies and practices in relation to breaches of international criminal law during that period, but these are dramatically increased by the veils of censorship, secrecy and obscurity that have been either deliberately or, through inaction, laid over the war crimes investigations and prosecutions during and since the Second World War.

This chapter briefly examines the changing attitudes and actual restrictions over time regarding the dissemination of knowledge of war crimes investigations and prosecutions in the public sphere in Australia, and the impact of those restrictions for the consolidation of knowledge of international criminal law since the Second World War. Notwithstanding

the existence of a severe regime of censorship during most of the war, which impacted on the publicity of atrocity stories, knowledge of the extent of alleged Japanese war crimes, if not the precise details of those war crimes, was reasonably widespread among the Australian public. Serving members of the armed forces undoubtedly knew more, as many had either the opportunity to personally witness evidence of Japanese atrocities or had atrocity stories repeated to them.[1] Knowledge of alleged Japanese war crimes became very widespread after the war, as censorship was lifted and members of the armed forces returned home to give personal accounts. However, the degree of publicity given to atrocity stories during certain stages of the war crimes trials from 1945 to 1951 made some actively call for the return of censorship.

For much of the post-war period, it has been reasonably difficult to acquire detailed knowledge of Australia's war crimes investigations and prosecutions of Japanese.[2] For many decades, the war crimes investigation files and trial proceedings were inaccessible, as they were restricted government documents. Even though the trial proceedings were finally opened to public access in 1975, the enormous wealth of material on war crimes investigations and prosecutions now held by the National Archives of Australia, scattered across several locations and with few finding aids, has regrettably continued to preclude all but the most devoted scholars or

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1 For an overview of Australian military views of the Japanese as the enemy, including the impact of hearing reports of and witnessing physical evidence of Japanese atrocities, see Mark Johnston, *Fighting the Enemy: Australian Soldiers and their Adversaries in World War II*, Cambridge University Press, Cambridge, 2000, pp. 73–128.

2 The standard internationally cited work on the Australian trials, for instance, has remained Philip Piccigallo's 1979 book, even though Piccigallo used newspaper reports of the trials, not the trial proceedings, for his analysis: Philip R. Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945–1951*, University of Texas Press, Austin, 1979, see chap. 7 on "Australia and Other Commonwealth Trials (Canada, New Zealand)", pp. 121–42.

researchers from delving into it.[3] Since the Second World War, therefore, the limitation of both national and international knowledge of Australia's war crimes investigations and prosecutions has meant that Australia's contribution to the development of international criminal law has been effectively, and most regrettably, elided from the historical narrative.

32.2. Atrocity Stories and Censorship in Australia

That atrocities are an inevitable part of even a modern war was well known in Australia prior to the Second World War.[4] That atrocities were also playing a part in the new war against Japan was very rapidly brought home to Australians in early 1942, as disturbing reports of breaches of the laws and usages of war began emanating from the field. In April 1942, for instance, Australian military personnel who had escaped from the Japanese occupation of New Britain told "horror" stories to the press about "acts of ferocity" by the Japanese towards surrendered Australians.[5] These included accounts of the "shocking" and "cold-blooded" massacre of Australian prisoners of war ('POWs') at Tol plantation, which had taken place in January 1942.[6] Given that there had been semi-official

[3] For selected references utilising the trial proceedings, see Michael Carrel, "Australia's Prosecution of Japanese War Criminals: Stimuli and Constraints", in David A. Blumenthal and Timothy L.H. McCormack (eds.), *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?* Martinus Nijhoff, Leiden, 2008, pp. 244–45; David Sissons, "Sources on Australian Investigations into Japanese War Crimes in the Pacific", in *Journal of the Australian War Memorial*, 1997, vol. 30; and also David Sissons, "The Australian War Crimes Trials and Investigations (1942–1951)", n.d., Papers of D.C.S. Sissons, MS 3092, Series 10, National Library of Australia. Regrettably, none of the three substantial Ph.D. theses on the trials has been published in full: Caroline Pappas, "Law and Politics: Australia's War Crimes Trials in the Pacific 1943–1961", Ph.D. Thesis, University of New South Wales, 1998; Michael Carrel, "Australia's Prosecution of Japanese War Criminals: Stimuli and Constraints", Ph.D. Thesis, University of Melbourne, 2005; and Dean Michael Aszkielowicz, "After the Surrender: Australia and the Japanese Class B and C War Criminals, 1945–1958", Ph.D. Thesis, Murdoch University, 2012.

[4] Even as early as September 1914, various Australian newspapers instructed their readers at length on "what is fair fighting?" and provided a list of "war crimes" in response to claims that the Germans were committing them; see, for example, "War Crimes. What is Fair Fighting? Early Atrocities", in *Sydney Morning Herald*, 7 September 1914, p. 5.

[5] Letter from E.G. Bonney, Chief Publicity Censor to Brigadier E.G. Knox, Director-General of Public Relations, Department of the Army, explaining the "background to Censorship policy with regard to enemy atrocities", 3 December 1942, A11663, PA33, National Archives of Australia ('NAA').

[6] See for example, "AIF Massacre. Survivor's Story. Wholesale Murder. 125 Men Die; 2 Escape", in *West Australian*, Perth, 10 April 1942, p. 5.

reassurances after the fall of Singapore in early 1942 that Japan was properly treating Australian POWs, and advice that the public should disregard "sensational stories" and "rumours" spread by "morbid-minded people",[7] the impact of the "horror" stories appeared substantial. In South Australia, for instance, Gilbert Mant, the State Publicity Censor, reported to Edmund Bonney,[8] the Chief Publicity Censor, on 10 April 1942 that press stories of Japanese atrocities were "causing much distress here amongst relatives of soldiers known to be in enemy hands" and that the public in general was "greatly concerned". Mant advised that it was felt that "no useful purpose" was being served by "such gruesome detail" from New Britain. While it was "problematical [sic]" whether atrocity stories fell within the scope of censorship, he thought that the stories "should be of a milder nature".[9] After being taken "severely to task"[10] over the fact that the stories from New Britain had been passed for publication, Bonney warned all state censors on 11 April 1942 that "further Japanese atrocity stories" should be given "the closest scrutiny".[11] Indeed, the Advisory War Council ('AWC'), the bipartisan parliamentary body set up instead of a negotiated national government during the war, swiftly directed that "atrocity stories should not be published", unless they were officially released under the name of a government minister, the chief of staff of an armed service or by General Headquarters and then only after it was decided whether the "probable effect on public morale would be good or bad".[12]

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7 From, for instance, Major General Gordon Bennett, the General Officer Commanding, Australian Infantry Force in Malaya, who had just controversially "escaped" from the fall of Singapore: Adele Shelton Smith, "Special Interview with Major-General Bennett", in *Australian Women's Weekly*, 14 March 1942, p. 7. See also "Gen Bennett's Views on War Captives", in *News*, Adelaide, 11 March 1942, p. 3.

8 See John Hilvert, "Bonney, Edmund Garnet (1883–1959)", *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, Canberra, n.d.

9 Telegram from "PresCensor Adelaide" to "FedCensor Canberra", stamped 10 April 1942 and letter from State Publicity Censor, South Australia, to the Chief Publicity Censor, 10 April 1942, SP109/3, 329/07 (NAA).

10 As recalled by E.G. Bonney, Chief Publicity Censor, in a letter to the State Public Censor, Brisbane, 10 March 1944, SP109/3, 329/07 (NAA).

11 Letter from E.G. Bonney, Chief Publicity Censor to the Secretary, Department of Defence, 18 April 1942, SP109/3, 329/07 (NAA).

12 Letter from E.G. Bonney, 3 December 1942, *supra* note 5.

The AWC's direction in early 1942 was effectively the start of concerted censorship of atrocity stories – and, therefore, censorship of knowledge of alleged war crimes – in Australia, although the press had been subject, from the very beginning of the war, to severe censorship, which would venture well beyond that experienced in other Allied countries.[13] Under regulation 16 of the National Security (General) Regulations 1939 issued pursuant to the National Security Act 1939 (Cth), censorship was authorised:

> if it was necessary or expedient so to do […] in the interest of the public safety, the defence of the Commonwealth or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community.[14]

A Press Censorship Order was issued pursuant to regulation 16 in October 1939, which specified a number of matters which were subject to censorship, prudently encompassing a variety of national security and military operational matters, and also

> any other matter whatsoever information as to which would or might be directly or indirectly useful to the enemy or prejudicial to the public safety, the defence of the Commonwealth or of any other part of His Majesty's dominions, the efficient prosecution of the war, or the

[13] For example, American war correspondent Theodore White commented in *Time* magazine, "Never anywhere have we encountered political censorship of such a character as exists in Australia", cited in Roger Bell, "Censorship and War: Australia's Curious Experience, 1939–1945", *Media Information Australia*, no. 6, November 1977, p. 1.

[14] Regulation 16 "Censorship", National Security (General) Regulations, no. 87 of 1939, made on 13 September 1939 (as amended by Statutory Rules no. 34 of 1940, no. 120 of 1940, no. 9 of 1941, no. 475 of 1942 and no. 137 of 1943) pursuant to the National Security Act 1939 (Cth). For an analysis of the passage of the National Security Act 1939 and operation of wartime censorship, see Paul Hasluck, *The Government and the People 1939–41*, in *Australia in the War of 1939–1945*, series 4 – Civil, vol. I, Australian War Memorial, Canberra, 1952, pp. 174–87. On publicity censorship, see John Hilvert, *Blue Pencil Warriors: Censorship and Propaganda in World War II*, University of Queensland Press, St. Lucia, 1984; and Sam Headon, "Censored! A Study of the Relationship between the Press and the Government in Australia during World War II", Honours Thesis, Australian National University, 1999. For an excellent study of the Department of Information, under whose control publicity censorship fell from 1939 to October 1941 and from September 1943 to 1945, see Edward Vickery, "Telling Australia's Story to the World: the Department of Information 1939–1950", Ph.D. Thesis, Australian National University, 2003.

> maintenance of supplies and services essential to the life of the community.[15]

In practice, this matter was interpreted from 1939 to 1944 as encompassing anything that might negatively affect public morale. Censors were officially advised, for instance, that:

> in this war the term "Security" has a much wider application than in any previous war. It must cover the morale of civilians as well as Service personnel.[16]

As the official historian Paul Hasluck later described, the censor thus "became the protector of what was called 'public morale'. The public must not be alarmed or incited. It had to be protected from bad news and from anything that might shake confidence".[17] Interestingly, even though there were repeated references during the war to the importance of not just maintaining but improving public morale,[18] it was never at all clear what public morale actually encompassed, as the term was not defined.[19] Moreover, as Edward Vickery has observed, the "machinery needed to assess the state of public morale" in Australia, such as public opinion polls, was never put in place during the war.[20] At best, as Hasluck acknowledged, there were "opinions on the state of opinion".[21]

Given the importance placed on public morale, even though the concept itself was vague and undefined, neither censors nor the press appeared to question the authority to apply censorship to atrocity stories, at least until 1944 when protecting public morale as a basis for any censorship was itself challenged (as discussed below). Despite this, the

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15 Order 3(vi), Press Censorship Order, issued 4 October 1939 (later repealed and re-issued in 1943 as Press and Broadcasting Censorship Order), pursuant to regulation 16, National Security (General) Regulations, *ibid.* Similar censorship orders over film and radio broadcasting and postal, telegraphic and telephonic communications were also issued pursuant to regulation 16.

16 *For State Censor's Information: Why War-time Censorship is Necessary*, official guidance booklet, cited in Vickery, 2003, p. 197, see *supra* note 14.

17 Paul Hasluck, *The Government and the People 1942–45*, in *Australia in the War of 1939–1945*, series 4 – Civil, vol. II, Australian War Memorial, Canberra, 1970, p. 401.

18 Hasluck suggested that these references were overblown, given that Australians in 1942 appeared to be "in a fighting mood" and "aroused by danger as they had never been stirred before"; see *ibid.*, p. 128.

19 Vickery, 2003, p. 22, see *supra* note 14.

20 *Ibid*., pp. 6, 23–24, 243.

21 Hasluck, 1970, p. 129 and appendix 7, pp. 745–50, see *supra* note 17.

application of censorship to atrocity stories actually took some time to firm up from 1942, as opinion was divided as to the probable effect of publishing atrocity stories on public morale. Lacking the "machinery" to assess morale, there were never any formal attempts to evaluate whether publicity of atrocity stories did affect morale, how it affected it and to what extent. There were only numerous hearsay reports that it did, such as that conveyed by the South Australian censor in the wake of the "horror" stories from New Britain. Some commentators thus thought that censorship of atrocity stories was warranted, as publication raised the level of alarm and created anxiety amongst the public, thereby impacting negatively on morale. Particular attention was drawn to the likely detrimental impact of atrocity stories upon relatives and friends of those serving in the armed forces, even more so if they had been already taken POW, or upon those who had not yet enlisted, as it might discourage them from doing so. Others, however, were all for the publication of verified and approved atrocity stories as part of the carefully orchestrated propaganda campaign against Japan, which built on decades of fear of the "yellow peril".[22] The rationale was, apparently, that presenting the Japanese as a despised enemy race innately prone to committing systematic atrocities and Japan itself as a savage outlier nation, which had little, if any, respect for international law would alleviate public complacency about the degree of danger that Japan posed to Australia and harden support for a "war without mercy".[23] Lieutenant General John Northcott, the Army's Chief of General Staff, for instance, apparently held the view that "so long as the stories were well authenticated, the

[22] For analysis of the concept of the 'yellow peril', see Richard Austin Thompson, *The Yellow Peril, 1890–1924*, Arno Press, New York, 1978; Gina Owens, "The Making of the Yellow Peril: Pre-war Western Views of Japan", in Phil Hammond (ed.), *Cultural Difference, Media Memories: Anglo-American Images of Japan*, Cassell, London, 1997, pp. 27–47; Narrelle Morris, "From 'Yellow Peril' to 'Japan-bashing': Historical Images of Japan in the West", in Narrelle Morris, *Japan-Bashing: Anti-Japanism since the 1980s*, Routledge, London, 2011, pp. 14–29.

[23] For discussion of this point in an Allied context, see John W. Dower, *War Without Mercy: Race & Power in the Pacific War*, Pantheon Books, New York, 1986, pp. 33–73. In Australia, the Department of Information embarked on a racist anti-Japanese campaign in newspapers and on radio in March 1942, which included the claim that the Japanese were "devils" who would "torture, murder, [and] enslave". The public reaction to the campaign was broadly critical and the campaign ceased after two weeks; see Hilvert, 1984, pp. 115–18, *supra* note 14.

more nakedly the horrible truth was told the better".[24] A newspaper editorial in April 1942, amidst the "horror" stories emanating from New Britain, also thought that there was a certain utility in publishing such stories, observing:

> Atrocity disclosures make sickening reading. But they serve as a warning, and as a stimulus to the fighting spirit and determination of the Australian nation […] factual stories like those of the massacre in New Britain give us a clear picture of the kind of enemy we are up against.[25]

In the end, the willingness to accept some possible detriment to public morale from the publication of atrocity stories in return for the apparent value of verified and approved atrocity stories to the propaganda campaign against Japan meant that plenty of information about alleged Japanese war crimes actually seeped, with the concurrence of censors, through the censorship regime to the Australian public in 1942 to 1945. This was because while censorship of atrocity stories was strict, it was not absolute, given the proviso allowing publication of 'official releases'. The censorship instruction on atrocity stories issued by Bonney, the Chief Publicity Censor, in early 1942, read:

> A.8 Atrocities. Atrocity stories concerning Australians or relating to incidents in the Southwest Pacific area may not be published unless officially released under the name of a Commonwealth minister, the chief of staff of the service concerned or by General Headquarters.[26]

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[24] As reported in a letter from T.P. Hoey, State Publicity Censor, Victoria to the Chief Publicity Censor, 21 December 1942, A11663, PA33 (NAA). See H.J. Coates, "Northcott, Sir John (1890–1966)", *Australian Dictionary of Biography*, *supra* note 8.

[25] Editorial, "War Against the Beast", in *News*, Adelaide, 8 April 1942, p. 2.

[26] See for example, Consolidated Censorship Directions issued pursuant to the Press and Broadcasting Censorship Order, 30 April 1943, p. 3, J2813, CENSORSHIP (NAA). This censorship direction was renumbered as A.9 in new directions issued in late 1944. While a literal reading of "Atrocity stories concerning Australians" in the censorship direction suggests that it could also apply to stories of atrocities allegedly committed by Australians, it is probably more likely that the press and censors practised self-censorship in relation to reporting such stories, akin to the practice discerned in the United States; see Karen Slattery and Mark Doremus, "Suppressing Allied Atrocity Stories: The Unwritten Clause of the World War II Censorship Code", in *Journalism & Mass Communication Quarterly*, vol. 89, no. 4, December 2012, pp. 624–42. My own search of press coverage during the war has been unable to find anything beyond the most cursory reference to Australian atrocities, usually dismissed as, for instance, "lurid tales": see for example, "Italian Treachery in Libyan campaign", in *Advertiser*, Adelaide, 14 August 1941, p. 6. It is clear,

The censors were privately instructed that "in handling Japanese atrocity stories remember that if [stories were] too startling [the] effect may be frightening to relatives of soldiers known to be in enemy hands thus lowering morale". They were also instructed that while it was "difficult" to impose the "rule" in all cases, "most careful scrutiny [was] essential".[27] Elsewhere, Bonney explained that the censorship of atrocity stories was "designed to prevent the publication of atrocity stories without due consideration of all the issues involved". He continued:

> It is obviously undesirable to publish stories of atrocities where these can do nothing but cause distress to relatives and friends of men of the Fighting Services, or where the stories might inculcate fear of the enemy. On the other hand, it sometimes is necessary to ask our own people to face the facts of a situation so that they may realise the nature of the enemies we are fighting. It is also sometimes necessary to proclaim to the world that an enemy has violated international law and the essential decencies of civilisation.[28]

With the approval of censors, therefore, certain atrocity stories were publishable. For instance, a proposed press report which described Japanese atrocities in Timor by the war correspondent Bill Marien was passed for publication by censors in late December 1942, although it is not entirely clear whether the report was passed by "relaxing" the censorship direction regarding atrocities or whether the report received imprimatur as an "official release".[29] The approved draft of Marien's report stated, for instance:

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however, that Australian service personnel did commit atrocities against Japanese, including killing surrendering Japanese or Japanese POWs, see for example, Johnston, *Fighting the Enemy*, pp. 80–81, *supra* note 1.

27 Telegram from "FedCensor" to "PresCensor Sydney", stamped 11 April 1942, SP106/1, PC551 (NAA).

28 Suggested draft letter from E.G. Bonney, Chief Publicity Censor to Minister for Information for reply to E.V. Raymont, undated but circa June 1942, SP109/3, 329/07 (NAA).

29 T.P. Hoey, State Publicity Censor, Victoria, initially suggested that Marien's report had been passed by "relaxing" the censorship instruction which "prevents references to happenings in Timor except for official disclosures": see letter from State Publicity Censor to Brigadier E.G. Knox, Director-General of Public Relations, Department of the Army, 23 December 1942, A11663, PA33 (NAA). Later, however, Hoey advised the Chief Publicity Censor that the "Publication of official releases recently – Marien articles […] etc. did not constitute a relaxation", which suggested that he now viewed Marien's report as an

> There are many authenticated instances of Japanese inhumanity to the natives. They have destroyed native food crops, cattle, horses, pigs and houses […] Japanese have not only violated native women but have forced them into brothels[30] where they have become infected with venereal disease with which the Japanese themselves seem to be universally affected.

The approved draft also discussed Japanese "brutalities" against others in Timor, including the murder of priests and "one authenticated case of Japanese atrocities committed on Australian commandos".[31] Marien's report on Timor was eventually published in a number of Australian newspapers in early January 1943.[32]

Other atrocity stories similarly received approval for publication during the war for propaganda purposes, particularly if the alleged victims were not Australians, as it thought that these were less likely to be significantly detrimental to public morale. Sometimes the victims were, in fact, Australian but the Australian connection was sanitised, not always very successfully and sometimes in a rather shambolic manner. For instance, a press report was widely published on 6 October 1943 concerning the Japanese execution by beheading of an Allied airman in New Guinea in March 1943, drawn from a detailed and graphic witness account of the execution in a captured and translated Japanese diary.[33] The publication of the report was made with the approval of General Headquarters South Pacific Area, General Douglas MacArthur himself (which made it an "official release"), on the grounds that the story would "bestir Australians and Americans from their complacency", and as it was

approved official release: letter from T.P. Hoey, State Publicity Censor to Chief Publicity Censor, 4 January 1943, A11663, PA33 (NAA).

30 This appears to be an early reference to evidence of "comfort" women.

31 Bill Marien, untitled article known as Timor No. 6 on "Natives", A11663, PA33 (NAA).

32 See, for example, Bill Marien, "Commandos Helped by Natives", in *Argus*, Melbourne, 4 January 1943, p. 12.

33 See for example, "An Abominable Example of Jap Barbarism. From General MacArthur's Headquarters", in *Barrier Miner*, New South Wales, 6 October 1943, p. 1; "Japs Behead Airman Prisoner", in *Argus*, Melbourne, 6 October 1943, p. 3; and Axel Olsen, "War Prisoner Beheaded by Jap Officer. Body Mutilated to Suit Samurai Code", in *Canberra Times*, 6 October 1943, p. 1. The report was also widely published around the world, see for example, *The New York Times*, 6 October 1943, p. 1.

"desirable in the interests of the war effort".[34] In response to the publication, and noticeably reinforcing the motivational message underpinning the story's release, Prime Minister John Curtin stated that he was "sure all Australians would be deeply shocked at the story of the Japanese atrocity", and that "the barbarity […] must bring home to the Australian people the type of enemy we face. It must stiffen us to throw in all we have against the ruthless foe".[35]

On the following day, the censors were instructed that no speculation in the press was permissible concerning the nationality of the executed airman.[36] Unfortunately, while the story might have, in the longer term, "stiffened" Australia's fighting resolve, the immediate effect of the executed airman's anonymity was tremendous agitation amongst the public. W.H. Lamb, State Member for Granville, asked in the New South Wales Parliament whether the Premier would approach the Federal Government to enquire what the "public and national value the publication of such a gruesome narrative has" and whether

> the nerve-wracking distress, pai[n] and fear suffered by the parents and near relatives, particularly mothers, of boys at present fighting in New Guinea were taken into consideration before the publication was authorised.[37]

Similarly, the Returned Services League of Victoria directly asked the Prime Minister to release the name of the airman, as the anonymity had left many relatives "in suspense".[38] Moreover, as was always the danger with such stories, notwithstanding their apparent verification, it was soon reported in the press that Japan had declared the story a "fabrication", one that revealed not only an "utter ignorance of the Japanese character" but

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[34] Memorandum from E.G. Bonney, Chief Publicity Censor, to the Prime Minister, 7 October 1943; and memorandum from E.G. Bonney, Chief Publicity Censor to the Secretary, Prime Minister's Department, 13 October 1943, SP109/3, 329/07 (NAA).

[35] "Mr Curtin's Comment", in *Western Mail*, Perth, 7 October 1943, p. 45.

[36] Priority telegram from "FedCensor" to "All States", 7 October 1943, SP109/3, 329/07 (NAA).

[37] Quoted in letter from the Premier, New South Wales to the Prime Minister, 8 October 1943, SP109/3, 329/07 (NAA).

[38] See for example, "Dead Airman's Name Sought", in *Courier-Mail*, Brisbane, 8 October 1943, p. 1.

the "desperate position" of the Allies who were "frantically trying to boost public morale".[39]

As a result of the public agitation, there was an immediate attempt to silence further reporting on the story, with the censors instructed on 8 October 1943 that "[n]o further references permissible to Japanese beheading Allied airman" and that the censorship instructions on atrocities must be "strictly observed".[40] The instruction's "background for censors only" advised that it was

> unlikely that any further atrocity stories will be released for some to come. The reason is that it is difficult to keep subsequent publicity within bounds. Every time an atrocity story is published it is enlarged upon by correspondents, who concoct "think-pieces" about even more hideous examples of Japanese cruelty.[41]

Similarly, in New South Wales, H.H. Mansell, the State Publicity Censor, instructed his censors on that day that "[a]ll references to Japanese atrocities to be submitted to censorship". That would have been fairly innocuous but for the part of the instruction designated for "censors only", which stated "[a]ll such submissions to be 'killed'".[42] An "off the record" and "confidential" document, apparently aimed at the press, articulated three reasons for the government's policy "against publishing atrocity reports". Firstly, as the government's "international reputation" was "staked on the veracity of charges it makes", it was necessary to "authenticate" information as "far as possible" before publication, although this was noticeably not a reason "against" publishing stories, just a reason for delaying publication until verification. Secondly, it claimed that publication led to "widespread anxiety on the part of relatives of all members of the Forces", which was the standard "public morale" justification for censorship. The third and final reason was that "publication may provoke or lead to demands for reprisals on our part.

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39 See for example, "Japan Denies Atrocity. Says Story of Airman's Execution 'Fabrication'", in *Advertiser*, Adelaide, 8 October 1943, p. 5.

40 Priority telegram from "FedCensor" to "All States", 8 October 1943, SP109/3, 329/07 (NAA).

41 Memorandum from E.G. Bonney, Chief Publicity Censor to F. McLaughlin incorporating Censorship Instruction of 8 October 1943 and "Background for Censors Only", 8 October 1943, SP109/3, 329/07 (NAA).

42 See Action Sheet for censorship instruction R7, 8 October 1943, SP106/1, PC551 (NAA).

Should this lead to counter-reprisals, we are incapable of competing with a barbarous foe in 'frightfulness'".[43]

Eventually, this single atrocity story caused such a level of public anxiety that Curtin issued a statement on 13 October 1943 in which he admitted that the airman had been Australian, although he still refused to identify him by name, as it was a "private and intimate matter" for his kin.[44] Especial care was taken a few days later, therefore, to ensure that no connection was made in the press between the executed airman and the announcement of a posthumous award of a Victoria Cross, Australia's highest military honour, to Flight Lieutenant W.E. Newton, an airman who had indeed been captured and executed by beheading in New Guinea in March 1943. On 19 October 1943, the day of the award's announcement, the censors were instructed that Newton's award "must in no circumstances be linked even inferentially at present with beheading atrocity".[45] Alas, the attempt to avoid making a connection to Newton was not entirely successful: when a Japanese photograph showing an Allied POW about to be beheaded was discovered in April 1944, it was widely published around the world showing the imminent execution of Newton. It took some time before the identity of the Allied POW in the photograph was confirmed as that of Army Sergeant L.G. Siffleet,[46] not Newton. In the end, the relative shambles that had been made of the attempted use of this atrocity story to shore up public support for the war aptly demonstrated how the use of propaganda could backfire.

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43 "Execution of Airman by Japanese. Off the Record Reasons for the Government's Policy", Canberra, 11 October 1943, A5954, 671/1 (NAA). While reprisals were lawful in international law and Australian military law as a coercive measure taken against a belligerent in response to illegitimate acts of warfare in order to force future compliance with the law, there were procedural rules to follow. For instance, an injured party could not at once resort to reprisals but had to first lodge a complaint with the offending belligerent; moreover, the form of a reprisal must not be "excessive and must not exceed the degree of violation committed by the enemy"; see the Australian *Manual of Military Law 1941*, Australian Government Printer, Canberra, 1941, chap. XIV, paras. 452–60.

44 "Airman Executed by Japs. Australian, But Name Withheld", in *Singleton Argus*, New South Wales, 13 October 1943, p. 2.

45 Priority telegram from "FedCensor" to "All States", 19 October 1943, SP109/3, 329/07 (NAA).

46 Captain Noto Kiyohisa and CPO Watanabe Teruo, were eventually tried in an Australian Military Court at Rabaul for the murder of Siffleet and two others. For the trial proceedings, see A471, 81210 (NAA).

Undoubtedly due to the potential consequences of publication of certain atrocity stories on public morale, the decision whether to pass certain stories for publication occasionally reached the highest level of the government. The Chief Publicity Censor, Bonney, was "accustomed" to making his "suggestions, complaints and criticisms" about censorship directly to Curtin, who held ministerial responsibility for censorship from October 1941 to September 1943.[47] Even after Arthur Calwell, Minister for Information, took over ministerial responsibility for censorship, Bonney still sought Curtin's counsel. For example, Bonney advised Curtin in March 1944 that he had been hesitating over whether to approve for publication some atrocity stories of a "particularly gruesome character", namely cannibalism. Bonney acknowledged to Curtin in relation to his forthcoming decision: "Some people will think whatever we do is wrong".[48] In turn, Curtin solicited the opinion of H.V. Evatt, the Minister for External Affairs and the Attorney-General, on whether the stories should be passed, who responded:

> Publication of such accounts […] only arouses morbid interest and cause a lot of anxious relatives to enquire whether their menfolk had been victims of Japanese cannibalism. While there is much to be said for telling the public the truth about Japanese barbarities – using only well-authenticated stories – I feel that we should avoid distressing relatives over the purely gruesome.

[47] Hasluck, 1970, pp. 399–400, *supra* note 17. Bonney enjoyed considerable public support from Curtin. For example, Curtin described Bonney in a speech in August 1942 as "competent and impartial" and a "patriotic servant of Australia". Commonwealth Government, *Digest of Decisions and Announcements and Important Speeches by the Prime Minister (The Right Hon. John Curtin)*, no. 37, 10–15 August 1942, p. 5, B5459, 37 (NAA). Curtin was also supportive of Bonney in private, advising senior journalists in one of his regular "secret" press briefings in May 1943 that he had the "utmost confidence" in Bonney. Clem Lloyd and Richard Hall (eds.), *Backroom Briefings: John Curtin's War*, National Library of Australia, Canberra, 1997, p. 151.

[48] Letter from Prime Minister John Curtin to Dr. H.V. Evatt, Minister for External Affairs, including text of memorandum from Chief Publicity Censor to the Prime Minister dated 7 March 1944, undated but circa 15 March 1944, A989, 1944/43/735/577/1 (NAA). The draft cannibalism stories in question can be read in SP109/3, 329/07 (NAA).

Evatt recommended "strongly" that the "these particular cannibal accounts" not be released.[49]

32.3. The Australian War Crimes Investigations under Sir William Webb

Even if certain atrocity stories, particularly those involving Australians as victims, were unknown to the Australian public, the extent to which Japan appeared to be in breach of international law became quickly apparent to the Australian military and the Australian Government in 1942. In response to the successful Japanese landings in New Britain, Timor and on Ambon early that year, the Army convened a Court of Inquiry in May 1942, which was instructed to enquire into and report on, amongst other things, "any acts of terrorism or brutality practised by the Japanese against Australian troops"; the "treatment of Australian prisoners of war by Japanese troops" (including deaths occurring after capture); and "any breaches of International Law or rules of warfare committed by Japanese forces".[50] The Court of Inquiry found that the Tol massacre in New Britain, for instance, had been established "beyond all possible doubt" and that "[n]o excuse whatever existed for this outrage", which was a "clear" and "most flagrant" breach of international law.[51] Moreover, the evidence that Australian POWs still held by the Japanese in New Britain were being "reasonably well treated" was "meagre".[52] While the Court of Inquiry's report had "very limited circulation", a number of government departments and the military were becoming "interested in this question of Japanese atrocities".[53] By the end of 1942, only a year after the declaration of the war against Japan, the Australian Army had issued instructions to its commands that reports on allegations of breaches of

[49] Copy of letter from Dr. H.V. Evatt, Minister for External Affairs to Prime Minister John Curtin, 24 March 1944 (this copy is marked "Original returned to Dr. Evatt"), A989, 1944/43/735/577/1 (NAA).

[50] See the proceedings of the Court of Inquiry with Reference to Landing of Japanese Forces in New Britain, Timor and Ambon, Australian War Memorial ('AWM'): AWM226, 1/1.

[51] *Ibid*., p. 23.

[52] *Ibid.*, p. 24.

[53] Department of the Army Minute Paper, "Japanese Atrocities", 7 April 1943, MP742/1, 336/1/1145 (NAA).

rules of warfare be forwarded to Army Headquarters in Melbourne.[54] In that same month, Australia also applied to be represented on the United Nations War Crimes Commission ('UNWCC'),[55] although it would be more than a year before the UNWCC held its first official meeting.[56]

Australia's national programme to investigate alleged Japanese atrocities and war crimes got firmly underway in 1943, when the government, in response to a request by the Army, commissioned Sir William Flood Webb, who went on to be the Australian Judge and President at the International Military Tribunal for the Far East ('IMTFE'), to conduct a war crimes inquiry.[57] Webb was instructed on 23 June 1943 to enquire into "[w]hether there have been any atrocities or breaches of the rules of warfare on the part of members of the Japanese Armed Forces in or in the neighbourhood of the Territory of New Guinea or of the Territory of Papua".[58] While Webb's commission to conduct a special inquiry for the Australian Government was publicly known (as Chief Justice of the Supreme Court of Queensland, he could not just abruptly disappear from his position), the press was prohibited from "speculation" on the "object" of the inquiry under a censorship instruction which was issued on 1 July 1943, although the censors themselves were privately informed that the inquiry related to atrocities.[59] Indeed, Webb himself had "raised the matter of undesirable premature publicity" in relation to the inquiry and "recommended censorship of any further additional reference to his appointment".[60]

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54 Memorandum from Brigadier W.J. Urquhart for the Adjutant-General to the Secretary, Department of the Army attaching "Statement Concerning Action Taken to Apprehend Japanese War Criminals", 27 September 1945, MP742/1, 336/1/980 (NAA).

55 Cablegram from the Prime Minister's Department to the Secretary of State for Dominion Affairs, London, 8 December 1942, A989, 1943/735/580 (NAA).

56 For a history of the UNWCC, see *History of the United Nations War Crimes Commission and the Development of the Laws of War*, His Majesty's Stationery Office, London, 1948.

57 Letter from Prime Minister John Curtin to F.M. Forde, Minister for the Army, 8 April 1943, MP742/1, 336/1/1145 (NAA). Webb's three commissions in 1943–1945 were pursuant to the National Security (Inquiries) Regulations, no. 35, 1941, also made pursuant to the National Security Act 1939 (Cth).

58 Sir William Webb, "A Report on Japanese Atrocities and Breaches of the Rules of Warfare", March 1944, AWM226, 5 (AWM).

59 See Action Sheet for censorship instruction O2, 1 July 1943, SP106/1, PC551 (NAA).

60 Reported in letter from Col –, Acting Director General of Public Relations, Department of the Army, to the Chief Publicity Censor, 10 July 1943, SP109/3, 329/07 (NAA).

Only a few months later in October 1943, however, amidst the "wave of horror"[61] caused by the story of the beheaded airman, it seems that censorship instruction about the inquiry was either relaxed or withdrawn. Oddly, while it was now permissible to publicise that there was an inquiry underway into Japanese atrocities, Webb's connection to it was now concealed. Several newspapers reported, for instance, merely that an "eminent Australian with special qualifications" or "an Australian with special qualification" had been appointed to undertake an investigation into allegations of Japanese atrocities.[62] The nexus between Webb and the atrocities inquiry was finally made clear on 31 January 1944, when Curtin responded to accounts of Japanese atrocities revealed in Britain and the United States of America ('US') with his first detailed public comment on the subject.[63] On the same day, Evatt issued a lengthy statement on Webb's commission, including the comment that Japan's record of "crimes and barbarities"

> demonstrates Japan's complete lack of civilised practice and stands as an indictment against the whole Japanese military administration and warrants the condemnation of the civilised world.[64]

Perhaps feeling the sting of criticism about apparent government inaction up until that point, Curtin also privately asked senior journalists "in a somewhat truculent manner" in February 1944 to "make it clear that Webb has been working [on the inquiry] for some months".[65]

Webb's remit was broadened for his second war crimes inquiry, when he was instructed on 8 June 1944 to enquire into "whether there have been any war crimes on the part of individual members of the

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61 "Australia Horrified", in *Dubbo Liberal and Macquarie Advocate*, New South Wales, 7 October 1943, p. 1.

62 "Japanese Atrocities to be Investigated", in *Mercury*, Tasmania, 7 October 1943, p. 2; "Inquiry into Jap Atrocities", in *Courier-Mail*, Brisbane, 7 October 1943, p. 1.

63 For a summary of overseas press reporting, see "Storm of Protest in Britain, USA. Feelings of Horror about Japanese Atrocities", in *Argus*, Melbourne, 31 January 1944, p. 12; "Anger at Atrocities. Sharp World Reaction", in *Advertiser*, Adelaide, 31 January 1944, p. 1.

64 "Commission to Probe Jap War Crimes", in *Canberra Times*, 1 February 1944, p. 2. See also "Inquiry into Jap War Crimes. Body Set Up By Federal Govt.", in *News*, Adelaide, 31 January 1944, p. 3; "Japanese Atrocities in Pacific. Australian Commission of Inquiry Appointed", in *Mercury*, Hobart, 1 February 1944, p. 2.

65 Lloyd and Hall, 1977, p. 199, see *supra* note 47.

Armed Forces of the enemy against any persons who were resident in Australia prior to the present war, whether members of the Forces or not".[66] Webb's second appointment did not appear to be subject to censorship, for both his appointment and the subject matter of his inquiry were publicised.[67] The instructions given to the Board of Inquiry into war crimes, also headed by Webb, on 3 September 1945 expanded the remit even further to embrace both British subjects and citizens of allied nations. The Board of Inquiry was instructed to enquire into

> [w]hether any war crimes have been committed by any subjects of any State with which His Majesty has been engaged in war since the second day of September, [o]ne thousand nine hundred and thirty-nine, against any persons who were resident in Australia prior to the commencement of any such war whether members of the Defence Force or not, or against any British subject or against any citizen of an allied nation.[68]

The three comprehensive reports that Webb (and his fellow commissioners in respect of the third report) produced are not surprisingly known as the "Webb Reports". However, details of the evidence being gathered from witnesses and the review of captured Japanese documents throughout 1943 to 1945 remained closely held. As Webb himself described in his first report in March 1944, he had been amply instructed from the very beginning in the need for "the utmost secrecy" and that when the subject matter of the inquiry was discussed in military correspondence, it was classified as "most secret".[69] He advised that he had, therefore, heard all evidence "in camera", as he was empowered to do,[70] and had warned each witness that their evidence was "most

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66 Sir William Webb, "A Report on War Crimes against Australians Committed by Individual Members of the Armed Forces of the Enemy", October 1944, AWM226, 7 (AWM).

67 See for example, "Webb to Sift War Crimes", in *Courier-Mail*, Brisbane, 18 August 1944, p. 1.

68 Sir William Webb, "Report on War Crimes Committed by Enemy Subjects against Australians and Others", January 1946, AWM226, 8 (AWM).

69 See Webb's discussion of "The Need for Secrecy" in "Report on Japanese Atrocities and Breaches of the Rules of Warfare", preamble address to the Attorney-General dated 15 March 1944, pp. 4–5, A10943, 1 (NAA).

70 The whole or part of an inquiry's proceedings might be "heard in private" if the commissioner "considers that it is desirable in the public interest to do so"; see regulation 15, National Security (Inquiries) Regulations, *supra* note 57.

secret".[71] As it had been "repeatedly urged" to him that "so much of the information in this report would be of immense value to the Japanese", he recommended that

> no part of it [the report] be published without the concurrence of General Sir Thomas Blamey. Moreover, in the interests of parents and other relatives of victims of atrocities, it is very desirable not to release to the public their names, or anything else that would enable their identity to be established; except where those particulars have been released already. Above all, the greatest care is required to ensure that none of people in Japanese occupied territory suffer as a result of any publication.[72]

Webb did not reiterate his description of his practices or his recommendation against publication in his second report, submitted in October 1944; however, it was marked at the beginning as "Most Secret (According to Army Classification)".[73]

When completed, the Webb Reports were provided to the Australian Government under the terms of the various commissions, and copies or summaries were provided to the UNWCC and selected Allied nations, including Britain, several other British Commonwealth nations (including Canada and New Zealand) and the US. Copies of the full reports and the summaries were typically marked "secret".[74] The Australian Government did, apparently, briefly consider whether to make public all or some of the first Webb Report in 1944. Certainly, the regulations under which Webb's three inquiries took place appeared to contemplate the eventual publication of the reports, as they offered protection against civil or criminal proceedings, such as defamation, being instigated against any person "publishing in good faith for the information of the public".[75] Conferral with Britain and the US about possible publication, however, revealed that they "did not favour any

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71 "Report on Japanese Atrocities and Breaches of the Rules of Warfare", p. 4, A10943, 1 (NAA).

72 *Ibid*., p. 5.

73 Webb, October 1944, see *supra* note 66.

74 See, for example, "Summary of Report on Japanese Atrocities and Breaches of the Rules of Warfare Presented to His Majesty's Government in the Commonwealth of Australia on March 15, 1944, by Sir William Webb Kt", which is marked as the "secret" copy for H.V. Evatt, A1066, H45/580/2/8/1 (NAA).

75 Regulation 16, National Security (Inquiries) Regulations, see *supra* note 57.

further publicity on Japanese atrocities at present".[76] The Australian Government therefore decided in early July 1944 not to publish a "detailed" statement regarding the "atrocities" disclosed by Webb's first inquiry.[77]

Interestingly, the decision to withhold the first Webb Report from publication, in full or in part, was seemingly not on the ground of the probable effect of very detailed atrocity stories on public morale, which was usually the rationale given for censorship. Rather, the issue of whether to publish or publicise the Webb Report became a fundamental part of broader and complex Allied policy discussions regarding the publicity campaign aimed at Japan in general (which encompassed propaganda about Japanese atrocities) and, in particular, the likely effect of further publicity of atrocity stories on efforts that were then ongoing to secure better Japanese treatment of Allied POWs and internees. Indeed, as Evatt informed the AWC, in making the decision not to publish the Webb Report, the government had given "regard to the interests of the Australian prisoners-of-war in Japanese hands".[78] Instead of publishing the Webb Report, the government decided to issue only a general statement that Webb had received a second commission in order to continue his investigations; the results of Webb's inquiries would eventually be brought before the UNWCC; and that Australia was "determined that those individuals responsible for atrocities shall be brought to justice and punished".[79] Curtin therefore briefly announced in July 1944 that the Webb Report would "not be made public at present".[80] Even so, the nature of the Webb Reports would have been clearly evident to the Australian public from the general statement issued by the government and other verified atrocity stories that were passed by the censors in 1942 to 1945.

The censorship regime was eventually reformed in early 1944, after a press revolt about the application and degree of censorship to various

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76 Reported in Advisory War Council Minute, 19 October 1944, A2680, 22/1945 (NAA).

77 Memorandum for Advisory War Council, "Investigation of War Crimes Against Australians", 3 July 1944, A989, 1944/43/735/577/1 (NAA)

78 *Ibid*.

79 *Ibid*.

80 "Atrocities Report Not to be Published Yet", in *The Advertiser*, Adelaide, 6 July 1944. p. 5.

subjects, including criticism of the government.[81] Censorship had developed, as one newspaper complained in March 1944,

> an unblushing political character, a zest for suppression, and a fussy preoccupation with matters supposed to relate to public morale […] Since nothing that it [censorship] does, however arbitrary or irrational, can be publicly referred to, it enjoys complete immunity from challenge or exposure on specific instances of suppression.[82]

The claim of "complete immunity from challenge" was a definite exaggeration given the confrontation that came to a head in April 1944 between the (principally Sydney) press and the censorship authorities, which eventually reached the High Court of Australia. The dispute was settled out of court, with the outcome being authorisation of censorship only in cases of national security or military operations, thereby removing the public morale ground.[83]

Notwithstanding the censorship reformation, the application of censorship to atrocities stories continued virtually unabated. Indeed, a priority telegraph from Bonney, the Chief Publicity Censor, stamped May 1944 addressed "for censors only" stated that "notwithstanding new [1944 censorship] code", the censorship direction regarding "atrocities still stands […] the only stories publishable will be those released by GHQ [General Headquarters]".[84] In fact, censorship of atrocity stories could well have enlarged in dimension thereafter, due to an instruction that the censorship direction also be construed as including "Japanese atrocities committed in the Indian Ocean Area or elsewhere, irrespective of the nationality of the victims".[85] It was not until May 1945 that Bonney, faced with the influx of atrocity stories which had been published overseas and were being republished in Australia, and without much recourse should a disgruntled newspaper challenge a censorship ruling against an atrocity story, suggested that it might be time for a realistic reappraisal of Australian censorship policy regarding such stories. Bonney advised:

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81 Hilvert, 1984, pp. 174–96, see *supra* note 14.

82 "It is Happening Here", in *Sydney Morning Herald*, 3 March 1944, p. 4.

83 See the new censorship principles in Hasluck, 1970, p. 413, *supra* note 17.

84 Telegraph from "FedCensor" to 'PresCensor Melbourne", stamped 31 May 1944, A11672, 1/1/47 (NAA).

85 Extract from Temporary Censorship Directions – 8. Japanese Atrocities, Department of Information, 5 December 1944, A2680, 22/1945 (NAA).

> Normally, I would ban all horror stories affecting Australian troops on the ground that the effect on relatives and on younger soldiers might be bad, and their publication would not, in my opinion, add an ounce to the war effort. We have to face the fact, however, that the new [1944 censorship] code lays it down that censorship shall not be imposed for the maintenance of morale or the prevention of despondency or alarm. Moreover, it is a fact that horror stories are being released elsewhere.[86]

Indeed, some Australian newspapers had republished atrocity stories cabled to Australian after publication in the US, "despite the standing prohibition contained in publicity censorship directions",[87] but seemingly without action being taken against them. The War Cabinet most curiously decided in June 1945, however, that the "existing Publicity Censorship Instructions on atrocities be adhered to".[88]

As might be surmised, in the immediate aftermath of the war, with the lifting of wartime censorship and the surge of publicity of first-hand accounts of atrocity stories, the imminent public release of the first Webb Report – which was described in the press in August 1945 as "perhaps the most horrifying war document yet compiled" – was hotly anticipated.[89] At the same time, the prominence now being given to atrocity stories, and their level of detail, was criticised on the grounds that it was furthering the suffering of relatives of Australian POWs. Calwell, the Minister for Information, stated:

> There has been a difference of opinion amongst Government advisers on the wisdom of allowing these stories to be published. Unfortunately, the government's censorship power does not cover these cases […] censorship could deal only with questions of security. The Government's power to

[86] Memorandum from E.G. Bonney, Chief Publicity Censor, to the Secretary, War Cabinet, 8 May 1945, A2671, 234/1945 (NAA).

[87] War Cabinet Agendum on "Publication of Stories Relating to Japanese Cannibalism", no. 234, 1945, p. 2, A2670, 234/1945 (NAA). One such story, using the by-line "From Australian Associated Press, New York", was said to be "Cannibalism by Japs in New Guinea", in *Argus*, Melbourne, 24 April 1945, see extract in A2670, 234/1945 (NAA). This article was indeed published on that date on p. 16.

[88] War Cabinet Minute, 12 June 1945 on War Cabinet Agendum on "Publication of Stories Relating to Japanese Cannibalism", no. 234, 1945, A2670, 234/1945 (NAA).

[89] Massey Stanley, "Evatt Presses for Release of Damning Report", in *Sunday Telegraph*, Sydney, 19 August 1945, held in A2680, 22/1945 (NAA).

> prevent publication of such stories is strictly limited. The matter, finally, depends on the good taste of newspaper proprietors. Unfortunately, many of them find in atrocity stories what they regard as sensational news, and, regardless of exacerbations they cause, and the sufferings they impose on the relatives of prisoners of war, the profit motive wins every time.[90]

The editor of the *Sydney Morning Herald*, which published Calwell's comment, responded that while it was "realised" that such stories "must distress the relatives of men who have been in enemy hands", their publication was

> part of a newspaper's duty to inform its readers of the facts on a subject of international importance. The suggestion that this news is published simply for the purpose of increasing circulation is an outrageous one and typical of Mr. Calwell.[91]

One subsequent letter of protest plaintively asked Calwell if it was "quite impossible to stop the publication of atrocity stories completely", at least "could not the papers be prevented from splashing these stories on front-page, back-page, and every page, with pictures and fat head-lines?" Calwell responded with the advice that while the government also deplored the newspapers' actions, censorship could no longer be invoked and protests should be addressed to newspaper editors, whose responsibility it was to consider the "bad effect which these sensational atrocity stories create".[92]

When extracts of the first Webb Report were eventually made public in September 1945,[93] the report was labelled "one of the most

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[90] "Atrocity Stories Mentioned in Federal House", in *Sydney Morning Herald*, 6 September 1945, p. 5.

[91] The editorial comment is at the end of another version of *Sydney Morning Herald* article, *ibid.*, said to have been published on the same day, which was clipped for retention for the Advisory War Council, held in A2680, 22/1945 (NAA). Calwell had a very antagonistic relationship with the press, see Headon, 1999, p. 3, *supra* note 14.

[92] Letter from Dr. Greta Hort, Principal, University Women's College, Melbourne, to A.A. Calwell, Minister for Information, 10 September 1945; and letter in response from Calwell, 19 September 1945, SP109/3, 329/07 (NAA).

[93] While the first Webb Report was tabled in Parliament and publicised in September 1945, it was not until April 1946 that the second Webb Report was tabled in Parliament; see statement by Dr. H.V. Evatt, Commonwealth, Parliamentary Debates, House of Representatives, Hansard, 10 April 1946, pp. 1294–97.

important documents Australia has presented to the world".[94] The resulting deluge of publicity about Japanese atrocities served to firm up the Australian Government's resolve to investigate and prosecute suspected Japanese war criminals, and certainly the rhetoric about doing so. As Norman Makin, the acting Minister for External Affairs, advised the House of Representatives on 12 September 1945, it was "[o]ur duty to future generations to ensure that *all* those responsible for those crimes against humanity shall be brought to justice". Makin thus argued that the "apprehension and bringing to trial of *all* classes of Japanese war criminals should commence forthwith".[95] A similar resolve regarding all war criminals can be seen in the instructions issued by the Australian Army in relation to war crimes investigations. As various Australian forces and command areas were advised in January 1946: "It is the policy of the Australian and Allied Governments that no stone should be left unturned in bringing ALL Japanese war criminals to justice".[96] The Army's own history of its war crimes operations, written in 1951, suggests that

> a policy was strictly adhered to under which every possible action was taken, irrespective of the expense and effort involved, to ensure that every war criminal received his just des[s]erts.[97]

32.4. The Prosecution of War Criminals

The goal to prosecute every single accused Japanese war criminal was, of course, doomed to failure. While a newspaper report trumpeted in October 1946 that the "greatest manhunt in the history of the Asia and the Pacific has already netted *most* of the Japanese responsible for the worst

[94] "Webb Report", in *Daily Telegraph*, Sydney, 12 September 1945, clipping held in A2680, 22/1945 (NAA).

[95] Italics added for emphasis: N. Makin, Question on 'Japanese Atrocities', Commonwealth, Parliamentary Debates, House of Representatives, Hansard, 12 September 1945, pp. 5284–85.

[96] Capitalisation in the original: memorandum by Brigadier W.J. Urquhart for the Adjutant-General entitled "Investigation of War Crimes", 11 January 1946, SP196/1, 22, PART 2 (NAA).

[97] "Report on the Directorate of Prisoners of War and Internees, 1939–1951", Part V, Introduction, A7711, VOL 1 (NAA).

crimes against Australian prisoners-of-war",[98] these were, of course, only a very small number of those who had committed such crimes. Moreover, only a smaller number of those detained went on to be prosecuted, for a variety of reasons. The most pressing difficulty facing the Australian Government in late 1945, however, was not the numbers of suspects, the number of stones to be overturned or the expense or effort but the fact that Australia had never before prosecuted anybody for committing a war crime. Moreover, the Australian Army, which was tasked with that duty, had also never held custody of a convicted war criminal sentenced to a term of imprisonment or, in fact, ever carried out a death sentence on any person at all, let alone a convicted war criminal sentenced to death. As might be surmised, the story of how Australia proceeded to do all these things from zero base knowledge has much to offer those who study the historical origins of international criminal law.

While the war crimes trials were ongoing in various locations in 1945 to 1951, it was possible, theoretically, to learn a great deal about how Australia was approaching the prosecution of accused war criminals. The legislative machinery for the trials, the War Crimes Act 1945 (Cth), and its subsidiary Regulations for the Trial of War Criminals, were gazetted, as is the legislative practice in Australia. Moreover, pursuant to the regulations, the trials were open to the public to attend, space permitting and unless the Court itself decided that the public should be excluded.[99] In practice, of course, the far-flung trial locations meant that few members of the public did attend, apart from service personnel in their off-duty hours or their spouses. A party of nurses, for instance, were interested attendees at the Darwin trials in early 1946 (see Figure 1).

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98 See "Post-war Manhunt: Nemesis and the Japanese", in *West Australian*, Perth, 26 October 1946, p. 6 (emphasis added).

99 Regulation 14 of the Regulations for the Trials of War Criminals provided: "The sittings of Military Courts will ordinarily be open to the public so far as accommodation permits. But the Court may, on the ground that it is expedient so to do in the national interest or in the interests of justice, or for the effective prosecution of war crimes generally, or otherwise, by order prohibit the publication of any evidence to be given or of any statement to be made in the course of the proceedings before it, or direct that all or any portion of the public shall be excluded during any part of such proceedings as normally take place in Open Court, except during the announcement of the finding and sentence pursuant to the preceding regulation". As far as I know, however, this regulation was used only once in 300 trials to exclude the public from a trial for "torture", which principally encompassed sexual assault, see the Rabaul R35 trial proceedings, A471, 80782 (NAA).

Figure 1: Three nurses spectating at a war crimes trial in Darwin, taken on 4 March 1946 (Photograph in the collection of the Australian War Memorial, NWA1071).

Official publicity regarding the trials was, therefore, quite vital for the dissemination of knowledge to the Australian public and, just as importantly, to audiences outside Australia. In early 1946, for instance, the Minister for the Army, F.M. Forde, suggested to the Army that it was "desirable" for "greater publicity" to be given to the results of trials because of their "international importance".[100] Lieutenant General V.A.H. Sturdee, then the acting-commander-in-chief of the Australian Military Force, agreed on the "desirability of greater publicity" and thereafter provided "periodical statement[s] giving the details of the charges, findings, sentences, results of appeal, etc. for release to appropriate

[100] Memorandum from the Secretary to the Minister for the Army to the A/Commander-in-Chief, Victoria Barracks, Melbourne, 7 February 1946, MP742/1, 336/1/980 (NAA).

publicity channel".[101] Such particulars were given, for instance, to the Shortwave Division of the Department of Information in early to mid-1946 for "Japanese news broadcasts", which were made in the Japanese language.[102]

Of course, press correspondents, if they were in or could get to the trial locations, were also free to attend the trials and to file reports, now free of censorship. The relative accessibility of Darwin, for instance, meant that several newspapers had correspondents in place for the trials there in early 1946 and the trials were photographed far more comprehensively than those in any other location. By comparison, a reporting share agreement had to be put in place for the Manus Island trials in 1950–1951, due to the limited space for accommodation on the military base. The Army also deliberately manipulated the selection of the press representatives, claiming limited accommodation, so as to "discreetly circumvent" having to admit a press photographer who might "not confine his activities to subjects directly associated with the War Crimes Trials and may possibly feature certain aspects of progress being made with Defence installations".[103] The Army also, for no apparent reason, prohibited photographs from being taken in court on Manus Island, although it allowed photographs to be taken of the accused being taken to court.[104] While limited representatives of the press were allowed to witness executions of convicted war criminals, no photographs were allowed to be taken for publication.[105] As the Secretary of the Army

[101] See letter from Lieutenant General V.A.H. Sturdee, Acting Commander-in-Chief, Australian Military Force to F.M. Forde, Minister for the Army, 9 February 1946, MP742/1, 336/1/980 (NAA).

[102] See the exchange of correspondence in MP742/1, 336/1/569 (NAA).

[103] Unsigned copy of memorandum from the Press Relations Officer to the Minister for the Army, 25 May 1950, held in Papers of Major Harold Alexander Richardson, Wallet 4, PR02009 (AWM)

[104] Message from "Army Melbourne" to "CrimSec Manus", 7 June 1950, AWM166, 4 (AWM).

[105] Lieutenant General V.A.H. Sturdee, then Acting Commander-in-Chief, originally held the view that the press should be excluded from executions. He wrote: "My own view is that it would be wrong to carry out these executions in any but the most solemn form. I don't think the admission of the Press, and especially photographers, would be in the interests of Australia": letter from Lieutenant General V.A.H. Sturdee to F.M. Forde, Minister for the Army, 9 February 1946, MP742/1, 336/1/980 (NAA). Sturdee later decided, however, to follow British practice; see minute from F.R. Sinclair, Secretary of the Army to the Minister for the Army, 21 February 1946, MP742/1, 336/1/980 (NAA). See also

pointed out in February 1946, however, the decision to admit the press as witnesses to executions "should not be regarded as an open invitation to the press to proceed from Australia to the scene of the executions, but that local press representatives in the area will be admitted".[106]

To the ongoing regret of some in the government, it was no longer possible to apply censorship to the press, which meant that atrocity stories in all their "nakedness", as Northcott had put it earlier, were freely reported from the trials. Members of the public and various veterans' organisations wrote many letters, including directly to the Prime Minister and the Minister for the Army, protesting about the publication of names of Australian victims, or photographs of them, during reporting on the trials, due to the distress it was causing to families and friends. The protestors were usually informed, however, that while the government shared and fully endorsed their view of the indelicacy of the practice, the trials were being conducted in open court and it was no longer possible to impose censorship on the press. The impetus to resolve complaints about press reporting did seem to come to a head, finally, in relation to the Manus Island trials in 1950.[107] After official discussions with a representative from the Australian Newspaper Proprietors Association, the government received assurances that newspapers would voluntarily withhold names of Australian victims from publication,[108] in effect introducing a practice of self-censorship.

The Australian Government continued to hold firm to the policy that names and photographs of Australian victims should not be published well into the 1950s. For example, a T.M. Johnson of New York sought permission from the Australian Government in 1957 to publish the name, which he knew, of the Army sergeant who had been executed by the Japanese in New Guinea in 1943. The execution of Sergeant Siffleet, mentioned earlier, was already infamous worldwide due to the photograph of it that had been seized in 1944. Even though 14 years had passed since

"Admission of Press Representatives to View the Executions of War Criminals Press Statement", Melbourne, 23 February 1946, MP742/1, 336/1/980 (NAA).

106 Memorandum from F.R. Sinclair, Secretary of the Army to the Minister for the Army, 23 February 1946, MP742/1, 336/1/980 (NAA).

107 For selected examples of the correspondence at this stage, see MP742/1, 336/1/2044; MP742/1, 336/1/2050; and MP742/1, 336/1/2054 (NAA).

108 Memorandum from C.A. Nicol, Press Relations Officer, Department of the Army to the Secretary, Department of the Army, 9 June 1950, MP742/1, 336/1/2044 (NAA).

Siffleet's execution, Johnson's request to publish his name was refused to spare Siffleet's relatives from the "anguish and distress that may result from publication", as his next-of-kin had "not been advised of the nature of his death whilst a prisoner of war of the Japanese".[109] Interestingly, while Johnson's article entitled "Execution of a Hero" included the infamous photograph when it was published in *People* magazine in March 1958, and acknowledged that the photograph had previously been mistakenly identified as showing Flight Lieutenant Newton, the article did not give Siffleet's name, explaining that the Australian Government had requested the identity of the serviceman not be revealed.

32.5. Restricting Access to the War Crimes Trials after 1951

After the trials were completed in 1951, a new veil, not so much of secrecy this time but one of obscurity descended, one borne largely through inaction rather than deliberate action. It is, to a legal historian, a crime in and of itself that the Australian trial proceedings were kept out of public knowledge for decades after they concluded, thereby inhibiting research into the Australian policies and practices in relation to war crimes and how these were positioned vis-à-vis the practices of other nations or international criminal law itself as it was developing in this critical period.

After being returned from the various trial locations to Melbourne, the original trial proceedings were retained in house by the Department of the Army while the trial programme was ongoing. The Australian War Memorial sought in 1946 to obtain copies of the trials already completed for inclusion in its library,[110] but eventually conceded that it "should meet requirements" for the writing of the official history of the war that the Attorney-General's Department would allow "access" to the trial

[109] See letter from G. Long, General Editor, Official War History to the Secretary of the Department of the Army, 30 January 1957 and letter from A.D. McKnight, Secretary of the Department of the Army to Long, 12 February 1957, MP927/1, A336/1/71 (NAA). It was "always" the "policy governing notification of casualties to the next of kin of prisoners of war who were killed during captivity" to "withhold information as to the circumstances surrounding the member's death unless the next-of-kin asked that the information be furnished"; see memorandum from the Adjutant-General to the Secretary of the Army, "Publication of Names of AMF Personnel – Manus Trials", 14 June 1950, AWM166, 4 (AWM).

[110] Letter from A.W. Bazley, Acting Director, Australian War Memorial to the Secretary, Department of External Affairs, 28 August 1946, MP742/1, 336/1/1000 (NAA).

proceedings for "official historical purposes".[111] The War Memorial mistakenly believed at this stage that the Attorney-General's Department also held copies of the trial proceedings, following the practice to transmit copies of military courts martial to that department. The War Memorial duly complained to the Army in 1947, therefore, when the official war historian[112] applied to the Attorney-General's Department to inspect the proceedings but was told that the department did not hold them. The Department of the Army explained to the War Memorial that the files were "constantly being perused to check whether information can be obtained which will help in the preparation of charges against other Japanese" and, as such, they had "not yet been sent for filing".[113] In 1949, however, the original trial proceedings, which formed the "only complete copy" of each trial, began to be transferred to the Attorney-General's Department.[114] There were some incomplete copies of some trials: for instance, the War Memorial eventually received incomplete photostat and microfilm copies of some trials, principally from Rabaul.[115] Cost seemed to be the prohibitive consideration against wider distribution in Australia of the trial proceedings. Even the official historian, after he reviewed the relevant files, advised the War Memorial that while a "complete set of [trial] proceedings would be of value", the "labour and expense which would be involved in producing copies" of the trials "would not be justified".[116]

Interestingly, while the official war historian was able to review the trial proceedings, other applicants were not permitted to see original

[111] Letter from J.L. Treloar, Director, Australian War Memorial to Lieutenant Colonel E.A. Griffin, Director of Prisoners of War and Internees, AHQ Melbourne, 18 October 1946, MP742/1, 336/1/1000 (NAA).

[112] This is probably a reference to Gavin Long, the General Editor of the Second World War Official Histories and also the author of *The Final Campaigns, Australia in the War of 1939–1945, Series 1 – Army, Volume VII*, The Australian War Memorial, Canberra, 1963.

[113] Letter from F.R. Sinclair, Secretary, Department of the Army to the Director, Australian War Memorial, 17 September 1947, MP742/1, 336/1/1000 (NAA).

[114] These did not, of course, include the Manus Island trials, which had yet to take place. See letter from J.L. Treloar, Director, Australian War Memorial to the General Editor, Official War History, 30 September 1949, AWM113, 5/6/1 (AMW).

[115] Memorandum from J.L. Treloar, Australian War Memorial to the Secretary, Department of the Army, 16 April 1949, AWM113, 5/6/1 (AMW).

[116] As reported in letter from J.L. Treloar, Director, Australian War Memorial to the Officer-in-charge, Military History Section, AHQ, Victoria Barracks, 14 December 1948, AWM113, 5/6/1 (AMW).

documents pertaining to the trials, even though they seemingly had legitimate reasons for doing so and were quite persistent about it. E.J. Ward, the Federal Member for East Sydney, for instance, asked in 1957 for detailed information about the numbers of war criminals convicted, their offences, penalties imposed and, if to imprisonment, the actual periods of confinement and where they served their sentences.[117] Ward appeared to be greatly aggrieved by the fact that war criminals who had been sentenced to life imprisonment had received, in his view, the "sudden generosity" of being released in 1956, even though he believed that the government had given an undertaking that the war criminals returned to Japan would serve their full sentences.[118] The Departments of External Affairs and the Army spent more than three weeks drafting and redrafting a very general and brief statement in response which, naturally, did not satisfy Ward, who continued to press his request to inspect the "official records".[119] Both departments concurred, however, that Ward should "simply be informed that these records remain confidential".[120]

While considerable effort has gone into officially documenting Australia's history of the war, the characteristics of comprehensiveness and widespread dissemination of information have never quite coincided in relation to the discrete topic of Australia's war crimes investigations and prosecutions. A detailed official history was drafted in the early 1950s, for instance, of the Army's Directorate of Prisoners of War and Internees, which had ultimate responsibility for investigating and prosecuting war crimes, but the report appears to have had extremely

[117] Letter from E.J. Ward to A. Fadden, Acting Prime Minister, 1 July 1957, MP927/1, A336/1/73 (NAA).

[118] Extract from Hansard – 11 September 1957 on Japanese War Criminals by E.J. Ward, MP927/1, A336/1/73 (NAA). The reasons behind his action were probably numerous but Ward was in 1957 a senior Labor figure in opposition to the Liberal government; he also disliked Prime Minister Robert Menzies (although his correspondence on this issue went to the Acting Prime Minister, as Menzies was overseas). Moreover, Ward has been described as someone who pursued "sensational allegations with characteristic vindictiveness": Ross McMullin, "Ward, Edward John (Eddie) (1899–1963)", *Australian Dictionary of Biography*, see *supra* note 8.

[119] Letter from Acting Prime Minister to E.J. Ward, 25 July 1957; and letter from E.J. Ward to the Acting Prime Minister, 31 July 1957, MP927/1, A336/1/73 (NAA).

[120] Teleprinter message from the Secretary, Department of External Affairs to the Secretary, Department of the Army, 4 September 1957 and teleprinter message in response, 5 September 1957, MP927/1, A336/1/73 (NAA).

limited circulation and has never been published.[121] The official histories of the Second World War are, as might be expected, extremely comprehensive and widely known but the volumes necessarily concentrate on the 1939–1945 period. While they do mention Japanese atrocities (including executions and massacres) and alleged war crimes, and briefly cover the Webb investigations, the post-war war crimes trials are mentioned only briefly.[122]

The Australian war crimes trials were not systematically reported and, indeed, there appeared to be no serious consideration in the immediate post-war of publishing a law reports series, even though the importance of reports of the trials was recognised by at least one eminent Australian historian. Kenneth Binns, the distinguished Parliamentary and National Librarian (1928–1947), noted in an April 1947 memorandum:

> This may be an opportune time to raise the question of the Reports of the Japanese War Trials, any information concerning the publication and supply of which we should appreciate. We are anxious to secure a set as soon as possible.[123]

Only five of the 300 Australian trials were eventually reported as a part of the UNWCC's *Law Reports of Trials of War Criminals* (1947–1949),[124] even though microfilm copies of about a third of the 300 Australian trials

[121] "Report on the Directorate of Prisoners of War and Internees, 1939–1951", see *supra* note 97. The archival note to series A7711, which solely holds this history, advises, for instance, that the "master copy" is held by the Directorate, with copies held by the Australian War Memorial, the Department of Defence and that the National Archives of Australia holds the "third copy".

[122] Lionel Wigmore, *The Japanese Thrust, Australia in the War of 1939–1945, Series 1 – Army,* vol. IV, The Australian War Memorial, Canberra, 1957, p. 669; Long, 1963, p. 583, see *supra* note 112; and George Odgers, *Air War Against Japan, 1943–45, Australia in the War of 1939–1945, Series 3 – Air,* vol. II, The Australian War Memorial, Canberra, 1957, p. 386.

[123] Memorandum from Parliamentary Librarian to the Secretary, Department of External Affairs, 12 April 1947, A1838, 1550/3 (NAA). See Pauline Fanning, "Binns, Kenneth (1882–1969)", *Australian Dictionary of Biography*, see *supra* note 8.

[124] United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, His Majesty's Stationery Office, London, 1947–1949. These were the Rabaul R26 trial of Sergeant Major Ōhashi Shigeru and others, vol. V, pp. 25–31; the Rabaul R31 trial of Captain Shinohara Eitarō and others, vol. V, pp. 32–36; the Rabaul R59 trial of Captain Katō Eikichi, vol. V, pp. 37–38; the Rabaul R176 trial of Lieutenant General Baba Masao, vol. XI, pp. 56–61; and the Rabaul R161 trial of Sergeant Major Tanaka Chūichi, vol. XI, pp. 62–63.

from various trial locations, principally from Rabaul but also trials from Darwin and Labuan, were sent to the UNWCC.[125] The trial proceedings themselves were not otherwise widely circulated outside Australia, again in part because of the considerable cost involved in copying them. For instance, the US Library of Congress enquired through the Australian Embassy in Washington in early 1947 about obtaining transcripts of the Australian trials held in New Guinea, whether by carbon copy or microfilm, at the Library's expense.[126] The Army estimated, however, that the approximate cost for microfilming the trials requested would be £223–6–8,[127] a considerable sum at the time. As of August 1949 the Library of Congress was still considering the purchase of the transcripts[128] and it is unclear whether they ever obtained them. Certainly, the catalogue of the Library of Congress includes only a few standard sources on Australian war crimes trials, although, unexpectedly, it does have what appears to be a transcript of three of the 26 trials held on Manus Island in 1950–1951. It was clear, however, that not all applicants for copies of the Australian trials would receive them, even if they were prepared to pay the costs.

During the decades after the war, the Australian Government held understandable concerns that if the Australian trial proceedings were freely accessible, commentators, particularly in Japan, would criticise them as "victors' justice", a concept that was in circulation well before Richard Minear's book in 1971.[129] This concern meant that a request by the Japanese Government in the 1950s for copies of the Australian trial proceedings was refused. Judging by the attention given in Australia to how the other Allied Powers were handling similar Japanese requests for their trials, the same or similar concerns about Japanese criticism were held elsewhere. As with many of the Allied decisions made regarding Japan in the post-war period, the Japanese requests to the US, Britain, France and the Netherlands for copies of their various trials were "refused

[125] See the list of trials provided in Memorandum from the Secretary, Department of External Affairs to the External Affairs Officer, London, 15 December 1947, A1838, 1550/3 (NAA).

[126] Letter from Chancery, Australian Embassy, Washington to the Department of External Affairs, 2 May 1947, A1838, 1550/3 (NAA).

[127] Letter from F.R. Sinclair, Secretary, Department of the Army to the Secretary, Department of External Affairs, 1 April 1949, A1838, 1550/3 (NAA).

[128] Letter from O.L. Davis, First Secretary, Australian Embassy, Washington to the Secretary, Department of External Affairs, 1 August 1949, A1838, 1550/3 (NAA).

[129] Richard Minear, *Victors' Justice: The Tokyo War Crimes Trial*, Princeton University Press, Princeton, NJ, 1971.

by agreement" in 1959. Another Japanese request for copies of the Australian trial proceedings arrived in 1965, together with strong reassurances about the purposes for which Japan wanted the copies and the conditions it was willing to abide by to receive them. The Japanese Ministry of Justice explained that it was collecting "all available material concerning war trials" to facilitate research, as it was "convinced that these researches contribute to the development of international law and to the prevention of war". The Ministry reassured Australia that it had "no intention of repudiating the war trials themselves" and advised that, if received, the copies would be "made available only to those scholars who can make good use of them for a purely academic purpose".[130]

The Japanese request was considered at some length over the next few years. This delay was not merely an overabundance of caution on Australia's part but a realistic appraisal that, in some cases, there were valid grounds for criticism. As a 1967 report by the Attorney-General's Department into the issue of whether to grant access observed, while the trials were "generally satisfactory" and did not cause "any substantial miscarriage of justice":

> Since war crimes trials are a controversial issue in general, they provide material for a troublemaker to use against the country which conducted them […] Almost all of the trials of "B" and "C" class criminals have elements appearing on the face of the records which would provide a hostile reader with anti-Australian ammunition.[131]

The report cautioned, therefore, that "[w]e should therefore be wary of providing adverse propaganda against ourselves".[132] One of the report's conclusions, however, was that a refusal to grant access to the trials "might imply that we have something to hide".[133] R.J. Percival of the Australian Embassy in Tokyo presented the decision to be made as a balancing act: in his mind, the advantages to be gained by releasing the copies outweighed the possible disadvantages from a refusal. Percival, too, thought that refusing the request would not only suggest that Australia had something to hide but that "our action would also doubtless

[130] Embassy of Japan, Note Verbale, no. 51, 25 April 1965, A432, 1967/2152 (NAA).

[131] See Lyndel V. Prott, report entitled "Release of Records of Japanese War Crimes Trials", 5 April 1967, pp. 1, 2, 5, A432, 1967/2152 (NAA).

[132] *Ibid*., p. 1.

[133] *Ibid*., p. 11.

be regarded as evidence that a strong element of distrust and antipathy remains in Australia's attitude towards Japan".[134] After considerable consultation, again with the other Allied Powers, Australian approval was finally granted in late 1968 for partial copies of the trial proceedings[135] to be made available to the Japanese Government and for "bona fide Australian scholars" to be able to review the trials. There was no instruction given, however, as to how to determine whether an applicant was a "bona fide Australian scholar", perhaps because, as of 1967, there was "no record of any interest ever being expressed by scholars in the trials".[136] Indeed, it was erroneously presumed at this stage that as the trials lacked written judgments, this meant that they were of "little value for research" and, in particular, their "usefulness […] for research into international law" was "dubious".[137]

It was not until 1975 that the public at large was granted open access to the trial proceedings,[138] which had, by then, been handed over to the National Archives of Australia, where they reside today. In announcing his decision to lift the access restrictions, the Attorney-General, Keppel Enderby QC, remarked:

> For too long Australian scholars have been hampered in their attempts to interpret Australia's history. Restrictions like this one [on access to the trial proceedings] no longer serve a useful purpose […] The past should be everyone's property.[139]

Of course, it was not only Australia's history that was obscured by the long-term restrictions on accessing the trial proceedings but also that of international criminal law.

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[134] Confidential memorandum for the Secretary, Attorney-General's Department, 14 August 1968, A432, 1967/2152 (NAA).

[135] The copies were not to include the Judge Advocate General's reports, pursuant to the practice not to provide such confidential and privileged reports when transcripts of Australian court-martial proceedings were ordinarily made available.

[136] Department of External Affairs cablegram, 11 April 1967, A432, 1967/2152 (NAA).

[137] Prott, 1967, pp. 11, 13–14, *supra* note 131.

[138] This was comparatively late, as the United States reportedly made their trial proceedings "available to U.S. scholars" since 1962: advised in cablegram from Australian Embassy, Washington to Department of External Affairs, 3 April 1967, A432, 1967/2152 (NAA).

[139] Attorney-General's Department, "Access to Historical Records", press release, 2 June 1975, A1838, 3103/10/13/12, PART 16A (NAA).

Today, the Australian trial proceedings are digitised in full,[140] as are many associated files, including war crimes investigation files, and are freely available online to anyone anywhere in the world. As the director of the Australian War Memorial accurately predicted in 1946, the "proceedings of the trials of Japanese war criminals […] will be of value to the Australian official historians and later to other historians and students as records of the Second World War".[141] Interestingly, the National Archives continues to practice, in effect, its own form of "censorship" of atrocity stories. Pursuant to the Archives Act 1983 (Cth), information in certain categories may be exempt from public access, including if the disclosure of the information would "involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person)".[142] This allows the National Archives to redact a document, as but one example, when it names a person who is said to have been a victim of cannibalism. The practice is, however, sporadic and inconsistent; it is certainly possible to find information redacted in one file and unaltered and freely readable in another.[143] The exemption practice is, ultimately, about sensitivity towards family members and not, as has been recently suggested in the Australian press, indicative of a government cover-up or a deliberate suppression of information to hide Japanese war crimes from the Australian public.[144] After all, access decisions that certain information is exempt are appealable.[145]

[140] Apart from a handful of large maps tendered as exhibits during the trials, the size of which currently precludes digitisation.

[141] As quoted in memorandum from the Attorney-General's Department to the Secretary, Department of External Affairs, 11 October 1946, A1067, UN46/WC/8 PART 5 (NAA).

[142] Section 33(1)(g), Archives Act 1983 (Cth).

[143] An example of this inconsistent practice is that the name of the victim in respect of charges of mutilation of the dead and cannibalism in the Wewak MW1 trial, and the names and units of witnesses whose identities might disclose the identity of the victim, have been redacted from the trial proceedings otherwise open to the public. For the trial proceedings, see A471, 80713 (NAA). The identity of the victim is, however, ascertainable from other files which I have similarly, out of sensitivity, chosen not to provide the details of here.

[144] Rory Callinan, "Commandos' Horrific End Kept Secret", in *Sydney Morning Herald*, 5 October 2013, p. 3.

[145] I have successfully challenged decisions to exempt some documents from public access, although, as far as I am aware, none are related to atrocity stories.

Regrettably, the constraints of space mean that it is not possible to recount in full the extent of Australia's contribution to international criminal law as revealed by the Melbourne Law School's project, in conjunction with the Australian War Memorial and Department of Defence's Legal Division, to finally create a comprehensive and systematic *Law Reports Series* for the Australian trials, which shall be published in the coming years. However, it is possible to share one brief conclusion about the issue of victors' justice and the trials. Given the general Australian animosity towards Japan during the war, heightened by the deluge of atrocity stories in the immediate post-war period, it was entirely possible that the official Australian attitude towards the prosecution of war criminals might have given rise to something resembling the quintessential "kangaroo court". For instance, Archie Cameron, Federal Member for Barker, took a Churchillian view and reportedly suggested in September 1945 that it should be Allied policy to "execute every convicted Japanese war criminal", [146] presumably no matter the war crime. It is heartening, however, to find statements by Australian government officials and military officers directly associated with the trials that expressed the desire to uphold standards of fairness, justice and accountability. Indeed, there was an acute awareness and a clear understanding by many involved that Australia would be judged in the future on its conduct. As Webb observed in June 1945, for example:

> Posterity cannot condemn us if we deal with our enemies in the strictly legal way recognised by International Law, to which after all, our enemies have professed their adherence. I respectfully suggest that we should not abandon this strictly legal method, to join with other Nations in spectacular public trials in a special Court created for the occasion and savouring perhaps of the barbaric.[147]

[146] Quoted in "Enquiries on Atrocities: Federal Measures to Sift Evidence", in *The Advertiser*, Adelaide, 13 September 1945, p. 5. It was not surprising that Cameron held firm views on Japanese war criminals, as he had worked in the Directorate of Military Intelligence at AHQ Melbourne during the war and, in addition kept up with not only his own parliamentary duties but those of A.M. Blain, the Member for the Northern Territory, who was being held as a POW by the Japanese: John Playford, "Cameron, Archie Galbraith (1895–1956)", *Australian Dictionary of Biography*, see *supra* note 8.

[147] Letter from Sir William Webb to J.D.L. Hood, Acting Secretary, Department of External Affairs, 26 June 1945, A1066, H45/580/6/2 (NAA).

Given his later position at the "spectacular", "public" and "special" IMTFE, of course, this early viewpoint on the advisability of adhering to legal norms becomes rather ironic. However, many other officials knew that the Australian trials would be judged and of the necessity for a legal, instead of an emotional, approach to the prosecutions of accused war criminals. The Secretary of the Department of the Army suggested in December 1945, for instance, that a critical view would be taken of the Australian trials in the years to come and

> it might be held that any departure from the normal methods of administration and justice cannot be justified because the motives which underlie our activities in bringing our former enemies to trial cannot be said to be altogether disinterested or unbiased.

He was concerned, in particular, with ensuring that sentences were not imposed as a "measure of retaliation against a former enemy" but that the "underlying motive" in each trial was "the securing of strict justice".[148] Various individual Australian Military Courts themselves were certainly clear that they were not operating out of a desire for vengeance. For instance, Colonel J.L. McKinlay, the President of the very first trial, which commenced at Morotai on 29 November 1945, observed that in sentencing the convicted, the Court was

> merely carrying out the laws of British and International justice. We are not taking our vengeance, but protecting society from the ravages of cruelty and imposing a sentence to act as a deterrent to others who, in the years to come, may be like minded.[149]

That questions of justice were routinely raised and considered by officials in their private correspondence in the lead-up to and during the trials demonstrates that the public promises made to the Australian people about bringing all Japanese war criminals to *justice* were not merely verbiage designed to cloak otherwise unfair trial policies and practices, motivated in full or in part by vengeance, with legal respectability. Indeed, the protracted survey of all 300 Australian trials that I have conducted over the last five years in fact reveals very few instances of

[148] Memorandum from the Secretary, Department of the Army for the Minister, 6 December 1945, A472, W28681 (NAA).

[149] For the trial proceedings, see A471, 81718 (NAA).

gross unfairness to the accused, which are detailed elsewhere.[150] Of course that does not mean that criticism cannot be made of the trials nor, indeed, of the few instances of clear injustice that occurred. The line between vengeance and justice was, then as it is now, extremely thin. As a public servant submitted to Cabinet when it was considering clemency for convicted war criminals in 1955:

> Perhaps the emotions at the time [of the trials] varied between "Hang the Kaiser" and "Crime Does Not Pay" themes. The whole philosophy of international punishment for war crimes is equivocal. From the viewpoint of the vanquished it is difficult to avoid seeing in punishment of individuals a vindictiveness towards the beaten. But what were we to do? To allow these men to go unpunished would have done violence to our own feelings, and would have caused the Japanese to think we were both soft and easily hoodwinked. We wanted to ram home the ideas that to use war as an instrument of policy is evil, but that if war is used there are conventions of humanity to be observed, which somewhat soften its impact.[151]

No doubt, if there were a wider knowledge of Australian policies and practices in relation to breaches of international criminal law during the Second World War, and particularly of the Australian war crimes trials, some of the most prevalent criticisms of the various Allied international and national war crimes trials of the Japanese – including that they were nothing more than victors' justice or disregarded Asian-Pacific victims or failed to prosecute for sexual crimes – would be far less sustainable. Moreover, we would know a great deal more about certain less usual war crimes, such as cannibalism[152] or the extensive discussion in a number of trials of what actually constituted a fair and proper trial for committing a war crime under international law. Finally, we would have a

[150] See the forthcoming book, Georgina Fitzpatrick, Timothy McCormack and Narrelle Morris (eds.), *Australia's War Crimes Trials 1945–51*, Martinus Nijhoff, Leiden, forthcoming 2015.

[151] Ronald Mendelsohn, Comments on Cabinet Submission No. 315, "Japanese War Criminals'", 12 April 1955, A4940, C1233 (NAA).

[152] "Offences committed against Dead Bodies", as an "exceptional" war crime, received only one small paragraph of consideration in the UNWCC's *Law Reports of Trials of War Criminals*, vol. XV, p. 134, *supra* note 124.

more consolidated understanding of how international criminal law developed and was applied in this crucial period.

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Historical Origins of International Criminal Law: Volume 2

Morten Bergsmo, CHEAH Wui Ling and YI Ping (editors)

The historical origins of international criminal law go beyond the key trials of Nuremberg and Tokyo but remain a topic that has not received comprehensive and systematic treatment. This anthology aims to address this lacuna by examining trials, proceedings, legal instruments and publications that may be said to be the building blocks of contemporary international criminal law. It aspires to generate new knowledge, broaden the common hinterland to international criminal law, and further develop this relatively young discipline of international law.

The anthology and research project also seek to question our fundamental assumptions of international criminal law by going beyond the geographical, cultural, and temporal limits set by the traditional narratives of its history, and by questioning the roots of its substance, process, and institutions. Ultimately, the editors hope to raise awareness and generate further discussion about the historical and intellectual origins of international criminal law and its social function.

The contributions to the three volumes of this study bring together experts with different professional and disciplinary expertise, from diverse continents and legal traditions. Volume 2 comprises contributions by prominent international lawyers and researchers including Professor LING Yan, Professor Neil Boister, Professor Nina H.B. Jørgensen, Professor Ditlev Tamm and Professor Mark Drumbl.

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