COMMAND RESPONSIBILITY AT THE SANDAKAN-RANAU WAR

CRIMES TRIALS

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This thesis is submitted in partial fulfilment of the requirements of the
Bachelor of Arts in History with Honours, 2016.
DECLARATION

I declare that this thesis is my own account of my research and contains as its main content work which has not previously been submitted for a degree at any tertiary institution.

Paul Taucher
3 November 2016.
ABSTRACT

In the Allied trials of suspected Japanese war criminals after the Second World War, the court utilised a number of legal doctrines, derived from both domestic criminal law and international criminal law. The question of how to convict those who had ordered war crimes, or allowed them to happen, without directly taking part in the crimes, was answered by the doctrine of command responsibility. The first command responsibility trial, of General Yamashita Tomoyuki in late 1945, resulted in a precedent that was used to establish the validity of command responsibility charges. The precedent, however, was unclear. Command responsibility could be interpreted as a way of holding a commander responsible for crimes committed by his subordinates, by virtue of his position as commander. Alternatively, it could be interpreted as a way of holding a commander responsible for failing in his duty to stop or punish atrocities. This thesis examines the use of the doctrine of command responsibility at five Australian trials of officers accused of responsibility for the deaths of prisoners of war in the Sandakan-Ranau area in British Borneo. It shows that the court applied both interpretations of command responsibility, exploiting the doctrine as a flexible legal tool. When appropriate, officers were held responsible for failing to discharge their duty; when the court was determined to convict officers with limited connection to a crime, a strict liability was attached to a commander. At other times, where it was evident that an officer himself had directly participated in a crime, command responsibility was not used, as the accused could be convicted by other means.
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# List of Abbreviations

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<tr>
<td>JA</td>
<td>Judge Advocate</td>
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<td>JAG</td>
<td>Judge Advocate General</td>
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<td>IJA</td>
<td>Imperial Japanese Army</td>
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<td>IMTFE</td>
<td>International Military Tribunal for the Far East</td>
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<td>NCO</td>
<td>Non-Commissioned Officer</td>
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<td>POW</td>
<td>Prisoner of War</td>
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INTRODUCTION

Between late 1941 and mid-1942, Japanese military forces made rapid advances across the Asia-Pacific region. In the process, they captured a large number of Allied prisoners of war (POWs), of whom approximately 22,000 were Australian. These POWs were held in Malaya, Borneo, Manchuria, Formosa, the Netherlands Indies, Korea, Burma, Thailand, Japan and various islands in the Pacific and Indian Oceans, where they were utilised as a labour force for the Japanese military. Approximately 2700 Australian and British POWs were held at a camp at Sandakan, in British Borneo. Over 2000 of them died either at Sandakan Camp, or marching 260 kilometres along a mountain trail from Sandakan to a camp in the Ranau region, west of Sandakan, under the guard of Imperial Japanese Army (IJA) soldiers.¹

After the war, the Australian military held multiple trials for Japanese personnel deemed responsible for the deaths of the POWs at Sandakan-Ranau. These trials were part of a larger process through which the Allied governments sought to bring Japanese war criminals to justice.² In these prosecutions, accused war criminals could be charged not only for direct participation in atrocities, but also for their indirect participation, as

officers in a position of command and control over subordinates who had committed the crimes. Such officers were indicted through the legal doctrine of command responsibility. This thesis examines the application of command responsibility in five trials of officers prosecuted for the atrocities committed at Sandakan-Ranau.

The invasion of British Malaya by the IJA began on 8 December 1941, and culminated in the fall of Singapore in February 1942. Approximately 130,000 white soldiers were captured by the IJA during the campaign, the majority at the surrender of Singapore. The Japanese forces were underprepared for the massive numbers of prisoners they captured. Initially, most of the POWs captured at Singapore were held locally at Changi Prison and the Selarang Barracks. To minimize overcrowding at these complexes, and also to provide labour for military projects, many prisoners were sent out across the conquered territories of Asia and the Pacific. On 17 July 1942, approximately 1600 POWs from Changi Prison arrived at Sandakan in British Borneo, to construct an airstrip for Japanese forces. An additional 1100 would arrive between January and April 1943.

As work continued on the airstrip throughout 1943 and 1944, conditions at the camp steadily worsened. IJA guards beat the prisoners with

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increasing severity and regularity, while supplies of food and medicine became scarcer. Lack of food and medicine, combined with hard labour, meant that the POW death rate rapidly increased. In 1944, Allied bombing severely damaged the airstrip and construction of the airfield was halted in December.  

In January 1945, shortly after the arrival of a new commander, Lieutenant-General Baba Masao, 455 POWs were marched from Sandakan to Ranau, over a period of twenty-one days. According to statements made by Japanese officers at war crimes trials, the prisoners were moved in order to evacuate them from a potential battle site, and in any case, there was insufficient food in the Sandakan region to sustain them.  

Conditions on the march were harsh, and only 295 prisoners reached Ranau. More prisoners died after arrival at Ranau, from exhaustion, starvation, and disease. By 26 June 1945, only six of the POWs who had left Sandakan in this group were still alive. In May, 536 more prisoners had been marched to Ranau, of whom only 183 survived the journey. On approximately 1 August, only thirty-three were still alive at Ranau. At around this time, these prisoners were executed by their guards. Approximately 288 POWs had been left behind at Sandakan, deemed too sick to take on the second march. They were guarded by a small group of enlisted IJA guards, but were left with little shelter, and no food or medicine. The majority were too sick and starved to forage in the surrounding forest. In mid-June, seventy-five of the remaining POWs at Sandakan were taken on another march, supposedly to Ranau, but none made

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6 Ibid., pp. 22-23.
8 Ham, Sandakan, pp. 274, 344, 378.
it further than sixty kilometres. On 13 July 1945, another twenty-three POWs were walked to the defunct airstrip and shot. All remaining POWs at Sandakan died from starvation and disease.⁹

During the early stages of the war, Allied governments, including Australia’s, had remained hopeful that POWs captured by the Japanese military would be treated under the directions of the Geneva Convention of 1929. The Japanese government had signed but not ratified the convention, which meant its provisions were not legally binding upon the Japanese government or military. Initial communications between Allied governments and the Japanese government suggested the POWs captured by the Japanese military would nevertheless be treated according to international law. From early 1942 onwards, however, it was clear that Japanese forces had committed, and were committing, widespread atrocities against both POWs and civilians in occupied territories. In the Potsdam Declaration of July 1945, Allied governments undertook to bring all war criminals to justice.¹⁰

Following the unconditional surrender of Japanese forces in August 1945, Allied governments began to organise the prosecution of alleged war criminals. The most famous trial was the International Military Tribunal for the Far East (IMTFE), which opened in May 1946 with twenty-eight defendants, who represented the senior echelons of both the Japanese military and the civilian government. All of the defendants were charged with planning and carrying out an aggressive war, and some with other crimes including murder, before an international bench consisting of representatives

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⁹ Reid, Laden, Fevered, Starved, pp. 41-44.
¹⁰ Piccigallo, The Japanese on Trial, pp. 3-5; Totani, Justice in Asia and the Pacific Region, pp. 27-28.
from eleven Allied governments. Approximately 5700 other members of the Japanese military, and some Japanese civilians, were charged with “ordinary” war crimes. The governments of the USA, the UK, the Philippines, the Netherlands, Australia, Nationalist China, and France prosecuted these “ordinary” war criminals in national courts, which cooperated with each other to some degree, by “trading” suspects and seconding staff. The USSR and the People’s Republic of China also prosecuted suspected Japanese war criminals, in trials that were separate from those run by the other Allies.

The national tribunals conducted by the Australian military were governed by the War Crimes Act 1945 (Cth). The military courts established under this act differed from both courts martial and civilian courts. One important difference was that evidence which would normally be inadmissible as hearsay was allowed. The Australian military argued that it would be an injustice if an accused person escaped punishment merely because a more desirable form of evidence could not be produced. This provision was especially important for prosecuting massacres, where hearsay evidence might be all that was available to a prosecutor, if there were few or


no survivors. Though in many cases witnesses were produced in court, the prosecution and defence cases were also permitted to rely exclusively on sworn affidavits of witnesses. The courts were not required to publish the reasons for their decision. The explanation is probably that the mixed levels of legal training among members of the bench, and the heavy trial workload, meant that producing reasoned, written legal judgments would have been difficult, and unduly time-consuming. Moreover, the trials were not bound by precedent, so there was no need to publish decisions that could be relied upon in later proceedings.

The majority of the staff at the Australian trials were from the military. Some had legal training, though many did not. As a safeguard, a military lawyer sat as Judge Advocate (JA), to ensure that the War Crimes Act was properly followed, to advise the bench on points of law, and also to draft a review of the proceedings. At the end of a trial, if the accused was found guilty, he was entitled to submit a petition against the finding of the court, or the sentence, or both. The petition served as a basic means of appeal, as there was no appellate court. After the court’s findings were announced, the review by the JA, and any attached petition, were sent to the Judge Advocate General (JAG), a civilian legal expert, in Australia. The JAG’s duty was to review the trial, and any attached petition, and to produce a non-binding report, which was then sent to the Confirming Officer, who could confirm or reject the sentence of the court. At the time of the trials for the crimes committed at Sandakan-Ranau, the confirming officer was Lieutenant-

General Vernon Sturdee, Commander in Chief of the Australian army.

Sturdee had no legal training.¹⁵

A total of fifteen Australian trials for war crimes perpetrated at Sandakan-Ranau were held at Labuan, British Borneo, beginning on 7 December 1945, and ending on 31 January 1946. Two trials were held for the events at the Sandakan POW Camp: one of the commandant, the other of enlisted soldiers accused of beating prisoners. The first march to Ranau was the subject of three trials at Labuan. One was a joint trial of officers who had led the march; the other two were of non-commissioned officers (NCOs) and enlisted men. The second march produced five trials. Again, one was a joint trial of officers, while the other four were of NCOs and enlisted men. The execution of prisoners at the Sandakan airstrip and at Ranau at the end of the war was the subject of five trials, in which all of the accused were NCOs and enlisted men.¹⁶

At Rabaul, New Guinea, 188 Australian war crimes trials were held between 11 December 1945 and 6 August 1947. Two of them were related to the Sandakan-Ranau atrocities. The first was a retrial of officers accused of committing war crimes during the first march. The original trial had been

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overturned by the Confirming Officer, because certain witnesses, although available, had not given direct evidence. The second Rabaul trial for the Sandakan-Ranau atrocities was of Lieutenant-General Baba Masao, the commander of Japanese forces in Borneo during the time the marches to Ranau and the execution of POWs at Sandakan took place.\textsuperscript{17}

One of the major issues in pursuing war criminals was that although the actual atrocity had often been committed by enlisted men and NCOs, they may have been acting on the orders of their superior officers.\textsuperscript{18} The question then arose of whether the superior should be held culpable to some degree for the crime he had ordered. The doctrine of command responsibility addresses this question, by creating a legal responsibility held by a commander for the crimes committed by a subordinate. How this responsibility manifested itself in practice was subject to different interpretations during the trials of Japanese suspects.

In the post-war trials, the principle of command responsibility was first used in the prosecution of General Yamashita Tomoyuki in late 1945; formally or informally, the Yamashita verdict then functioned as a major precedent for other cases. Yamashita had commanded Japanese armed forces during the defence of the Philippines in 1944-1945. In early 1945, Japanese troops under his command had committed widespread war crimes, including


\textsuperscript{18} Wilson, Cribb, Trefalt and Aszkiełowicz, Japanese War Criminals, p. 5.
the rape, torture, and murder of thousands of civilians, and summary executions of hundreds of alleged guerrillas. After surrendering to US forces, Yamashita was charged with failing to prevent his subordinates from committing war crimes, or failing to punish subordinates who had committed a war crime. He was found guilty by a US military court in Manila on 7 December 1945. An appeal was heard by the Supreme Court of the United States, and rejected. Yamashita was hanged on 23 February 1946.  

In the Yamashita trial, the degree of knowledge required to make a commander responsible for preventing or punishing war crimes was a major issue. The prosecution argued that the crimes perpetrated by Yamashita’s subordinates were so widespread, that either he must have known, or he ought to have known, that the crimes were being committed. The prosecution stated that if Yamashita knew that the crimes were being committed, and did nothing, he failed to prevent their recurrence, or to halt them. In arguing that he ought to have known that the crimes were being committed, the prosecution claimed a positive duty of a commander to investigate potential breaches of international law. Failing to fulfil this duty would amount to negligence on the commander’s part, potentially to a criminal extent.  

From the Yamashita trial, two possible interpretations of command responsibility emerged. In the first, the charge could be identified as a

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separate offence of the superior officer, where the superior officer had failed to fully control his troops, or to punish them. This charge could arise when he had either known that the crimes were being committed, or he ought to have known that they were being committed. In the second interpretation, the superior officer was held to be directly responsible for the crime committed by his subordinate, meaning that there was no separate offence. This interpretation stemmed from an attribution of broad responsibility, where a commander is responsible for the actions of his subordinates. Which of the two interpretations was actually used in the Yamashita trial, and on which of the two he was found guilty, have been the subject of debate. The answer depends on the court’s view of what level of knowledge of the crimes Yamashita possessed. If the court held that Yamashita knew of the crimes, or ought to have known of them, yet did nothing to prevent them from occurring, then it would have found that he committed a separate offence as a superior officer. If it found that he did not have knowledge of the crimes, or that he did not have the means to know of the crimes, then he would have been guilty by the nature of his position as the superior officer at the time of the atrocities. The poorly drafted decision published by the court used both of these interpretations in its judgment.

The significance of which interpretation of command responsibility was used lies largely in the fairness, and perception of fairness, of the trial. If the charge is a separate offence of the superior, where he failed to take action, then the accused could attempt to show one of three things: that he did take

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necessary steps to prevent, halt, or punish the commission of war crimes; that he could not have known of the crimes; or that he was not the commander at the relevant time. If, however, the commander was held responsible for the crimes of his subordinates, and had not known of the crimes being committed, there could be no substantial defence to the charge, beyond showing that he was not the commander at the relevant time. If the accused was the commander at the time atrocities were committed, then under this interpretation of the charge, he would be found guilty of committing war crimes, simply by virtue of his position. This approach to command responsibility raises the issue of “victor’s justice”, as the accused has such a limited defence, and is likely to be found guilty.

Subsequent scholars have disagreed about the grounds on which Yamashita was found guilty. W.H. Parks argues that the first interpretation of command responsibility was used: Yamashita was found guilty because he failed to carry out his duty. Parks’ main evidence is the wording of the charge, which explicitly accuses Yamashita of failing to perform his duties as commander. Parks further states that the court established that Yamashita either did know of the crimes, or ought to have known, and that this requirement of knowledge, either actual or construed, means that the charge was interpreted as a separate offence of the superior.23 M.C. Bassiouni asserts that Yamashita was held to be responsible under an almost strict liability, that is, the second interpretation, in that he was considered to be criminally responsible because he was the superior officer at the time the atrocities were committed.

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committed. Chantal Meloni agrees that Yamashita was considered guilty through this interpretation, which, in her view, established a strict liability of the commander. Meloni’s argument, however, is heavily flawed. She shows that the tribunal found that Yamashita either secretly ordered the atrocities, or wilfully permitted them, yet at the same time, she denies that the court made any findings of knowledge. Her conclusion is likely influenced by the memoir of A. Frank Reel, one of Yamashita’s defence counsel, who also asserts that there was no actual finding of knowledge in the final statements of the court. In recent work on Australian hearings at Rabaul, Gideon Boas and Lisa Lee argue that the senior officer trials which involved command responsibility relied heavily on the judgment of Yamashita’s appeal to the United States Supreme Court, rather than the original proceedings, and did not interpret the charge to be assigning strict liability.

Regardless of the debate about what exactly Yamashita was held accountable for, his case did establish an important precedent, in that a commander can be held responsible for the crimes of his subordinates, either by his inaction in a specific circumstance, or more generally, by virtue of his position. The Yamashita trial achieved considerable notoriety, partly because of Reel’s 1949 memoir, which was highly critical of the procedure, the charge, and the political influence that had shaped the trial. The Yamashita case has heavily influenced subsequent discussion of command responsibility. The two different interpretations of the trial, however, mean

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28 Reel, *The Case of General Yamashita*. 
that the precedent is not a precise one. Partly for this reason, subsequent trials were not consistent in their application of the principle of command responsibility.\textsuperscript{29}

Most of the scholarly literature examining command responsibility does so through the discussion of trials of very high ranking officers.\textsuperscript{30} It is less often recognized that command responsibility was used extensively in the pursuit of lower ranking field officers. Though enlisted soldiers were often the actual perpetrators of war crimes, their immediate superiors, such as lieutenants and captains, were frequently held responsible. In the existing literature there is a lack of examination of command responsibility as applied to junior officers, and little or no discussion of how the doctrine was applied to different levels of the chain of command. In this thesis the trials involving command responsibility that arose from the Sandakan-Ranau atrocities will be used to address this gap in scholarly interpretation. Five command responsibility trials (including one retrial) centred on the events at Sandakan-Ranau. The accused were officers of varying ranks and seniority within the command structure. I show that the application of command responsibility was not uniform across the five trials. I argue that the reason for inconsistency was not confusion over which interpretation was the “correct” one. Rather, prosecutors deliberately used whichever interpretation suited their requirements as the best means of securing a conviction.

Literature that deals explicitly with the Sandakan-Ranau atrocities has almost exclusively focused on the suffering of the POWs during their

\textsuperscript{29} Cohen, “The Singapore War Crimes Trials”, p. 12.
captivity, escape attempts made by POWs, and an aborted rescue planned by
the Australian military in 1945.\textsuperscript{31} There is almost no material on the resulting
war crimes trials. An exception is a recent essay by Georgina Fitzpatrick. She
does not provide detail, however, on the results of the trials, or the application
of legal doctrines at individual trials. Rather, she concentrates on general
court proceedings, and the experiences of the accused and of court
personnel.\textsuperscript{32}

The major source materials for this thesis are the trial documents from
the five key trials. The trial transcripts provide the complete record of what
was said within the court, encompassing the opening and closing addresses of
the prosecution and the defence, examination and cross-examination of
witnesses by counsel, and any questioning of witnesses by either the JA or
the bench. Trial records also include the reports of the JA and the JAG;
witness affidavits of IJA supply troops, enlisted guards and officers, as well
as surviving POWs; maps of the Sandakan-Ranau trail; and itemised
descriptions of military supplies and personal effects of POWs and IJA
members from around Sandakan-Ranau. In the absence of published reasons
for the decisions of the bench, combining all of these sources has become the
established method of examining the judgments in post-1945 war crimes
trials.\textsuperscript{33} Taken together, these sources provide a good understanding of the
courts’ reasons for their decisions, and of how points of law were interpreted

\textsuperscript{31} Ham, Sandakan; Silver, Sandakan; Athol Randolph Moffit, Project Kingfisher (North
Ryde: Angus & Robertson, 1989); Reid, Laden Fevered, Starved; Anthony Hill, The Story of
Billy Young: A Teenager in Changi, Sandakan and Outram Road (Camberwell: Penguin
Australia, 2012); Hank Nelson, Prisoners of War: Australians Under Nippon (Sydney: ABC
Enterprises, 1985); Braithwaite, Fighting Monsters.
\textsuperscript{32} Georgina Fitzpatrick, “The Trials on Labuan”, in Fitzpatrick, McCormack and Morris
(eds), Australia’s War Crimes Trials 1945-51, pp. 429-470.
by the bench. For other war crimes, trial records can often be supplemented by memoirs produced by former POWs, but in the case of Sandakan, there were very few survivors.\(^{34}\)

Trials transcripts and related evidence are generally reliable as accounts of what happened in courts. With regard to the events which were the subject of the trials, however, the evidence must be interpreted carefully. What actually happened at Sandakan-Ranau cannot be fully established solely from the records of individual trials. The prosecution and defence supported different accounts of what occurred, in relation to whether orders were issued, what the orders contained, and the nature of events that took place where there are no survivors left to tell what happened. Moreover, the majority of personnel records, as well as military supplies, at Sandakan POW Camp were burnt by the Japanese military when the camp was abandoned.\(^{35}\)

Existing works on the Sandakan-Ranau events show the danger of using the trial records uncritically. Such works sometimes advance arguments that are not credible, out of readiness to accept trial evidence and arguments at face value. Some popular writers, for example, attribute the crimes at Sandakan-Ranau to a wider policy of the Japanese military to kill prisoners through “enslavement”. Paul Ham states that a plan of “extermination” of the POWs at Sandakan was carried out with thoroughness.\(^{36}\) Richard Braithwaite, the son of one of the surviving POWs, has compared the Sandakan-Ranau

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\(^{34}\) Direct accounts of individual survivors’ experiences are provided in Braithwaite, *Fighting Monsters*; and Hill, *The Story of Billy Young*. A new version of Young’s story has appeared as Lynette Silver and Keith (Billy) Young, *Billy: A Teenage POW* (Binda, NSW: Sally Milner Publishing, 2016).


\(^{36}\) Ham, *Sandakan*, p. 347.
experience to the Holocaust.\(^{37}\) These claims repeat the prosecutor’s assertion in the trials of the junior officers who oversaw the Sandakan-Ranau marches that the purpose of the march was to kill the POWs. Such a policy, however, makes little sense. POWs could have been, and were, murdered in much more straightforward ways. It is far more likely that the POWs were marched to Ranau to provide labour for the Japanese military, and perhaps to move them away from an expected Allied landing at Sandakan. In popular interpretations such as those of Ham and Braithwaite, the deaths at Sandakan-Ranau were not only intended by the local officers and commanders, but also by the wider Japanese military. Such assertions are probably shaped by the prosecution’s efforts at the IMTFE to show that the Japanese government not only knew that war crimes were widely committed, but also implicitly condoned them.\(^{38}\)

The narrative presented by Ham and Braithwaite is part of a broader Australian depiction of POW life under the Japanese military, where cruelty, brutality, and murder were allegedly commonplace. It is undeniable that atrocious crimes were committed by members of the Japanese military, across a large area. Outside of popular history like that produced by Ham and Braithwaite, however, scholarly work has seriously undermined the claim that a policy of the Japanese military or government decreed that no POWs were to survive the war. Sandra Wilson, Robert Cribb, Beatrice Trefalt and Dean Aszkiełowicz have jointly suggested that the circumstances of the war itself were a key factor in the crimes committed by Japanese soldiers.\(^{39}\) John Dower has shown that Allied propaganda produced inflated accounts of


\(^{39}\) Wilson, Cribb, Trefalt and Aszkiełowicz, \textit{Japanese War Criminals}, p. 37.
Japanese brutality. Figures cited by Gavan Daws reveal that of the Australian POWs who died in Japanese captivity, approximately one third were killed at sea by friendly fire.

Arriving at an accurate understanding of what happened at Sandakan-Ranau, and therefore assessing command responsibility trials, requires a balancing of the available evidence. In the absence of other materials, trial transcripts and related documents must remain the major sources. These sources are not monolithic, in that prosecution statements and evidence can be balanced by material produced by the defence, and vice versa. Material from one trial can be compared with that from other regions and other periods, and checked against accounts in secondary sources.

The thesis is organised into four chapters. Each chapter discusses the proceedings against an officer, or group of officers, in chronological order of the trials. The first chapter examines the trial of Captain Hoshijima Susumu, who had been the commander of the Sandakan prison camp for the majority of the war, and was tried for mistreating and starving POWs. Though the prosecutor laid the foundation for a conviction based upon the doctrine of command responsibility, it was not fully used in court, because other arguments were available to convict Hoshijima. Chapter Two discusses the trial of Captains Takakuwa Takuo and Watanabe Genzo, who were held responsible for the second march of prisoners to Ranau. Takakuwa, as the commander of his unit, was by his own admission responsible for the crimes committed by his subordinates. Watanabe’s conviction was based upon a more controversial application of the command responsibility doctrine: he

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was held to be strictly liable for the acts of his subordinates. Chapter Three uses an overturned trial and the ensuing retrial to show how the court applied command responsibility across a range of levels of command. Nine officers and two non-commissioned officers were charged with murder, or an alternative charge of ill-treating POWs, for their part in the first march to Ranau. The position of the accused in the chain of command, and the impact of superior orders, play an integral part in explaining how command responsibility was assigned to the accused across the two trials. The retrial also demonstrates how the war crimes court system utilised its “appeals” process. The final chapter analyses the trial of Lieutenant-General Baba Masao, who was the commander of the IJA in Borneo when the two marches to Ranau occurred. The chapter confirms the findings of a number of scholarly works that command responsibility was applied to senior officers as a separate offence, rather than a strict liability for the crimes of subordinates, but I show that the trial was nevertheless influenced by the principle of the strict liability of the superior officer.
CHAPTER I

THE TRIAL FOR THE SECOND MARCH

The first prosecution for the crimes committed at Sandakan-Ranau was of Captain Takakuwa Takuo and Captain Watanabe Genzo, of the Japanese 37th Army. The joint trial was held between 3 January and 5 January 1946, at Labuan, British Borneo. Each of the accused was charged with one count of murder, for “unlawfully and wilfully causing to be killed numerous unknown POWs”. Both officers were also charged with three counts of massacre, for killing thirty-three POWs on or about 1 August 1945 at Ranau. Both of the accused were found guilty of all four charges, and were sentenced to death. Takakuwa was executed on 6 April 1946 at Rabaul, New Guinea. Watanabe was executed ten days later, on Morotai Island in the Netherlands Indies.¹

The principle of command responsibility was applied in two separate ways by this court. Takakuwa admitted to ordering the execution of prisoners during the second march from Sandakan to Ranau, and to ordering at a later point the execution of thirty-three POWs. The court thus had the necessary evidence to show that he was directly responsible for these deaths, in an uncontroversial application of the overall theory of command responsibility, in which an officer is held responsible if he orders atrocities to be committed.² The case of Watanabe, Takakuwa’s adjutant, was more complicated. Watanabe had been second in command during the march and

¹ ML17: War Crimes: Proceedings of Military Tribunal, Captain Takakuwa Takuo and Captain Watanabe Genzo, Charge Sheet, p. 3; Warrant of Execution, p. 27, archived at [https://www.legal-tools.org/uploads/tx_ltpdb/ICWC710YakuoTakakuwaetal02.pdf].
the massacres, and, on Takakuwa’s admission, had followed Takakuwa’s orders. No evidence was raised during the trial to indicate that Watanabe had directly participated in the crimes, either by committing violence or by issuing orders for executions. Nevertheless, Watanabe was held to be culpable for the deaths of POWs killed by subordinates within his unit, by reason of his position as a superior officer. This interpretation of command responsibility is one of strict liability. The fact that two interpretations of command responsibility featured in the same trial shows that the doctrine was used very flexibly, and could be deployed to convict suspects whose connection to the commission of crimes was questionable. Enforcing strict liability on an officer meant that little defence was available to the accused.

On 17 May 1945, Captain Hoshijima Susumu, the commander of the Sandakan POW Camp since 1942, had been replaced by Takakuwa, who arrived with Watanabe. Three days after taking command at Sandakan, Takakuwa received orders from 37th Army headquarters to move the remaining POWs at the camp to Ranau. At this point, the prisoners were extremely sick. They were suffering from a range of diseases, including beriberi, malaria and dysentery, and many had to be relegated to stretchers. Takakuwa informed his headquarters that many of the POWs were too sick to be moved, and that he would need to leave approximately 288 of them at Sandakan Camp. Takakuwa alleges that he received no reply, because communications between Sandakan and 37th Army headquarters had broken down. Heavy bombardment by Allied naval and aerial forces at the time
means that it was highly likely this was true.³ At another trial involving Takakuwa’s superior, no mention of this communication was made.⁴ Takakuwa spent the next nine days preparing for the march. On 29 May 1945, Takakuwa, along with Watanabe and 536 prisoners, left Sandakan for Ranau. Before leaving, Japanese personnel burned the camp buildings, along with records relating to POWs and IJA personnel.⁵

The prosecution alleged that events took place as follows. The rations, the majority of which were either rice or tapioca, that had been assigned to the POWs for the march, amounted to 1.8 kilograms per man, and were expected to last ten days. More rations were left at supply dumps along the march. However, during the march, the IJA guards appropriated a portion of the POWs’ rations, forcing the prisoners to survive on roots, tree shoots and insects. Takakuwa expected the march to take twenty days, but it took twenty-eight. The survivors arrived at Ranau on the night of 25 June 1945. Of the original 536 POWs who had left Sandakan, only 183 arrived at Ranau, of whom 142 were Australian. The prosecution alleged that the majority of the 353 prisoners recorded to have died during the march had been executed. Allegedly the IJA guards had been rotated through to the rear of the group, so that they could be “blooded” by executing straggling prisoners.⁶ Though POWs were certainly executed along the way, it is unlikely that the majority of the prisoners were executed. Many more had probably died of sickness and

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⁵ ML17: Prosecuting Officer’s Opening Address, pp. 30-32; ML17: Testimony of Captain Takakuwa Taku, pp. 38-40.
⁶ ML17: Prosecuting Officer’s Opening Address, pp. 33-34.
exhaustion. Claims of “blooding” guards were most likely also exaggerated. Such claims may have been added by the prosecutor to portray the IJA soldiers as unnecessarily cruel and murderous, to help secure a conviction. Braithwaite suggests that sick POWs were not the only ones who were shot: some IJA members too sick to continue the march were also shot.7

Of the 183 POWs who arrived at Ranau on 25 June 1945, only thirty-three were still alive at Ranau on 1 August. The rest had died from disease and starvation. The three charges of massacre levelled against each of the accused state that on or about this day, the remaining prisoners were shot, under the orders of Takakuwa, and under the supervision of Watanabe. The guards organised the POWs into three separate groups, of officers, enlisted men who could walk, and enlisted men too sick to stand. Each group was taken to a separate nearby location, shot, and then buried.8

The case for the prosecution was heard in just three hours, and consisted entirely of affidavits, mainly from interrogations of IJA soldiers who were on the march, and from the six POWs who escaped during the march, or while at Ranau. It was not unusual in the war crimes trials for prosecutors to rely solely on written statements.9 As will be shown, in a subsequent trial of those accused of the murder of POWs in the first march from Sandakan to Ranau, where the prosecution also relied solely on affidavit evidence, a retrial was ordered, on the grounds that it was in the best interests of the court to have survivors testify in court, rather than through affidavit.

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7 Braithwaite, *Fighting Monsters*, p. 228.
8 Ibid.
By contrast, in the trial of Takakuwa and Watanabe, none of the court members or legal officers objected to the lack of witnesses for the prosecution.

Two survivors of the second march to Ranau, Warrant Officer William Sticpewich and Private Nelson Short, supplied witness statements that had been taken during interviews in Australia. Short stated that during the march to Ranau, the IJA used the prisoners to carry ammunition. As a result the POWs were able to carry less of their own supplies and belongings. Both Sticpewich and Short believed that those who fell to the side were then executed by the rear guard of the IJA. Both admit, however, that they never saw this actually occur. Both also testified that each morning of the march, the POWs who were too sick to continue were held back at the rest stop. As the healthier prisoners continued along the trail, they would hear rifle and machinegun fire. Those guards who had been left with the sick POWs would later meet up with the main body, unaccompanied by any prisoners. Both Sticpewich and Short also testified that throughout the march, POWs were hit by the guards, with fists and rifle butts, to make them march faster. Clothing and personal items of the POWs who died were taken by the IJA guards, including any remaining rations, which were not redistributed to the other prisoners.  

At Ranau there was no shelter available for the prisoners. Basic sanitation and cooking equipment were also lacking. During the first three days at Ranau, nineteen prisoners died, mostly from a combination of starvation, exhaustion, and diseases such as beriberi, malaria and dysentery.

Water for the POWs was supplied from a creek, downstream from the IJA latrines and washing station. The prisoners built a raised hut, with those sick with dysentery quarantined below the floor. On or about 7 July, Short escaped with several other prisoners, including two other survivors of the Sandakan-Ranau atrocities, Keith Botterill and Bill Moxham. On approximately 28 July, Sticpewich also escaped into the jungle.\(^\text{11}\)

The defence of both Takakuwa and Watanabe relied on witnesses from the IJA. Takakuwa called seven witnesses, all of whom testified solely to the facts of the march. They largely agreed with the prosecutor's version of events, but denied that the IJA took prisoners' rations or clothing. They also argued that the beatings were less severe, and occurred less frequently, than the prosecutor had stated. There was no mention of being cycled through execution parties during the march.\(^\text{12}\) Watanabe called only two witnesses, who testified to his character.\(^\text{13}\) During the trial, the defence counsel treated the two accused as essentially the one defendant when it came to the facts. However, as will be shown below, when petitioning against the verdict and sentence of the court, the defence treated each defendant as distinctly separate from the other.

The accused themselves gave an account of the march which was largely similar to that of the prosecutor, though it differed in some respects, especially as to the rations available to the POWs, and how the prisoners were executed, and in what circumstances. Takakuwa stated that although the

\(^{11}\) ML17: Testimony of Sticpewich, pp. 58-61.  
\(^{13}\) ML17: Testimony of Kitamura, p. 53; ML17: Testimony of Takani Tsuneo, pp. 53-54.
IJA had only allotted 100 grams of rice per day for the prisoners, he instead gave them 500 grams, which he collected from food dumps along the trail. According to Takakuwa, the IJA guards had more food than the POWs because they not only had rations that had been allotted for the march, but also emergency rations, which the POWs did not have. Takakuwa maintained that he ordered the guards to help the POWs as much as they could. Those who could not walk any further were to be shot, not in an act of cruelty, he asserted, but rather out of humanity, as it would be barbarous to leave them to die alone in the elements, either through starvation or disease. Takakuwa also stated that he did not use the company’s machinegun to kill the POWs, because it was strictly reserved for anti-aircraft use. It is likely that submachineguns instead were used during the executions. Though the type of gun used probably made little difference to the case, it can be assumed that Takakuwa argued the point as a way of indicating that the executions were essentially euthanasia, rather than brutal massacres.

Takakuwa defended his decision to execute the POWs both during the march, and at Ranau, by invoking the defence of military necessity. In military thinking before the Second World War, military necessity was commonly held to allow both individual soldiers and their commanders a carte blanche for acts considered to be essential to victory. The majority judgment at the IMTFE, however, would later reject the defence of military necessity.

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14 ML17: Testimony of Takakuwa, pp. 38-40.
15 Braithwaite, Fighting Monsters, p. 224.
necessity when it was used to counter charges of ill-treating POWs.\textsuperscript{16} Takakuwa stated that the prisoners whose execution he ordered had been of no further use in moving ammunition, and also that he was concerned that they might escape and assist the locals in fighting against the IJA.\textsuperscript{17} The fact that a number of the prisoners were incapable of walking, and that most were suffering from disease, meant the latter defence was not convincing, because the POWs were not capable of performing combat duties.

Takakuwa made further arguments invoking military necessity. He maintained that by the time he ordered the executions, the POWs were hindering military operations, because they were potentially a burden on the limited supplies of food and medicine to which Takakuwa had access. Furthermore, caring for the POWs would have meant that the limited number of soldiers under his command would have expended their efforts on those who were likely to die.\textsuperscript{18} Though there is no doubt he did order the executions of the POWs, Takakuwa’s defence demonstrates the difficult situation he was in. Caring for sick prisoners would certainly have placed a heavy burden on supplies for his own troops, and on manpower. Moreover, when Takakuwa was placed in command of the POWs, they were already severely weakened from working on the airfield with limited food and medicine.

In his examination of the Sandakan-Ranau marches, Ham portrays Takakuwa as having no regard for the welfare of the prisoners under his

\textsuperscript{17} ML17: Testimony of Takakuwa, p. 40.
\textsuperscript{18} Ibid., pp. 41-42.
charge; as concerned only with moving his men to Ranau; and as determined to use the march to kill off the prisoners. Ham argues that Takakuwa had been given an order that POWs were to be executed as a last resort, when they were either no longer useful as labour, or were about to be rescued.19 That Takakuwa did not claim superior orders for the execution of the POWs, or even mention this order which supposedly directed the execution of “useless” POWs, entirely discredits Ham’s claim. In contrast, Braithwaite claims that the marches were actually orchestrated by Takakuwa, who intended to kill the POWs to hide the ill-treatment of prisoners by IJA forces during the war.20 If this were true it would mean that Takakuwa, in order to hide atrocities committed by his predecessor, with whom he had had no contact prior to being posted to Sandakan, committed more atrocities himself.

There is no substantial evidence to support this claim.

Watanabe’s petition against the finding of guilt on all four charges addresses the fact that he was not in command of the march, but rather was Takakuwa’s adjutant.21 In other words, he claimed the defence of superior orders. In March 1945, the United Nations War Crimes Commission had unanimously decided that superior orders would not be available as a complete defence to a charge. Rather, when superior orders were claimed by an accused, and found to exist by the court, they would act as a factor of mitigation in sentencing. As such, superior orders did not remove the guilt of an accused in carrying out a war crime, but rather served as a method of

20 Braithwaite, Fighting Monsters, p. 344.
21 ML17: Petition of the Accused, pp. 9-10.
reducing his culpability for his acts. The Japanese Imperial Rescript to Soldiers and Sailors of 1882, however, explicitly stated that military personnel owed total obedience to their superiors. This instruction, together with the harsh discipline meted out in the IJA for disobedience, was a common defence used by accused war criminals.

Watanabe’s petition stated that he had only carried out the orders of Takakuwa, and that due to wartime conditions, he could not disobey those orders. Most likely in an effort to counter this defence, the prosecuting officer sought to establish in his cross-examination of Takakuwa that within the Japanese military, an order could be disobeyed where it was either manifestly illegal, or practically impossible to carry out. If the court accepted that Watanabe potentially had a reason and the capacity to disobey Takakuwa’s orders, Watanabe’s defence of superior orders would probably have been rejected. Furthermore, it is likely that the court took into account that Watanabe was of the same rank as Takakuwa, and was not an immediate subordinate.

When the prisoners were executed at Ranau, in early August, Takakuwa happened to be bedridden, having been injured in the leg, and Watanabe was serving as his representative to the subordinate military personnel. On or around 1 August, Watanabe passed on Takakuwa’s order to execute the remaining POWs. Watanabe mentioned this in his petition to the court, to argue that he had not been responsible for the order. Cohen labels

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24 ML17: Petition of the Accused, pp. 9-10.
25 ML17: Testimony of Takakuwa, p. 41.
this argument as a “mere conduit defence”, in which the accused claims that he merely passed on the order, and had no actual connection to the crime.\textsuperscript{26}

Evidently Watanabe’s claim that he was essentially a messenger was rejected by the court, which appears to have thought that relaying an order that was manifestly illegal was the same as issuing it.

It seems unusual, within the greater pattern of Allied war crimes trials of Japanese suspects, that Watanabe, an adjutant (a staff officer), was charged with war crimes. Often, staff officers either escaped indictment completely, or were found not guilty, because Allied war crimes courts operated under the principle that staff officers were strictly administrative, with exceptionally limited capacity to order, or to control subordinates.\textsuperscript{27} Watanabe’s petition stated that a death sentence did not properly reflect his position within the command structure, and that commutation of the sentence would be appropriate.\textsuperscript{28} The petition, however, was rejected. Probably, the court and the Confirming Officer concluded that at the time of the massacres of the thirty-three POWs at the beginning of August, Watanabe was in a position of some authority and control over the IJA forces guarding the POWs, and so they imposed the death sentence.

After confirmation of the death sentences, Takakuwa was hanged, while Watanabe was executed by firing squad. The difference in mode of execution may show some, albeit extremely limited, distinction between the two sentences. Death by firing squad was seen to be the more honourable


\textsuperscript{28} ML17: Petition of the Accused, pp. 11-13.
method of death for a soldier.\textsuperscript{29} Thus, when the sentence of hanging was imposed upon Yamashita and his Chief of Staff, General Muto Akira, the latter said “Why can’t they shoot us like soldiers?”\textsuperscript{30} The difference in sentencing between Watanabe and Takakuwa probably reflects an assessment by the court that Takakuwa, in overseeing the march and ordering the massacre of the surviving POWs, was more culpable for the crimes than Watanabe was.

In reviewing the trial of Takakuwa and Watanabe, the JAG wrote that one of the defining elements of the crimes was that Takakuwa had no superior orders to execute straggling prisoners, or to kill the remaining POWs at Ranau in August 1945.\textsuperscript{31} This shows that the JAG, at least, found Takakuwa to be fully culpable for the crimes. The JAG did not mention Watanabe’s position within the command structure, either as an adjutant, or as de facto commander during Takakuwa’s indisposition. Nor did he mention Watanabe’s claim of superior orders. The JAG seemed to regard them as equally responsible for the crimes committed. The JAG also made a definitive distinction between their part in the atrocity and that of the NCOs and soldiers who actually shot the POWs during the march and at Ranau, stating that the NCOs and enlisted soldiers had a wholly different form of responsibility, due to their obligation to obey Takakuwa and Watanabe.\textsuperscript{32} The JAG’s assessment clearly shows the broad ranging, yet at times contradictory, nature of the doctrines of command responsibility and superior orders. The soldiers and NCOs who participated in the march and the massacres were

\textsuperscript{29} Wilson, Cribb, Trefalt and Aszkiewicz, \textit{Japanese War Criminals}, p. 91.
\textsuperscript{31} ML17: JAG’s Report, p. 4.
\textsuperscript{32} Ibid.
found not to have been fully responsible for what occurred, presumably because they did not have command or control over the situation. Yet Watanabe, who as a staff officer also had only limited control over the events, and was acting under the orders of a superior on that superior’s admission, was found to be culpable for the prisoners’ deaths.

The court’s finding of guilt against Watanabe rests on an interpretation of command responsibility that holds a commander to be strictly liable for atrocities committed by his subordinates. Cohen and Meloni both argue that this was the most common interpretation of command responsibility in the trials of Japanese suspects. This case shows that the application of strict liability was not limited to senior officers; it was also used to convict medium and low ranking field officers. The defining aspect of Watanabe’s culpability appears to be that at some point during the events in question he had some level of command; he was not convicted because of any act that he committed or failed to carry out. He was, in fact, found to be responsible both for the crimes of his subordinates, and, to an extent, the crimes of his superior.

Takakuwa, as the superior officer, was clearly responsible for the execution of POWs during the march and at Ranau, and for the deaths that occurred from starvation and disease. He ordered the executions, and he admitted that he was wholly responsible for the prisoners’ deaths. A question could have arisen as to whether he was fully culpable, in that the poor condition of the POWs when he took charge of them was a matter largely outside of his control, and he was not responsible for organising supplies for

the majority of the trip. The court, however, evidently did not hold these issues to be relevant. Rather than viewing the atrocity in the broader context of what had occurred before Takakuwa assumed command, the court was concerned only with the immediate issue of the ordering of executions, and the deaths of prisoners who died under Takakuwa’s charge.

Command responsibility was a convenient method of fulfilling the goals of the court because it ensured that the military personnel most likely to be blamed for the Sandakan-Ranau atrocities, both by survivors and by the Australian public, received the punishment that had long been promised. Takakuwa and Watanabe, because of their actual or perceived command, appeared to be responsible for the conditions on the march and at Ranau, and for the deaths that resulted. Willingness to enforce a strict liability on superior officers made the doctrine exceptionally flexible, because it could be used to accuse a large number of personnel. The trial of Takakuwa and Watanabe demonstrates that the principle of command responsibility could be used to charge and sentence not only officers who had clearly ordered atrocities, but also those who had been in a very limited position of control at the relevant time. Command responsibility thus allowed a broad-ranging pursuit of military personnel considered culpable for atrocities. It became a useful tool to ensure that justice functioned in the way that it was expected to function in the aftermath of the Second World War.
CHAPTER II

THE TRIAL OF CAPTAIN HOSHIJIMA SUSUMU

The trial of Captain Hoshijima Susumu took place between 8 January and 20 January 1946, at Labuan. These proceedings focused on the conditions at Sandakan Camp, rather than the marches to Ranau. During Hoshijima’s command of the camp, approximately 1100 Australian and British POWs died from disease, torture, beatings and starvation. After the war, Hoshijima was charged with “authorising and permitting POWs in his charge to be closely confined under inhuman conditions and beaten”, “authorising and permitting POWs in his charge to be tortured and beaten by soldiers under his command”, “failing to provide adequate and proper medical care and food for the POWs under his charge”, and “authorising and permitting underfed and ill POWs in his charge to be used for heavy manual labour and other labour”. Hoshijima was found guilty on all four charges, sentenced to death, and executed by hanging on 27 February 1946.¹

In this trial, there was a limited focus on Hoshijima’s responsibility to control his subordinates, or whether he was culpable for actions undertaken by his subordinates, probably because considerable evidence showed that he either directly participated in, or ordered, the commission of war crimes. Though command responsibility could have been used to a

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¹ ML17: War Crimes trial of Captain Hoshijima Susumu (hereafter ML17), Part A, Charge Sheet, archived at [https://www.legal-tools.org/search/?tx_ltpdb_pisearch%5Bq%5D=&tx_ltpdb_pisearch%5Bdoctype%5D=&tx_ltpdb_pisearch%5Bcasename%5D=Prosecutor+v.+Susumu+Hoshijima&tx_ltpdb_pisearch%5Bcasenumber%5D=&tx_ltpdb_pisearch%5Bfrom_date%5D=&tx_ltpdb_pisearch%5Bto_date%5D=&tx_ltpdb_pisearch%5Bfolders%5D=%5B%5D&tx_ltpdb_pisearch%5Bsort%5D=&tx_ltpdb_pisearch%5Bfilter%5D=&tx_ltpdb_pisearch%5Bkeywords%5D=%5B%5D], p. 3; ML17: Part A, Sentence of the Court, p. 81.
greater extent in the trial, it was not a prominent feature of the prosecution’s case because Hoshijima’s direct connection with war crimes was very easy to prove.

The wording of the charges against Hoshijima demonstrates that the prosecution anticipated using some form of command responsibility accusation. The phrase “authorising and permitting” does not implicate Hoshijima in the direct commission of war crimes, but instead relies on his position within the command structure of the camp. It shows that the prosecution intended to hold Hoshijima responsible for the crimes committed by his subordinates. If, instead, the original intent of the prosecution had been to argue that Hoshijima was personally responsible for committing the crimes, there would have been no need for the wording to connect Hoshijima’s authority, or command, to the crimes. Instead he would be charged directly with the crime in question.

The trial of Hoshijima had been preceded by the trial of Captain Takakuwa Takuo, who succeeded him as commander of the Sandakan Camp, as discussed in the previous chapter. It seems illogical that the trial of Takakuwa would be heard first, when the atrocities of which Hoshijima was accused occurred before Takakuwa had assumed command. One possible explanation is that the Takakuwa trial was heard first so that the court would have judicial notice that the prisoners were unhealthy before Takakuwa took command; that is, that Hoshijima was responsible for the condition the POWs were in, and so was partially responsible for the large number of deaths which occurred during the march. Though the prosecutor did link Hoshijima to Takakuwa, arguing that he had some responsibility for
the deaths, this argument was never a significant part of the trial, and appears to have been set aside.

Hoshijima was originally assigned to the Sandakan region as commander of an engineer company, to construct the airfield. The prisoners initially reported relatively good conditions at the camp. They were paid for their work on the airstrip, which enabled them to trade with locals for extra food rations. A canteen was also built at the camp, where extra food, medicine, and luxuries such as cigarettes could be bought. Discipline was also relatively light, with minimal beatings. In 1943, conditions at the camp declined. Prisoners’ memoirs and works by historians offer a number of explanations. In mid-1943, all but eight officers had been taken from the camp and moved to Kuching, approximately 900 kilometres west of Sandakan. Officers provided some, albeit limited, protection from Japanese mistreatment, by complaining formally to their captors, as well as organising the soldiers to support each other, so their removal was thought to have had a deleterious effect. In the prisoners’ view, increased brutality could also be attributed to the arrival of Formosan guards: many POW memoirs claim that Formosan guards were more likely to beat and torture POWs, allegedly because of their low position, as colonial subjects, in the Japanese military hierarchy. As a way of compensating for their inferiority, they treated the

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4 Ibid., pp. 224-228.
prisoners as inferior to themselves, or so the prisoners believed. Finally, by 1943, the Japanese military position in the Pacific had been seriously undermined by Allied advances and by an extremely effective Allied submarine campaign, which severely restricted resupply from the sea. Lack of supply restricted the amount of food and medicine that reached islands occupied by Japanese troops. Further, the prisoners believed that their guards were frustrated at the defeats sustained by Japanese forces across the Pacific, and took out their frustration on the prisoners. Sandakan Camp was not the only one in which conditions deteriorated in 1943: POWs at Ambon experienced a similar worsening of conditions at around the same time.

The use of cages as punishment was the main focus of the first charge, that is, that Hoshijima had authorised and permitted the confinement of prisoners under inhuman conditions, and had authorised his subordinates to beat them. Three bamboo cages had been built in early 1943, to be used in the punishment of both POWs and IJA soldiers who broke camp regulations. The cages were designed so that a person inside could not lie down or properly stand up. These cages were not unique to Sandakan; records show they were relatively widespread in POW camps across Asia and the Pacific. Testimony from surviving POWs stated that when put into one of the cages they were not fed for the first week, were denied water for several days, and were taken

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out for regular beatings by IJA guards. In the cage they had no protection from the elements, or from mosquitoes carrying malaria. One POW died while in the cage at Sandakan, while several became severely sick, and died after being released from the cage. Hoshijima admitted to ordering POWs into the cage. He also stated that the cage may have been used without his express authority. In cross-examining Hoshijima, the prosecutor established that he had inspected the cages on several occasions, and so was aware of what they were like.8

Hoshijima’s defence to the charge was based on the assertion that this form of punishment was widespread in the Japanese army, and that under IJA disciplinary regulations, he was entitled to order those under his command to be put in the cage. He denied any knowledge that prisoners were allowed no food or water for prolonged periods while in the cage. He attributed the deaths which occurred from mistreatment in the cages to sudden attacks of malaria.9 Hoshijima’s defence to this charge was not a total defence. He admitted that prisoners were put in the cages, an act which, by itself, is considered as mistreatment of POWs, for which he could be held responsible on the principle of command responsibility. Hoshijima’s defence was thus limited because he denied only the beatings carried out by his subordinates during a prisoner’s punishment in the cage, and the withholding of food and water.

Although the prosecutor had established a basic framework for a command responsibility argument for this charge, the argument was not fully raised during the trial. The prosecutor showed that the cages were in plain

sight, that they were commonly used in punishing the prisoners, and that Hoshijima had inspected them. Combining these three elements, it is probable that the prosecutor could successfully have argued that Hoshijima knew, or ought to have known, that POWs were placed in the cages, even if it had been done without his actual authority, and were beaten. The most likely reason that this argument was not pursued is that Hoshijima admitted to ordering POWs into the cage himself. As such, there was no substantial need for the prosecutor to argue that he was liable for the conduct of his troops, or that he had failed to discharge his duty. He had clearly ordered the ill-treatment.

The second charge, that Hoshijima authorised and permitted the torture and beating of prisoners, relied on evidence by former POWs that beatings occurred while they were working on the airstrip. The prosecution clearly thought there was a difference between the beatings that took place in the cage, and those that took place outside of it. This difference, though minimal, may have been exploited to increase the number of charges against Hoshijima. Allegedly, POWs were beaten by their guards for not working fast enough. The prosecution raised evidence that on at least two occasions, prisoners were tied to logs and beaten over several days. In cross-examination, Hoshijima initially denied that beatings were widespread, yet when numerous instances were raised by the prosecutor, he admitted that they had happened. Hoshijima also admitted that he himself had slapped POWs on several occasions. A common defence at trials of Japanese soldiers accused of beating prisoners was that the beatings were merely light slaps, and that punishment such as this was accepted in the Japanese military. He originally

maintained that they were light slaps, but when the amount of evidence showed that they were heavy punches, one of which took out a prisoner’s eye, Hoshijima blamed other guards.\(^\text{11}\) After Hoshijima admitted that he had seen beatings, and had taken part in them himself, there could be no substantial defence to the charge. He argued that beatings had been used as a last resort, and that they were a widespread form of punishment within the IJA. However, as noted by the prosecuting officer, the court was operating under international criminal law, which meant that defences specific to Japanese military law were not applicable.\(^\text{12}\)

The third charge was the major focus of the trial, that is, the alleged failure to provide adequate food and medical care for the POWs. The prosecution alleged that Hoshijima, upon receiving rations for the prisoners and for his subordinates from the local IJA quartermaster, failed to give the prisoners all of their rations, instead keeping some for his own soldiers. The prosecutor also alleged that substantial medical supplies had been available to Hoshijima, but that again, he had not provided adequately for the prisoners’ needs, instead stockpiling medical supplies for his own soldiers.\(^\text{13}\)

Claims that prisoners had been denied adequate food and medicine were common in the trials of suspected Japanese war criminals. In response, defendants and their lawyers often asserted that supplies were limited for everyone, and that it was impossible to obtain enough. In this case, however, the prosecution claimed that there were adequate supplies, but that they had been kept from the prisoners. The evidence raised by the prosecutor had been provided by the former POW William Sticpewich, mentioned in the previous

\(^{11}\) ML17: Part A, Cross-Examination of Hoshijima by Prosecuting Officer, pp. 125-127.  
\(^{12}\) ML17: Part B, Prosecuting Officer’s Closing Address, p. 50.  
\(^{13}\) Ibid., pp. 51-53.
chapter. Sticpewich played a major role at the Sandakan-Ranau trials. The Australian military believed him to be very reliable, and he supplied evidence, either in person or on paper, at all of the Sandakan-Ranau trials. He also gave evidence, in person, at the IMTFE.\(^{14}\) At the Hoshijima trial, Sticpewich, appearing in person, stated that he saw large quantities of rice, the main food source for the prisoners, stored under Hoshijima’s house in 1944, at a time when the rice ration for POWs had been cut in half at Sandakan. Sticpewich asserted that the guards were eating considerably more than the prisoners at this stage. He claimed that the deathrate of POWs in late 1944 and early 1945 was approximately ten or twelve men per day, mostly from starvation and disease.\(^{15}\) Evidence from an IJA supply officer, independent of the POW camp, stated that though rations for all prisoners had been cut in 1944, the allotted amount was still higher than what was being given to prisoners at Sandakan.\(^{16}\) Affidavits from guards, mostly Formosans, also stated that IJA personnel at the camp had been eating more than the POWs.\(^{17}\)

The prosecution again relied on Sticpewich’s evidence to show a failure to provide medical care. Sticpewich testified that he saw numerous boxes of Red Cross medical supplies in an IJA storeroom. He asserted that POWs would often trade items, such as watches and clothing, with individual IJA soldiers for quinine, thus proving that some additional medicine was available.\(^{18}\) A local doctor, who had lived in Sandakan since? before the war

\(^{14}\) Totani, *Justice in Asia and the Pacific Region*, pp. 170-176.
\(^{15}\) ML17: Part A, Testimony of Sticpewich, pp. 95-104.
\(^{16}\) ML17: Part B, Statement of Lieutenant Arai Yoshio, pp. 170-171.
\(^{17}\) ML17: Part B, Affidavit of Nakano Ryochi, p. 79; ML17: Part B, Prosecuting Officer’s Closing Address, p. 50.
\(^{18}\) ML17: Part A, Testimony of Sticpewich, p. 98.
started, stated in an affidavit that in 1943 there had been enough quinine at Sandakan to supply all of Borneo for two years.\textsuperscript{19} A report from a British soldier, written in October 1945, corroborated this information. The soldier stated that approximately fifty kilograms of quinine, along with considerable amounts of vitamins and ulcer treatments, were found at Sandakan after the Allied invasion of Borneo.\textsuperscript{20}

In his defence, Hoshijima stated that on several occasions he had obtained extra meat for the POWs from nearby farms. He had also allowed prisoners to go fishing. He claimed that he had petitioned his superiors for more food for the prisoners, and had argued that cuts to rations would be disastrous to their health. He further claimed that he had inflated the number of POWs at Sandakan in his official reports, so as to get more rations. He denied that the IJA guards had received more food than the POWs, and that the stores of food under his house were supposed to be for the POWs.\textsuperscript{21} Hoshijima’s defence in relation to the medical supplies was very similar. He testified that he had attempted to obtain extra medicines for the POWs from a nearby hospital on multiple occasions, and had also sent an officer to Kuching to request more. He denied that the Red Cross parcels seen by Sticpewich had been held back for the IJA, and claimed that they had in fact been distributed to the POWs.\textsuperscript{22}

Hoshijima may indeed have obtained extra supplies on occasion. His defence, however, that he did make adequate efforts to supply the prisoners with food and medicine, is largely undone by the high deathrate amongst the

\textsuperscript{19} ML17: Part B, Affidavit of Doctor James Taylor, p. 175.
\textsuperscript{21} ML17: Part A, Testimony of Hoshijima, pp. 138-142.
\textsuperscript{22} Ibid., pp. 132-136.
POWs in late 1944 and early 1945. Only one member of the IJA at Sandakan POW Camp died from disease during Hoshijima’s time as commander. Hoshijima attempted to explain the discrepancy by arguing that the POWs were not acclimatised to the tropics, and that the Japanese and Formosan soldiers were.\(^{23}\) Article Nine of the 1929 Geneva Convention stipulated that prisoners from temperate climates were not to be held in tropical locations for longer than necessary.\(^{24}\) It appears that Hoshijima used this clause in the Convention to blame the Japanese government for the deaths.

The charge of failing to supply adequate food and medicine was thus substantiated by the high deathrate of the POWs, together with the testimony of Sticpewich and IJA supply personnel. The prosecutor relied on this combination of evidence to highlight the discrepancy in access to necessary items between the POWs and the guards. As with the first two charges, Hoshijima raised no substantial defence to the charge that could adequately explain the crimes alleged by the prosecution.

The final charge, that Hoshijima authorised and permitted sick and underfed POWs in his charge to be used for heavy manual labour, was a minor point in the trial. The reason is that evidence raised in relation to the third charge, in which the prosecutor alleged that the majority of POWs were sick and underfed in late 1944, essentially established the major element of the fourth charge as well. The defence did not contest the claim that work on the airstrip was under way at the relevant time. Since the court had accepted the evidence of the third charge, the basic elements of the fourth charge had

\(^{23}\) ML17: Part A, Testimony of Hoshijima, p. 144.  
been met: the prisoners were sick, and were working on the airstrip.

Hoshijima’s defence to the final charge was that the sick prisoners who had been forced to work at manual labour had been ordered to do so by one of his subordinates, Lieutenant Moritake. Hoshijima claimed that he had reprimanded Moritake for forcing the sick to work.\textsuperscript{25} However, it is unlikely that this single reprimand could fully have discharged Hoshijima’s duty to ensure that sick prisoners were not used for heavy labour, because the charge covered a considerable period of time, namely the last half of 1944.

In his closing address the prosecutor declared that Hoshijima was directly responsible for the deaths of 1100 POWs at Sandakan. According to the prosecutor, these deaths were almost entirely attributable to Hoshijima’s refusal – rather than inability – to properly supply the POWs with adequate food or medicine. The prosecutor presented limited arguments that Hoshijima was responsible for the acts of his subordinates, or that he had failed to discharge his duty in controlling his subordinates. Instead, he relied heavily on the weight of evidence showing widespread brutality and neglect that had been directly perpetrated by Hoshijima.

Hoshijima’s trial is unusual in comparison with the other officer trials that emerged from the Sandakan-Ranau atrocities, principally because of the ample amount of evidence available to the prosecutor. Rather than needing to rely on limited witness statements, the prosecutor was presented with many details of the crimes committed during the period in question, both from guards, and from former POWs who had at some point been moved to Kuching, and had therefore survived the Sandakan Camp. Hoshijima also

\textsuperscript{25} ML17: Part A, Testimony of Hoshijima, p. 148.
implicated himself in most of the charges. As a result, the prosecutor was able to show that the guards had often committed crimes against the POWs and that the overall commander of the camp not only allowed the crimes to happen, but also actively participated. It was not a trial in which the prosecutor’s principal task was to hold a commander responsible for the actions of his subordinates. Instead, the trial determined that a commanding officer was directly responsible for the deaths of 1100 POWs, mostly through actions that he himself undertook. Because there were large amounts of evidence supporting the prosecution’s case, with limited explanation or defences by the accused, the prosecutor did not need to argue fully that command responsibility was at issue in order to secure a death sentence. The fact that a command responsibility argument was included in one of the charges shows that it was seen as a potentially useful legal tool to convict Hoshijima. However, it is likely that the relative novelty of the doctrine of command responsibility meant that it was not used unless absolutely required.
CHAPTER III

THE TRIAL FOR THE FIRST MARCH

Atrocities connected with the first march from Sandakan to Ranau were the subject of two trials. Between 23 and 28 January 1946, the joint trial of Captain Yamamoto Shoichi, Captain Iino Shigeru, Captain Abe Kazuo, Captain Mizuta Ryuichi, Lieutenant Sugimura Shimichi, Lieutenant Hirano Yihikiko, Lieutenant Horikawa Koichi, Lieutenant Sato Tatsuo, Lieutenant Tanaka Shojiro, Warrant Officer Gotanda Kiroku, and Sergeant Sato Shinichi took place at Labuan. All eleven of the accused were charged with the murder of numerous POWs in their charge, or alternatively, with the ill-treatment of numerous POWs, by compelling them to march long distances under difficult conditions when sick and underfed. The alternative charge of ill-treatment, which also established a responsibility of the accused for deaths of the POWs, was a way to ensure that the accused could be convicted by the court, even if murderous intent were not found. At the end of the proceedings, under the
advice of the JAG, the Confirming Officer rejected the court’s findings. A retrial was held at Rabaul, between 20 and 27 May 1946.¹

This chapter examines both trials. The doctrine of command responsibility was used at both, but the two trials demonstrate different interpretations of what defined command, and how command responsibility could be attached to these different definitions of command. In the first trial, command responsibility was attached to all of the officers, as the court determined that in the circumstance in question, they had operated not as junior officers, but as junior commanders. In the retrial, the court held that the military experience of an accused was a factor in applying responsibility, and therefore, in its judgment, the court differentiated among the accused. The retrial also showed that the defence could successfully argue that acting under superior orders diminished the scope and discretion of command which could be attached to an officer.

In January 1945, Captain Yamamoto had received orders from Lieutenant-General Baba Masao’s headquarters to move 500 prisoners from Sandakan POW Camp to Ranau. Captain Yamamoto and Captain Hoshijima decided that there were not 500 POWs of good enough health to complete the

¹ National Archives of Australia (hereafter NAA): A471, 81663 Part B [War Crimes - Military Tribunal - YAMAMOTO Shoichi (Captain) AWC 585: IINO Shigeru (Captain) AWC 736; HIRANO Yihikiko (Lieutenant) AWC 724; MIZUTA Ryuichi (Captain) AWC 783; SATO Tatsu (Lieutenant) AWC 814; SUGIMURA Shimichi (Lieutenant) AWC 820; TANAKA Shojiro (Lieutenant) AWC 837; HORIKAWA Koichi (Lieutenant) AWC 732; ABE Kazuo (Captain) AWC 700; GOTANDA Kiroku (Warrant Officer) AWC 714; SATO Shinichi (Sergeant) AWC 813: Unit - 2nd Battalion, Independent Mixed, 25th Regiment, Japanese Forces: Place and Date of Tribunal Labuan, 23 to 28 January 1946] (Hereafter cited as ML36), Part B, p. 3; NAA: A471, 81029 Part B [War Crimes - Military Tribunal - YAMAMOTO Shoichi (Captain) AWC 585: IINO Shigeru (Captain) AWC 736; HIRANO Yihikiko (Lieutenant) AWC 724; MIZUTA Ryuichi (Captain) AWC 783; SATO Tatsu (Lieutenant) AWC 814; SUGIMURA Shimichi (Lieutenant) AWC 820; TANAKA Shojiro (Lieutenant) AWC 837; HORIKAWA Koichi (Lieutenant) AWC 732; ABE Kazuo (Captain) AWC 700; GOTANDA Kiroku (Warrant Officer) AWC 714; SATO Shinichi (Sergeant) AWC 813: Unit - 2nd Battalion, Independent Mixed, 25th Regiment, Japanese Forces: Place and Date of Tribunal - Rabaul, 20, 21, 22, 23, 24 and 27 May 1946] (Hereafter cited as R125), Part B, p. 29.
march, and in the end, approximately 450 prisoners were taken from Sandakan Camp. The prisoners were organised into groups of fifty, each led by one of the accused officers. As we will see, this division of prisoners into groups led by one officer had important ramifications for the accused in the two trials. Neither of the two NCOs charged in the two trials was in control of a group.

Approximately 250 of the 450 prisoners died on the march to Ranau, from starvation, disease, exhaustion, and execution by IJA soldiers. Captain Abe commanded the rear group. Before the march began he was ordered by Captain Yamamoto, on Yamamoto’s admission, to kill any POWS or guards who were too sick or weak to continue. As in the case of Captain Takakuwa, discussed in the first chapter, Captain Yamamoto claimed that he had ordered the executions so that food and medicine would not be wasted on those who would likely die, and also as an act of humanity, so that the sick would not die slowly from starvation or exposure.²

At the first trial, all of the accused were found guilty of one of the two charges. Yamamoto, Abe, Gotanda and Sato were found guilty of murder. Yamamoto was sentenced to be hanged, while the others were sentenced to death by firing squad. Tanaka, who was second in command of his group at the time, but was the only member of that group to be indicted, was sentenced to life imprisonment for ill-treatment of POWs. The remaining officers were all found guilty of ill-treating POWs, and were sentenced to death by firing squad.³

³ ML36: Part B, The Sentence of the Court, p. 118
Yamamoto’s admission that he had ordered Abe to kill POWs who were too sick to continue the march would have been enough to secure his conviction, and thereafter, the prosecutor ceased to focus on Yamamoto’s actions. The prosecutor did, however, devote considerable attention to the exact wording of Yamamoto’s directions to Abe. The question was whether Yamamoto had directly ordered Abe to shoot the prisoners, or had merely given him what the prosecution labelled a “licence to kill”.\textsuperscript{4} The difference between the two could have determined whether Abe, in executing the POWs who fell behind, had followed orders, or exercised his own discretion. As will be shown, however, other factors were more influential in Abe’s sentencing.

Both Yamamoto and Abe argued that Yamamoto’s direction to Abe constituted an order. If the court accepted this point, Abe ought to have been held to a lesser level of responsibility. At the time the order was issued, however, Abe was not actually under Yamamoto’s command. Abe was the commander of an independent unit, which was placed under the command of Yamamoto once the march began.\textsuperscript{5} This situation demonstrates the difficulty in assigning responsibility in complex or unfamiliar command structures. Because Abe was not under Yamamoto’s command at the relevant time, the order given to Abe could be interpreted as not binding. The fact that the court found Abe guilty of murder suggests that he was held to have had some level of discretion in choosing whether to follow the order. The charge of command responsibility requires the capacity to exercise discretion, which is the hallmark of command: if an officer is entitled to take action under his

\textsuperscript{4} ML36: Part B, Prosecuting Officer’s Opening Address, p. 24.
\textsuperscript{5} ML36: Part B, Defending Officer’s Closing Address, p. 91
own initiative, he is a commander.⁶ A significant challenge not only at national war crimes trials, but also at the IMTFE, was understanding how command worked in the Japanese military, where actual command was often overlapping, or unorganised and unclear.⁷

In the first trial, the junior officers who were sentenced to death were found guilty of ill-treatment of POWs. The prosecutor maintained that the march was a deliberate act, designed by the accused to kill the prisoners. He argued that the junior officers showed implied malice in forcing the POWs to march when they were so unhealthy, and that the fact that they did not allow for adequate rest indicated a murderous intent.⁸ It is surprising that although the court did not find the junior officers guilty of murder, it did find that the ill-treatment inflicted on the POWs was severe enough to warrant the death penalty. On this point, the division of the prisoners into groups under separate commanders appears to have been crucial. The reasoning seems to have been that the accused officers had been in limited contact with Yamamoto, the overall commander, and that as commanders of their own groups, they had some discretion in the amount of time taken to finish the march.⁹ This aspect of the sentencing shows that in this trial, the court found that a duty of command operated at multiple levels within a relatively small structure. The court probably considered that because the sub-commanders had been separated from their direct commander, in practice they had operated as distinct superior officers.

⁸ ML36: Part B, Prosecuting Officer’s Closing Address, pp. 95-98.
The defence of superior orders was claimed by all of the accused in this trial, to argue that they were not responsible for their actions. The rationale behind the defence of superior orders is that organised militaries rely on obedience to superior orders, and that junior officers and enlisted personnel often do not have the training to know whether an order would lead to a breach of international criminal law and therefore ought to be refused or ignored. There is a logical link between command responsibility and superior orders. In both cases, the superior officer is alleged to be responsible for the actions of his subordinates. At the start of the Second World War, the majority of Allied military manuals, including Australia’s, stated that the defence of superior orders was a total defence to a charge. This meant that if it were shown that a subordinate had committed a war crime under the orders of a superior officer, he could not be found guilty of the crime. Military regulations were changed when it became clear that Allied governments would pursue alleged war criminals, most of whom were likely to claim that they had acted under the orders of a superior officer. At the end of the conflict, the majority of accused Japanese war criminals still maintained, in effect, that obedience to superior orders was a total defence to the charge. Like the United Nations War Crimes Commission, Allied war crimes courts, including Australia’s, took the view that superior orders were not a total defence to the charge, but might function as a mitigating factor at the time of

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sentencing. In the Labuan trial, the defence of superior orders was clearly rejected by the court for those who had led a group during the march, probably because the court decided they held some level of discretionary command, and that superior orders were therefore not a legitimate defence to the charge of ill-treatment.

Warrant Officer Gotanda and Sergeant Sato were both found guilty of murder in the first trial. Through an affidavit, Private Keith Botterill of the Australian army accused Gotanda of directly shooting a POW, based on hearsay evidence. Though it was accepted at the Labuan trial, the reliability of Botterill’s evidence was questioned later, at the Rabaul trial. Evidence against Sato was derived from an interrogation of an IJA private, who stated that Sato had ordered the execution of two POWs. This evidence appears reliable, as the private was allegedly present at the time. The conviction of the two NCOs for murder suggests that the mitigating impact of superior orders was limited.

Lieutenant Tanaka, who was second in command of his group during the march, was sentenced to life in prison. Tanaka’s presence at the trial was unusual, as no other officer at the trial had been second in command during the march. The officer in charge of Tanaka’s group had died before the trial began, and Tanaka appears to have been brought before the court as the most senior available representative of his group. The fact that he received a

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lighter sentence than the other accused is probably because he had no substantial degree of command or control over his men: he had operated under the orders of both Yamamoto and his own immediate superior officer, now deceased.

The sentencing in the first trial was heavily criticised in the JAG’s report to the Confirming Officer. The JAG stated that the junior officers, who were found guilty of ill-treating the POWs by forcing them to march, were not in a position to disobey the orders they had received, not only because of their junior position, but also because once the march was under way, they had no option but to continue to their destination. Supplies had been left for them along the route, and had they turned around, no fresh supplies would have been available to them. The JAG thus stated that there was insufficient evidence to find the junior officers guilty of the charge.\(^\text{15}\) In reaching this assessment, the JAG appears to have considered superior orders as a complete defence. The evidence did show that the junior officers had forced the prisoners to march, and under the circumstances, this amounted to ill-treatment. The JAG nevertheless found that there was insufficient evidence to convict them. According to the JAG, the real criminals were those responsible for ordering the march. In this assessment, the JAG put command responsibility at the centre of the trial. His opinion was that the commanders were responsible, and that superior orders ought to excuse subordinates of culpability for their crimes.\(^\text{16}\)

It is not entirely clear why a retrial was ordered. The Confirming Officer, in reviewing the decision of the first trial, failed to approve either the

\(^{15}\) ML36: Part B, JAG’s Report, p. 9.
\(^{16}\) Ibid.
verdicts of guilt or the sentencing. A staff officer stated that the retrial was necessary so that evidence could be given directly by three prosecution witnesses, Botterill, Moxham and Stic Pompewich, rather than the court relying on affidavits. Previous trials which had relied on affidavit evidence, however, had been confirmed. It is possible that the retrial was ordered to address the issues with both the verdicts and sentencing that were discussed in the JAG’s report, though the question of why the Confirming Officer did not merely adjust the decision as he saw fit still remains.17

The major changes at the second trial concerned the sentencing of the junior officers, and the verdicts brought in against the NCOs. For Yamamoto and Abe, the senior officers, the finding of the court remained the same. The junior officers were again all found guilty of ill-treatment, but they were sentenced to ten years’ imprisonment. This was a drastic reduction of their previous penalties: all except one had been sentenced to death, and the exception was a life sentence. The change was even more dramatic for the two NCOs, who were both found not guilty on both charges.18 In the case of Gotanda, the reason is probably that the evidence of Botterill, now given in person, was deemed unreliable. Sergeant Sato was probably found not guilty merely by reason of his rank.

In its opening address, the prosecution again argued that although forcing the POWs to march might appear to constitute ill-treatment, it was, rather, a method of murdering the POWs. The charge of murder thus covered not only the POWs who were directly executed during the march, but also

18 R125: Part B, Record of Military Court, p. 5.
those who died through exhaustion, starvation, and disease.\textsuperscript{19} As in the original trial, the defence’s response was that all of the accused were acting under superior orders. Yamamoto relied on the orders that he had received from Lieutenant-General Baba Masao to undertake the march. Yamamoto also alleged, for the first time, that he had been ordered to undertake the march as quickly as possible. All of the other accused officers were said to have acted under Yamamoto’s orders.\textsuperscript{20} They further testified that they had been ordered to complete the march quickly.

Yamamoto’s claim of superior orders was rejected by the court, probably for two reasons. First, he had directly ordered his subordinates to execute the prisoners who could not continue.\textsuperscript{21} As noted above, this by itself would have satisfied a court that Yamamoto was directly responsible for the deaths of those prisoners. Second, the court probably found that Yamamoto set the timetable for the march himself, and that he had not in fact been instructed in the original orders to complete it as quickly as possible. A strict timetable had not been mentioned in the quashed trial. If a timetable had been included in the orders, it is highly unlikely that the defence would have passed over that point. At the second trial, the officers all testified that the order had existed. When asked why it had not been mentioned at the first trial, they replied that they had not been directly asked about it. The fact that such an important piece of evidence was not produced at the first trial, together with the organised manner in which it was raised at the retrial, suggests that it was most likely a fabrication.\textsuperscript{22}

\textsuperscript{19} R125: Part B, Prosecuting Officer’s Opening Address, p. 38.
\textsuperscript{20} R125: Part B, Defending Officer’s Opening Address, p. 57.
\textsuperscript{21} Ibid., pp. 58-59.
\textsuperscript{22} R125: Part B, Prosecuting Officer’s Opening Address, p. 103.
The verdict brought in against Abe was very likely based on the same reasoning as in the original trial. Though Abe had not directly participated in the executions, he had ensured that the orders given to him by Yamamoto were carried out by his subordinates. The fact that he had been relatively independent of Yamamoto at the time the order was given, and that Abe nevertheless made sure that the POWs were executed, probably convinced the court that he had had some degree of discretion in carrying out his duty.

The JA (who was not the same as the one at the Labuan trial) played an active role in the retrial. At the conclusion of the proceedings, he explained to the court that where an act by omission or commission is lawful, yet at the same time dangerous, and is carried out in gross negligence, the resulting death should be classed as manslaughter at the very least. In his report to the JAG, the JA submitted that the junior officers, by reason of their isolation from their immediate superiors, could reasonably have been required to exercise a degree of command. Though it is not explicitly stated, it is likely that the JA meant that the junior officers should have changed the pace of the march, and taken greater care of straggling POWs. The JA went on to state that the junior officers had failed to alleviate the suffering of the prisoners under their charge, because they failed to exercise discretion in their command. As a result of this failure to act, a large number of POWs died. The JA apparently believed the junior officers were guilty of manslaughter at least, because they failed to exercise discretion in their command groups.

This argument frames a charge of murder as a charge of homicide; murder

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23 R125: Part B, Testimony of Yamamoto, p. 60
and manslaughter are degrees of homicide. Evidently the JA agreed with the prosecutor’s argument that the deaths that occurred on the march outside of direct execution were still homicidal.24

This argument was clearly rejected by the court, as the junior officers were found not guilty of murder, but instead, of ill-treatment of prisoners. The argument made by the JA in this regard appears sound, but it is likely that the court was heavily influenced in the opposite direction by the junior officers’ claim of superior orders. As stated earlier, under the accepted interpretation of this claim, the court would still be required to find the officers guilty of murder, and could then mitigate their sentences after reaching this verdict. Rather, it would appear that the court used the defence of superior orders to downgrade the officers’ responsibility for the deaths of POWs under their command, and instead to find them guilty of ill-treatment.

All of the accused were questioned directly by the members of the bench, on matters which appeared to have had a direct bearing on the court’s decisions. The accused were asked about their level of field experience and formal training at the time of the march, and what their rank was at that time. Yamamoto, Abe and Iino had all been on active service since at least 1942. Iino had been Yamamoto’s adjutant. All of the other officers had been members of the reserve army, and were not placed on active service until September 1944. None of the accused had undergone training at a military school.25 The fact that the junior officers had only very recently been placed on active service was probably a major factor in mitigating their culpability. Iino’s position as adjutant, meaning that he was an administrative officer,

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25 R125: Part B, Testimony of the Accused, pp. 65, 72, 75, 81, 84, 88, 90, 95, 97, 100.
likely played a similar part in mitigating his culpability, but as was common practice in other Allied war crimes trials, it did not fully protect him from conviction.26

The reliability of one of the witnesses also appears to have been a key factor in the court’s judgment. Private Keith Botterill, one of the surviving POWs from the march, presented evidence of dubious quality. Reports by the Australian military state that Botterill had also given unreliable evidence on other occasions.27 Lynette Ramsay Silver, who wrote on the Sandakan-Ranau atrocities, conducted interviews with Botterill in 1997, in which he expressed remorse for giving false evidence in court to secure convictions.28 At the Rabaul trial he repeated in person evidence that he had given in affidavit at the Labuan trial, alleging that Gotanda had executed an Australian POW who had fallen behind. This claim was based on hearsay from a POW who later died on the march. That the evidence was hearsay was not in itself an issue: Sticpewich, who was not on the march, gave a considerable amount of evidence that was deemed reliable at this trial. Rather, Botterill gave conflicting evidence about Gotanda’s personality and behaviour. He alleged that Gotanda was capable of killing a sick POW, yet also stated that he had refused to do so on a separate occasion, instead asking an Australian prisoner to carry out the shooting. Botterill also stated that the IJA members in his group received three times as much food as the POWs,

yet also stated that Gotanda had bought meat from locals and evenly shared it amongst the prisoners and guards. These contradictions probably brought Botterill’s statements into disrepute, and the evidence he gave pertaining to specific IJA members appears to have been largely disregarded by the court.

In Sergeant Sato’s case, the issue was probably rank, rather than what he had actually done. The prosecutor’s opening address explicitly accused him of shooting POWs. According to the defence, the interrogation upon which this accusation was based was subject to an error. The defence contended that during the march there were multiple guards named Sato (and indeed, two defendants in this trial were named Sato), and that it was in fact a deceased Sato of different rank who had ordered the executions. At trials of Japanese war criminals deceased soldiers were often blamed for the commission or ordering of war crimes, but it seems unlikely that two ranks would be confused. The fact that the court found Sato not guilty on all counts might theoretically show that it had accepted this defence. However, it is more probable that the court found Sato not guilty by reason of his rank. It is unlikely to be a coincidence that the two NCOs, Sato and Gotanda, were both found not guilty, where there was credible evidence against them. Instead it seems that the court followed a pattern identified by Australian prosecutor Athol Moffit, who noted in his diary that the policy of the court at the time of the Labuan trials was to “shoot the person in charge, and … let the privates and sergeants go with imprisonment”.

30 R125: Part B, Prosecuting Officer’s Opening Address, p. 38.
Command responsibility at the second trial was not a contentious issue in relation to the senior officers: it was clear that Yamamoto and Abe had directly ordered the execution of straggling POWs. The distinguishing feature of the second trial is the rejection by the court of the argument from both the prosecutor and the JA that the junior officers had a duty to exercise some degree of discretion by reason of their separation from their own commander, and that therefore, they ought to be convicted of murder. The sentences of the junior officers were apparently reduced because of their lack of military experience and the fact that they had operated under superior orders. Though they had exercised a degree of command, and thus were responsible to some extent for the deaths of a large number of prisoners, the court found that them not guilty of murder. Just as the JAG had asserted in the report on the original trial, the second court concluded that the junior officers had not been in a position to avoid the actions they took. This assessment recognised that the largely unqualified responsibility assigned to the junior officers in the first trial did not reflect their actual position in the chain of command. In turn, this acknowledgment of the realities of command demonstrates that the prosecutor’s interpretation of command responsibility did not always align with that of the court, and that, at least on this occasion, steps were taken to ensure that the doctrine was properly used to convict those thought to be the responsible for ordering and allowing atrocities to be committed.
CHAPTER IV

THE TRIAL OF LIEUTENANT-GENERAL BABA MASAO

Lieutenant-General Baba Masao was the highest ranking member of the IJA who was tried for his part in the Sandakan-Ranau atrocities by the Australian military.\(^1\) Baba was charged with “unlawfully disregarding and failing to discharge his duty to control the conduct of the members of his command, whereby they committed brutal atrocities and other high crimes, against the people of the Commonwealth of Australia, and its Allies, between December 1944 and September 1945”. This charge covered the crimes committed by members of his command during the first and second marches to Ranau, and the massacre of POWs at Ranau in August 1945. The trial took place at Rabaul, between 28 May and 2 June 1947. Baba was found guilty of the charge, and was executed by hanging on 7 August.\(^2\)

The crime for which Baba was charged was framed as a separate offence as a superior officer: that is, his crime was distinct from that of his subordinates. The court found that he had the requisite level of knowledge to have taken action to prevent, halt, or punish the commission of war crimes by his subordinates. Because of this knowledge, he had a very broad and far reaching responsibility, which he failed to discharge adequately. At certain points in the trial, the prosecution also presented arguments that were more

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aligned with holding Baba strictly liable for the crimes of his subordinates. Thus, in Baba’s case, a dual interpretation of the principle of command responsibility was evident at the one trial.

Baba’s was one of five senior officer trials held at Rabaul where command responsibility was explicitly used. The Rabaul senior officer trials were heard before a bench of a largely stable composition, with minimal changes in personnel between trials. At three of the trials before Baba’s, Lieutenant-Colonel John Brock had assisted the bench as JA. Brock had carefully studied the decision of the Supreme Court of the United States in the Yamashita appeal, and had advised the court against finding a broad and unqualified responsibility when applying the doctrine of command responsibility. Though Brock was not present at Baba’s trial, the fact that the majority of the members of the bench had previously heard his interpretation of the doctrine meant that command responsibility was relatively consistently applied across the senior officer trials. The already controversial decision of the military tribunal that tried Yamashita would have been fresh in the minds of those conducting the Rabaul trials. It is likely that prosecutors wanted to show that a more traditional legal method was in use at the senior command responsibility trials, as an important part of establishing the proceedings as fair.

The charge against Baba was very broad. Originally the prosecution had intended that he should face three, more specific charges. The first two charges, one relating to the first and one to the second march, were that he

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had ordered the POWs moved from Sandakan to Ranau, when they were in such a condition that it would cause them great pain and suffering. The third original charge was that he had violated the laws and usages of war, by unlawfully disregarding, and failing to discharge, his duty to control the members of his command. This charge addressed the massacre of thirty-three POWs under Takakuwa’s orders, on or around 1 August 1945.5 Though the original charges were amalgamated into one broad charge, the prosecutors still presented their case as though they were accusing Baba of the original three charges. This procedure had no material effect on the evidence raised during the trial. The charges were probably redrafted to make one broad charge in order to favour the prosecution: rather than having explicitly to show Baba’s guilt in relation to each specific charge, it was only necessary to show that atrocities had been committed by members of his command, and that he had failed in his duty to command or control. Using such a broad charge was not unusual in senior officer command responsibility cases.6 In fact, Brock had previously criticised this kind of charge as having no real meaning under international criminal law, because it was too general.7

The prosecutor drew direct attention to the Yamashita case in his opening address, pointing out that the phrase “brutal high crimes and other atrocities” had also been used in the charge against Yamashita. He went on to state that the charge had been upheld as valid by the US Supreme Court. This explanation was no doubt intended to address Brock’s comments in previous trials that the charge had a limited basis in international law.8 Furthermore,

5 R125: Part B, Abstract of Evidence, p. 35.
8 Ibid.
using the doctrine of command responsibility in war crimes courts was still a novel practice. Making explicit reference to the Yamashita trial was probably meant to reinforce the validity of the trial, by appealing to precedent in a manner similar to the practice in civilian courts.

Formal command responsibility was more important in Baba’s trial than in the previous Sandakan-Ranau trials. In all the previous proceedings, command responsibility had been used to varying extents to hold the accused responsible for the actions of their subordinates. In those cases, there had been a reasonably clear and direct connection between the crimes committed and the superior officers, who had been in close proximity to the crime. Though they may not have personally participated in the crime, they had had direct and immediate control over their subordinates. Baba, by contrast, had remained at his headquarters, relying on staff officers to transmit his orders. He was thus clearly separated from the subordinate personnel accused of committing war crimes.

Compared with previous trials of officers accused of responsibility for the Sandakan-Ranau atrocities, the court in Baba’s case took a more rigid and formulaic approach to procedure, probably because of the importance of the case: Baba was a very senior officer, who had commanded the troops responsible for a major atrocity against Australian soldiers, and his trial would therefore attract significant attention in Australia. Moreover, the trial took place more than a year after the other proceedings, so courtroom practices had probably developed to conform more with civilian trial procedure. The prosecutor, for example, took the trouble to highlight the court’s jurisdiction to try the case, by establishing that the crimes, though not
committed on Australian territory, had been committed against soldiers of the Australian military and their Allies, and had been committed by an enemy nation’s soldiers. At no other Sandakan-Ranau trial had this been done.

Initially it seemed there was little evidence connecting Baba to the decision to undertake the first march to Ranau. The prosecutor acknowledged that although the march took place under Baba’s command, he could not prove that Baba had created the order for the march. He also acknowledged that the idea behind the march had likely been originated by Baba’s predecessor. The prosecutor nevertheless argued that there was no real doubt that Baba had issued the order for the march, and had decreed that the march should be completed as quickly as possible. The prosecutor thus sought to establish the point that, although the idea to move the prisoners from Sandakan to Ranau originated with his predecessor, Baba had actually ordered that the march take place.

The prosecutor maintained that Baba knew, or ought to have known, that the POWs were in poor health when he arrived in Borneo. Baba had been de jure commander of Borneo since December 1944, but had not actually arrived until January 1945. De facto control of a unit is a required element of a command responsibility charge: if the commander does not have actual power to command a unit, then logically he cannot be held responsible for failing in his duty to control that unit. To establish that Baba knew of the prisoners’ condition, the prosecutor relied on an interrogation of Captain Hoshijima, which had been used at Hoshijima’s own trial. The interrogation

9 R125: Part B, Prosecuting Officer’s Opening Address, p. 42.
10 Ibid., pp. 36-37.
11 Ibid.
showed that in October 1944, Hoshijima had allegedly informed “Army Headquarters” that the prisoners were in a very poor state of health.\textsuperscript{13} It is unclear who “Army Headquarters” was; it could have been Hoshijima’s immediate superior, Colonel Suga Tatsuji, or Baba’s predecessor, Lieutenant-General Yamawaki Masataka.\textsuperscript{14} Regardless of who it was, the contention was that Baba ought to have been aware of the prisoners’ condition, even though he was not in command at that time. The prosecution maintained that as commander, Baba should diligently have informed himself of all the circumstances under his command in Borneo. This argument resembles the position taken by the prosecution at the Yamashita trial, and is not especially controversial. Pappas has shown that it had become established at Australian command responsibility trials that a commander could be held guilty for an act of either omission or commission.\textsuperscript{15}

The issue of what Baba knew when he arrived in Borneo continued to play a central role in the proceedings. At the end of Baba’s testimony, the JA asked him whether, at the time he assumed \textit{de facto} command in Borneo, he had ascertained the condition of the POWs at Sandakan Camp. Baba stated that he had, and that he knew what their condition was.\textsuperscript{16} This admission clearly showed to the court that Baba had the requisite degree of knowledge to be held responsible for the deaths of POWs during the first march. Later, in his petition against the verdict of the court, Baba argued that he had misinterpreted the JA’s question, treating it instead as an enquiry about

\textsuperscript{13} R125: Part A, Interrogation of Captain Hoshijima Susumu (Exhibit B), pp. 22-31.
\textsuperscript{15} Pappas, “Law and Politics”, p. 236.
\textsuperscript{16} R125: Part B, Testimony of Lieutenant-General Baba Masao, p. 54.
whether he had been told that the prisoners were healthy when he took steps to ascertain their condition. The report he received, he said, had falsely assured him they were healthy. The difference in interpretation is important: Baba argued that in relying on reports given to him, even though they were false, he had discharged his duty to ascertain the state of the prisoners’ health, and that it was not his fault that his staff officers had given him false information. Therefore, he was not responsible for the prisoners’ deaths, as he had taken reasonable steps to inform himself of the situation. It seems unlikely, however, that Baba had misinterpreted the question, as the JA had specifically asked if he knew what the actual condition of the POWs was at the time.

The prosecution accused Baba of causing unnecessary deaths of POWs on the first march, by ordering the march to be completed as quickly as possible. As seen in Chapter Three, in the joint trial of Captain Yamamoto Shoichi and other officers accused of responsibility for the first march, Yamamoto claimed that he had been ordered to complete the march as quickly as possible. In that trial, the prosecutor alleged that such an order never existed, and that Yamamoto and the other officers were responsible for the pace of the march. At Baba’s trial, by contrast, the prosecution essentially supported Yamamoto’s claim, arguing that Baba had ordered the march to be completed quickly, and as a result, caused the deaths of many POWs, because they could not keep up.

This reversal by the prosecution across the two trials shows how command responsibility was used in the broader context of war crimes trials:

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17 R125: Part B, Petition of Lieutenant-General Baba Masao, p. 15.
18 R125: Part B, Prosecuting Officer’s Opening Address, p. 42; R125: Part B, Prosecuting Officer’s Closing Address, p. 57.
as a flexible legal doctrine designed to secure convictions. Further example can be seen in the trial of Admiral Toyoda Soemu, who was accused of responsibility for crimes committed by Japanese forces during the Battle of Manila in 1945. Using the doctrine of command responsibility, the prosecution alleged that Toyoda was criminally responsible for the same crimes for which General Yamashita had been held responsible two years earlier. Though Toyoda was acquitted, his case shows that the prosecution’s reversal of opinion in the Baba trial was not an anomaly.

The prosecution argued that Baba had wilfully failed to undertake several positive duties when ordering the second march. Therefore, he had committed a crime of omission, and he ought to be held responsible for the resulting deaths of POWs. The prosecution declared that Baba had had a duty to ensure that the prisoners could complete the march without harm. Baba neglected this duty, by failing to obtain a full report of the results of the first march, wilfully ignoring reports of the POWs’ health, and failing to ensure that the prisoners received adequate care at Ranau. This argument is far more detailed than that relating to the first march, which attached responsibility to Baba in a much broader sense. Instead of merely asserting that Baba knew that the POWs were sick, and nevertheless ordered the march, the prosecution argued that he had also failed to take precautions to prevent or limit deaths on the march, and afterwards. The bulk of the prosecution’s efforts went towards reinforcing this argument.

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20 R125: Part B, Prosecuting Officer’s Opening Address, pp. 56-58.
The case against Baba relied heavily on evidence concerning the outcome of the first march to demonstrate that he ought to be held responsible for the results of the second, either because of action, or inaction. Yamamoto had submitted a written report on the first march. If Baba had wilfully ignored it, then he was criminally responsible for failing to take necessary steps in planning the second march. If, however, Baba had read the report, and had ordered the march anyway, then he had committed a crime by commission, as he knew that more deaths would occur.\(^{21}\) In neither of these arguments would Baba have been accused of responsibility for the crimes committed by his subordinates; he would be accused of committing a separate offence as a superior officer. The fact that the actual crimes occurred was a necessary element of the charge, but Baba was not accused of the actual crimes that were perpetrated: that is, he was not accused of inflicting bodily harm.

Warrant Officer William Sticpewich’s testimony from the trial of Takakuwa and Watanabe was used by the prosecution to establish that there was inadequate food, medicine and shelter for the POWs, both during the march and at Ranau.\(^{22}\) Therefore, Baba had failed in his duty to protect the POWs from harm during the relevant time. This failure probably suggested that Baba was more culpable for the deaths that occurred during the second march than during the first, as he had greater control over the planning and execution of the second march. Baba’s defence to the accusations about the second march was that he had taken action to ensure the prisoners arrived without harm, and that the atrocities which occurred were outside of his control. Baba maintained that on 20 May 1945, he had ordered

\(^{21}\) Ibid.
\(^{22}\) R125: Part A, Testimony of Warrant Officer William Sticpewich (Exhibit F), pp. 6-14.
his subordinates to move all of the prisoners, but had then sent an immediate correction, stipulating that only the healthy be taken. He explained that this correction had not reached Takakuwa before he left for Ranau on 28 May. The signal post from which the order had been sent to Takakuwa was ten miles away.\(^{23}\) It is extremely difficult to believe that an order sent by the commander of IJA forces in Borneo took more than eight days to reach an officer ten miles away. It is more likely that the order was never issued.

Baba claimed that he had taken further steps to prepare for the second march. He had ordered that the trail be made easier for weakened POWs to traverse, and that more food and medicine be supplied. He also inquired into the possibility of moving the prisoners on boats, but the unrestricted bombing of Japanese vehicles by Allied planes precluded this option.\(^{24}\) Baba may well have taken these steps. As for the supplies, however, the evidence given by Sticpewich during Takakuwa’s trial, and raised again as evidence in Baba’s trial, suggested that Takakuwa’s soldiers kept the majority for themselves.\(^{25}\)

The fact that Baba was held responsible for the deaths on the second march, even though quite possibly he supplied extra food and medicine, demonstrates a potential overlap of the two interpretations of command responsibility. Baba perhaps took steps to provide the prisoners with food and medicine, yet his subordinates committed a war crime by withholding these supplies. Since he was held responsible for the deaths which occurred on the march from lack of supplies, he was potentially held strictly liable for crimes.

\(^{23}\) R125: Part A, Written Statement of Lieutenant-General Baba Masao (Exhibit I), pp. 136-140.
\(^{24}\) Ibid.
committed by his subordinates, because of his command position. This ambiguity suggests that the two forms of liability encompassed by the doctrine – either a separate offence or a strict liability – were not always distinct in practice, but could be blended together within one trial.

Baba argued that war-time conditions inhibited him from fully exercising his command. He stated that the quality of his troops was very low; they were not experienced soldiers, but had mostly been drawn from reserve forces. Furthermore, the heavy bombing of Borneo by the Allied military, beginning in late 1944 and continuing until the end of the war, meant that maintaining effective control was difficult.26 A similar argument had been raised at the Yamashita trial, where the defence maintained that the attacking US forces had successfully eliminated Yamashita’s capacity to command. This defence had been rejected.27 Baba’s similar argument was also rejected by the court.

Finally, the prosecution argued that the massacre of POWs by Takakuwa and his subordinates at Ranau, on or about 1 August 1945, was a direct and natural consequence of Baba’s actions or inaction in planning the march. The prosecutor stated that Takakuwa had been placed in an unfortunate position, and that there was some merit to arguments raised at his trial that he had been constrained by military necessity.28 The prosecutor thus clearly asserted that responsibility for the massacres did not lie solely with Takakuwa. Though it is not explicitly stated, the prosecution implied that Baba knew, or more likely, ought to have known, that the only option

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26 R125: Part B, Testimony of Baba, p. 52.
28 R125: Part B, Prosecuting Officer’s Closing Address, p. 58.
available to Takakuwa would be to execute the remaining prisoners. As shown in Chapter Two, it was central to Takakuwa’s conviction that he had given the order to execute the POWs at Ranau, and that he had exercised his own discretion in doing so, without superior orders. The fact that the prosecutor in the Baba trial sought to apportion the majority of culpability for Takakuwa’s actions to Baba shows a strong determination to hold Baba responsible for any atrocity with which he could be linked, regardless of how limited the connection was. As was done with the alleged timetable for the march, the prosecution reused the same evidence or facts from previous proceedings, this time reframing them to shift responsibility on to Baba.

The prosecution’s argument that Baba was responsible for the massacre demonstrates a potential interpretation of command responsibility as a strict liability. In asserting that Baba was responsible for the execution at Ranau, the prosecutor appeared to contend that a commander is required to exercise a very high degree of forethought: Baba ought to have known that Takakuwa would have no effective choice but to execute the prisoners. This extension of responsibility exceeds that which was imposed in the Yamashita case, and other command responsibility trials. In the Yamashita trial, the key issue was that the atrocities were so widespread that, in the court’s view, the commander ought to be held responsible. Yet in the Baba trial, the prosecution contended that responsibility should also be applied in isolated cases, not just where a pattern of atrocities could be established. There had not been a comparable massacre of prisoners during the previous march, and the basis of the charge against Baba in relation to the second march was that

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he was mainly responsible for the deaths which occurred, because of improper planning, or wilful disregard. Attaching responsibility to Baba for the later massacre appears to be a move towards strict liability, in which he was held responsible for crimes committed by his subordinates, rather than for any action or inaction on his part. Yet the prosecutor framed the executions as a natural consequence of his action or inaction. Again, this approach shows the blending of the two interpretations of command responsibility, signalling either confusion as to how exactly the doctrines operated, or a convenient method of convicting senior officers.

Unlike the previous trials of junior officers accused of responsibility for the Sandakan-Ranau atrocities, the Baba trial concerned command responsibility only, without combining it with direct participation in crimes. This meant that for the court properly to convict Baba, the doctrine needed to be fully understood, and deployed in a consistent manner. The substantial discussion of how much Baba had known of the condition of the prisoners and the results of the first march demonstrates that the charge was conceived by the court as a separate offence of the superior, as advised by the JA in previous trials. On the other hand, interpreting the charge as a strict liability meant that the prosecution could connect Baba to a greater number of crimes. This latter interpretation, though not fully imposed in connection to all the elements, was at least used to a limited degree. The mixing of approaches demonstrates two related things. First, the doctrine was still new, and did not have a fully established interpretation. As a result, second, prosecutors were able to use it opportunistically: command responsibility was an important tool
in securing convictions, and prosecutors would use whichever version of the doctrine best suited their purposes at any particular time.
CONCLUSION

Japanese military forces committed atrocious crimes against Allied prisoners of war in the period 1941-1945. After the conflict, the Allied authorities were determined to exact justice for the crimes, not only from the soldiers who had mistreated and killed prisoners, but also from the more senior officers who had issued the relevant orders or who, at the least, had allowed the crimes to occur, by failing to prevent or punish mistreatment and murder. The doctrine of command responsibility was a major tool in this endeavour, and it was enthusiastically embraced by Australian military prosecutors and courts.

In the late 1940s command responsibility was still a relatively novel doctrine, and it had no single, established interpretation. As the trials examined in this thesis show, the lack of a definitive interpretation made it possible for the prosecution and the courts to use the doctrine of command responsibility very freely. The aim was usually to secure convictions against those considered responsible by reason of their position for crimes against Allied prisoners. For this purpose, strict liability was the safest approach: a commander was simply held responsible for his subordinates’ crimes. On occasion, however, prosecutors and courts departed from the strict liability version of command responsibility. The doctrine could be tempered in its application to those who were seen to have had limited control over atrocities. Thus, the apparently strict liability imposed on junior officers was sometimes qualified by reason of superior orders, or degree of command. When very senior officers were tried with command responsibility, the charge was generally interpreted not as imposing a strict liability, but as a separate
offence of the superior, an approach which, at least potentially, allowed a
greater range of defence arguments, and hence did not automatically imply
guilt. This approach was probably conditioned by the controversy over the
Yamashita case, and the corresponding inclination to demonstrate that justice
was being done in subsequent cases. Yet these qualifications of the doctrine
of command responsibility did not fully erode the application of strict liability
by prosecutors, when they held it to be necessary to bring to justice those they
considered to hold most responsibility for war crimes.

The trial of Takakuwa and Watanabe provides an illustration of a
limited interpretation of command responsibility, in which the commander,
Takakuwa, was held responsible for orders he gave to his subordinates. This
is a clear and uncontroversial application of the doctrine. In the same trial,
however, command responsibility was applied in a far more controversial
manner: Watanabe was held to be unqualifiedly responsible for the conduct
of his subordinates, and to be held strictly liable for their conduct. The court
and the prosecutor applied both of these approaches to command
responsibility in the joint trial of Takakuwa and Watanabe, which suggests
that there was no issue with deploying multiple interpretations of the doctrine
simultaneously.

Hoshijima’s trial for his role in the atrocities at the Sandakan POW
Camp shows that the command responsibility doctrine was not always fully
utilised, even when it was available. Hoshijima had undeniably been a direct
participant in the majority of the crimes for which he was charged. Thus,
there was no need to invoke command responsibility at his trial: his
conviction was assured on far simpler grounds. Ample evidence of a direct
nature was available to support the prosecutor’s case, and so the tentative plan to use command responsibility was abandoned. The prosecutor in the Takakuwa and Watanabe trial had invoked command responsibility because there was no evidence which would secure Watanabe’s conviction. Hoshijima, on the other hand, had convicted himself as an actual participant in crimes, and so this argument was set aside in favour of a more direct one.

The Yamamoto trial applied command responsibility at multiple levels. The prosecutor and the Judge Advocate in the first trial, at Labuan, both argued that the doctrine ought to be applied in some way to officers who had been able to exercise some level of discretion. Culpability was attributed to the immediate superior officer connected to a crime. The junior officers in this trial were held to a strict liability, even when they had not had full control over the actions of their subordinates because they, the junior officers, were subject to superior orders. The results of the Labuan trial showed the court’s unwillingness to accept superior orders as a mitigating factor when applied to a command responsibility charge. This trial also showed the prosecutor broadly applying the doctrine of command responsibility to secure convictions.

The retrial of Yamamoto and the others at Rabaul reversed the strict liability to which the junior officers had been held. This time, the court, against the argument of both the prosecutor and the Judge Advocate, deemed that superior orders did mitigate the culpability of the junior officers, probably because those orders had limited the exercise of discretion in their command. The decision making authorities in this case showed some refinement in their application of command responsibility, finding that a
broad, unqualified responsibility of a superior officer was not always present in a chain of command. The court probably took this stance because it had already assigned full culpability to the two senior officers in this trial, and because it recognised that the application of a strict liability, where junior officers were acting under orders, was a questionable use of the command responsibility doctrine. The change in treatment of the case by the two different courts shows that application of the doctrine could vary, even within a short period of time and in the face of the same crime and the same evidence.

The trial of Baba Masao confirms that, at least in senior officer trials, the prosecution was mostly willing to apply the doctrine of command responsibility as a separate offence of the superior, where such an argument could be made. Yet, in this case, the prosecutor apparently still attempted to hold Baba strictly liable for crimes of which he could not have been expected to have had any knowledge. It is impossible to know whether the court agreed with the prosecution on this matter, because we do not know the reasons for the court’s judgment. However, the point still stands that strict liability arguments held superior officers to a higher standard than did arguments embracing command responsibility as a separate offence of the superior, and each of these arguments was used as needed by the prosecutor. As we have seen, in some respects the arguments about Baba’s responsibility extended beyond even the arguments used against General Yamashita Tomoyuki. It is unlikely, however, that prosecutors were deliberately attempting to extend the liability established in the Yamashita case. The prosecution’s overriding goal, in the Baba trial and all the trials analysed in this thesis, was to secure the
convictions of commanding officers for atrocities against Allied prisoners of war, by whatever means had the greatest chance of success.
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