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Culture and understanding in the Singapore war crimes trials (1946–1948): interpreting arguments of the defence

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Abstract

After the Second World War, the British military organised 131 war crimes trials in Singapore, which served as the base for British war crimes investigations in Asia. These trials brought together diverse participants—judges and counsel from the UK, India, and other Allied countries; accused persons from Japan, Korea, and Taiwan; defence counsel from Japan; and witnesses from all over Asia. The majority of defendants in these trials did not deny their involvement in the war crimes concerned; instead, these defendants argued that their conduct was consistent with Japanese norms, beliefs and practices. This article explores trial participants' varied and contested interpretations of the culturally influenced arguments put forward by the defence.

I. Introduction

At least 60 million lay dead at the close of World War II (Doyle, 2013, p. 206). The end of hostilities and bloodshed brought not only relief, but also weariness, insecurity and a desire for justice. The Allied Powers scrambled to reoccupy territories, restore order and implement war crimes trials. Apart from the Tokyo and Nuremberg Trials, the Allies would organise hundreds of national trials throughout Asia and Europe.[1] In Asia, the British made Singapore the base of their war crimes trials programme. Altogether, 131 trials were conducted by the British military at different locations across the island. These trials, which I will refer to as the Singapore Trials, brought together diverse participants – judges and prosecutors from the UK, India and other Allied countries; accused persons from Japan, Korea and Taiwan; defence counsel from Japan; and witnesses from all over Asia.[2]

The majority of defendants in these trials did not deny their involvement in the war crimes concerned; instead, these defendants argued that their conduct was consistent with Japanese

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1 For examples of such historical case-studies, see Bergsmo *et al.* (2014).

2 The full and original trial transcripts and trial-related records are at the National Archives of the UK (hereinafter 'NAUK'). NAUK staff have entered sequential pagination. I use this pagination for reference, placing 'SP' before the number. In terms of methodology, I first read trial transcripts in an open-ended way. During this first reading, I noticed communication problems associated with the different cultural backgrounds of trial participants. I then went through the transcripts again, reading repeatedly for such communication breaks related to participant background diversity, using sociological coding methods to identify recurring culturally related communication challenges. One important point about these trial records: these military courts did not issue fully reasoned decisions in the Singapore Trials. The trial transcripts comprehensively capture exchanges at trial. While it is therefore difficult to conclusively determine how a court's interpretation of defence arguments impacted its eventual finding or sentence, by carefully reading trial transcripts, I am able to study how non-Japanese participants interpreted the defendants' culturally influenced arguments.

norms, beliefs and practices. How were these culturally influenced arguments of the defence interpreted by other trial participants in the Singapore Trials? This paper explores the different interpretations given by trial participants to culturally influenced arguments of the defence. Many of these divergent interpretations stemmed from the cultural distance between trial participants. A number of judges did, however, modify their understandings after being exposed to similar defence arguments over several trials. Other Japanese participants took advantage of cultural differences and adjusted their arguments in anticipation of how they thought non-Japanese trial participants would react. In other words, while some participants were limited by cultural differences, others used such differences in a strategic manner. The Singapore Trials were thus the site of varying and contested interpretations.

Section II of this paper positions the Singapore Trials against other multicultural trials and scholarly debates about cross-cultural interpretation issues at trial. I then introduce the reader to the historical and legal context of the Singapore Trials in Section III. In Section IV, I analyse common culturally influenced trial arguments put forward by the defence and trial participants' interpretations of defence arguments. I conclude by observing that, although defendants were permitted to raise culturally influenced arguments in these trials, due to conflicting interpretations, this did not result in sustained discussion or improved understanding of the defendants' motivations and conduct.

II. The universe of multicultural trials: positioning the Singapore Trials

Like the Singapore Trials, many of today's war crimes trials bring together individuals with diverse cultural backgrounds. However, before proceeding further, I should clarify some terms used in this paper. When using the phrase 'war crimes trials', I refer to trials of core international crimes, including genocide and crimes against humanity. When referring to 'culture', I specifically draw on Swidler's (1986) definition of culture as a 'tool kit' of 'symbols, stories, rituals, which people may use in varying configurations to solve different kinds of problems' (p. 273). I recognise that other sociologists and anthropologists have put forward different definitions of culture. For example, Geertz (1977) describes culture as a 'historically transmitted pattern of meanings embodied in symbols' (p. 89), while Sewell (1999) sees culture as a 'sphere of practical activity' (p. 45). For my research purposes, I find Swidler's actor-centred definition of culture as 'tool kit' most appropriate, as I am interested in how trial actors employed norms, values, symbols and practices to defend their positions and achieve certain objectives in the Singapore Trials.

In many of today's multicultural war crimes trials, international judges and lawyers are required to assess the testimony and guilt of defendants who come from societies very different from their own. This cultural aspect of war crimes trials remains underexplored, as most war crimes trials research continues to focus on the political or legal aspects of these trials. A number of researchers have nevertheless produced recent and important work on the impact of cultural factors in war crimes trials. Combs (2010) draws attention to numerous fact-finding obstacles experienced by internationalised criminal courts due to the linguistic and cultural distance between fact-finders and witnesses. In his work on the Special Court for Sierra Leone (SLSC), Kelsall criticises the court for in effect 'criminalising elements of local culture' when convicting accused for enlisting child soldiers and forced marriage (2009, p. 258). My study of the Singapore Trials contributes to this emerging body of work by analysing the sundry and contested interpretations of defence arguments at trial.

Defendants in the Singapore Trials often argued that they had acted in accordance with broader institutional and societal norms. Similar arguments were probably raised by the defence in other post-Second World War trials. The Singapore Trials, however, serve as a particularly interesting case-study for several reasons. First, unlike the more well-known Tokyo and Nuremberg Trials that

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targeted high-ranking military and political leaders, the Singapore Trials, like most Allied national trials, largely targeted low to mid-ranking military personnel. Group-based norms and practices arguably play a bigger role in shaping the conduct of low and mid-ranking military personnel. Studies have indeed shown that the Japanese army subjected its lower-ranking soldiers to highly oppressive and militaristic socialisation (Drea, 1989). Also, the Singapore Trials involved a significant number of repeat players so I was able to ascertain and track any cultural learning or adjustment among trial participants.

Culturally influenced arguments are raised by accused not only in war crimes trials, but also in ordinary domestic trials. Defendants or witnesses from minority groups may refer to norms, beliefs or assumptions to explain or justify their conduct. The judicial treatment of such culturally influenced arguments in domestic trials has received substantial attention from scholars. Renteln argues that judges should consider defendants' culturally influenced arguments when determining guilt or, less controversially, when deciding on sentences (2004, p. 46). Not all commentators support this position. Lacey argues that, given its normative and communicative aims, criminal law is 'in the business of challenging and opposing particular cultural norms' rather than accommodating these norms (2014, p. 50). Regardless of the different scholarly positions taken on this issue, discussions are premised on the fact that judges are able to understand the culturally influenced arguments raised by defendants at trial. My study intervenes in this debate by examining participants' divergent interpretations of defence arguments in the Singapore Trials.

Multicultural ordinary trials and multicultural war crimes trials face some common cross-cultural challenges. All trials claim to arrive at their conclusions of guilt or innocence after considering witness testimonies and counsel arguments. This claim may be undermined in trials where participants have difficulties understanding each other, resulting in miscommunication and inaccurate fact-finding. However, multicultural war crimes trials have to deal with additional legitimacy concerns. It has become a norm for these trials to use international law, thus claiming to apply a universal justice. Contested interpretations at trial undermine these trials' claim to universality. In addition, most war crimes trials operate in politically precarious environments (Osiel, 2000). Such divided and unsettled environments make war crimes trials more vulnerable to accusations of unfairness and illegitimacy. As a result, multicultural war crimes trials are more vulnerable to legitimacy challenges than multicultural ordinary trials conducted in times of stability and peace.

III. The historical and legal context of the Singapore Trials

Some latest estimates of national Allied trials are as follows: China (609 trials), the US (456 trials), the Netherlands (448 trials), the UK (330 trials), Australia (294 trials), the Philippines (72 trials) and France (39 trials) (Kushner, 2015, p. 9). Out of the 330 trials conducted by the British military in Asia, 131 trials were conducted in Singapore. Where do the Singapore Trials fit in the landscape and timeline of these postwar trials? The first British war crimes trial started in Germany on 17 September 1945 (Charlesworth, 2008, p. 3). Shortly after, the American trial of General Tomoyuki Yamashita began in the Philippines (Piccigallo, 1979, p. 50). In Europe, the Nuremberg Trial commenced on 20 November 1945 (Tusa and Tusa, 2010, p. 146). Back in Asia, the first British war crimes trials of Japanese atrocities started on 21 January 1946 in Singapore.[3] On 3 May 1946, the

3 The full citation information of this trial at the National Archives of the UK (NAUK) is as follows: 'WO 235/813 – Defendant Gozawa Sadaichi, Place of Trial Singapore'. The case will be referred to as '*Gozawa Sadaichi and others*'.

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Tokyo Trial began and continued for two and a half years, coming to an end on 12 November 1948 (Totani, 2008, pp. 7–8). The last of the Singapore Trials concluded on 12 March 1948.[4]

British postwar trials were conducted pursuant to a Royal Warrant passed by the British executive on 18 June 1945, based on which the British military was authorised to establish military courts and conduct trials of 'violations of the laws and usages of war'.[5] The same 1945 Royal Warrant applied to all war crimes trials conducted by the British military in Asia and Europe. However, trial implementation was shaped by local conditions. There is therefore a need to pay attention to Singapore's postwar conditions when studying the Singapore Trials. Local conditions also shed light on how trial participants interpreted arguments at trial.

3.1 Political and socio-economic postwar conditions

On 12 September 1945, at Singapore's old City Hall, the Supreme Commander of South East Asia Command (SEAC) Lord Louis Mountbatten formally accepted Japan's surrender from General Seishiro Itagaki. The British faced numerous challenges upon their return to Singapore. First of all, the Allies had agreed that Mountbatten's SEAC, which comprised largely British personnel, would be responsible for reoccupying most of South East Asia, including Singapore, Malaya, Ceylon, Burma, Siam and Borneo. SEAC was also to occupy Indo-China and Indonesia until the return of the French and Dutch authorities to their colonies.[6] Thus, SEAC became responsible for 1,500,000 square miles altogether.[7] The British military's resources had to be stretched over this vast area. This led to manpower shortages that impacted the trials. At the end of 1946, the British military continued to report the shortage of legal personnel as its 'biggest administrative problem' when organising war crimes trials.[8] This shortage of legally trained personnel led to, among others, the use of Japanese defence counsel *in lieu* of British defence counsel in the Singapore Trials.

The British military also had to meet overwhelming humanitarian and reconstruction demands in postwar Singapore. There was a severe shortage of food, housing as well as basic necessities, and much of Singapore's local infrastructure had been destroyed by the war or was in need of repair (Turnbull, 1977, p. 224). The British also had to deal with numerous security issues (Donnison, 1956, pp. 385–396). Interracial group clashes erupted across Malaya between the Chinese and Malays as a result of divided wartime loyalties (Donnison, 1956, p. 388). The Malayan Communist Party, which had worked alongside the British during the war, soon turned its efforts to resisting continued British colonial rule by organising strikes and other violent action. Additionally, World War II had undermined the legitimacy of British colonial rule. British colonial rule in Singapore and the region had long been supported by, among others, British propagation of the 'White prestige' myth – the belief that the White man was better placed than the native to provide the latter with good government. Japan's taking of Singapore in the war had irrevocably eroded this 'myth of white invulnerability' (Bayly and Harper, 2007, p. 10).

Despite these numerous postwar challenges, the British were determined to hold comprehensive war crimes trials. By 1946, the British military had formed seventeen investigation teams

4 The full citation information of this trial is 'WO235/1110 – Defendant Mizuno Keiji, Place of Trial Singapore'. This case will be referred to as '*Mizuno Keiji*'.

5 Royal Warrant 0160/2498, 18 June 1945, promulgated by the War Office, Army Order 81 of 1945 ('1945 Royal Warrant').

6 Lord Killearn to Foreign Office, 17 June 1946, NAUK, CAB 21/1954, para. 1. The land army responsible for postwar occupation was known as Allied Land Forces South East Asia (ALFSEA), which would be later called South East Asia Land Forces (SEALF) from 1 December 1946 upon the dissolution of SEAC. On 15 August 1947, the SEALF would be replaced by the Far East Land Forces (FARELF).

7 *Ibid.*, para. 14.

8 War Crimes, GHQ, SEALF, 'Quarterly Historical Report', for the quarter ending December 1946 (n. 49), para. 4(a).

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throughout Asia.[9] The British had also established twelve British war crimes courts in Singapore, Kuala Lumpur, Rangoon, Hong Kong and Borneo.[10] Eight of these twelve courts were located in Singapore.[11]

3.2 Applicable laws and process in the Singapore Trials

As mentioned above, the Singapore Trials were regulated by the 1945 Royal Warrant passed by the British executive on 18 June 1945. Attached to the 1945 Royal Warrant was a brief list of thirteen regulations ('Royal Warrant Regulations').[12] British war crimes trials in Asia fell under the responsibility of SEAC and the army under its command, Allied Land Forces South East Asia (AFLSEA). ALFSEA War Crimes Instruction No. 1 was passed to operationalise Royal Warrant trials in Asia.[13] British military courts established under the 1945 Royal Warrant were to be treated, unless otherwise explicitly or implicitly specified, as 'Field General Courts-Martial', and these courts were to take judicial notice of the 'the laws and usages of war'.[14] In brief, these 1945 Royal Warrant courts were to apply a mixture of international law, British law and English criminal law.

Each court established under the 1945 Royal Warrant comprised at least three judges, a prosecutor, an interpreter and two shorthand writers.[15] Other Allied personnel could be appointed as judges under certain conditions.[16] The trials followed English adversarial procedure. The prosecution first presented its case and witnesses. If the prosecutor established a prima facie case of the defendant's guilt, the defence would then be called to present its case and witnesses. Upon hearing both the prosecution and defence, the court would announce its findings of guilt or innocence. This would be followed by any sentencing decisions. Courts could hand down sentences of death, imprisonment, confiscation and fines.[17] It is important to note that the courts in Singapore did not issue comprehensive judgments, although some did give brief reasons for their findings and sentences. Acquittals handed down by these courts were final but judicial findings of guilt and sentences had to be confirmed by a confirming officer.[18] For the Singapore Trials, the Office of the Deputy Judge Advocate General (DJAG) in Singapore prepared post-trial

9 These numbers are set out in ALFSEA War Crimes Instruction No. 1, para. 23. The Instruction regulated the organisation of war crimes trials by ALFSEA. There are two editions. The more comprehensive version is dated 4 May 1946. Allied Land Forces, South-East Asia, *War Crimes Instruction No. 1*, 2nd edn), 4 May 1946, NAUK, WO 203/6092. At least six amendments were adopted. Copies are in the following files: NAUK, WO 203/6092 and WO 203/6076. A copy of the first edition may be found in the following file: NAUK, WO 203/325/53. I will use 'ALFSEA Instruction No. 1' to refer to the second more comprehensive edition. When referring to the first edition or later amendments, I will state that I am referring to the first edition or specific amendments.

10 ALFSEA War Crimes Instruction No. 1, para. 27. See *ibid.* for background of this Instruction.

11 *Ibid.*

12 Royal Warrant 0160/2498, 18 June 1945, promulgated by the War Office, Army Order 81 of 1945, NAUK, WO 309/1. Also available at ‹http://www.legal-tools.org/doc/386f77/›. Hereinafter referred to as '1945 Royal Warrant'. The regulations appended to this warrant are hereinafter referred to as '1945 Royal Warrant Regulations'.

13 ALFSEA Instruction No. 1. See note 9 for history.

14 1945 Royal Warrant Regulations, Regulations 3 and 8(iii). British military law and English criminal law were applied by ordinary British courts martial, including field general courts martial.

15 1945 Royal Warrant Regulations, Regulation 5.

16 *Ibid.*

17 Death sentences could only be passed with the agreement of all judges when the court was composed of not more than three judges. 1945 Royal Warrant Regulations, Regulation 9.

18 Those convicted at the trial stage could submit a petition within 14 days to be considered by the confirming officer at the confirmation stage. 1945 Royal Warrant Regulations, Regulations 8(iv), 10 and 11.

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review reports summarising the facts and law for the confirming officer's consideration at the confirmation stage.

The legal framework established by the 1945 Royal Warrant impacted participant understandings and interpretations at trial. I will consider specific legal provisions in greater depth when discussing participants' interpretations of defence arguments below. First, the applicable legal framework impacted understanding and interpretation at trial by foreclosing certain arguments. Even if a judge fully appreciated a culturally related argument of the defence, his ability to take it into account when deciding the case was limited by applicable law. For example, as further explained below, the British Manual on Military Law (MML), which trial participants treated as an authoritative legal source, expressly prohibited courts from treating superior orders as an automatically exculpatory factor.

Legal rules and concepts also influenced how trial participants perceived and understood defence arguments. As illustrated below, non-Japanese judges and prosecutors in the Singapore Trials often employed a concept of legality that assumed the existence of an independent standard of morality based on which the legality of written laws and superiors' orders could be assessed. This differed from the concept of legality put forward by the Japanese defence. Also, as explained more fully below, non-Japanese judges and prosecutors often had certain English criminal law defences in mind when asking questions or evaluating the answers of Japanese accused and witnesses. Such legal categories shaped how non-Japanese trial participants approached or interpreted the arguments of Japanese participants, at times distorting or overlooking the latter's arguments.

Additionally, even if non-Japanese trial participants fully appreciated defence arguments, the former still had to translate or 'fit' these arguments into applicable legal categories in order for these arguments to be recognised by the law. As highlighted below, some defendants argued that they were conditioned to obey orders through Japanese military practices and norms. Such an indoctrination defence could not easily be 'fit' into any of the legal rules or concepts applied by non-Japanese participants in these trials. Indeed, such an argument is not recognised in present-day international criminal law. The legal rules and categories imposed by the 1945 Royal Warrant framework thus shaped trial interpretation in many ways.

3.3 Allied assumptions and misunderstandings about Japanese society

Cross-cultural understanding in the Singapore Trials was also influenced by then-prevailing Allied assumptions about Japanese society. Researchers such as Ferris (2003) have studied British race-based assumptions about Japanese military behaviour. Similar race-based assumptions were held by British personnel involved in the Singapore Trials. In a 1948 publication on the first Singapore Trial, Stuart Colin Sleeman (1948), who served as a prosecutor in the Singapore Trials, highlighted some Japanese characteristics to emphasise what the British would be 'up against' when prosecuting Japanese war criminals (p. xvii). Sleeman argued that Japanese soldiers were 'technically and morally' 'dependent' on the regulations of the Japanese army and 'slogans of Army politics' (1948, p. xviii). Sleeman (1948) further declared that Japanese soldiers did not 'reflect' on such inconsistencies and would persist in their deception also aimed to 'keep up appearances' (p. xix). Sleeman believed that an 'infinite capacity' for such 'make-believe' applied to all Japanese – Japanese defendants as well as witnesses.

Cross-cultural misunderstandings in the Singapore Trials may also have stemmed from the fact that, on the surface, Japanese institutions seemed very similar to Allied institutions. This was due to Japan's systematic adoption of Western models since 1868 during the Meiji Restoration (Hackett, 1965, p. 245). When undertaking these reforms, Japanese leaders did not see themselves as breaking from Japan's past. Rather, their aim was to preserve Japan's independence and avoid Japan's domination by more powerful countries. In light of this, Japanese reformers were careful not to introduce norms in opposition with pre-existing norms (Haley, 1994, p. 71). This blending

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of old and new gave rise to Japanese institutions and practices that looked very much like their Western counterparts but that, in reality, worked very differently (Funk, 1990, p. 224). For example, although the Japanese army adopted the Western courts martial system, the workings of Japan's courts martial system was influenced by Japanese society's preference for informal methods of dispute resolution. Japanese soldiers maintained discipline through a mixture of informal punishments alongside formal courts martial (Drea, 2009, p. 68).

Also, while Japan's military leaders adopted foreign practices and technology, these leaders used Japanese traditional ideas to construct and disseminate particular soldiering ideals (Drea, 1998, p. 330). These same ideas may have appeared strange or unbelievable to some non-Japanese participants in the Singapore Trials. Specifically, Japan's military leaders deliberately employed traditional ideas to cultivate a militaristic culture and secure the Japanese soldier's unyielding loyalty to the Emperor. Japanese ideas of the family were used by military leaders to emphasise links of loyalty and submission between subordinates and their superiors in the army (Drea, 1998, p. 335). Traditional Japanese ideas were thus reshaped and deployed to further military and political purposes. These ideas exerted a real impact on ordinary Japanese servicemen. Japanese defendants and witnesses repeatedly referred to these ideas when rationalising their conduct during the Singapore Trials.

Allied wartime understandings of Japanese conduct were therefore influenced by prevailing assumptions of race-based difference or institutional resemblance. In addition, there was a tendency to overlook subtle similarities between Allied and Japanese soldiers that could otherwise shed light on the conduct of Japanese soldiers. Indeed, some contemporary scholars argue that the difference between Japanese and Allied military practices is one of degree rather than type. Harries and Harries (1991) argue that the Japanese military's conception of 'spirit' should not be seen as 'other-worldly dogma', but as intensifying 'normal standards and values' (p. 274). Moore (2013) has observed how the American military had practices of inculcating self-discipline similar to that of the Japanese military during World War II (p. 175). In other words, when seeking to understand the impact of cultural difference on the behaviour of Japanese servicemen, it is important not to consider but not overestimate cultural factors, while taking into account other explanatory factors. The Japanese serviceman's conduct in World War II was shaped by a mixture of culture, politics – including the political use of cultural ideas – and institutional arrangements.

IV. Analysing the varied interpretations of defence arguments in the Singapore Trials

A kaleidoscope of actors with different cultural backgrounds participated in the Singapore Trials. Out of the over eighty judges who served in these trials, most were British military personnel. Eight judges had Asian names and were from the British Indian army. Six judges were from US and Australian militaries. Prosecutors were largely British military personnel, although there were six prosecutors who were US, Dutch and Australian military personnel. Over 400 defendants from Japan, Korea and Taiwan were prosecuted.[19] In the first few trials, defendants were represented by British defending officers (Pritchard, 2006, p. 303). However, due to a severe shortage of legal personnel, the majority of accused were defended by legal counsel with Japanese names and who held legal or judicial positions in Japan or Korea (Pritchard, 2006, p. 303). Most Japanese defence counsel were assigned British defence advisory officers who were to advise them on trial procedure.

19 For ease of reference, and as Korea and Taiwan (known then as Formosa) were during Japanese colonies during this period, I will refer to defendants from these territories as Japanese defendants, differentiating them when necessary.

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As explained above, most defendants of the Singapore Trials did not dispute the fact that they committed the offences concerned. Instead, many Japanese trial participants argued that the defendants should not be held liable because their actions were consistent with Japanese norms, beliefs and assumptions. How were these arguments interpreted by non-Japanese trial participants? Here I examine the culturally influenced arguments raised by Japanese participants as well as the different interpretations of these arguments by non-Japanese participants. I evaluate how these varied interpretations were shaped by the broader contextual factors discussed in the previous section.

4.1 Japanese standards of conduct and different understandings of harsh treatment

Many Japanese participants in the Singapore Trials argued that the defendants had acted consistently with then-prevailing Japanese standards of conduct. They claimed that their actions were ordinary when assessed against Japanese standards, although these same actions may seem cruel based on British and Allied standards. Japanese trial participants attempted to elaborate on such Japanese standards during the trials but were not persuasive. They used analogies and explanatory devices that appeared unconvincing to non-Japanese participants, and their descriptions of Japanese beliefs and practices were regularly treated by non-Japanese participants with distrust.

4.1.1 The Japanese military's practice of meting out unauthorised punishment to prisoners-of-war (POWs) and detainees

In many of the British war crimes trials held in Singapore, the defendants were accused of dealing out unauthorised punishments of civilian detainees and POWs. These defendants argued that such unauthorised harsh treatment was normal in the Japanese military and should not be interpreted as cruel or malicious. In advancing such arguments, some Japanese trial participants used the analogy of a family to describe how such harsh treatment within the Japanese military was similar to the corporal punishment carried out within a family. In the trial of *Gozawa Sadaichi and others*, the prosecution witness Higotsu Tomiyama was asked by the prosecutor whether the beating meted out to victims was provided for in Japanese regulations.[20] Tomiyama explained that, if he had followed formal Japanese regulations, he should have sent the victims to the much-feared Japanese military police or the Kempeitai.[21] Tomiyama insisted that he had hit the victims so they would not be sent to the Kempeitai and agreed to the prosecutor's suggestion that Tomiyama had beaten his victims 'out of kindness'.[22] The victims would have been punished more severely by the Kempeitai. The court treated Tomiyama's explanation with suspicion and intervened:

> 'By Court: Ask him why he said one thing to the Prosecuting Officer one moment and another, another moment.
>
> 'A: To we Japanese people slapping is carried out quite easily, even among the family, even the parents are used to slapping their children so the slapping I do not consider [deleted words] it is carried out between Mother and children and among themselves, so I do not take it as punishment regulated in the regulation.

20 *Gozawa Sadaichi and others*, SP 00070. Note that the court had earlier found that this witness would be considered a hostile witness, SP 00068.

21 *Gozawa Sadaichi and others*, SP 00070.

22 *Gozawa Sadaichi and others*, SP 00070.

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> 'Q: Well, if a slapping was so severe that a man had an eye injured, would the witness consider that as a punishment?
>
> 'A: I do not know the regulation because I never read it so I do not understand if it is to be called a punishment or not Sir.'[23]

The non-Japanese judges appear to have been unconvinced by Tomiyama's use of the Japanese family as an analogy to describe the Japanese standard of unauthorised harsh treatment. To the judges, the strangeness of this analogy made Tomiyama's response seem more like an excuse than a genuine explanation.

As explained earlier, Japanese military leaders regularly used traditional Japanese ideas of family to enhance loyalty and cohesion among servicemen. Japanese servicemen were exposed to such family analogies from their very admission into the army, and would have viewed such analogy as commonplace. Before a soldier was sworn into the Japanese pre-war army, his nearest relatives would receive a 'letter of instruction' from the army asking for information that would help 'administer his education and guidance along the most rational lines' (Lory, 1943, p. 25). The letter declared that once 'your son and brother enters the barracks the officers of the company will take your place in looking after his welfare' and that the army 'will be to him as a stern father and a loving mother'. The 1908 revision to the army handbook for squad administration stated that the 'company commander is a strict father' and the 'NCO a loving mother', while 'lieutenants are relatives in perfect accord with their company commander' (Drea, 1989, p. 335). In other words, it was quite natural for Japanese military personnel to use the analogy of a family when describing the Japanese military, though this would have come across as unusual to non-Japanese.

The informal nature of such punishments was also ordinary within the Japanese military. It was common for Japanese military personnel to undertake punishment on an informal basis rather than secure punishment through official avenues. As mentioned above, the Japanese military seldom resorted to its formal court martial system, as offenders were punished on the spot for any wrongful behaviour by their superiors. Japanese military law expert Yoshita Kita (2003) observes how a defendant's choice to implement such informal harsh treatment may in fact reflect the defendant's desire to avoid the imposition of even harsher punishments on the victims as mandated by formal rules (p. 267).

Japanese military personnel did not view slapping or beating as particularly serious acts and such treatment was regularly dealt out by superiors to their subordinates within the Japanese military. The slapping, beating and harassment of subordinates was standard in the Japanese army. Some defence counsel tried to explain this Japanese military standard to the non-Japanese judges in the Singapore Trials. In the trial of *Terada Takao and others*, the accused were Kempeitai members and were charged for the unlawful arrest, confinement and torture of civilians at the Kempeitai Headquarters in the YMCA Building of Singapore.[24] British defence counsel Lieutenant Colonel A. Blakemore argued in his closing address:

> 'The word "slap" has occurred often in this case. Slapping in Japan and by the Japanese is not looked upon as a serious act – in fact evidence has been given that it frequently takes place between soldiers. These men do not look upon slapping as a form of illtreatment but possibly as a minor corrective measure [illegible insertion] and the learned Court are therefore asked to

23 *Gozawa Sadaichi and others*, SP 00071.

24 The full citation information of this trial at NAUK is as follows: 'WO 235/819 – Defendant Terada Takao, Place of Trial Singapore'. This case will be referred to as '*Terada Takao and others*'.

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bear that point of view in mind in connection with the admissions and allegations regarding slapping which have been made.'[25]

Blakemore highlighted the fact that slapping was common in the Japanese military, and argued that its significance should be considered from the defendant's perspective.

Some Japanese participants seemed to have been aware that the British frowned upon practices such as slapping and beating. Accordingly, some chose to deny that such practices existed within the Japanese army. In *Nadamoto Hideo and others*, the accused were charged for beating and causing the death of a civilian labourer who was late for work at Port Blair, the capital of the Andaman and Nicobar Islands.[26] During the trial, when the prosecutor cross-examined defence witness Nagasaki Masayuki, who was in command of the defendants' workshop, the prosecutor called Nagasaki's attention to his claim that he had forbidden the beating of civilians.[27] The prosecutor asked Nagasaki whether he had issued this order because 'beating was quite common in the Japanese Navy'.[28] Nagasaki emphatically insisted that beating was 'not a custom' and that he had issued his instructions generally rather than to the accused specifically.[29]

In another case, *Kojima Hisajiro and another*, the defendants were accused of beating and causing the deaths of several civilian labourers who had run away and not shown up for work on Nancowry Island.[30] The court, when questioning one of the defendants, Kojima Hisajiro, expressed its disbelief when he insisted that he had never witnessed any slapping in the Japanese military:

'Q: Have you ever seen a Japanese soldier slapping a man on his face?

'A: No. I have not.

'Q: Does he realise that he is on oath. Does he? He expects the Court to believe that it is true? Have you ever seen a Japanese soldier slapping any one on the face?

'A: He does not remember.'[31]

Judges thus encountered witnesses who simply denied the existence of such harsh practices or witnesses whose explanations appeared untruthful or strange to non-Japanese eyes. None of the judges in the Singapore Trials questioned witnesses in detail to ascertain the true nature of these Japanese military practices or determine how these practices impacted individual culpability. This may be due to widely held British beliefs about Japanese 'self-deception' as discussed earlier in this paper.

Though there were no in-depth discussions about the Japanese military's harsh practices in the Singapore Trials, some British military decision-makers had some level of awareness of these Japanese military practices and the need to adjust British war crimes prosecutions. In 1947, in a

25 *Terada Takao and others*, SP 00300.

26 The full citation information of this trial at NAUK is as follows: 'WO 235/827 – Defendant Nadamoto Hideo, Place of Trial Singapore'. This case will be referred to as '*Nadamoto Hideo and others*'.

27 *Nadamoto Hideo and others*, SP 00127. Note that defence counsel's examination of this witness had taken place on an earlier day as the court had agreed to the prosecutor's request to delay cross-examination of this witness, SP 00105.

28 *Nadamoto Hideo and others*, SP 00127.

29 *Nadamoto Hideo and others*, SP 00127.

30 The full citation information of this trial at NAUK is as follows: 'WO 235/826 – Defendant Kojima Hisajiro, Place of Trial Singapore'. This case will be referred to as '*Kojima Hisajiro and Takayoshi Eizo*'.

31 *Kojima Hisajiro and Takayoshi Eizo*, SP 00080. From this exchange, it is clear that linguistic interpretation was at times done in an indirect manner. I explore cross-cultural issues of linguistic interpretation in these trials elsewhere.

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draft reply to Deputy Judge Advocate General F.G.T. Davis in Singapore, Henry Shapcott, the Military Deputy of the Judge Advocate General, observed that 'kickings', 'slapping' and 'beatings' were 'part of the ordinary routine of the Japanese'; it would be 'wrong to try a Japanese whose sole crime was that he on one or more occasions kicked or slapped a British prisoner-of-war'.[32] These observations were made at a time when the British military was under much pressure to conclude war crimes trials. Shapcott may have made his observations for pragmatic case prioritisation reasons rather than beliefs about blameworthiness. I suggest otherwise, as Shapcott stated that it would be 'wrong' to try such defendants, indicating that he did not believe these defendants were criminally culpable.

4.1.2 Japanese understandings of beheading as a method of killing

Another form of harsh treatment highlighted in the Singapore Trials was the use of beheading as a means of killing. A number of war crimes trials conducted in Singapore featured beheadings by defendants. Some defendants argued that, for the Japanese, beheading was considered to be an 'honourable' method of execution. Some defendants were also aware that most non-Japanese viewed beheading as a particularly cruel form of execution. In *Kuwahata Tsugio and another*, the two defendants were accused of beheading two American POWs in French Indo-China.[33] The prosecutor questioned the accused, Kuwahata, about the decapitation of the victim, asking whether decapitation was considered 'more dishonourable than hanging or sheering [shooting]'.[34] The accused replied: 'Hearing your questions, I am able to realise that for foreign people it might be considered dishonourable, but in the case of Japanese soldiers they have different ideas.'[35] There was, however, no sustained discussion about the meaning of beheading from a Japanese perspective.

Research findings undermine the claims of defendants that beheading was a particularly 'honourable' practice in Japanese culture. A study done by Morimoto and Hirata (1992) of decapitated skulls in Japan shows that beheading as an 'honourable' practice of Japanese samurai applied only in specific circumstances (p. 357). Such beheading was only considered honourable if it was conducted as part of a samurai's voluntary suicide and had to be conducted in a particular way. While beheading conducted as part of an assisted voluntary suicide in the samurai tradition was indeed 'honourable', there was no such meaning attached to beheading as a means of execution. It is more likely that beheading was seen by Japanese perpetrators as just another means of execution. Some may have taken perverse pleasure in it. But most Japanese military subordinates ordered by their superiors to behead a victim probably did so in obedience to superior orders – a common explanation for subordinate behaviour that is further explored below.

Though non-Japanese judges in the Singapore Trials did not subject the defendants' claims of beheading as 'honourable' killing to any extended inquiry, some judges used these claims to test defendants' testimonial consistency. In *Hirakawa Mitsuki and others*, the three defendants were accused of beheading a civilian resident of Port Blair who was suspected of being a spy.[36] The court asked one of the accused, Egami Masao, whether beheading was believed to be 'more

32 Draft reply of Shapcott to Davis, 6 February 1947, NAUK, WO311/541. It is indicated in the draft letter that, since 'dictating' the letter, Shapcott had a 'long and full discussion' with Davis on the phone, though the topics discussed are not specified. Nevertheless, the draft letter reflects how Shapcott at one point understood the culpability of the Japanese for slapping.

33 The full citation information of this trial at NAUK is as follows: 'WO 235/865 – Defendant Kuwahata Tsugio, Place of Trial Singapore'. This case will be referred to as '*Kuwahata Tsugio and another*', WO 235/865.

34 *Kuwahata Tsugio and another*, SP 00034.

35 *Kuwahata Tsugio and another*, SP 00034.

36 The full citation information of this trial at NAUK is as follows: 'WO 235/856 – Defendant Huakawa [Hirakawa] Mitsuki, Place of Trial Singapore'. This case will be referred to as '*Hirakawa Mitsuki and others*'.

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honourable' than death by shooting in Japan.[37] To this, the accused replied yes.[38] The court then proceeded to ask the accused why he had asked his superior to have the victim shot instead.[39] The accused explained that he had 'made it clear' to his superior that he did not want to do it', proposing that someone else perform the beheading, but that his superior had insisted that others would not be able to perform the beheading 'properly'.[40] Egami explained that it was then that he had suggested that the victim be shot.[41] Though the court used the act of beheading as an interrogation tool to test the defendant's testimonial consistency, it did not engage in any detailed examination of what this practice meant to lower-ranking Japanese soldiers.

Similarly, the court in *Hara Teizo and five others* did not enter into in-depth discussions about how Japanese defendants viewed the act of beheading.[42] The court viewed beheading as a particularly cruel means of execution, stating this in its findings.[43] The victims in *Hara Teizo and five others* had been executed by three of the accused pursuant to a decision handed down by a Japanese military court convened by the other three accused in this case. The British war crimes court acquitted the latter group of accused who had been involved in the Japanese military court decision. However, the British court sentenced the other three accused who had been involved in the beheading of the victims to death. In other words, the accused who had implemented the decisions were sentenced to death while the higher-ranking accused who had handed down the decision were acquitted. The court's different treatment of these two groups of accused can be explained by the court's finding. When handing down guilt, the court found that the accused persons sentenced to death had 'carried out the execution of the nine Burmese civilians in an unnecessarily cruel manner'.[44]

In summary, some non-Japanese judges in the Singapore Trials judged Japanese practices based on non-Japanese standards, rather than using the opportunity presented at trial to gain more information about these practices and determine their relevance to blameworthiness.

4.2 Ascertaining the Japanese military's practice and understanding of superior orders

The most frequent explanation given by Japanese participants in the Singapore Trials was that the defendants were acting according to the orders of their superiors. All militaries in World War II, including that of the British and its Allies, required military personnel to obey orders. The laws and practices regulating such obedience, however, differed from military to military and from country to country. Indeed, the British military itself changed its position on superior orders during the war.[45] This raises questions of legal retrospectivity but my focus here in this paper is

37 *Hirakawa Mitsuki and others*, SP 00058.

38 *Hirakawa Mitsuki and others*, SP 00059.

39 *Hirakawa Mitsuki and others*, SP 00059.

40 *Hirakawa Mitsuki and others*, SP 00059.

41 *Hirakawa Mitsuki and others*, SP 00059.

42 The full citation information of this trial at NAUK is as follows: 'WO 235/818 – Defendant Teizo Hara [Hara Teizo], Place of Trial Singapore'. This case will be referred to as '*Hara Teizo and five others*'.

43 *Teizo and five others*, SP 00097.

44 *Ibid.*

45 Prior to 1944, the British MML recognised that superior orders would exculpate an accused. In 1944, that the British MML was amended to state that superior orders alone would not exculpate a subordinate. The new relevant portion stated: 'The fact that a rule of warfare has been violated in pursuance of an order of the belligerence Government or of an individual belligerent commander does not deprive the act in question of its character as a war crime; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent. Undoubtedly, a court confronted with the plea of superior orders

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on trial discussions about Japanese laws and practices on superior orders. Judges did not prohibit defendants from raising superior orders in the Singapore Trials, but trial records show that non-Japanese judges and lawyers had difficulties understanding the law and practice of superior orders within the Japanese military.

4.2.1 Assessing inconsistent witness testimonies about the Japanese military's superior order practices

One of the problems encountered by non-Japanese trial participants seeking to understand the mechanics of superior orders in the Japanese military was the fact that witness testimonies on this topic varied and at times conflicted with each other. Testimonies especially varied on one point: whether a subordinate was permitted to question a superior's order.[46] This testimonial variance may have been part of the defendants' trial tactics, but it may also be explained by the fact that most of us seldom know the law or its practice in detail even in ordinary times (Darley *et al.*, 2001, p. 181). In *Takasaki Shinji and another*, the two defendants were charged with numerous incidents of ill-treating and killing POWs in various POW camps in Thailand and along the Burma–Siam Railway.[47] Both accused argued, among others, that they were following the orders of their superiors. Takasaki Shinji testified that a subordinate was permitted to 'submit his opinion' to his superior if he believed that the order was illegal.[48] However, if the superior repeated this order after receiving his subordinate's opinion, the subordinate should then proceed to comply with this order.[49]

A different position was put forward by the accused in *Tomono Shunio*.[50] Here, the defendant Tomono was accused of organising and participating in the beheading of two captured American airmen in Saigon. He had conducted one of the two beheadings personally while ordering one of his subordinates to behead the second victim. When explaining the Japanese system of superior orders, Kuwahata, a defence witness in *Tomono Shunio*, distinguished between orders that subordinates could submit an opinion on and orders that had to be complied with.[51] Specifically, when the court asked Kuwahata whether he was allowed to express an opinion on the order to his superior, Kuwahata replied that this was only permitted if 'the order was in the stage of being

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adduced in justification of a war crime is bound to take into consideration the fact that the obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces and that the latter cannot, in conditions of war discipline, be expected to weight scrupulously the legal merits of the order received. The question, however is governed by the major principle that members of armed forces are bound to obey lawful orders only and that they cannot therefore escape liability if, in obedience to a command, they commit acts which violate unchallenged rules of warfare and outrage the general sentiment of humanity.'

46 The relevant text was introduced by Japanese defence counsel into court in the trial of *Harada Kensei*: 'Those who oppose or disobey orders of superiors shall be punished in accordance with the following discriminations. 1. When in face of an enemy they shall be punished with death or imprisonment for life or imprisonment for the term of more than 10 years. 2. When operation or arrest under martial law, they shall be punished with imprisonment for a term of within one and ten years. 3. In other cases they shall be punished with imprisonment for a term not exceeding 5 years.' The full citation information of this trial at NAUK is as follows: 'WO 235/884 – Defendant Harada Kensei, Place of Trial Singapore'. This case will be referred to as '*Harada Kensei*', SP 00047.

47 The full citation information of this trial at NAUK is as follows: 'WO 235/862 – Defendant Takasaki Shinji, Place of Trial Singapore'. This case will be referred to as '*Takasaki Shinji and another*'.

48 *Takasaki Shinji and another*, SP 00030.

49 *Takasaki Shinji and another*, SP 00030.

50 The full citation information of this trial at NAUK is as follows: 'WO 235/829 – Defendant Tomono Shunio, Place of Trial Singapore'. This case will be referred to as '*Tomono Shunio*'.

51 *Tomono Shunio*, SP 00056.

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formed'.[52] If the order 'was issued regularly as a definite order', then it would have to be obeyed.[53] The court went on to ask Kuwahata whether the following order – 'Take 4 or 5 men and execute 2 airmen' – was a definite order, to which Kuwahata said yes.[54]

In other cases, witnesses or accused denied that such an option of expressing one's opinion to one's superior existed. In *Okamura Hideo*, the defendant was charged, among others, with the killing of an Indian POW pursuant to orders received at Babelthuap, Palau.[55] Okamura was a company commander of a POW camp on Palau Island. The victim had been caught stealing sweet potatoes. He was beaten and eventually shot by a firing squad on the orders of Okamura. Okamura argued that he had received an order that the victim was to be executed.[56] Okamura emphasised that a subordinate is 'not allowed to make any consideration of choice whether the orders were legal or illegal' and a superior order had to be obeyed 'absolutely'.[57] Presumably pointing to testimony received in a previous trial, the court told the Okamura that someone 'who is presumed to know more about Japanese orders than he does thought the Japanese officer had discretion'.[58] In response, Okamura said: 'I am very surprised. That could not be true.'[59]

These inconsistent answers about whether such an option existed could be explained as defence tactics. For example, in the case of *Okamura Hideo*, Okamura had insisted that a subordinate did not have discretion to question the legality or illegality of a superior's order.[60] Okamura had not questioned or protested the order. It was therefore in Okamura's interest to say that Japanese law and practice did not provide for the subordinate to submit an opinion. In comparison, in the case of *Takasaki Shinji and another*, as studied above, Takasaki claimed that subordinates could submit an opinion to their superior when they received an order they considered illegal.[61] Takasaki testified that he had indeed submitted an opinion to his superior, asking whether the victims should be sent to the Japanese military police rather than executed.[62] When instructed by his superior to execute the victims concerned, Takasaki maintained that he had asked his superior whether the victims should be sent to the Kempeitai instead of being executed.[63] According to Takasaki, his superior had continued to insist on the victims' execution.[64] It must have been difficult for judges to assess the authenticity of these various claims about superior orders, given judges' unfamiliarity with Japanese laws and military practice.

According to Kita (2003), wartime Japanese military regulations did not require subordinates to obey illegal orders (p. 269). Superior orders were regulated by a number of Japanese laws: the *Gunjin Chokuyo* or 1881 Imperial Rescript, which was most often cited by Japanese military personnel in the

52 *Tomono Shunio*, SP 00056.

53 *Tomono Shunio*, SP 00056.

54 *Tomono Shunio*, SP 00056.

55 The full citation information of this trial at NAUK is as follows: 'WO 235/820 – Defendant Ckamura [Okamura] Hideo, Place of Trial Singapore'. This case will be referred to as '*Okamura Hideo*'.

56 *Okamura Hideo*, SP 00032.

57 *Okamura Hideo*, SP 00032.

58 *Okamura Hideo*, SP 00036.

59 *Okamura Hideo*, SP 00036.

60 *Okamura Hideo*, SP 00032.

61 The full citation information of this trial at NAUK is as follows: 'WO 235/862 – Defendant Takasaki Shinji, Place of Trial Singapore'. This case will be referred to as '*Takasaki Shinji and another*', SP 00029.

62 *Takasaki Shinji and another*, SP 00029.

63 *Takasaki Shinji and another*, SP 00029.

64 *Takasaki Shinji and another*, SP 00029.

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trials; the *Tokuho* or Articles of War; and the *Guntai Naimusho* or Internal Regulations (Kita, 2003, p. 268). The Internal Regulations permitted subordinates to voice their opinion on the illegality of the order to their superior (Kita, 2003, p. 269). If the superior insisted on the order being implemented, the subordinate was then not permitted to resist the order any further (Kita, 2003, p. 269). The defendants' inconsistent testimony about whether this option existed may have been tactical, but such inconsistent testimony could also genuinely reflect the different beliefs held by defendants on the law. This is especially so as most defendants in the Singapore Trials held low to mid-level positions in the Japanese army, and were themselves not specialists in military law. Furthermore, the procedure to be followed when submitting an opinion against a superior's order was particularly complicated. This arguably made the exercise of this option virtually impossible.

As mentioned above, in *Tomono Shunio*, the witness drew a distinction between an order that was about to be 'formed' and one that was already 'formed'.[65] A similar distinction between the types of orders received was put forward by defence witness Tazawa Teizo in *Tamura Shinji* where the accused was charged with the ill-treatment and mass killing of civilians on Tarmgli Island in the Andaman and Nicobar Islands.[66] Tazawa argued that he had been ordered by his superior to organise the shooting of these civilians. When questioned by defence counsel, Tazawa explained: 'Making a suggestion against an order should be made before the order is issued formally, and there is no making suggestions against orders after they have been issued.'[67] The court later questioned Tazawa about the process by which a subordinate could submit an opinion before an order was formally issued:

> 'Questioned by the Court:
>
> 'Q: Will the witness give us some idea how a subordinate can make a suggestion against an order before the order has been issued?
>
> 'A: There are many cases in which such a suggestion can be made; in one case a General Staff Officer suggests that a certain order be issued and in another case a subordinate approached that a certain order is going to be issued and in such cases a subordinate can suggest to his superior what he thinks.
>
> '(Court) It must be a laborious undertaking!'[68]

The court's exclamation may reflect its exasperation at Tazawa's roundabout and vague answer. However, if Japanese military practice made such fine distinctions between orders that were 'regularly' issued and those that were not, and between orders that were 'formed' and those that were not, it must have been very difficult for lower-ranking subordinates to decide when they were actually permitted to submit an opinion to their superiors.

4.2.2 Analysing the impact of Japanese superior orders using a British common law duress framework

The court and prosecution would often ask accused persons or defence witnesses whether the disobeying of orders would result in immediate punishment or harm. The answer to this was seldom a straightforward yes. Instead, from the answers given, it seems that ordinary Japanese

65 *Tomono Shunio*, SP 00056.

66 The full citation information of this trial at NAUK is as follows: 'WO 235/816 – Defendant Tamura Shinji, Place of Trial Singapore'. This case will be referred to as '*Tamura Shinji*'.

67 *Tamura Shinji*, SP 00020.

68 *Tamura Shinji*, SP 00021.

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soldiers did not see disobedience of orders as an option due to their military training and conditioning. In *Tamura Shinji*, the defence witness, Tazawa, recognised that a subordinate disobeying an order would have been dealt with through the crime of insubordination in the Japanese Army Penal Code.[69] However, when he was asked by defence counsel about what would happen if the defendant Tamura Shinji disobeyed his superior's order, Tazawa could not say what would happen in this concrete situation, replying: 'I have never thought of anybody disobeying and it is rather difficult for me to answer the question right now.'[70] While this vague response may be interpreted as disingenuous prevarication, it may also point to the Japanese army's training of subordinates to obey orders without question. Tazawa could articulate the consequences of disobeying orders at an abstract level, namely that the law on insubordination would apply. But he found it hard to apply this law to the concrete situation at hand because he could not envisage how disobeying a superior's orders would play out in reality.

By focusing on compulsion and whether the accused had to obey superior orders on the pain of punishment, judges were trying to assess the arguments of the defence using a modified understanding of the duress defence in English common law (Jia, 2013, p. 171). The arguments of Japanese trial participants on this point did not fit easily within this framework. Most accused did not have potential punishments for disobeying orders in mind when they were following orders. Japanese trial participants did not say that the defendants had failed to resist their superior's orders because they were afraid of punishment. Rather, Japanese participants explained that the defendants had failed to do so because they had been trained to obey orders absolutely and unconditionally. This strand of argument was raised in the petition of *Shimizu Kiyoji and others*: 'Therefore, it is regulated by the Code, that a man in the army should be habituated to follow with their superiors' orders through fire and water.'[71] Because the ordinary Japanese soldier was habituated or conditioned to follow orders without questioning, he may not even have considered the options before him when receiving an order from his superior.

In *Takasaki Shinji and another*, the accused Takasaki stated that he had been aware that subordinates were permitted to submit an opinion to superiors when receiving a potentially illegal order.[72] Takasaki could not identify the type of punishment that would be given when a subordinate who had exhausted the opinion option continued to disobey orders. Specifically, Takasaki explained:

> 'A: I do not know what punishment would be given and in fact I did not consider at any time what the punishment would be because I was trained in the Army where I knew I could make one submission of opinion but after that to obey the order. So I had never thought what the punishment would be.'[73]

In other words, Takasaki had followed his superior's order because of the conditioning he had received rather than because of any fear of punishment. This explained why Takasaki did not protest or question his superior's order.

69 *Tamura Shinji*, SP 00020.

70 *Tamura Shinji*, SP 00021.

71 'In the Military Court for the Trial of War Criminals' (Petition of Shimizu Kiyoji, Uchiyama Chokichi, and Mukai Heihachi), p. 5. The full citation information of this trial at NAUK is as follows: 'WO 235/882 – Defendant Shimizu Kiyogi [Kiyoji], Place of Trial Singapore'. This case will be referred to as '*Shimizu Kiyoji and others*', SP 00017.

72 The full citation information of this trial at NAUK is as follows: 'WO 235/862 – Defendant Takasaki Shinji, Place of Trial Singapore'. This case will be referred to as '*Takasaki Shinji and another*'.

73 *Takasaki Shinji and another*, SP 00030.

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It is easy to see why Allied prosecutors and judges would have been unwilling to accept these superior orders alone as a complete defence. Accepting the defence of superior orders would preclude the conviction of most lower-ranking subordinates in the Singapore Trials who were acting according to superior orders. Yet the fine distinctions put forward by the accused seem to have appealed to some judges. In *Kuwahata Tsugio and another*, the two defendants were charged for killing pursuant to the order of their higher-ranking superiors.[74] The first accused, Kuwahata Tsugio, was of a higher rank than the second accused, Murakami Isao, and had organised the execution. At trial, Murakami made a distinction between an 'instruction' and an 'order', with the seeming aim of absolving Kuwahata. Murakami argued that a higher-ranking Major Tomita, who had not been charged in the case, had the power to give orders while the first accused had merely conveyed his order through instructions.[75]

Murakami explained that, unlike orders, instructions could be disobeyed. Specifically, he claimed that he could have disobeyed the instruction given by Kuwahata to conduct the execution at a particular place if he had found a more suitable place.[76] Murakami also emphasised that Kuwahata could not have given an instruction to conduct an execution because power to give an order for such execution only lay with the commander in chief.[77] While the distinction between an instruction and order sounds duplicitous, the judges appear to have been somewhat persuaded by the defendants' arguments and sentenced them each to only one year of imprisonment. During sentencing, the court noted that the accused 'were acting under superior orders' and that, although this was not 'a complete defence', the accused would be given sentences 'commensurate' with their 'degree of responsibility'.[78] The DJAG review report in this case also noted the defendants' 'frank admissions' and the manner by which they were 'very leniently' treated by the court, advising confirmation.[79]

The superior order arguments of the defence were given different interpretations by non-Japanese actors involved in the Singapore Trials. Many judges tried to ask Japanese trial participants for more information about how superior orders worked in the Japanese military but did not get answers that were satisfactory from their perspective. The answers given by some Japanese trial participants about the system of superior orders seemed contradictory or incomplete to non-Japanese judges, but this could have been explained by the fact that the lower-ranking Japanese military personnel did not know details of the law governing these orders. More importantly, some non-Japanese participants, including judges, assessed the defendants' superior orders arguments using a duress framework drawn from English common law. This did not accurately capture the defendants' arguments about how they had been indoctrinated, rather than coerced, to automatically obey superior orders.

4.3 Different interpretations of legality and the Japanese Emperor's authority

When examining claims of superior orders in the Singapore Trials, the non-Japanese prosecutors and judges often interrogated Japanese defendants about whether they were aware of the order's illegality. This reflected then-prevailing understandings about superior orders. The state of the law on superior orders was still in flux during the World War II period. In his research on the Hong Kong Trials,

74 The full citation information of this trial at NAUK is as follows: 'WO 235/865 – Defendant Kuwahata Tsugio, Place of Trial Singapore'. This case will be referred to as '*Kuwahata Tsugio and another*'.

75 *Kuwahata Tsugio and another*, SP 00041.

76 *Kuwahata Tsugio and another*, SP 00042.

77 *Kuwahata Tsugio and another*, SP 00042.

78 *Kuwahata Tsugio and another*, SP 00047.

79 'War Crimes Court' (review report, prepared by Brigadier F.G.T. Davis), *Kuwahata Tsugio and another*, SP 00004.

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which were conducted under the same legal framework as the Singapore Trials, Jia observes that courts generally considered superior orders when determining guilt or sentencing when the accused did not know of the order's illegality and the order was not manifestly illegal (2013, p. 179). Much judicial questioning in the Singapore Trials focused on whether the defendant knew the order was illegal and whether the defendant had independently assessed the nature of the order.

4.3.1 The Japanese military's hierarchical understandings of legality

When discussing the legality of superior orders, Japanese and non-Japanese trial participants put forward different interpretations of legality. The defence advanced an understanding of legality that focused on who gave the order. In contrast, non-Japanese prosecutors and judges put forward an interpretation of legality that focused on the nature of the order. In *Terada Takao and others*, the accused Shin Shigetoshi explained that, when assessing an order's legality, one did not focus on the nature of the act, but on whether the order 'embodied the wish or intention' of the higher commanding officer.[80] The prosecutor had asked the accused whether he would have burned down the Kempeitai building if ordered to do so by his immediate superior. The accused said that his superior would never issue an order against 'the intentions of the Commander'.[81] The prosecutor put it to the defendant that, based on his reply, he would not obey such an order 'for the obvious reason that it was unlawful'.[82] In response, Shigetoshi explained that his disobedience of the order would be based on his assessment of 'whether the order meets with the intention of the Commander or not'.[83] He went on to emphatically declare: 'May I repeat it Sir – among us we had not put the criterion of whether lawful or unlawful in the act itself but in the fact whether the order embodies the intention of the Commander or not Sir.'[84] In essence, Shigetoshi argued that determination of an order's legality was to be based on from whom the order emanated and not on any independent assessment of the act's quality.

When asked why the orders of one's superior had to be absolutely followed, Japanese participants explained that this was because the orders of superiors were deemed to be orders of the Japanese Emperor. In *Hikiji Susumu*, the defendant's petition explained the Japanese military's teachings on subordinate–superior relations: 'Orders issued by superiors were not to be questioned, but were to be obeyed to the full, as though they were the orders from the His Majesty the Emperor himself, as set forth in the Imperial Rescripts.'[85] This idea that the orders of superiors were to be deemed orders of the Emperor permeated official documents and practices of the Japanese military. The Emperor Meiji's Imperial Rescript to Soldiers and Sailors called on subordinates to 'regard the orders of their superiors as issuing directly from Us' (Lory, 1943, p. 242). Every morning, each soldier had to read and meditate on the 2,700 characters of this Imperial Rescript. The full Rescript was also formally read out in the army four or five times a year. Servicemen were required to be able to recite by heart an abbreviation of the Rescript, 'Five Principles of the Soldier' (Drea, 1989, p. 336). Ordinary Japanese soldiers were thus trained to consider their superior's orders as those of the Emperor.

80 The full citation information of this trial at NAUK is as follows: 'WO 235/819 – Defendant Terada Takao, Place of Trial Singapore'. This case will be referred to as '*Terada Takao and others*'.

81 *Terada Takao and others*, SP 00234.

82 *Terada Takao and others*, SP 00234.

83 *Terada Takao and others*, SP 00234.

84 *Terada Takao and others*, SP 00234.

85 The full citation information of this trial at NAUK is as follows: 'WO 235/1108 – Defendant Hikiji Susumu, Place of Trial Singapore'. This case will be referred to as '*Hikiji Susumu*'. 'Petition against the finding and sentence of a military court' (Petition of Hikiji Susmu), *Hikiji Susumu*, SP 00015.

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Did such a hierarchical understanding of legality leave any room for independent assessment of the order itself, other than assessing from whom the order came? In *Chida Sotamatsu and others*, a defence witness explained that a subordinate was still required to exercise some limited independent assessment of whether the order from his superior was one that could have come from the Emperor.[86] In this case, the defendants were accused of the beating and maltreatment leading to injuries or death of British POWs in Kanburi Camp, Siam or present-day Thailand. During the trial, the defence called Major General Otsuka Misao, the DJAG of the Japanese military, to testify about how superior orders were understood in the Japanese military. When questioned by the court, Otsuka pointed to one historical instance when Japanese military subordinates had assassinated the Japanese Premier upon being ordered by their superiors to do so.[87] Otsuka was referring to the 15 May 1932 assassination of Japanese Premier Inukai Tsuyoshi by cadets who were subsequently court-martialled, but who received light sentences as a result of public pressure. The court asked the witness further questions on this event:

> 'By the Defence: The extenuating circumstance in the case in which the General has quoted, is it a fact that the soldiers who went to carry out the order knew that it was the Premier's house. Therefore they should not have obeyed the order under ordinary circumstances. When they got to the Premier's house the Japanese Soldiers knew it was the Premier's house. They were guilty because when they killed the Premier they knew that it was the Premier whom they were killing and the Premier was a person entrusted by the Emperor to carry out orders and that the Emperor would not give such an order.
>
> 'By the Court: It all depends on whether the Emperor would give an order or not?
>
> 'A: Yes.'[88]

This conception of legality set out by the accused did not depend on his assessment of the act's nature, but on his assessment of whether the Japanese Emperor could have ordered such an act.

4.3.2 Making sense of the Japanese Emperor's authority

The Japanese Emperor's World War II authority has been subject to much scholarly scrutiny. After Japan's surrender, the Americans decided that the then Japanese Emperor Hirohito would not be prosecuted in the Tokyo Trial. The Americans believed that, due to the Japanese Emperor's divine status within Japanese society, any attempt to prosecute the Emperor would destabilise Japanese society, making America's postwar occupation of Japan impossible. This understanding of the Japanese Emperor's status and wartime role has been challenged by scholars who argue that the Allies misunderstand and overestimated the Japanese Emperor's religious nature and influence in Japanese society. Allied participants displayed similar misunderstandings of the Japanese Emperor's divinity and authority in the Singapore Trials.

When assessing the role of the Japanese Emperor, Allied judges and trial participants were often influenced by their own cultural understandings of kingship and religion. This was reflected in the questions posed by the prosecution and the court. For example, in the trial of *Tomono Shunio*, the prosecution attempted to determine the ultimate source of the Japanese Emperor's authority:

> 'Q: Is it not the basic doctrine of Japanese religion that the Emperor is guided by heaven? In fact the Emperor is called the son of heaven.

86 The full citation information of this trial at NAUK is as follows: 'WO 235/822 – Defendant Chida Sotamatsu, Place of Trial Singapore'. This case will be referred to as '*Chida Sotamatsu and others*', SP 00066.

87 *Chida Sotamatsu and others*, SP 00066.

88 *Chida Sotamatsu and others*, SP 00066. For more details of this incident, see Pike (2015, pp. 59–60).

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'(By Defence) – Defending Lawyer objects. The matter seems to be far apart from this case.

'(By the Court) – Oh no! The order, the Defence Counsel says, comes from the Emperor. What the Prosecutor wants to know is what happens behind the Emperor, whether it originates from the Emperor or from any other authority. There may be some authority which we do not know about.'[89]

First, the prosecution hinted that the Emperor is 'guided' by heaven. This conception of the Emperor's authority is closer to the European idea that kings function as a 'conduit' for divine power (Ohnuki-Tierney, 2005, p. 220). This conception also by implication refers to a normative order that is external to the Emperor. Researchers argue that, instead of subscribing to an external normative order with clear notions of right and wrong, the Japanese sense of appropriate behaviour is context-driven (Parker, 1988, p. 189). Second, in the excerpt above, the court hinted at the fact that there is a puppet master behind the Emperor. This echoes the prevalent narrative advanced at the Tokyo Trial that the Japanese Emperor had been deceived by his political and military leaders – an explanation that did not accurately reflect the complex dynamics of the Japanese political system (Dower, 1999, p. 278).

It did not help that the Emperor was referred to in religious terms in these trials without any deeper discussion about the meaning of religion in the Japanese context. In *Sato Tamenori and others*, Japanese defence counsel argued that it was 'the religious belief of the Japanese military officers and men that orders from their superiors are simply orders from their Emperor'.[90] In *Tamura Shinji*, the accused explained that orders from superiors are 'no other than orders from the Emperor' and this order would be 'sacred'.[91] Defendants and defence counsel in both these cases were Japanese and were probably using the term 'religion' in a Japanese sense. Historians and sociologists underscore the difference in religion as understood in the West and in Japan (Ohnuki-Tierney, 1991, p. 199). The Allies believed that the Japanese Emperor was viewed as a god in the Western sense by ordinary Japanese. During their postwar occupation of Japan, the Americans took various steps to deny the Japanese Emperor a god-like divinity. This was something ordinary Japanese never in fact believed he had (Ohnuki-Tierney, 1991, p. 207). Discussions in the Singapore Trials reflected and contributed to Westernised Allied understandings of the Japanese Emperor's divinity.

In pre-war Japan, the Emperor was regarded by ordinary Japanese in a religious way but not as a god in the Christian or Western worldview. Rather, in Japanese religion, the hierarchy of supernatural beings or 'kami' is not 'fixed or linear'. 'Kamis' have a strong human element, and can be manipulated by humans just as the kami can themselves manipulate humans (Ohnuki-Tierney, 2005, pp. 222–223). As a 'kami', the Japanese Emperor would be more appropriately known as a man-god. Though the reforming Meiji leaders sought to bestow a manifest divinity on the Japanese Emperor through constitutional changes and far-reaching popular education, ordinary Japanese continued to view the Emperor as human and religious at the same time. The British and Allies failed to fully comprehend this.

As mentioned earlier, due to their assessment of the Japanese Emperor's level of control over the Japanese, the Americans went to great lengths during their postwar occupation of Japan to shield the

89 The full citation information of this trial at NAUK is as follows: 'WO 235/829 – Defendant Tomono Shunio, Place of Trial Singapore'. This case will be referred to as '*Tomono Shunio*', SP 00054.

90 The full citation information of this trial at NAUK is as follows: 'WO 235/814 – Defendant Sato Tamenori, Place of Trial Singapore'. This case will be referred to as '*Sato Tamenori and others*'. 'Closing Address in Defence of the Accused', p. 6, *Sato Tamenori and others*, SP 00094.

91 *Tamura Shinji*, SP 00015.

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Japanese Emperor from war crimes prosecutions. The Americans believed in the Japanese Emperor's 'virtually totalitarian' power over ordinary Japanese and that any destruction of the Imperial throne would complicate Japan's postwar reconstruction (Dower, 1999, p. 283). They also thought that they could use the Japanese Emperor's imperial position to further occupation policies (Dower, 1999, p. 281). The Americans actively promoted the myth of the Japanese Emperor being led astray by a military clique to draw a 'wedge' between him and those to be deemed responsible for the war (Dower, 1999, p. 284). They also tried to avoid any mention by defendants at the Tokyo Trial of the Emperor's war involvement (Dower, 1999, p. 325). These policies and myths were based on Allied misconceptions of the Emperor's power and position in Japanese society.

Given the Japanese views of the Emperor as 'kami' and not all-powerful deity, it is unlikely that an ordinary Japanese serviceman obeying superior orders was motivated by his belief in the Emperor's divinity or his desire to do the Emperor's will. The Japanese Emperor's divinity was not all-encompassing or overwhelming as that of a god in theistic religions. The conduct of ordinary Japanese servicemen during World War II was largely shaped by the severe military training imposed by the Japanese military, which aimed to ensure the unquestioning compliance of subordinates with superior orders. In other words, the behaviour of lower-ranking Japanese soldiers was less foreign and strange than represented in these trials. This is demonstrated in the results of a 1939 study conducted by the Japanese medical corps based on responses obtained from the Japanese military's 23rd Infantry Division (Drea, 1989, pp. 342–343). This study showed that Japanese troops fought well when they had good leaders, when they believed they had the support of other units though temporarily isolated and when there were healthy ties between individuals in smaller units (Drea, 1989, p. 343). Similarly, Kushner (2007) argues that the ordinary Japanese soldier's refusal to surrender had less to do with Emperor worship than the fact that most Japanese soldiers had resigned themselves to death upon joining the Japanese military (p. 131).

Non-Japanese trial participants were thus influenced by different understandings of religion and authority when interpreting Japanese participants' references to the Japanese Emperor. Based on the questions asked, non-Japanese participants drew on different ideas of religion and political authority to make sense of the Japanese Emperor's power and influence, but these ideas did not reflect popularly held Japanese understandings of the Japanese Emperor.

V. Conclusion

Japanese trial participants put forward a range of culturally influenced arguments in the Singapore Trials. Judges attempted to gain insight into these arguments by questioning Japanese participants about relevant Japanese norms and practices. However, the answers by some Japanese participants often appeared inconsistent or duplicitous when assessed according to British or Allied standards. On the one hand, testimony that seemed inconsistent or duplicitous may be explained by genuine forgetfulness or by culturally specific practices. However, due to their unfamiliarity with Japanese culture, it was difficult for non-Japanese trial participants to distinguish authentic testimony from non-authentic ones.

Very often, non-Japanese trial participants would assess these culturally influenced arguments using lenses from their own cultural 'tool kits', rather than seeking to understand these arguments on their own terms. For example, non-Japanese trial participants applied their own understandings of religion, legality and individual responsibility to defence arguments. However, some trial participants displayed active learning and strategic use of cultural difference. As discussed earlier, archival records show British personnel recognising that the Japanese attached a different meaning or significance to the practice of slapping. This led to a discussion on British prosecution policies mid-way through the trials. Some Japanese trial participants also became

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aware of how their arguments were being received by non-Japanese participants and adjusted their testimonies to conform to the latter's expectations. For example, some Japanese participants tried to benefit from Western perceptions of Japanese cultural difference by arguing that beheading was an 'honourable' form of killing based on Japanese understandings, though there is no support for this in Japanese tradition or history.

To conclude, many non-Japanese trial participants gave differing interpretations to the culturally influenced arguments put forward by the defence. Some dismissed Japanese participants' culturally influenced arguments as a defence tactic or interpreted these arguments using their own cultural 'tool kits'. Though Japanese participants were permitted to raise culturally influenced arguments in the Singapore Trials, the varied treatment and interpretations of these arguments by non-Japanese participants unfortunately did not lead to a better understanding of these arguments or their possible impact on blameworthiness or sentencing. Also, some non-Japanese trial participants, including judges, did not take these culturally related arguments seriously or did not appreciate their full implications due to insufficient cultural knowledge or awareness. These findings give rise to some concerns over the fairness of these trials from the perspective of the defence. If judges did not fully appreciate the culturally related arguments put forward by the defence, these judges would probably not have considered these arguments, at least as intended by the defence, when determining the guilt or sentences of the defendants. The varied and contested interpretations encountered in the Singapore Trials remind us of the communication difficulties associated with organising multicultural war crimes trials – lessons that we should have learned a long time ago and that we should keep in mind today when implementing war crimes trials.

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