# Capital Punishment and Clemency in Papua New Guinea, 1954 - 1965.

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A thesis submitted for the degree of Doctor of Philosophy of The Australian National University.

I hereby declare that this thesis is entirely my own work and that to the best of my knowledge it contains no material published or written by another person, except where duly referenced and acknowledged in the text, and contains no substantial material previously accepted for the award of any other degree or diploma in any university.

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# Abstract

"What factors affected the decision by the Australian Government to grant clemency to offenders condemned to death in Papua and New Guinea between 1954 and 1965 and by what process did Australian officials make their decision?"

This thesis provides a close examination of an archive of files that advised the Executive on Nuiginians found guilty of capital offences in PNG between 1954 and 1965. Intended to inform the Commonwealth Executive, these files provide insight into conceptions held by officials at different stages of the justice process into justice, savagery and civilisation, and colonialism and Australia's role in the world. Interrogated as a sequence, this thesis shows three main domains of discussion between interests and highlights change over time in the ideas and relations between the levels of the process. First, there were different ideas about what punishments would be appropriate to the particular context of the crime to be just and to maintain and extend Australian colonial control. Second, officials debated whether justice was best achieved by policies that accommodated cultural differences, or policies that adhered strictly to the Australian rule of law. Third, decisions were affected by the changing demands of protecting Australia's hold on PNG by representing Australian colonialism as benevolent, effective and temporary. In explaining the impact of these factors, the particular combination of idealism and self-interest, liberalism and paternalism, and justice and authoritarianism axiomatic to Australian colonialism becomes apparent and enables insight and analysis of Australia's administration of PNG in the lead up the acceptance of independence as an immediate policy goal. In answer to the second part of the question, the archive of clemency submissions reveals three elements of the process by which Australian officials and politicians enacted clemency. First, clemency was a discretionary, political process common to English-based jurisdictions and involved officials gathering information, evaluating it, and making political and administrative calculations in coming to a decision. Second, officials and politicians took into account information gained from both the official advisors and informal networks. Finally, as the colonial administration changed with changes in personnel, the files show Australia gathering the authority to grant mercy into the hands of the Commonwealth and then devolving it back to the territories. In these transitions, the lens of the capital case review shows the trajectory of Australian colonialism during a period when it was unsure of the duration and nature of its future relationship with PNG.

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Figure 0-1"Assistant District Officer Bill Tomasetti offers tobacco to two men in tribal dress, possible as payment for a sing-sing, Papua New Guinea, 1950. [1]

Between 1954 and 1965, a multi-layered process of judicial and official evaluation determined who of those condemned to death in Papua and New Guinean (PNG) courts would be executed and who would be granted the mercy of the Crown. Only two men in that eleven-year period, out of the average of 55 Nuiginians per year condemned for the capital crimes of murder or rape, were executed - a much higher rate of commutation, for example, than that of British African colonies such as Kenya and Nyasaland.[2] This apparent leniency was often the product of careful, and sometimes contentious, debate within and beyond government, particularly as after 1954, a process largely superintended by PNG officials became one might tightly controlled in Canberra, only to be devolved back to PNG in 1964. This thesis explores these processes and this period, arguing that this

[1] "Assistant District Officer Bill Tomasetti offers tobacco to two men in tribal dress, possible as payment for a sing-sing", Papua New Guinea, 1950", National Archives of Australia (NAA), NAA: A120, L12849, 7462681. A 'sing-sing' is a Tok Pidgin term for a gathering of various groups for exchanges and involves music, dancing and eating.

[2] Parliament of the Commonwealth of Australia, Territory of Papua*; Annual Report for the period 1st July, 1949 to 30th June, 1950., 24 October 1951*, Commonwealth Government Printer, Canberra (Reports 1949-1965); Commonwealth of Australia, *Report to the General Assembly of the United Nations on the Administration of the Territory of New Guinea from 1st July, 1948, to 30th June, 1949,* Government Printer, Sydney, 1950; Stacey Hynd, "'The Extreme Penalty of the Law': mercy and the death penalty as aspects of state power in colonial Nyasaland, c. 1903-47", *Journal of East African Studies*, vol. 4, no. 3, 2010, pp. 542-559; Stacey Hynd, "Murder and Mercy: Capital Punishment in Colonial Kenya, ca. 1909-1956, *International Journal of African Historical Studies*, vol. 45, no. 1, 2012, pp.81-101.

study of a profound exercise of colonial power provides a lens through which to understand the practice of Australian colonialism in PNG.

The extreme matters canvased in capital case reviews engaged decision makers in a series of re-evaluations relating to questions of appropriate punishment and authority, and broader considerations of the role of justice and the legitimacy of the state in PNG. These questions assumed particular importance through the years in which Australian practice moved from the paternalism of the immediate post-Second World War period to the acceptance of a more immediate path to self-determination for the territories. The extremity of the behaviours and issues associated with these cases sharpened the focus on a wider network of issues. In analysing these outcomes, this thesis explains why and how decisions on clemency were made, assessing the ways in which such determinations reflected wider dimensions of Australia's colonial project. As a historian of punishment in colonial Africa, Stacey Hynd, writes: "the death penalty was a crucial element of a colonial state's coercive capabilities, but it was also a potential marker of its violence and inefficiency".[3] This thesis develops that perspective through addressing the questions: what factors affected the decision by the Australian Government to grant clemency to offenders condemned to death in Papua and New Guinea between 1954 and 1964, and by what process did Australian officials make those decisions

The 822 capital case reviews arising during that decade present a daunting archive, from which aggregated trends might be deduced. But it is the processes by which, in each case, a decision was made, in the midst of shifting relations between a PNG village, lawyers, judges and officials in Port Moresby, or in Canberra, and more general national and international interest, that perhaps best reflects these issues. Accordingly, the method adopted in this thesis has been to work with a selection of specific cases that illuminate these transitions. More specifically, each case examined here is reconstructed and contextualised through the file which was assembled to inform the decision of the Governor-General in Council on whether clemency should be exercised. These files, now in the National Archives of Australia, are in themselves a rich archive of Australian practice, as notes prepared for prosecution, the verdicts of judges, the commentary of PNG and Canberra-based bureaucrats, the PNG Administrator, and the Minister of Territories were assembled in an extended exercise in colonial justice and accountability. Each file records, in varying depth, reflections, opinions and often debates around conceptions of civilisation, criminality, gender, violence, and their contributions to individual culpability, mitigation, and the challenge of managing a still poorly understood population in PNG. Each case generated its own archive in evidence, inquiry, advocacy,

[3] Stacey Hynd, "Killing the Condemned: The Practice and Process of Capital Punishment in British Africa, 1900-1950s", *Journal of African History*, vol. 49, no. 3, 2008, pp. 403-418.

judgement, review and punishment. Rather than draw a general conclusions from a mass of files, the approach here is instead to offer a detailed, immersive analysis of these processes in specific cases. This approach not only brings us closer to the crime, the criminal, the court, but also to the personnel who, with limited resources to hand, made those decisions, weighed those factors, and set those 'markers' to which Hynd refers.

In each capital case review file selected, the participants were much the same. After evidence was assembled from witnesses, patrol officers and other parties, and the case heard, a PNG Supreme Court judge, the PNG Administrator and the Commonwealth Minister of Territories each made recommendations to the Commonwealth Executive Council and Governor-General about who should live and die. Each case was managed in terms of set procedures. By the process established in 1954, the Governor-General was required to determine the use of the royal prerogative of mercy. While the judge was bound by a mandatory sentence of death for those found guilty of capital crimes - wilful murder, piracy, treason, and until 1958, the rape, or attempted rape of a white woman – two options existed for the guidance of the Governor-General. If a judge thought that the matter concerned was an egregious crime they could 'pronounce a sentence of death'. If they held reservations regarding such a severe sentence, either in terms of the crime or the impact of the punishment on Australian control, they would 'record a sentence of death' and thus recommend the use of the royal prerogative of mercy.[4] Once a sentence was recorded, it was accepted custom and practice in PNG that a hanging could not occur, nor the sentence be increased beyond that recommended by the Judge and Minister.[5] It was at that point of executive discretion that each case presented its own complexity as a microcosm of late--colonial governance.

The graph below summarises the use of death penalties by PNG Supreme Court justices and the final outcome of capital case reviews. As shown here, all recorded and most pronounced sentences of death were commuted. There was an execution in 1954/5 and another in 1956/7. The higher figures for wilful murder in some years are due largely to mass arrests, up to 30 at a time, for killings related to inter-group warfare and killings of officials, rather than individual murders.[6] My analysis is primarily focussed on cases selected from the latter group, as it is in the consideration of those

[4] "The Criminal Code (Queensland Adopted) 1903", Section 652. *Criminal Code Amendment Ordinance*, 1907, Section 2 (Papua) *Criminal Code Amendment Ordinance*, (Papua, and New Guinea) 1923-1939, Section 8.
[5] Murray Tyrell interviewed by Mel Pratt, Transcript 1974, National Library of Australia, pp. 45-6. This was a different application of the British *Judgement of Death Act*, 1823 (U.K. 4 Geo. 4, c.48) than other British colonies and Dominions and according to the Attorney-General's Department, that was partially due to the wording of the PNG criminal code: see The Assistant Secretary (Advisings), "Criminal Code Amendment Ordinance 1907 (Papua) Section 2 - Criminal Code Amendment Ordinance 1923-1939 (New Guinea) Section 8 - whether 'recorded' sentence of death can be enforced", Attorney-General's Department, NAA: A432, 1958/3143, 7801743. And Hynd, "Killing the Condemned"; Andrew Novak, "Capital Sentencing Discretion in Southern Africa: A human Rights perspective on the Doctrine of Extenuating Circumstances in Death Penalty Cases", *African Human Rights Law Journal*, vol. 14, no. 1, 2014, pp. 24-42.
[6] See for example- the Editor, "New Guinea Death Sentences" *Sydney Morning Herald*, 12 Feb, 1957, p. 2; "16 Cannibals Sentenced to gallows", *St. Joseph News-Press*, St. joseph, Missouri, USA, 22 May, 1960, p. 6.

crimes that the tests of 'advancement' were applied. In comparison to Australia, Papua and New Guinea had a similar rate of commutation for capital offences to other Australian jurisdictions, such as Victoria, where for example, between 1952 and 1958 there were 18 sentences of death with no executions, and the next execution was in 1967, the last in Australia.[7]

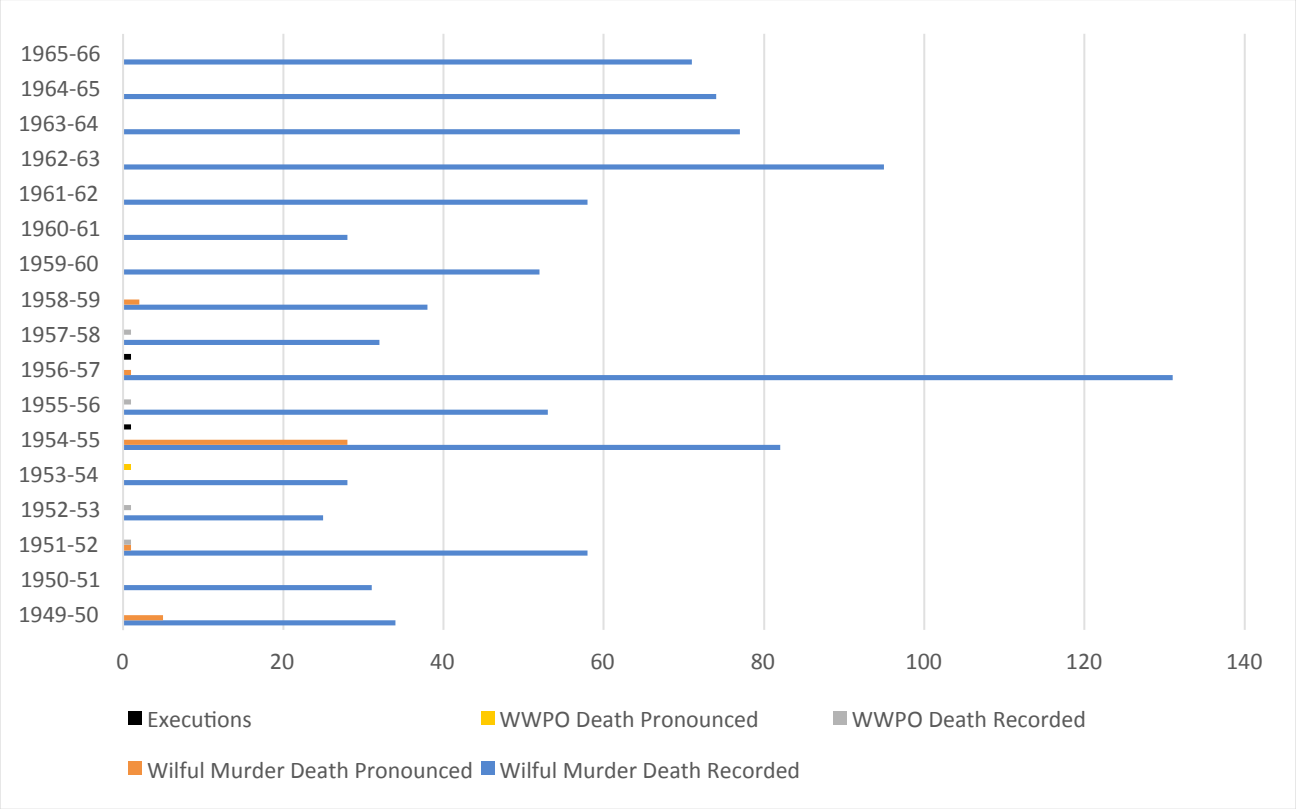


Figure 0-2 Numbers and types of sentences of death sentences under different capital offences from 1949/50 to 1965/66.[8]

The cases selected range from the different challenges of 'remote' villages and urban populations; the management of inter-racial relations and issues of gender and sexuality; and the relativities of criminality and culpability as they were understood in the unequal exchange of cultures, the negotiation of political power, and application of models of development. These cases also reflect the dynamics of change across the period, and in the sensitivity of Australian officials to how its tenure in PNG was being seen and judged. Each case captures the contestation of ideas, causation, continuity and change during the eleven years in which vice-regal review dominated the determination of clemency. In answer to the first general question of why decisions were made, this thesis shows that Australian officials in PNG enacted the royal prerogative of mercy affected by

[7] Jo Lennan and George Williams, "The Death Penalty in Australian Law", *Sydney Law Review*, vol. 34, 2012, pp.659-694, p. 674; And Barry Jones "The Decline and Fall of the Death Penalty", in Barry Jones (ed.) *The Penalty is Death; Capital Punishment in the Twentieth Century*, Sun Books, Melbourne, 1968, pp. 257-271.

[8] Statistics taken from the: Australian Commonwealth, *Annual Reports for the Territory of Papua for the Commonwealth of Australia* and the annual Commonwealth of Australia, *Report to the General Assembly of the United Nations on the Administration of the Territory of New Guinea. 1949-50-1965/66.*

three main influences: policy concerns, notions of justice, and the demands of international accountability. In answer to the second question of how decision were made, the processes involved in weighing those influences reflected a shifting alignment of interests and ideologies within the ranks of the politicians, judges and lawyers, officials, expatriates, journalists and commentators who shaped Australian governance of PNG.

Among those ideologies, the most prevalent and contested was that relating to 'advancement'. The term was much used by the most prominent figure directing PNG policy for much of the period covered by this thesis: Paul Hasluck, the first Minister of Territories from shortly after his election to Parliament in 1951 until 1963. A dominating personality, Hasluck brought experience and commitment to this portfolio. Before he entered politics he had been a historian of Western Australian indigenous policy and then a diplomat, closely associated with, and soon disenchanted by, Australia's role in the United Nations Organisation. Hasluck sought to manage in PNG what he described in 1954 as "the advancement of the natives … towards a civilized mode of life."[9] His vision of 'civilised' was essentially defined by a westernized, capitalist, democratic, and Christian paradigm.[10] And it ran parallel to the ways the term 'advancement' was used in the charter of the UN Trusteeship Council, under whose aegis Australia held New Guinea, but not its crown colony of Papua, as a project through which "to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories."[11] In between these models, as Edward Wolfers and John Dademo Waiko argue, Australian colonial officials, in day-to-day practice to achieve those aims, believed they had to maintain control of the people, both in terms of law and order and cultural change.[12] After the Second World War, Australia invested large sums of money in gradually extending control over all parts of the territories and their over three hundred culturally distinct language groups, seeking to translate pragmatic advancement into forms comprehensible in such a diverse range of settings, but also as a uniform practice and observance. While elsewhere the course of post-war colonialism was often moving towards exercising less direct control, Australia was extending its authority over PNG with these mixed concepts of advancement.

Concepts of justice and punishment became a central means of extending this control. As Ottley and Zorn have shown, in PNG, as in many colonial contexts, the law was often used pedagogically, to

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[9] Paul Hasluck, *A Time for Building: Australian Administration in Papua and New Guinea 1951-1963*, Melbourne University Press, Carlton, 1976, pp. 94-95.
[10] Hasluck, *A Time For Building,* pp. 94-97.
[11] United Nations, *Charter of the United Nations*, Chapter XII, Article 76b., *The United Nations*, Accessed 16-1-2017, http://www.un.org/en/sections/un-charter/chapter-xii/index.html Paul Hasluck, *A Time for Building*, p. 5, pp. 45-47. Oxford English Dictionary Online, "Advancement", *Oxford English Dictionary* (Online), http://www.oed.com/view/Entry/2887?redirectedFrom=advancement#eid, accessed 12-4-2017.
[12] Edward P. Wolfers, *Race Relations and Colonial Rule in Papua and New Guinea*, Australian and New Zealand Book Company, Brookvale, 1975, eg. pp. 5, 127. John Dademo Waiko, *A Short History of Papua New Guinea*, 2nd Edition, Oxford University Press, Melbourne, 2007, p. 114.

send messages about 'advanced' behaviour to Nuiginians while also imposing order.[13] Such priorities were often explicit in the clemency files because capital crimes were seen as instances in which the need to redefine understandings of justice was most pressing, away from cultures of vendetta, for example, or away from perceived customs of gendered violence.[14] As well as messages directed towards the colonised, officials were equally aware of messages that needed to be sent to critics of Australian colonialism, whether in the metropole or internationally. Through this period, for example, the Australian government was required to report annually to the United Nations Trusteeship Council (UNTC), and navigate there the post-colonial and Cold War scrutiny that was brought to its administration of the territories. Like advancement, there were mixed messages about the role of punishment, depending on intended audiences. The case files discussed in this thesis reveal the complexities of these tasks.

'Advancement' not only had several audiences, but also reflected a range of ideological investments. At least four ideologies of justice intersect as each case file made its journey from the crime to the executive council. First, some officials continued to hold on to pre-war colonial practices, favouring ad hoc dispute resolution to be determined by localised knowledge, paternalistic discretion, and an implicit scepticism regarding the prospects for significant indigenous self-determination. Generational changes in the ranks of expatriate officials, judges and commentators, tested this outlook in the period covered by this thesis but never completely displaced it. The files examined capture its influence, in assumptions, turns of phrase and rhetorical gestures as much as formal articulation. Second, there was another 'old' colonialism that was not so much local as imported from experience and examples in other British colonies, and which seemed to acquire greater salience given more systematic attention to the post-war future of 'subject peoples'. As Governor-General from 1953 to 1960, Sir William Slim, having had a career in the Indian army, was one representative of an emphasis on deterrence and coercion as the tools of responsible colonialism, and Slim's influence was felt in his unprecedented intervention in several clemency determinations. Third, there was a contrasting post-war liberal ideology of justice that valued due process before the law on Australian models and the equal treatment of races, leading to the eventual autonomy of populations within ostensibly Western models of nation, state and law. Paul Hasluck exemplified this perspective, again with considerable power over the course of policy and the culture of institutions. Finally, there was an emerging, more progressive ideology, envisaging an integration of traditional and western legal practices. By 1964 there was a return to pre-war colonial notions by investing

[13] Bruce L. Ottley, and Jean G. Zorn, "Criminal Law in Papua New Guinea; Code, Custom and the Courts in Conflict", *The American Journal of Comparative Law*, vol. 31, no. 2, 1983, pp. 251-300.
[14] John Greenwell, *The Introduction of Western Law into Papua New Guinea,* Unpublished Manuscript given to author by John Greenwell, the former First Assistant Secretary and Director of Papua New Guinea Office Government and Legal Affairs Division, Department of External Territories, 1970-1975; Sinclair Dinnen, "Sentencing, Custom and the Rule of Law in Papua and New Guinea", *Journal of Legal Pluralism*, vol. 20, no. 27, 1988, pp. 19-54.

significant authority in the discretion of judges to make determinations about traditional practices rather than the Executive, as figures such as Hasluck and Slim were replaced, international scrutiny contributed to forcing the pace of political autonomy for PNG, and opposition to the death penalty in Australia became a prominent political cause. In pursuit of justice, holders of each ideology held different assumptions about what were appropriate social controls, conflict resolution systems, and punishments for Nuiginians. Those assumptions informed their decision-making and arguments in the clemency case files.

While it would be easy to see the processes revealed in the files as confirming an already-familiar chronology of Australian colonial administration, the value of the detailed record they offer is that the progression in these concepts, ideals and policy was rarely neat. These files capture the logic, calculation and sometimes the simple prejudice that shaped not only individual life-or-death decisions, but also the management of the wider processes they revealed, ranging from the efficiency of policing and imprisonment systems through to the gender relationships between Nuiginians, and between Nuiginians and Europeans. They show officials drawing on official briefings, legal precedent and principle, but also informal information, sometimes gossip, and often the confidences of close-knit, insular, and under-resourced networks. Equally, these files capture not only the imposition of colonial authority, but also the terms in which the place of justice was conceptualised within transitional Nuiginian societies, in which execution was seen to have its own role in maintaining the credibility of authority and the cohesion of communities. And they reflect sensitivity to a wider public debate, already well-attuned to the tensions of a decolonising world and the moral collapse of other colonial regimes through harsh enforcement of power and authority.[15] Here, too, the messages of advancement were complex.

These files cannot be read in isolation. This thesis draws on three contexts to establish their significance. The first is the wealth of scholarship dealing with questions of crime and discretionary justice, especially as they intersect with colonialism. The second is the extensive literature on Australia's history in PNG. The third is a diverse range of primary sources that can assist in interpreting those files and the 'markers' associated with each case.

[15] Coverage of colonial missteps and problems were well covered in the Canberra newspaper. See for example: "Colonialism without Friends in Asia", *Canberra Times*, 8 June 1955, p. 2; "West Reproached for Complacency on Colonialism", *Canberra Times*, 1 June 1955, p. 4; "All-African Talks Call On U.N. To End Colonialism", *Canberra Times*, 15 December 1958, p. 1; "French Official Murdered in Indo-China", *Canberra Times*, 31 Oct 1951, p. 1. "Revolt Feared in Indo-China", *Canberra Times,* 27 June 1953, p. 1. "8.500 Arrests in Kenya", *Canberra Times*, 21 Nov 1952, p. 1. 'Threat of Open Rebellion Seen in Kenya", *Canberra Times*, 27 Nov 1952, p. 1; "Self-rule turns Sour for British Guiana", *Canberra Times*, 24 July 1963, p. 32; "Kenya 'too hot' for Governor", *Canberra Times*, 20 Nov 1962, p. 15; "Crowds Cheer Mau Mau Chiefs", *Canberra Times*, Wednesday, 18 Dec 1963, p. 17; "Dutch New Guinea Trusteeship", *Canberra Times*, 27 Feb 1961, p. 3.

Douglas Hay, Tina Loo, and Stacey Hynd's analyses of the uses of the royal prerogative of mercy have proved particularly valuable in this research. Hay argued that authorities used mercy and capital punishment to communicate messages about the authority and legitimacy of the state, while also tacitly accepting and seeking to ameliorate social injustices of the state.[16] Loo translated that process to a colonial setting, showing how mercy was used in British Columbia to promote the legitimacy of the colonial project in the eyes of Canadians who suspected it was brutal. Using clemency, Canadian colonists valorised British justice as civilized in contrast to representations of Aboriginal justice as savage, further justifying the colonisation of the people and their territory.[17] Hynd applied a similar approach to the use of mercy in African colonies, with a focus instead on the messages to be sent to an international audience.[18] Each aspect of clemency was evident in PNG in the period covered here, the sequence of cases reflecting the varying priorities associated with each constituency over time. Joining Hay, Loo and Hynd, Carolyn Strange explained that the determination of clemency was often an essentially political process run by politicians, and registering a broad range of social and political factors.[19] At these moments of professional, personal and political choice, officials and politicians also took into account information gained from the formal, legislated systems of consultation, the submission process, and also from informal social networks of influence that came from living and working in the colonial communities. Again, the cases selected show each of these elements in operation.

Despite the apparent evidence of Australian predispositions to clemency, some historians have questioned the benignity of Australia's colonial record, and in particular the extent to which legal principles mattered at all in calculations of political or strategic priorities.[20] Berger, Foster and Buck have asked: "How much sham was involved in the law of colonial enterprises?"[21] The capital case offer an opportunity to test the claims of officials, such as Paul Hasluck, that Australia's relationship with PNG was "the experimental stage of something which the world has not yet seen … an attempt

[16] Douglas Hay, "Property, Authority and the Criminal Law", in (ed.) Douglas Hay et al, *Albion's Fatal Tree,* A. Lane, London, 1975 p. 41.
[17] Tina Loo, "Savage Mercy: Native Culture and Modification of Capital Punishment in Nineteenth Century British Columbia", in Carolyn Strange (ed.) *Qualities of Mercy: Justice Punishment and Discretion*, University of British Columbia Press, Vancouver, 1996.
[18] Hynd, "'The Extreme Penalty of the Law', p. 552. Hynd, "Murder and Mercy", p.92.
[19] On discretionary justice see Hay, "Property, Authority and the Criminal Law"; Carolyn Strange "Discretionary Justice: Political Culture and Death Penalty in New South Wales and Ontario, 1890-1920, in Strange (ed.) *Qualities of Mercy*. R. Douglas and K. Laster "A Matter of Life and Death: The Victorian Executive and the Decision to Execute 1842-1967", *The Australia New Zealand Journal of Criminology*, vol. 24, no. 2, 1991, pp. 144-160; Simon Adams, *The Unforgiving Rope; Murder and Hanging on Australia's Western Frontier*, UWA Publishing, Crawley, 2009. Hynd, "Killing the Condemned".
[20] Allan M Healy, "Monocultural administration in a multicultural environment: the Australians in Papua New Guinea" in J.J. Eddy and J.R. Nethercote (eds.), *From Colony to Coloniser: Studies in Australian Administrative History*, Hale and Iremonger, Sydney 1987, p. 224; Wolfers, *Race Relations and Colonial Rule in Papua and New Guinea,* p. 3-4.
[21] Benjamin Berger, Hamar Foster and A.R. Buck, "Introduction: Does Law matter? The New Colonial Legal History?" in Hamar Foster, Benjamin L. Berger, and A.R. Buck (eds.) *The Grand Experiment; Law and Legal Culture in British Settler Societies,* University of British Columbia Press, Vancouver, 2008, p. 11.

at cooperation and mutual service between two peoples."[22] In analysing legal practice and punishment, the thesis casts into relief the nature of Australian colonialism and the ways discretionary justice was used to serve, or in relation to, other objectives. The capital case reviews produced a clear evidentiary trail of changing ideas about, and representations of, the relationship between Australia and PNG from 1954 to 1965.

That relationship has already attracted much attention. Histories of PNG by Hank Nelson, John Dademo Waiko, Clive Moore, Christopher Waters, C.D. Rowley, Brian Essai, and Ian Downs already allow for a nuanced reading of the factors shaping Australian post-war colonialism, focussing on the distinctive features and limitations of that project.[23] Edward Wolfers, Regis Tove Stella, Bruce Ottley and Jean Zorn, Christine Stewart, and August Ibrum Kituai have provided more specific assessments of the intersection of governance, law, gender, and race in PNG, including the making and practice of law. Their insights into racial discourses, for example, has been particularly useful in the interpretation of files. Similarly, the post-colonial framing of Australian practices has been closely-studied, building on Rowley's argument that:

> The 'colonial' nature of Australia's relationship with the Territory of Papua and New Guinea increasingly complicates her foreign policy... on the assumption that this kind of relationship involves restraints on 'freedom', and the denial of basic human rights.[24]

If a "great social change began with the enforcement of peace"[25] at the end of World War II, and if a more sophisticated gloss now had to be applied to the sentiments of long term expatriates residents, such as Jim Taylor, who "had in my mind that ours was a noble task, and that it was our duty to bring 'Pax Australiana' to these people,"[26] it remained the case that the path of reform was far from clear or smooth over the following decades. Nelson and Amirah Inglis made invaluable contributions to the place of capital punishment in Australian colonialism prior to and during World War II.[27] This thesis will build on their contributions in extending this analysis into the post-war period and indicating the

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[22] Paul Hasluck quoted in Nicholas Brown, *Governing Prosperity; Social Change and Social Analysis in Australia in the 1950s,* Cambridge University Press, Melbourne, 1995, p. 74.

[23] Waiko, *A Short History of Papua New Guinea*; Clive Moore, *New Guinea; Crossing Boundaries and History,* University of Hawaii Press, Honolulu, 2003; Hank Nelson, *Papua New Guinea; Black Unity of Black Chaos?,* Pelican-Penguin, 1972; Hank Nelson and Australian Broadcasting Corporation*, Taim Bilong Masta, The Australian Involvement with Papua New Guinea,* ABC, Sydney, 1982; Ian Downs, *The Australian Trusteeship; Papua New Guinea, 1945-75, Australian Government Publishing Service, Canberra 1980*. C.D. Rowley, *The New Guinea Villager*; *A Retrospect from 1964*, F.W. Cheshire, Marrickville, 1967; Brian Essai, *Papua New Guinea; A Contemporary Survey*, OUP, Melbourne, 1961; Wolfers, *Race Relations and Colonial Rule in Papua and New Guinea*.

[24] Rowley, *The New Guinea Villager*, p. 1.

[25] Rowley, *The New Guinea Villager*, p. 18.

[26] Nelson, *Taim Bilong Masta,* p. 128.

[27] Hank Nelson, "The Swinging Index; Capital Punishment and British and Australian Administration in Papua and New Guinea 1888-1945", *The Journal of Pacific History*, vol. 13, No. 3, 1978, pp. 130-152; Amirah Inglis, *The White Women's Protection Ordinance; Sexual Anxiety and Politics in Papua*, Sussex University Press, 1975; On a new standard for colonialism see Hank Nelson, "From Kanaka to Fuzzy Wuzzy Angel" *Labour History*, no. 35, 1978, pp. 172-188.

continued pervasiveness of executive clemency, if under different terms and in response to difference pressures.

There is also a rich literature that works back from PNG's eventual independence in 1975 to characterise the effectiveness with which Australia laid the foundations for political stability and representation, including studies by Donald Denoon, Peter Fitzpatrick and Allan Healy.[28] In contrast, this thesis focuses on Australian colonialism at a time before its practitioners knew clearly when or if it would end, and policy was formulated largely to support its continuance. While the final chapter deals with the awareness of the need to begin planning towards independence, this thesis primarily seeks to understand the ways in which the handing of capital cases reflected tensions within colonialism rather than those emerging from its perceived ending.

Six case studies have been selected for close examination. These cases, including both pronounced and recorded sentences, have been chosen because they were difficult to resolve and the processes of their consideration revealed key points in testing the limits and purposes of mercy.[29] These cases cover the four most controversial of the seven pronounced cases of death handed down in the period, including the two that resulted in execution, and two recorded sentences of death which deal with the executive's dissatisfaction with established procedures. Through their layered documentation, these cases unveil core concepts decision makers considered or held to be axiomatic to their discussions, ranging from ideas of the 'primitive' to the 'advanced' Nuiginian; ordinary to extreme violence; unprovoked to provoked violence; unmanly to manly behaviour; immoral to moral conduct; customs to be acknowledged, and those to be eradicated.

Six cases can hardly claim to be comprehensive. As Franca Iacovetta and Wendy Mitchinson argue, however, close analysis of specific examples can draw out that these clusters of evidence around decisions and actions, and support a "multi-layered analysis of social processes and moral discourses" central to a given case.[30] Such studies provide opportunities for detailed exploration of causation and test the match between words and action. Adopting a similar methodology, Martin J. Wiener argues that "large, indeed global, questions were worked through in small, specific

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[28] Donald Denoon, *A Trial Separation; Australia and the Decolonisation of Papua New Guinea*, Pandanus Books-ANU, Canberra, 2005. Peter Fitzpatrick *Law and State in Papua New Guinea Law and State in Papua New Guinea*, Academic Press, London, 1980; Healy, "Monocultural administration", pp. 217-18.

[29] The rape or attempted rape of a 'European female' by a Nuiginian man was a capital offence in PNG until 1959. Wilful murder, treason and piracy were also capital offences. Parliament of the Commonwealth of Australia*, Territory of Papua; Annual Report for the period 1st July, 1949 to 30th June, 1964 to 1st July, 1965 to 30th June, 1966*, Commonwealth Government Printer, Canberra. Commonwealth of Australia, *Report to the General Assembly of the United Nations on the Administration of the Territory of New Guinea From 1st July, 1948, to 30th June, 1949, From 1st July, 1965 to 30th June, 1966,* Government Printer, Sydney. 1966.

[30] Franca Iacovetta and Wendy Mitchinson in Mariana Valverde, J.R. Miller, Owram, Doug, Shirley Tillotson, et al, "On the Case: Explorations in Social History: A roundtable discussion", *Canadian Historical Review*, vol.81, no.2, 2000, pp. 266-292, 285-286.

contexts".[31] Philip Curtin adds that case studies can provide specific data against which larger questions can be compared, contrasted and tested.[32] These objectives inform my approach. Acknowledging Doug Owram's caution that focusing too much on the particular can distract from broader trends and movements, I have complemented close attention to these files with research encompassing newspaper reportage, contemporary commentary, reflective memoirs and biographical studies of major actors.[33] Deepening the understanding of the case file, my analysis of these clusters of information also shows how the actors in each process attempted to draw attention to some ideas and obscure others, to persuade, suppress, to justify and legitimate. If the files tended to generate, as Valverde suggests, "highly formatted resolutions,"[34] even that carefully managed form can itself be central to my inquiry, and contrasted to wider engagement with the issues at the heart of each case.

This thesis begins with an orienting chapter, briefly outlining the Australian colonial project in PNG up to 1954 and providing a background for the following chapters, each of which is based around one of two cases.

Chapter Two is focused on the Telefomin killings of 1954, in which patrol officers and Nuiginian police constables were killed in a protest against Australian colonialism. These killers were not executed despite pronounced sentences of death, despite much public discussion, despite the seriousness of the crimes, and despite the fact that similar crimes earlier in the century had led to deadly reprisals.[35] The decision on clemency recognised the extent of dissatisfaction with Australian governance, the need to enhance Australia's international reputation international, and to consolidate the case for the continued Australian control of the territories.

Chapter Three, also from 1954, and analyses the prosecution of Joseph Kita Tunguan for the rape of his European employer, Dr Blanka Nesbit. Kita Tunguan's crime was a capital offence under Section Three of *The White Women's Protection Ordinance, 1926-1934*,[36] and he received a pronounced sentence of death. That he was granted clemency revealed the disorderly nature of judicial administration, and also the role of informal networks of knowledge in influencing legal processes. This case also suggests an increasing focus on the welfare of the colonised, the exchange between

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[31] Martin J. Wiener, *Empire on Trial*; *Race, Murder, and Justice under British Rule, 1870-1935*, Cambridge University Press, New York, 2009, p. ix.
[32] Philip D. Curtin, *The World and the West: The European Challenge and the Overseas Response in Age of Empire,* CUP, Cambridge, 2000, p. xi.
[33] Owram, "On the Case", p. 273.
[34] Valverde, "On the Case", p. 269.
[35] Nelson, *Papua New Guinea*, pp. 66-67.
[36] "The White Women's Protection Ordinance, 1926-1934", *Laws of the Territory of Papua, 1888-1945, (Annotated)* http://www.paclii.org/pg/legis/papua_annotated/wwpo19261934342/.

Australian debates over crimes of sexual violence and those in PNG, and the highly gendered terms in which the tasks of 'advancement' were being defined.

The third case study is *R. v. Usamando, 1954*. Usamando was hanged after killing five people over some thirty years. The decision to hang Usamando was also an attempt to manage the disorder of Nuiginian prisons, to manage expectations of Nuiginians regarding the relations between Australian and customary justice, and to frame an idea of the 'advanced' Nuiginian that the colonial project was seeking to create. In handling this case, officials and politicians explicitly considered ways to maintain the sanction of the death penalty while still seeking to present a positive image of Australian colonialism to a range of audiences.

Chapter Four compares and contrasts the cases of *R. v Ako Ove, 1956* and *R. v Sunambus, 1956*, which were paired in a critique of PNG justice written by the Governor-General Sir William Slim. Slim argued that both should be hanged, despite receiving recorded sentences. Together, these cases highlight the extent of intervention possible in discretionary processes, testing the public and procedural thresholds to the use of execution, and exposing the relationships between the ideological frameworks contending within Australian practice.

The fifth case study is of *R. v Aro of Rupamanda, 1957*. Aro brutally killed his two wives and received a pronounced sentence of death, becoming the last person executed by Australian authorities in PNG. The moral and political reasoning in his case reveals evolving views on how public order and gender boundaries should be enforced, and also the relations between administrative priorities, international scrutiny, and contending ideologies.

Chapter Seven assesses the factors leading to the cessation of the legal framework underpinning these cases. In 1959 there was a perception that this increasingly centralised review process was functioning smoothly. In 1960, however, Prime Minister Robert Menzies announced the government's intention of more rapidly bringing PNG to independence, and effectively altered the calculus of decision-making in capital cases and favoured the devolution of final authority back to judges in PNG. By 1964 mandatory sentencing was abolished, giving those judges more discretion in finalising punishment. With the freedom to set their own sentences, judges ceased condemning offenders to death - even though the death penalty itself was not abolished until the lead-up to independence in 1975. This chapter assesses the significance of this return to localised discretion as a further reframing of ideas of 'advancement'.

Each chapter, except the last, will begin with a narrative constructed from the basic facts of the crime, trial and administrative process of preparing a file for presentation to the Governor-General in Council. The chapters then outline the main contextual factors shaping assessments of the place of

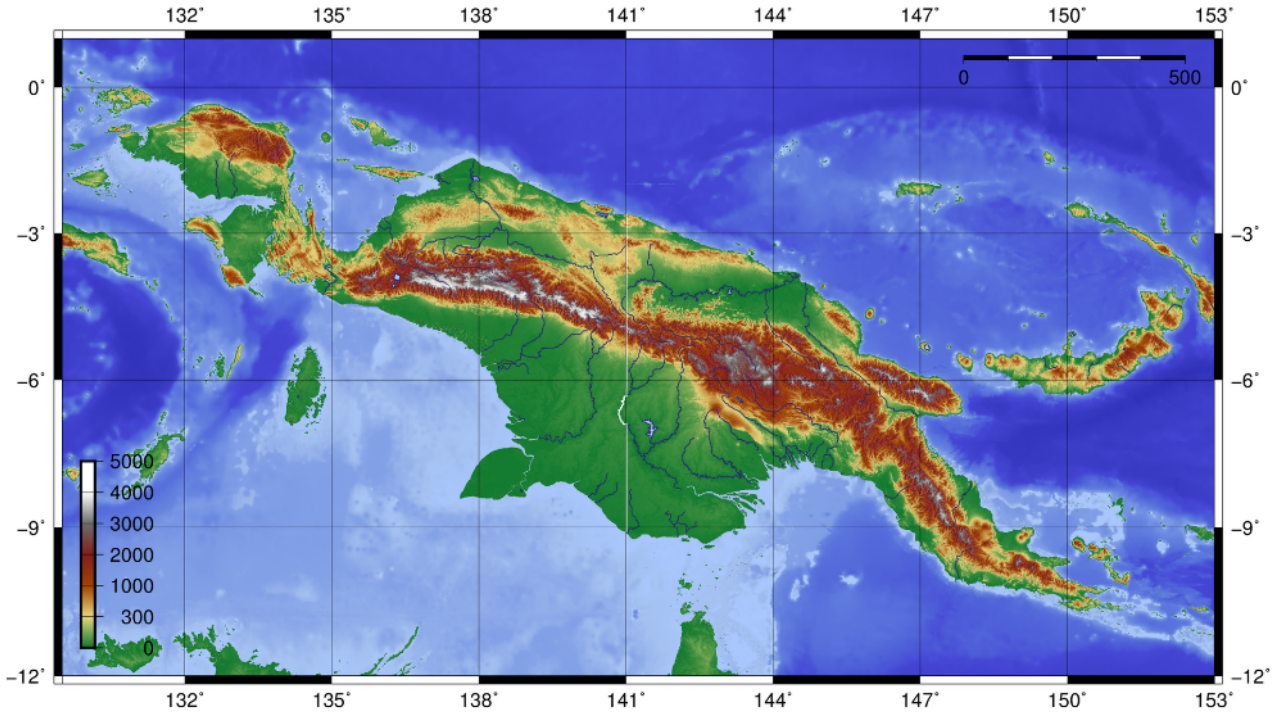
the case in the matrix of colonial concerns, and track the influence of these considerations on how the arguments mounted related to the exercise of discretionary justice for each individual. The files under consideration vary in completeness: wherever possible, the analysis will keep close to the file as an artefact of the issues under consideration; where appropriate, evidence will be inferred from other sources, such as reports of public statements in newspapers and passing references in official and personal correspondence. As noted above, each chapter will then summarise contemporary issues influencing the case, and existing scholarship, in building an assessment of its significance. Presented chronologically, each case will be assessed as a point of transition, testing or challenge in the Australian colonial project.

In his extensive memoir of his time as Minister for Territories, Paul Hasluck wrote that Australia was attempting to replace an old Nuiginian system of what he called "government by jabber"—by consensus-building and discussion—with fair and even handed Australian justice.[37] Ironically, in the case of capital punishment, 'government by jabber' was what Nuiginians got as Australian officials 'jabbered' to reach their own view of what was just and good.

[37] Hasluck, *A Time for Building,* p. 167.

# Chapter 1 - Meet Our Friend, Papua New Guinea

Figure 1-1 "Topography of New Guinea" Zamonin [1] Note that Papua and New Guinea comprises the Eastern half of the main island and its neighbouring archipelago.




Australia had held Papua and New Guinea out of a belief in its geopolitical necessity, a belief proved by the events of the Second World War. However, its possession had not resulted in large scale economic and political development prior to the war, which left Australia with a large task to fulfil in terms of its role and responsibilities to Nuiginians and the UN Trusteeship Council after the war, and the reassessments of colonialism, paternalism and "advancement" it reflected. Despite the enduring bipartisan support for that geopolitical strategy, and for the evolving terms of that sense of duty to wartime allies, Australia's priorities still ran counter to the decolonisation movement around the world. Equally and in response, there was also a widespread opinion within PNG and Australia that the territories should stay under Australian control for the longer term. In the 1950s and 1960s, policy was formed within the context of these tensions between staying and going. While that discussion unfolded, the administration of PNG, and the extension of its political and legal systems remained predicated on Australian practices, even if applying them to the very different cultures and geography of PNG strained the capacities of the bureaucracies and the very concepts on which those

[1] "Topography of New Guinea" Source: At least one of the following Public Domain data sources ETOPO1, CC BY-SA 4.0, https://commons.wikimedia.org/w/index.php?curid=47308148

systems were founded. This chapter will sketch the dimensions of Australian practices as they shaped the contexts for the cases examined in this thesis.

**An Underdeveloped Colony**

A pattern of protection for Nuiginians and limited economic development in Papua for both expatriates and Nuiginians was systematised from 1906 to 1942 under the direction of the long-serving Lieutenant-Governor, Hubert Murray. Papua was governed under what became known as 'the Murray System'. New Guinea had been subject to a more commercially-oriented regime prior to the Second World War, first as a German colony and then under an Australian Mandate through the aegis of the League of Nations. The differences between the levels of advancement in each territory should not, however, be over-stated: both were among the more rudimentary of the colonial systems that were suddenly brought under intense pressure, and scrutiny, with the coming of war.

Many people who supported what I have termed an old colonial ideology of law drew on the Murray system as their guide. After the war, B4 ('before', as they were colloquially known) officials from Papua also administered New Guinea as a part of their responsibilities across all of PNG. As such, the Murray system was used by many officials as a reference point in mapping out future possibilities and for assessing the value of policy in the 1950s and 1960s, including questions raised in their commentary on clemency cases.

While Murray, on his appointment as Lieutenant-Governor in 1906, was interested in the development of mining, the exploitation of oil reserves and the prospects for agriculture, his priority remained social stability for Nuiginians. Over time this emphasis rested, in particular, on the continuation of village and family social structures, both as a way of minimising the disruption to populations only slowly brought into "contact", and of managing those populations within the constraints of tiny budgets from the Commonwealth and low levels of commercial investment.[2] Labour contracts were limited in scope and extent and only leasehold title on land was allowed to Western settlers to prevent speculation, all of which was designed to keep Nuiginians enmeshed in traditional socio-economic obligations and support systems. Francis West argued that Murray's system in part was aimed at preventing a landless proletariat, with the associated social disruption and degradation of urban poverty, and West maintained that Murray preferred subsistence agriculturalists to landless unemployed in the towns and on the margins of plantations or mines.[3] Though hoping to encourage some cash cropping in commodities that would not disrupt the social order, copra for example, Murray's regulations extended from labour controls to a comprehensive

[2] Clive Moore, *New Guinea; Crossing Boundaries and History*, University of Hawaii Press, Honolulu, 2003, pp. 185-6.
[3] Francis West, *Hubert Murray; The Australian Pro-Consul*, OUP, Melbourne, 1968, pp. 122-127, 129.

strategy to attempt to maintain and preserve Papuan culture including regulations banning Nuiginians drinking alcohol, watching fictional cinema and wearing shirts. Papuans also had to follow curfews and restrict themselves to certain parts of the towns.[4] That segregation of space and culture maintained a social gulf between the expatriate and the indigenous communities in the scattering of small towns established by expatriates, such as Port Moresby, despite the use of Nuiginian commercial and domestic labour by expatriates.[5] Murray justified such distinctions as helping Nuiginians become "better brown men" and not some sort of cultural hybrid, which he presumed to be implicitly inferior.[6] Under Murray, Papuans were subject to what seemed to him and his disciples to be protection from an unkind world.[7] Along with Australia's tariff barriers to produce from Papua and New Guinea (NG), the government's resistance to cheap plantation labour meant there was little outside economic investment interest in the colony and markets for its produce.[8] An economic climate of low investment and low returns, and low interracial engagement, provided few resources and little incentive to expand direct control.[9]

Another reason for the limited extent of development in Papua by 1954 were the difficulties of establishing a legal regime that would support commerce and personal security on an island with extreme cultural and legal diversity. Australians understood Papua and New Guinea to possess few constant, hierarchical, judicial or legal structures capable of being adapted to protecting and regulating business interests on the part of, or on behalf of, the indigenous population. Neither, it was thought, could the many and varied local dispute resolution systems provide personal security. There were certainly no such system that were consistent across the complicated cultural and political patchwork of the territory. These assumptions led to a heavy recourse to Australian law as the

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[4] Edward P. Wolfers, *Race Relations and Colonial Rule in Papua New Guinea,* Australia and New Zealand Book Company, Brookvale*, 1975*, p. 31,36; Moore, *New Guinea*, pp. 185-6.
[5] Wolfers, *Race Relations*, p. 122; Frank Clune, *Prowling Through Papua with Frank Clune*, Angus and Robertson, Sydney, 1948, p. 236, 13-14; Rachel Cleland, *Pathways to Independence; Story of Official and Family Life in Papua and New Guinea from 1951-1975*, Singapore National Printer Ltd, Cottesloe, 1985, pp. 32-33; Owen Genty, *The Planter*, Geebar Enterprises, Wellington, 2006, p. 111. In 1924 Port Moresby had a population of about 400 expatriates and 3000 Nuiginians. Ralph Gore, *Justice versus Sorcery*, Jacaranda Press, Brisbane 1964, pp. 2-3. In 1960 Port Moresby had a population of about 4000 expatriates, 500 mixed race people and between 10,000 and 12,000 Nuiginians, some of whom came and went with seasonal labour: Brian Essai, *Papua and New Guinea; A Contemporary Survey*, OUP, Melbourne, 1961, pp. 84-85.
[6] Hubert Murray, cited in West, *Hubert Murray*, p. 274.
[7] Nelson, "The View from the Sub-district", p. 34-5, in Brij V. Lal, *The Defining Years; Pacific Islands, 1945-65.* Division of Pacific and Asian History, RSPAS, ANU, 2005. Hank Nelson, *Taim Bilong Masta; The Australian Involvement with Papua New Guinea,* ABC, Sydney, 1982, p. 210. C.D. Rowley, *The New Guinea Villager; The Impact of Colonial Rule on Primitive Society and Economy*, Pall Mall Press, London, 1966, pp. 5-6. Edward Wolfers, *Race Relations and Colonial Rule in Papua and New Guinea,* pp. 35-36. Moore, *New Guinea*, pp. 185.
[80] Rowley, *The New Guinea Villager,* pp. 12-13.
[9] West, *Hubert Murray*, pp.140-141, 145-7; Nelson, *Papua New Guinea*, pp. 22-23.

necessary, uniform code to which Nuiginians had to adhere.[10] Therefore, establishing an Australian legal and administrative regime was a long-term project under Hubert Murray that he saw as a necessary prelude to real economic development.[11] Again, a small budget allowed that only parts of the territories were effectively covered by this law prior to 1942.[12] (See figure 1-2). The goal of gradually establishing an overarching system of law and governance was at the heart of the Old Colonial legal ideology whose practitioners in 1954 saw themselves as training the Nuiginian people in a system alien to them and which they would only gradually come to understand over time. Aspiring to an eventual incorporation of the population into Australian law, there was also a recognition that prevailing circumstances required ad hoc adaptation by Australian officials, which took account of what they perceived to be the understanding and needs of local people, and the imperative of maintaining Australian control and authority.

While Australia had acquired Papua in 1906 from the United Kingdom as a colonial territory, Australian forces had seized German New Guinea during the First World War. At the completion of the war, and after intense lobbying by Australian Prime Minister Billy Hughes at the Versailles Treaty Conference, Australia gained the League of Nations mandate over New Guinea, but as a Class C mandate.[13] This classification followed the judgement that the given territory was largely undeveloped economically, culturally, and politically, and was "best administered under the laws of the mandatory as integral portions of its territory".[14] This did not mean annexation, as a mandate did not grant sovereign rights, but in practice the League had little control over the actions of mandatory powers.[15] That mandate was predicated upon the principle of eventual independence, "tutelage" being expected until territories were "able to stand by themselves under the strenuous conditions of the modern world" – a test more explicit than the indefinite possession of Australia's colony of Papua, but still far from a specific timetable.[16] As noted, German NG had seen traders and business people more aggressively practicing plantation agriculture by seizing land from local people. Recognising the benefits of these practices, in the inter-war years the Australian administration had

[10] John Dademo Waiko, *A Short History of Papua New Guinea*, *Second Edition*, OUP, Melbourne, 2012, p. 30; John Greenwell, *The Introduction of Western Law into Papua New Guinea,* unpublished manuscript, given to the author by John Greenwell, former First Assistant Secretary and Director of Papua New Guinea Office Government and Legal Affairs Division, Department of External Territories. 1970-1975L p. 2.
[11] H.N. Nelson, "Murray, Sir John Hubert Plunkett (1861–1940)", *Australian Dictionary of Biography Online*, http://adb.anu.edu.au/biography/murray-sir-john-hubert-plunkett-7711; "Australia in Papua", *Papuan Courier*, Port Moresby, Friday 5 Mar 1920, p. 2.
[12] Moore, *New Guinea,* pp. 184-5.
[13] Anuerin Hughes, *Billy Hughes: Prime Minister and the Controversial Founding Father of the Australian Labor Party*, John Wiley & Sons, Milton, Qld, 2005.
[14] Article 22, *The Treaty of Versailles*, The Avalon Project; Documents in Law, History and Diplomacy, Yale University, http://avalon.law.yale.edu/imt/parti.asp
[15] W.J. Hudson, *Australia and the Colonial Question at the United Nations*, East-West Centre Press, Honolulu, 1970, pp. 12-13.
[16] "Article 22", *The Treaty of Versailles*, http://avalon.law.yale.edu/imt/parti.asp

allowed looser labour and land regulation than in Papua.[17] Equally significant, as Nelson showed, western law was enforced more violently in NG than in Papua, given the commercial interests at stake, and less preparedness to be forgiving of Nuiginian resistance and violence, and more determined to maintain authority.[18]

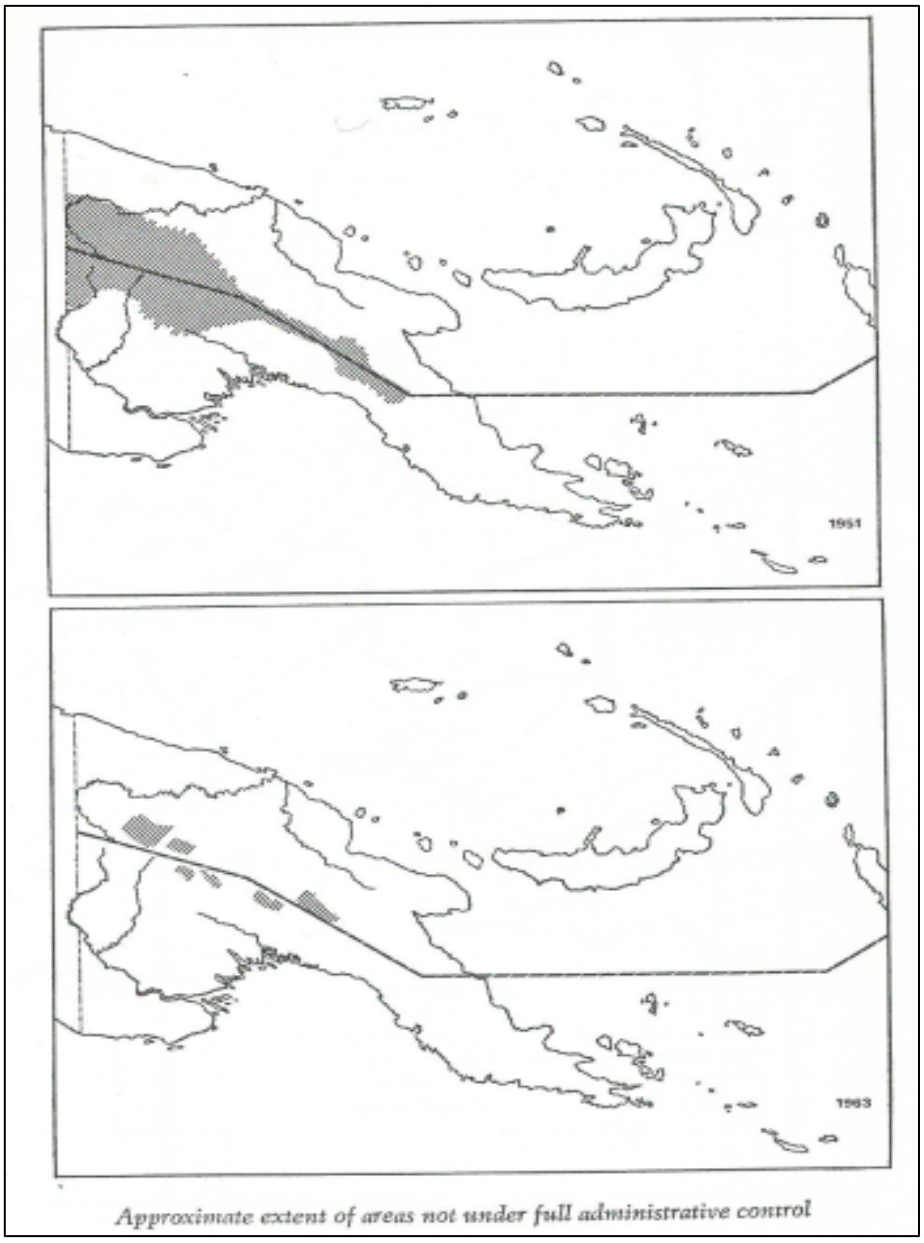


Figure 1-2 "Approximate extent of areas not under full administration Control 1951 and 1963" [19]

[17] Moore, *New Guinea,* p. 186.
[18] Hank Nelson, "The Swinging Index; Capital Punishment and British and Australian Administration in Papua and New Guinea, 1888-1945", *The Journal of Pacific History*, vol. 13, no. 3, 1978, pp. 130-152, p. 152.
[19] Hasluck, *A Time for Building*, p. 427.

The two territories were separately administered until 1942, during which time New Guinea also adopted the Queensland Criminal Code amongst other regulations and laws also in use in Papua to replace German law. Yet there were variations from Papua in areas such as labour ordinances, with labour recruiters not being restricted on the time period and value of contracts as they were in Papua under Murray's regulations.[20] Commercial interests lobbied hard to prevent the administrative amalgamation of the territories in the 1920s, as they rejected those aspects of Murray's regime that inhibited business.[21] It nevertheless remained the case that beyond relatively small areas of development, much of New Guinea remained under traditional systems, and little visited by Westerners, even in those areas more formally patrolled by Australian officials.[22] Yet many Nuiginians travelled widely through the war as conscripts and labour, so knowledge among Nuiginians of Australian governance, PNG and the world was greater after the war.[23]

In those areas remaining outside Australian control, social and economic activities remained regulated by customs and consensus-based systems which varied across the island. In the event of a disruption of communal harmony, or a violation of a community member's property or honour, discussion among families determined workable solutions to return the community to peace. Anthropologist Richard Scaglion argued that, in the case of the Abelam people of Papua, consensus building by prominent people produced a balance between competing forces.[24] If consensus could not be reached then vendetta or violence might result. In practice, this threat of violence, of loss of property, and social pressure, produced obedience to custom and communal consensus.[25]

In 1954, this diverse range of custom and practice within the more than 800 language groups in PNG still posed challenges for policies aimed at uniform development, and even for policy makers, police and the courts it was difficult to account for cultural obligations that might lead a Nuiginian to violate Australian law. As a result, PNG customs had limited recognition by Australians, except in a framework of judicial discretion to encompass diverse systems of property tenure and domestic

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[20] Criminal Code (Queensland, adopted), *Laws of the Territory of New Guinea 1921-1945* (Annotated), http://www.paclii.org/pg/legis/newguinea_annotated/toc-C.html See also Criminal Code Amendment Ordinance 1923-1939, *Laws of the Territory of New Guinea 1921-1945* (Annotated), http://www.paclii.org/pg/legis/newguinea_annotated/toc-C.html . See for example, Natives' Contracts Protection Ordinance 1921-1936, *Laws of the Territory of New Guinea 1921-1945 (Annotated)* *http://www.paclii.org/pg/legis/newguinea_annotated/ncpo19211936386/*

[21] Clune, *Prowling Through Papua,* p. 231; Ian Downs, *The Australian Trusteeship, Papua and New Guinea, 1945-75*, Australian Government Publishing Service, Canberra, 1980, p. 5; Nelson, *Papua New Guinea*, pp. 22-23.

[22] Greenwell, *The Introduction of Western Law*, p. 20l; Nelson, 'The Swinging Index", pp. 136-139.

[23] Waiko, *A Short History of Papua New Guinea*, Ch. 5.

[24] Richard Scaglion, "Kiaps as Kings; Abelam Legal Change in Historical Perspective", in, D. Gewertz and E. L. Schieffelin (eds*.) Customary Law in Papua New Guinea; A Melanesian View, History and Ethnohistory in Papua New Guinea:* Oceania Press, Sydney, 1985, p. 78.

[25] Greenwell, *The Introduction of Western Law,* pp. 3-4.

arrangements.[26] Ultimately, customary law could be overruled by Australian decision-makers using Australian policing, courts, principles and codes as seemed appropriate to them. Mediating between these systems, including the decisions of superior courts in Australia, were the examinations and judgements made by PNG Department of Native Affairs officials, such as patrol officers.[27]

Particularly in the absence of economic interests or political devolution, law was the primary means of colonial control and acculturation. Rick Sarre and Heather Douglas writing with Mark Finnane, have argued that colonists theorised that the subordination of colonial subjects to Australian law would eventually Westernise them.[28] Hoping to extend the reach of acculturation, Australian authorities continued the policy of the first British Lieutenant-Governor Dr William McGregor, in developing the Royal Papuan Constabulary — a police force staffed by Nuiginians, tasked with imposing order on the limited range of areas under Australian control from 1896 and throughout the colonial period.[29] These constables, who embodied the acculturation of Nuiginians to Australian ways, also saw themselves as agents of change in the people around them.[30] Australian officials, who superintended assigned districts and sub-districts, directed the work of constables. The areas under such formal and actual control from 195 to 1963 are shown in figure 1-2. This control was devolved down through District Officers (DO) within the Native Affairs Department who then directed Patrol Officers (PO) and Assistant Patrol Officers (APO), or Police Masters, in their work. In the more remote locations the DOs, POs, and APOs also acted as magistrates, lawyers, health officials, economic advisors, and generally as promoters of Westernisation. With their direct contact with the people, they also wrote the reports about the progress of the Administration in the regions, further formulating and monitoring policy.[31] This direct contact had been designed, as Murray hoped, to build confidence and gradually introduce Nuiginians to Australian law and systems. Under post-war pressures of development, such chains of control could also expose gaps in accountability and the capacity for eventual autonomy and independence.

In addition to constabulary, the Native Affairs Department appointed respected locals as 'headmen', called luluai, with deputies called tul-tul, to act as liaisons and advocates for colonial policy and law.[32] That structure had some success in extending Australian influence and control over

[26] Greenwell, *The Introduction of Western Law*, pp. 19-21.
[27] Greenwell, *The Introduction of Western Law,* pp. 19-21.
[28] Rick Sarre, "Sentencing in Customary or Tribal Settings: An Australian Perspective", *Federal Sentencing Reporter*, vol. 13, no. 2, 2000, pp. 74-78. Heather Douglas and Mark Finnane, *Indigenous Crime and Settler Law; White Sovereignty and Empire*, Palgrave Macmillan, Basingstoke 2012, pp.5, 8
[29] Essai, *Papua and New Guinea*, p. 6-7.
[30] August Ibrum Kituai, *My Gun, My Brother; The World of the Papua New Guinea Colonial Police, 1920-1960, Pacific Island Monograph* Series, University of Hawaii Press, Honolulu, 1998, p. 129.
[31] For extended descriptions of kiap duties, see: Kituai, *My Gun, My Brother*, Ch. 1. Nelson, *Taim Bilong Masta*, Ch. 21.
[32] Waiko, *A Short History of Papua New Guinea*, pp. 42-3,106.

Nuiginians, encouraging some compliance with regulating village hygiene and law and order. Even here, however, there were complexities regarding the directions of influence and control. According to Kenneth Read, an anthropologist who taught recruits to the PNG Administration at the Australian School of Pacific Administration (ASOPA), Nuiginian villagers expected luluais to prevent problems coming to the attention of authorities whose response would be to impose Western law.[33] The most influential Nuiginians in villages, PNG historian August Ibrum Kituai argues, were the constables who had more effective power over locals than luluais, especially as their salary gave them relative wealth, and their position more coercive power. And as constables were from many different regions across PNG, being rarely posted in their home area, they were less entangled in local obligations and so could bring legal sanctions against people, or not, with fewer social consequences.[34] Yet the constables were also an itinerant presence in smaller hamlets, far from patrol stations. Under these circumstances, traditional systems continued to deal with most issues of social order within communities. Only the most intractable situations, such as intergroup murders, came to the attention of Australian officials for much of the colonial period.[35] Indeed until the Second World War, much of PNG remained beyond the precise, constant control of the Australian administration.[36] The more successful apparatus of Australian colonialism, policing and law still had a limited impact on development.

**The World Order after the Second World War and the Administration of PNG**

From 1942 to 1945, PNG was a Second World War battlefield and vital to Australia's defence. The Japanese attacks on Australian territory proved the geopolitical value of holding PNG to protect the Australian mainland from the north. The war also changed Australian notions of its role in PNG.[37] During that emergency, for the first time, the territories were administered as one through the Australian New Guinea Administrative Unit (ANGAU). Military personnel took over civil functions that could be continued during the war, such as health and policing. The war saw massive destruction, yet after 1942 the USA provided large investments in infrastructure, as well as some disbursement of consumer goods to Nuiginians to cultivate their support in the conflict.[38] Waiko

[33] Kenneth Read, "Native Attitudes to European law", Papers Relating to teaching ASOPA course: the ASOPA Lectures Folio One c. 1950s, ANU Archives, ANUA444, Box 1, Folder 7 pp. 1-4.
[34] Kituai, *My Gun, My Brother,* p. 19.
[35] J.V. Barry et.al. *An Introduction to the Criminal Law in Australia,* Macmillian and Co, London, 1948, p. 16; and Greenwell, *The Introduction of Western Law into Papua New Guinea, p. 19.*
[36] Bill Gammage, *The Sky Travellers: Journeys in New Guinea 1938-1939*, Melbourne University Press, Carlton, 1998, p. 6.
[37] Moore, *New Guinea,* p. 193.
[38] Donald Denoon, Donald, Mein-Smith, Philippa with Wyndham, Marivic, *A Blackwell History of the World; A History of Australia, New Zealand and the Pacific,* Blackwell, Oxford, 2000, pp. 323, 329.

argues that the war and US investment gave Nuiginians and Australians a sense of the possibilities of greater engagement in the colonies.[39]

After returning to civilian administration in 1946, the administrative union of the two territories continued, although the foundation of the United Nations with its Trusteeship Council changed the regulations under which Australia held the territories. New Guinea was converted from a League of Nations Mandate into a United Nation's Trust Territory. Similar to the mandate, trusteeship presupposed a pathway to independence for New Guinea, though the terms of that pathway were subject to more stringent review by the United Nations Trusteeship Council (UNTC), a much more powerful and influential body than the League institution. After the war, with the Cold War, and with former colonies taking up places in the UNTC, the Eastern Bloc and newly independent states moved against the retention of colonial possessions by Western powers.[40] Charles Rowley argued in his analysis of Australian colonialism that:

> The 'colonial' nature of Australia's relationship with the Territory of Papua and New Guinea increasingly complicates her foreign policy... on the assumption that this kind of relationship involves restraints on 'freedom', and the denial of basic human rights.[41]

The Eastern Bloc and Non-aligned nations, particularly India, criticized Australian policy in PNG regularly through the discussions of the UNTC and through public commentary on Australian administrative decisions.[42]

As such Australia experienced more scrutiny of its actions than under the Mandate, and amid the suspicion that Australia would annex rather than free PNG dominated the dynamic of Australia' relationship with the Trusteeship Council. Anti-colonial members of the Trusteeship Council were suspicious enough of Australian policy goals to oppose, if unsuccessfully, the ongoing administrative union of the two territories. Australia used the support of its Western allies in the UNTC to succeed in opposing that measure. The Commonwealth gained permission from the United Nations to formally unify the administration of both territories, resulting in the *Papua and New Guinea Act,*

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[39] Waiko, *A Short History of Papua New Guinea*, pp. 91-2.
[40] Christopher Waters, "The Last of Australian Imperial Dreams for the Southwest Pacific: Paul Hasluck, the Department of Territories and a Greater Melanesia in 1960", *Journal of Pacific History*, vol. 51, no. 2, 2016, pp. 169-185.
[41] Rowley, *The New Guinea Villager*, p. 1.
[42] New York papers carried news of the PNG capital case discussed in Chapter One of this thesis e.g. "19 Get Death in New Guinea**"** *New York Times,* 18 Aug 1954, p. 6. See reflections on world debate on West Papua reflecting on PNG as well- Hasluck, *A Time for Building*, pp. 366-368 and 397. Specific instances of punishment were agenda items at UN Trusteeship Council meetings, for example- *Petition to United Nations from Kilsyth Communist Party and Others, Re: sentence of Death Passed on PNG Natives*, Department of Territories, NAA: A452, 1961/4256, 3500477. Regular reports to the trusteeship Council cited capital punishment figures, for example, Hugh Foot et al, *Report of the United Nations Visiting Mission to the Trust Territories of Nauru and New Guinea, 1962: Report on New Guinea*, United Nations Trusteeship Council, New York, 1962. "Member Refutes U.N. Statement", *South Pacific Post,* 19 May 1954, p. 3. "Minister Hits Back at Indian Critics", *South Pacific Post,* 7 July 1954, p. 3.

*1949 (Comm.)*.[43] In administering New Guinea and Papua together, Australia proposed that both territories would progress to independence as one nation at some point in the future.[44] Nevertheless, Australia faced the moral and political problem of holding PNG despite disapproval from other nations who spoke out in United Nations forums.

While anticolonial critics were unsure of Australian plans for PNG, it is also true that such plans remained unclear to most Australians and Nuiginians. Different groups in PNG and Australia had different medium and long-term visions for PNG. Whether administrative unification signalled movement towards self-determination in the near term, annexation by Australia as a state, or an extended period of domination by Australia under the existing terms, was cause of debate.[45] There were expatriates and Australians that coveted PNG for its potential wealth and others that felt Nuiginians were better off governed by Australia for their own protection from the world. Further, Australian officials often argued, according to Nelson, that many Nuiginians testified to the UNTC visiting missions in the 1950s and early 1960s that they preferred Australia to remain.[46]

Indeed, officials assumed that the international audience and the Trusteeship Council were hostile to Australian colonialism and consequently presumed they had to assuage a critical audience when they made significant decisions such as clemency and execution. The formal oversight of the United Nations Trusteeship Council rendered policy decisions in NG, and to a lesser extent Papua, such as execution or mercy, visible to the world community and in particular to anti-colonial critics. Such oversight meant that the Council sent triennial delegations to review progress in trust territories such as NG.[47] Consequently, Australia was anxious about how policy decisions would reflect on Australia's administration in the reports of these delegations. Further, newspaper articles in the *South Pacific Post (SPP)*, Port Moresby's and PNG's only newspaper after the war, maintained attention on the possibility of international scrutiny by providing regular articles about overseas commentary and the attitudes of UN officials.[48] This concern reached into administrative practice as in 1949,

[43] J.K. Murray, "The Provisional Administration of the Territory of Papua New Guinea; Its policy and problems", Lecture, University of Queensland, Brisbane, 1949 in Peter Smith, *Education and Colonial Contort in Papua New Guinea; A Documentary History*, Longman Cheshire, Melbourne, 1987, p. 161.
[44] "Ordinances- Papua New Guinea: Criminal Code Amendment (Papua) Ordinance, National Archives of Australia, A518-A846/6/145-327691 and A518- A846/6/45 Part 1- 3272356; and "Ordinances PNG Amalgamation of the laws of Papua and New Guinea- The Criminal Code", National Archives of Australia, A518- A846/6/21.
[45] "Mau Mau Talk 'Mischievous'", *Sydney Morning Herald,* 7 Oct 1953, p. 5; Hudson, *Australia and the Colonial Question at the United Nations*, pp. 28-30, 147, 151-153; Waters, "The Last of the Australian Imperial Dreams for the Southwest Pacific".
[46] Nelson, *Taim Bilong Masta*, p, 211.
[47] The Parliament of the Commonwealth of Australia, *Report to the General Assembly of the United Nations on the Administration of the Territory of New Guinea*, Department of Territories, Canberra, Commonwealth Govt. Printer, 1949-1970; On the reception of such delegations see discussion in Downs *Australian Trusteeship*, Ch. 7.
[48] For example: "Member Refutes U.N. Statement", *South Pacific Post,* 19 May 1954, p. 3. "Minister Hits Back at Indian Critics", *South Pacific Post,* 7 July 1954*,* p. 3.

when Jack Murray gave an official direction to current and future PNG officials to be cautious of the UN's reception of policy in PNG.[49]

Hasluck shared the Territory's cautious attitude to the United Nations and its scrutiny when forming policy.[50] Before becoming a politician, the Western Australian had been one of the diplomats working for the Australian Minister for External Affairs Dr. Evatt when the UN was first established and who spoke for Australia on the Security Council. Carl Bridge shows that Hasluck knew a great deal about United Nations institutions, both their weaknesses and possibilities.[51] As such, he had strategies for maintaining a positive image of Australian colonialism in New York. For example, he encouraged public diplomacy to depict Australian colonialism in a positive light, such as education films, exhibitions and information booklets.[52] Despite his concerns about the UN, he used the authority of the UN to justify his policy choices to administration officials, such as citing UN Charter provisions as a basis for policy development in education.[53] He saw the UN as an obstacle that had to be appeased when necessary to achieve Australia's geopolitical and moral aims, but also as a tool to pressure opposition to new policy within PNG. And indeed the use of that pressure was sometimes noted and resented by the expatriate community.[54] This thesis will outline through its case studies the situation in which both the perception of international audiences and their actual scrutiny became significant to the outcomes of clemency deliberations. I will argue, particularly in chapters two, three, four and seven, that the pressure of international expectations affected Australian officials in determining clemency.

While the UNTC had imposed a duty on Australia, the Second World War had also caused a sense of obligation to the PNG, and particularly to the auxiliaries who had supported Australian troops, the Nuiginian men Australian wartime reporting termed the 'fuzzy-wuzzy angels'. [55] This sense of duty played itself out in many policy areas, including clemency and capital punishment. This new focus

[49] J.K. Murray, "The Provisional Administration of the Territory of Papua New Guinea; Its policy and problems", Lecture, University of Queensland, Brisbane, 1949 in Smith, *Education and Colonial Policy in Papua and New Guinea*, pp. 160-61.
[50] Hasluck, *A Time for Building*, p. 5.
[51] Carl Bridge, "Diplomat", in Tom Stannage, Kay Saunders and Richard Nile (eds.), *Paul Hasluck in Australian History: Civic Personality and Public Life,* University of Queensland Press, St. Lucia, 1999.
[52] Jane Landman, "Visualising the subject of development; 1950s Government Film Making in the Territories of Papua and New Guinea", *The Journal of Pacific History*, vol. 45, no. 1, 2010, pp. 71-88. See also an example of public diplomacy in *Territory of Papua and New Guinea: An information Folder prepared by the Department of Territories,* Australian Federal Department of Territories, July, 1961, National Library of Australia, Nq995.3040222T326. For a discussion of such diplomacy, see Brown, *Governing Prosperity,* p. 54.
[53] Hasluck, *A Time for Building,* pp. 5, 94.
[54] See for example, "Less Bureaucracy and More Development; Fighting Speech Before Rabaul Chamber of Commerce", *Pacific Islands Monthly*, vol. 24, no. 10, 1954, pp. 85-6.
[55] Scott MacWilliam, "Papua New Guinea in the 1940s: Empire and Legend" in David Lowe (ed.) *Australia and the End of Empires; The Impact of Decolonisation in Australia's Near North, 1945-65*, Deakin University Press, Geelong, 1996, pp. 32-70; Rowley, *The New Guinea Villager;* Hudson, *Australia and the Colonial Question at the United Nations*.

was evident in a highly influential Commonwealth report of 1944 on PNG's future by General Sir Thomas Blamey. Blamey argued that while PNG was vital to the defence of Australia:

> It may be that we are confronted with one of those rare moments in history when morality coincides with expediency.[56]

Blamey proposed that Australia could use PNG for its defence, as a barrier to the north, while also helping its people to advance. The wisdom of Blamey's strategy of a northern bulwark in PNG, combined with assistance to the people, was again proved with the expansion of Communism in Asia, and the Malaya Emergency. South East Asia became "the primary focus of Australian strategic thinking."[57] The reformation of the Pacific Islands Regiment in 1951, which recruited from Nuiginian communities and was led by Australian officers, was indicative of the significance of PNG to Australian strategic thinking.[58] In 1946, the Labor government concurred with Blamey's assessment. Responding to this report, the then Minister for External Affairs, Eddie Ward, spoke of his dissatisfaction with previous colonialism:

> The government is not satisfied that sufficient interest has been taken in the territories prior to the Japanese invasion, or that adequate funds had been provided for their development and the advancement of the native inhabitants.[59]

His policy promised a focus on significant investment on the well-being of Nuiginians as defined in the Trusteeship Council provisions: "to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories".[60] Labor increased the funding for the territory to address the UNTC's requirement for "advancement", using Australian institutions as the means of that development, while still ensuring control.[61] For example, after the end of war, Labor abolished indentured labour and introduced a legal framework in which Nuiginians might negotiate their work conditions. But as Michael Hess suggests, these measures also sought to limit the growth of a collective labour movement that might have challenged colonial authority.[62] Also, changes to the titles of those in charge reflected a change in vision: Colonel Jack Murray arrived in Port Moresby as the first Administrator of the territory, not its Lieutenant-Governor, as the new designation signalled supervision rather than ownership.[63] Advancement policies were also aimed at producing a bulwark

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[56] Thomas Blamey cited in Scott MacWilliam, "Papua New Guinea in the 1940s: Empire and Legend", p. 33.
[57] Tristan Moss, *Guarding the Periphery: the Australian Army in Papua New Guinea, 1951-75*, CUP, Cambridge, 2017, p. 23.
[58] Moss, *Guarding the Periphery*, p. 23.
[59] Eddie Ward, cited in Downs, *Australian Trusteeship*, pp. 13-14.
[60] *Charter of the United Nations*, Chapter 12, Article 76b., http://www.un.org/en/sections/un-charter/chapter-xii/index.html
[61] Downs, *Australian Trusteeship*, p 14.
[62] Michael Hess, "In the Long Run...' Australian Colonial Labour Policy in the Territory of Papua and New Guinea", *Journal of Industrial Relations*, March 1983, pp. 51-67, p. 58. Allan M Healy, "Monocultural administration in a multicultural environment: the Australians in Papua New Guinea", in J.J. Eddy and J.R. Nethercote, *From Colony to Coloniser: Studies in Australian Administrative History*, Hale and Iremonger, Sydney 1987, p. 222-3.
[63] Essai, *Papua and New Guinea,* p. 57.

to the north and to justify its strategic possession of PNG. [64] Policy makers' statements waxed lyrical on the benefits of Australian occupation including promising to greatly increase the budget for development in PNG.[65]

Having been cast as a great battle for freedom and against imperialist aggression, the Second World War left the Western, democratic, colonial powers morally compromised by the contrast between their own values of self-determination, and their colonial control of subject people. Cooper and Stoler, and Wiener, argue that the climate of suspicion against conventional justifications for colonialism was such that even major colonial powers, such as Britain and France, felt intense pressure to translate their imperial practice into developmental policies, rather than merely enriching themselves.[66] That contrast was a substantial problem for Australia colonial officials well into the 1970s, including in debates in the Trusteeship Council meetings and the UN General Assembly debates.[67]

In short, with its colonialism on display to the world, Australia had to be a benign influence rather than exploitative presence in PNG. If Australia wished to have a strategic presence in PNG, it also needed to have UN approval of its plans for development, advancement and autonomy. In addition, due to the legacy of the Second World War Australians were motivated by gratitude to do more for PNG than just pursue strategic necessity.[68] That obvious tension between benevolence and expediency also played out in the actions of officials responsible for making discretionary decisions in capital cases. They were aware of the geo-political concerns as they discussed the possible impact of clemency or execution on advancement, law and order, and perceptions of Australian colonialism.

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[64] Downs, *Australian Trusteeship*, p. xviii; Essai, *Papua and New Guinea*, p. 57; Waters, "The Last of Australian Imperial Dreams", p. 171. See also Hudson, *Australia and the Colonial Question*, p. 174; Sally Percival Wood, "Chou gags critics in Bandoeng' or How the media Framed Premier Zhou Enlai at the Bandung Conference, 1955", *Modern Asian Studies*, vol. 44, no. 5, 2010, pp. 225–252. See also: David Lee, *Search for Security; The Political Economy of Australia's Post-war Foreign and Defence Policy*, Allen & Unwin, St Leonards, 1995, pp. 130-31; David McLean, "Australia in the Cold War: A Historiographical Review", *International History Review*, vol. 23, no. 2, 2001, p. 299-321; Stuart Doran, "Toeing the Line: Australia's Abandonment of 'Traditional' West New Guinea Policy", *The Journal of Pacific History*, vol. 36, no. 1, 2001, pp. 5-18; T.B. Millar, *Australia in Peace and War; External Relations since 1788* Australian National University Press, Botany, N.S.W, 1991; David Goldsworthy, *Losing the Blanket: Australia and the End of Britain's Empire,* Melbourne University Press, Carlton South, 2002*,* p. 51; E. W. Tipping "Australians in the Near North", in Robert J. Gilmore and Denis Warner (eds.) *Near North,* Angus and Robertson, Sydney, 1948, p. 1; David Lowe, *Menzies and the "Great World Struggle"; Australia's Cold War 1948-1954,* UNSW Press, Sydney, 1999, p. 54.

[65] Downs, *Australian Trusteeship*, p. 13.

[66] Frederick Cooper and Ann L. Stoler, "Introduction: Tensions of Empire: Colonial Control and Visions of Rule" *American Ethnologist*, vol. 16, no. 4, 1989, pp. 609-621, p. 616. And Martin Wiener, *Empire on Trial*; *Race, Murder, and Justice under British Rule, 1870-1935*, Cambridge University Press, New York, 2009, pp. 231-233.

[67] Hudson, *Australia and the Colonial Question at the United Nations*, e.g. p. 151.

[68] Hank Nelson, "From Kanaka to Fuzzy Wuzzy Angel", *Labour History,* No. 35, 1978, pp. 172-188.

**Bipartisanship for Advancement Policies in the 1950s and Early 1960s**

The change from a Labor to a Liberal-Country Party coalition government in 1949 saw new Prime Minister, R.G. Menzies, support the policy of increased investment of funds and manpower in PNG to fulfil Australia's international obligations and sense of duty. A bipartisan approach prevailed on most policy issues until the 1960s, although, according to Ian Downs, a former PNG official, PNG farmer, PNG politician, and historian of the trusteeship, the new Liberal-Country party government wanted more private enterprise than Labor had planned.[69] In reality, with money to spend, the first and new Minister for Territories, Paul Hasluck, could do more for economic development in the early 1950s than had been done before the war. Hasluck also recalled in his 1976 memoir of his work in PNG, *A Time for Building*, that his intention on assuming the portfolio was to encourage business, with the proviso that Nuiginians had to be heavily involved in any enterprises. His policy was that any economic development had to start with improving food production in subsistence farms to produce a surplus that would allow a transition to a cash economy. Also, similar to the Murray System, he intended that any policy would not lead to "harsh disruption of the indigenous social organisation and any sudden breakdown of social cohesion and discipline".[70] Yet, Hasluck could be more ambitious than Murray due to his much larger budget and staff. Indeed, signalling their intention to be consistent with Labor in investment and effort in PNG, Menzies separated the Department of Territories from External Affairs, to allow more focus on PNG by the Minister of Territories.

Hasluck, in 1951 spoke of a new kind of relationship between PNG and Australia that was not colonial, but "an attempt at cooperation and mutual service between two peoples" of a type never seen before, governance that was a product of Australia's gratitude.[71] However, to place Hasluck's sentiments and plans in a wider context of the history of colonialism, Peter Fitzpatrick argues that Hasluck's claims of a 'new relationship' needs to be taken with caution, as colonialists had adopted such benevolent postures before, but had not fulfilled those promises:

> As for ideology, Australia as a colonist claimed a particular humanitarian virtue. As a colonial power, Australia was, of course, far from unique in a belief in its superior benevolence. Indeed, the exploitative relations of any colonialism was so manifestly at odds with the egalitarian nature of Australia's self-image, that they appear to have to deny that they were colonists at all.[72]

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[69] Downs, *The Australian Trusteeship*, p. 71.
[70] Hasluck, *A Time for Building*, pp.128-9.
[71] Brown, *Governing Prosperity,* p. 74.
[72] Peter Fitzpatrick *Law and State in Papua New Guinea Law and State in Papua New Guinea*, Academic Press, London, 1980, p. 68.

Nevertheless Hasluck's language was consistent with Blamey and Ward's, and H. Murray's: that self-interest and altruism could coincide in Australian colonial practice.[73] The capital case review files provide an opportunity to examine those opposing contentions at work in a significant area of policy and show attempts to bring together those two priorities in decision making. While Fitzpatrick is right to suggest Australians did not see themselves as colonialist, there were significant attempts at policies for the betterment of the people that came at significant expense to Australia. Yet, the process of advancement had mixed success and was constrained by sometimes ill-informed policy making and the implementation of reformist policy being marred by deeply-ingrained, racist paternalism.

Hasluck wrote that his policies were based on his appraisal of the capacity of the Nuiginians for advancement, in particular, Nuginians' capacity to sustain a democratic nation state. The Minister's judgement is vital in understanding this period, as he held tremendous discretionary power and wrote that: "for in a country of two million people I was virtually the Premier and the whole of a state Cabinet."[74] He pictured advancement as: "taking a share in their government…over a number of generations".[75] Hasluck was to be Minister of Territories for ten years and his plans and policy had an enormous impact on the territories, so his intentions and view of the work of Australia in PNG are highly significant. For this reason, his statements and recollections are given value in this thesis, taking into account the evidentiary weaknesses inherent to a memoir, even one written by a historian. Hasluck represented himself as the primary mover to alter pre-war practices, pushing those ideas and practices that I term the liberal colonial ideology.[76] Whereas prior to the war, Nuiginians had been soldiers, police and luluai, but not candidates, politicians and bureaucrats, Hasluck wanted the gradual introduction of democracy beginning with local councils on the Australian model and a gradual expansion of the Nuiginian representation in the legislature with the Legislative Council first opening in 1951 with 3 appointed non-official Nuiginian members, that is not employed by the Administration.[77] Hasluck's intentions to build autonomy help to frame an understanding of the subsequent policy decisions he made as the Minister in charge of PNG from 1951 to 1963, including in clemency.

Nevertheless, as with Ward, Hasluck's view was contested. Old colonialists saw the bipartisan consensus as a threat to the economic interests of Australian capitalists. Some members of the

[73] Hubert Murray served Lt Gov. of Papua. Jack Murray was the first Administrator of PNG. They were not related.
[74] Hasluck, *A Time for Building,* p. 6; Downs, *The Australian Trusteeship*, p. 93.
[75] Hasluck, *A Time for Building,* pp. 69-73.
[76] Hank Nelson, "Papua and New Guinea", in Stannage, Saunders, and Nile, (eds.), *Paul Hasluck in Australian History*, p. 166.
[77] Hasluck, *A Time for Building*, p. 37.

McGregor Club, a group that advocated for PNG and PNG expatriates, called Hasluck a "kanaka lover". Hasluck overheard himself being called this after he gave a speech to the group in Sydney. He took pride in what these pre-war, old colonialists regarded as an insult.[78] Rejecting his critics and continuing in his direction with bipartisan support, Hasluck held that there were real prospects for development of Nuiginians in PNG, socially, politically, and economically, as leaders rather than merely as workers and servants, with a distant hope of self-determination.[79]

A major source of tension between Australian policy makers and many international observers was that the timetables envisioned by those interests for independence for PNG were wildly different, in some cases by a century.[80] This disparity tends to explain why despite the Australian party political consensus about the altruism of trusteeship, Australia's benevolence, was not universally accepted. To critics of colonialism, Australia's actions did not seem to be a path to independence.

Despite the intention to be altruistic and to advance PNG, as a range of scholars have noted, Australian colonialism in PNG was paternalistic and predicted on a conception of Nuiginians as needing guidance and protection because they were 'unsophisticated', or as Justice Ralph Gore of the PNG Supreme Court put it in 1965: "infants in history."[81] However, paternalistic colonialism could be sustained politically and diplomatically in the 1950s and 1960s—a period characterised by decolonisation and radical critique of imperialism—only if it was represented as a liberal project, as benevolent and, most of all, temporary, as argued by Peter Gibbon, Benoit Daviron and Stephanie Barral in discussing development in Africa.[82]

> To summarize, we can define, from the point of view of liberalism, a sort of legitimate paternalism that would be characterized by temporary measures (sometimes including, but not confined to, coercion) taken by a governing entity to influence subjects, with the ultimate explicit objective of making them free… These are provision of care to the governed, and coercion, both being covered by the same justification as edification. While edification is an invariable practice of paternalism, particular paternalisms may, and often do, devote the bulk of their governmental resources to practicing care and coercion.[83]

Gibbon et al's propositions about colonialism in the post war period provide an explanation for why paternalistic colonialism continued to be present in PNG, despite its repackaging as a liberal project

[78] Hasluck, *A Time for Building*, p. 70. Kanaka was a derogatory term for Melanesians.
[79] Hasluck, *A Time for Building*, pp. 94-95.
[80] Smith, *Education and Colonial Policy in Papua and New Guinea,* p. 159.
[81] Gore, *Justice Versus Sorcery*, p. 218. See for example: Wolfers, *Race Relations and Colonial Rule in Papua and New Guinea*; Healy, "Monocultural administration", pp. 222-223. Nelson, *Papua New Guinea*, p. 87. Regis Tove Stella, *Imagining the Other: The Representation of the Papua New Guinean Subject*, University of Hawaii Press, Honolulu, 2007, pp. 206-7.
[82] Peter Gibbon, Benoit Daviron and Stephanie Barral, "Lineages of Paternalism: An Introduction" *Journal of Agrarian Change,* vol. 14, no. 2, 2014 pp. 165-189.
[83] Gibbon, Daviron and Barral, "Lineages of Paternalism", 188.

by the Labor and Liberal-Country parties. Such differences between officials outline the difficulties of policy implementation and the fault lines of contention in decision making.

PNG historians have explained the paternalistic nature of Australian colonialism. August Ibrum Kituai commented that the direct rule of the Australians in PNG was paternalistic because it was unasked for and because Australians and the British presumed that Nuiginians were "not sophisticated", and needed protection and guidance.[84] He noted that ironically Australian paternalism actually rendered people too dependent on 'advice and guidance', and as such generated the conditions it was supposed to ameliorate.[85] Therefore, despite the explicit purpose of post-war control, as Hasluck asserted, being to give PNG "a measure of independence", it was not entirely successful.[86] Nevertheless, with the perception that the Nuiginians' cultures and understanding was as yet too 'unsophisticated' to comprehend and engage with the modern world, despite advancement policies, the timeframe for independence stretched well into the future; thus providing a window for more protective and paternalistic policies. Regis Tove Stella's study of Australian images of PNG, similar to Kituai, argued that Australian literature, fiction and non-fiction of PNG represented the colonised as uncivilised, as savages, to justify Australia's continued control, regardless of Nuiginian wishes.[87] Indeed, the primary material explored in this thesis supports these propositions about paternalism. For example, Hasluck wrote of the care he took in guiding and protecting "native" people from themselves and the potential stringency of Western punishments in arguing that authorities considered the "compulsion of native custom" in enacting clemency.[88] As will be shown in the case studies of this thesis, the exercise of discretionary justice provides evidence to support these contentions as mercy was used in the belief that many Nuiginians were too unsophisticated to understand capital punishment, and thus required Australian mercy to protect them from themselves.

Hasluck was a proponent of guardianship in his policies including those on the law. Yet, he wrote of his opposition to colonial attitudes reminiscent of the Raj in PNG.[89] In decrying colonialism, yet also commenting on the backwardness of the people and their need for guidance, he was paternalistic in Gibbon et al's definition.[90] His policy was controlling and colonial, but also

[84] Kituai, *My Gun, My Brother,* pp. 2-5; Secretary for Law, PNG Administration to His Honour the Administrator, PNG, re: Sentencing of native offenders convicted of unlawful homicides, 1 October 1956, *Territory of Papua and New Guinea- General question of sentencing of native offenders convicted of wilful murder-pronounced or recorded sentences of death*, NAA: A432, 1956/3371, 7801327.
[85] Kituai, *My Gun, My Brother,* pp. 7-8.
[86] Hasluck, *A Time for Building*, pp. 194-197. On "a measure of independence" see Nelson, "Papua and New Guinea", in Stannage, Saunders and Nile (eds.), *Paul Hasluck in Australian History*, p. 160.
[87] Stella, *Imagining the Other,* pp. 206-7.
[88] Hasluck, *A Time for Building*, p. 81.
[89] Hasluck, *A Time for Building*, p. 70.
[90] Gibbon, Daviron and Barral, "Lineages of Paternalism", p. 187.

emphasised the helpful, educative, and temporary character of the project. This language permeated much of the policy and argumentation of the period suggesting that it was both genuinely held, but also the means of justifying Australian occupation to the world. These case studies demonstrate the notional and actual pursuit of this liberal paternalism through the high profile life and death decisions of capital punishment and clemency.

**Counter currents to Change, the 'B4s' and their resistance to changes**

Opposition to Hasluck's bipartisan intention to change the relationship between Australia extended well into the period of this thesis. Indeed, different ideas than Hasluck's were discussed. Nicholas Brown noted that there were different ideas about how to pursue policies for advancement, and significant press and public interest in discussing Australia's attempts to fulfil its obligations to advance and repay its allies.[91]

The B4s, as they had been in PNG B4/before the war as business people, farmers, and colonial officials came into conflict with the Liberal-Country and Labor parties' liberal approach to colonialism. They had pre-war ideas about working with Nuiginians, which Moore called "deep-seated arrogant racism".[92] Rachel Cleland, the wife of the Administrator from 1951 to 1967, illustrated her understanding of the difference between liberals and old colonialists in an anecdote in her memoir.[93] When the Clelands first arrived in Port Moresby, they held a reception and invited Nuiginians members of the new legislature. However, the Papua Hotel in Port Moresby did not allow Nuiginians inside. This was both due to unofficial segregation, but also because there was an ordinance against Nuiginians drinking alcohol, for their own good. The Clelands had to insist that the owner of the hotel allow entry to invited Nuiginian legislators.[94] Evidently, there was a tension between established patterns of relations, and Commonwealth policies for change in the territory, during the 1950s and early 1960s.

Hasluck and his officials in Canberra were also well aware of these philosophical differences amongst Australians living and working in PNG, which made Canberra cautious about accepting recommendations on clemency from expatriates in PNG whom they perceived to be tainted by racism and colonialism.[95] Hasluck noted in his memoir:

> I came away from that first trip [1951] revolted at the imitation of British

[91] Brown, *Governing Prosperity*, p. 55.
[92] Moore, *New Guinea,* p. 185.
[93] This very long tenure allowed him to put a stamp on the territory's bureaucracy and culture. As a Liberal Party appointee with experience in the territory from the war, Hasluck listened to him, particularly in the initial stages of Hasluck's tenure.
[94] Cleland, *Pathways to Independence,* p. 34
[95] Nelson "Papua and New Guinea" in Stannage, Saunders and Nile (eds.), *Paul Hasluck in Australian History,* p. 152

> colonial modes and manners by some Australians who were there to serve the Australian Government ... never before in my life had I come across so many Australians who had lost so quickly any capacity to clean their own shoes, or pour themselves another drink without the attention of a 'boy'.[96]

Hasluck saw a connection between the relationships that Australians formed with Nuiginian workers and the wider attitude of officials to the future of PNG:

> Looking back I see now that what I said was very heavily influenced by my distress at the signs of colonialism in the part of both officials and private persons on my first visit to Papua and New Guinea and by the impression I had formed, from the present backwardness of the native people and the absence of any real participation by them in daily affairs that the present progress towards self-government would be likely to take several generations.[97]

Hasluck configured a segment of the expatriates in opposition to himself as illegitimately paternalistic, with no vision for the end of paternalism and little recognition of essential equality. He saw them as lacking in Australian values, and who had stood in the way of more rapid advancement. Even though only some expatriates demonstrated these tendencies, they dominated the Minister's understanding of the general culture of expatriates in PNG. The prejudice he perceived in old colonists was one reason he did not always rely on the advice that came out of PNG during clemency deliberations.

This unequal treatment that characterised the B4s, the old colonialists, had several faces, one of which was the protective aspect of the Murray system. As will be shown in the cases studies of this thesis, another aspect of unequal treatment was that Australian officials believed that Nuiginians did not properly understand Australian law or punishments.[98] Thus, it was an established practice in Australian PNG to grant clemency to Nuiginian murderers, if it could be established that the offending Nuiginian was too "unsophisticated" to comprehend the law and the meaning of state sanctioned capital punishment.[99] In the desire to be just despite their uncertainty, Australians of the old colonial school were wary of executing Nuiginians whom they did not fully understand and whom they wanted to protect. Some suspected Australia in PNG of being too paternalistic and colonial, old colonials made demands that it continue to be so.

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[96] Hasluck, *A Time for Building,* pp. 14-15.
[97] Hasluck, *A Time for Building,* p. 70.
[98] Gore, *Justice versus Sorcery*, p. 205.
[99] Gore, *Justice Versus Sorcery*, p. 218. On 'unsophisticated', see Secretary for Law, PNG Administration to His Honour the Administrator, PNG, re: Sentencing of native offenders convicted of unlawful homicides, 1 October 1956, *Territory of Papua and New Guinea- General question of sentencing of native offenders convicted of wilful murder-pronounced or recorded sentences of death*, NAA, A43, 1956/3371.

**Punishment as Education: Enforcing the Law and Prison Reform in PNG**

Despite 60 years of colonialism, advancing Nuiginians meant dealing directly and forcefully with those customary practices which were serious enough to become conspicuous in the far from comprehensive reach of Australian law. Often, law enforcement related to ending the wide spread practice of vendetta, or redeeming honour through reciprocal killing. In many Nuiginian cultures, honour required that the killing of a member of a given group be avenged by killing a member of the group to which the killer belonged.[100] Hasluck described Australia's response as "the basic first lesson however was that of law and order."[101] Justifying his position, Hasluck wrote of the gratitude of Nuiginian people who attributed the relative prosperity and security during his administration to the repression of vendettas—to his "lesson".[102] Reshaping responses to violence was a key part of advancement, but required considerable change in personal and social beliefs by Nuiginians. Under the Murray system and after the war, that entailed officials and judges making ad hoc judgements about which parts of the law to enforce and how to modify its implementation to suit local problems.

Yet Hasluck worried that the different treatment Nuiginians and expatriates experienced under the law was a barrier to the success of using punishment and the law to advance people. In 1951, Hasluck believed that many Administration ordinances and some practices by patrol officers and police in PNG undermined the principles of Australian law. Unequal treatment could not support Australian claims as to the benevolence of it Administration. Yet, there was agreement between liberals, such as Hasluck, and old colonial PNG officials on the centrality of maintaining law and order: so their priorities overlapped, but there was a tension. The old colonial legal practice of controlling people to prevent crime was suggestive of Healy's argument that PNG was a "thorough-going autocracy."[103] For example, some patrol officers acted outside of the law to imprison people to pre-empt violence, to remove witnesses and perpetrators from the community while passions were hot, and to keep witnesses available for testimony, as allowed by ordinances.[104] While not in keeping with the rule of law, pre-emptive arrest and detention of witnesses was effective in keeping order in the short term. And Hasluck was content enough with the result that he did not dispute the utility of such measures, in particular, at the beginning of his tenure as Minister.[105] Yet he came to insist on more equitable practices over time to ensure the rule of law. Wolfers suggests that the law was a

[100] Greenwell, *The Introduction of Western Law*, pp. 4-7; Hasluck, *A Time for Building,* pp. 80-84.
[101] Hasluck, *A Time for Building*, p. 80. Shaunnagh Dorsett and Ian Hunter (eds.), "Introduction", *Law and Politics in British Colonial Thought; Transpositions of Empire*, Palgrave-MacMillan, New York, 2010, p. 3.
[102] Hasluck, *A Time for Building*, p. 84.
[103] Healy, "Monocultural administration", p. 224.
[104] Hasluck, *A Time for Building*, p. 82; Downs, *The Australian Trusteeship*, pp. 154-55; Douglas and Finnane, *Indigenous Crime and Settler Law*, p. 10.
[105] Hasluck, *A Time for Building*, p. 82.

means of controlling change that would occur as PNG became more entangled within that world systems.[106] Concurring with Wolfers, Ottley and Zorn argue that the legal and penal regime served an educative function in PNG in instructing Nuiginians in what behaviour was acceptable so that they would learn to function in a Western world.[107] However, the aim and the practice were not entirely consistent.[108] This conflict between paternalistic old colonialism and the liberals' efforts to 'Australianise' the legal system and treat people more equally can be seen in the discussions held by officials in the case studies of this thesis.

Complicating questions of discretion and unequal treatment, a significant problem with policies for advancement through the 1950s and 1960s was that different places were quite different in their levels of advancement, despite the intention to have "uniform development".[109] Advancement was producingurban workers who seemed to be beyond being pacified and were actively engaged with the colonial project, for example see the observation of the *SPP* cartoonist on the matter in figure 1-3 below. Advanced Nuiginians were living and working with expatriates in urban communities, yet a few members of that community still committed crimes of shame and vendetta similar to those who had not been acculturated. As a consequence, it was difficult to accommodate disparate groups of Nuiginians the same legal calculus designed to understand the violence of less advanced people of the hills and valleys. Indeed, Cleland observed that in the 1950s many urbanized Nuiginians resented being treated in the same ways as less westernized people.[110] Similarly, Nuiginian and Australian scholars have pointed to increasing objections to paternalism amongst urban Nuiginians across the 1950s.[111] One result of this dissonance was the struggle to understand the cultural context and justice issues of offences committed by urban Nuiginians in contrast to rural offenders. This struggle was particularly visible in the sources when the Administration officials and the Executive Council deliberated on clemency and as they strove to understand what might motivate an urbanized Nuiginian to violence and what would result from mercy.

While some Nuiginians were more a part of the capitalist, urban society as intended by Australian plans, expatriates of the old colonialist school were anxious about Nuiginians migration to urban

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[106] Wolfers, *Race Relations and Colonial Rule*, p. 7.
[107] Bruce L. Ottley, and Jean G. Zorn, "Criminal Law in Papua New Guinea: Code, Custom and the Courts in Conflict", *The American Journal of Comparative Law*, vol. 31, no. 2, 1983, pp. 251-300. See also Amirah Inglis, *The White Women's Protection Ordinance: Sexual Anxiety and Politics in Papua,* Sussex University Press, London, 1975, p. 5.
[108] Fitzpatrick, *Law and State in Papua New Guinea Law and State in Papua New Guinea*, p. 68.
[109] See a thorough analysis of the policy in Downs, *The Australian Trusteeship*, Ch. 7.
[110] Cleland, *Pathways to Independence*, pp. 200-204.
[111] See for example: Waiko, *A Short History of Papua New Guinea*, pp. 96-98. Nelson, *Papua New Guinea*, pp. 168-9. Wolfers, *Race Relations and Colonial Rule in Papua and New Guinea*, p. 129-30. Sinaka Vakai Goava and Patrick Howley, *Crossroads to Justice; Colonial Justice and a Native Papuan*, Divine Word University Press, Madang, 2007, p. 19-21.

areas across the 1950s and 1960s. Consequently, during the 1950s and 1960s there was pressure on the courts and police, evident in the case files and newspaper reports, to enforce law and order. That anxiety overlaid existing anxieties about the prevalence of Nuiginians in the towns from before the war.[112] For example, legislation was introduced in 1952 and 1954 that controlled the movement and presence of Nuiginians in urban areas.[113] On the one hand there was a desire to restrict and control Nuiginians amongst some parts of the administration, but on the other an official policy to liberate and modernize Nuiginians. These two tendencies were in conflict and these case studies will suggest that in some cases, discretionary justice allowed administrators the freedom to make public statements to resolve that conflict.


Figure 1-3 1954 Caption reads- "Educated in Australia, of course!" [114]

Expatriates were unsure at how to deal with the newly educated Nuiginian. Does this satirise an attitude that limited Nuiginians to servant status, or satirise the programs that sent Nuiginians to be educated in Australia?

Punishment and prisons played a role in advancement policies. Prisons were a useful alternative to capital punishment in capital crimes because the Administration hoped that Nuiginians would become accustomed to Australian ways in prison and then become agents for change upon their release. That intention was held in spite the fact that the purpose, conduct, and quality of prisons had been a problem for Canberra since before the war.[115] For example, in 1949, prisons pooled together

[112] Inglis, *The White Women's Protection Ordinance*, p. 147.
[113] Wolfers, *Race Relations and Colonial Rule in Papua and New Guinea*, pp. 119-131.
[114] "Educated in Australia of Course", *South Pacific Post*, 6 Jan 1954, p. 12.
[115] Letter, Prime Minister to the Territory of New Guinea, re: Prisons Ordinance 1935, 5 July 1935- Minute, *Prisons Ordinance- New Guinea*, National Archives of Australia, A518, A846/1/12.

prisoners of different offences from minor to major, to use them as a labour force for government infrastructure. During the period 1949 to 1965, there were ongoing discussions about the benefits and financial costs of reforming the PNG prison system, so they would be schools of Westernisation and advancement; didactic, in the manner suggested by Bruce Ottley and Jean Zorn.[116]

Indicative of Hasluck's and Territories' interest in punishment as tool for advancement, in the 1950s there was a protracted process of preparing a prison policy with the intention to use prisons to reform and educate Nuiginians. Both Hasluck's determination to make these changes and the limits of PNG bureaucracy were suggested by the five-year time frame it took to develop and begin to implement his policies between 1952 and 1957.[117] This belief in the educational and acculturating function of prisons continued and in 1963 the Department of Territories argued to the UN Trusteeship Council that PNG prisons successfully rehabilitated people and drew them into the colonial economic and social system of the nascent PNG state.[118] Australian authorities expressed a degree of faith in PNG prisons as educational institutions when they claimed that prisons advanced Nuiginians as capitalists and westernised citizens to world audiences. It meant that the Commonwealth saw clemency as a clear alternative to execution, as they believed it would change assist with the goals of advancement policies.

In contrast to fears of vice and suffering, some Nuiginians were dissatisfied with a punishment system that left offenders, fatter, happier and more educated than when they entered prison. For example, Nuiginian critics of Australian prisons complained that offenders got to learn the lingua franca Pidgin in prison. Nuiginians sometimes doubted the efficacy of non-capital punishment, but recognised how the experience might change people.[119] Thus, to an extent, Nuiginian perspectives on prison experiences indicates that prison did contribute to Westernisation. Yet the prison experience could also include heavy labour, murders and rapes, so prison was not a jolly holiday in the 1950s.

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[116] Ottley and Zorn, "Criminal Law in Papua New Guinea", pp. 209–249.
[117] Extract from Classification Report Dated 26-2-47 by Mr C.J. Buttsworth, and Extract of Minutes of Meeting No. 19 of the Executive Council of PNG held on 12 July 1950, *Administration of Prisons- Policy Papua and New Guinea,* National Archives of Australia, A452, 1959/4611, 533996; Hasluck, *A Time for Building,* p. 175; C.R. Lambert, Secretary Department of External Territories to Administrator Papua and New Guinea, re: Control of Prisons, Prison Reforms, 12-8-52, *Administration of Prisons- Policy Papua and New Guinea*; D.M. Cleland, Administrator, to the Secretary External Territories, re: Control of Prisons, Prison Reforms with Report by Brian Essai enclosed, 30-10-52, *Administration of Prisons- Policy Papua and New Guinea.*
[117] Hasluck, *A Time for Building* p. 184.
[118] "Observations of the Administering Authority on Petitions" and C.R. Lambert, Secretary Department of Territories to the secretary, the Department of external Affairs, re: Trusteeship Council: 28 the Session, Petitions16 and 17, 6 June 1962, *Petition to United Nations from Kilsyth Communist Party and Others, Re: sentence of Death Passed on PNG Natives*, Department of Territories, NAA: A452, 1961/4256, 3500477.
[119] Hasluck, *A Time for Building*, p. 179; "Luxury Life for Killers Criticised" *Age*, (Melbourne), 21 Jan 1965, included in *Territory of Papua and New Guinea-General Question of sentencing of native offenders convicted on wilful murder-pronounced or recorded sentences of death*, Department of Territories Clippings File, NAA: A43432, 1956/ 3371.

**Staying In Step with the Lawyers of the Mainland in the 1950s and 1960s**

The signals and lessons to Nuiginians were products of the culture of the law in which judges and lawyers in PNG were immersed. There was a particular jurisprudence of the PNG Supreme Court bench, but despite that distinctiveness, in the post-war period, PNG's place in the wider Australian legal system limited the extent of inequity, paternalism, and ad hoc decision making. Australian legal trends and precedents provided limits to punishment and policing practises, and several times in this period, the High Court of Australia enforced those limits by quashing PNG Supreme Court judgements to protect the rule of law.[120] There was a shared culture among legal practitioners across the Australian jurisdictions including PNG, and indeed that was necessary if PNG was to be advanced using Australian-style institutions and systems. Consequently, in attempting to replicate those systems for the project of advancement, the Australians that ran the territories participated in the same cultural, legal and ethical debates as the mainland and these debates, particularly the debates on capital punishment, affected clemency decisions.

PNG legal practitioners took their lead from mainland jurisdictions such as Queensland, NSW, and Victoria, and the broader British common law. However, there was some local adaptation to PNG of the adopted Queensland Criminal Code. Contextualising that adaptation, Wiener shows that the adaptation of those metropolitan systems in colonial contexts was not unusual.[121] One such adaptation significant to understanding PNG cases was that trial by jury was not used for indigenous offenders and judge acted as jury and judge.[122] Further, there was almost never trial by jury for Europeans because the expatriate community was so small that an impartial juror was thought impossible to find, and Nuiginians were not considered peers.[123] Despite these variations, the implementation of the PNG Criminal Code drew on Griffith Code prescriptions, PNG precedents, and Australian and Common Law precedents in implementing the Code.[124]

Further, the expatriate community who administered the law and made judgments about the qualities and characters of offenders, were educated in Australian and culturally Australian. They read Australian papers, holidayed in Australia, retired to Australia and thought of themselves as

[120] For example, *Smith v. R., 1957,* High Court of Australia, 3, 97 CLR 100.
[121] Wiener, *Empire on Trial,* p. 3.
[122] Hasluck, *A Time for Building,* p. 175. *The Criminal Code (Queensland, adopted)* Sections 590-612 go to the use of juries. There were subsequent amendments such as "Jury Ordinance of 1907 - Jury Ordinance Amendment Ordinance of 1909", *Laws of the Territory of Papua 1888-1945* (Annotated), http://www.paclii.org/pg/legis/papua_annotated/joo1907joaoo1909480/
[123] Hasluck, *A Time for Building,* p. 175. Nelson, *Papua New Guinea*, p. 71; Greenwell, *The Introduction of Western Law into Papua New Guinea,* see rules of evidence, p. 16; Barry et al. *An Introduction to the Criminal Law in Australia*, p. 6.
[124] Barry, *An Introduction to the Criminal Law in Australia*, pp. 6-7. Also the trial transcripts show the application of precedents from Australian and other British Common Law jurisdictions.

Australian. The strength of Australian norms on the legal practice of PNG was particularly visible in the prevalence of capital punishment before during and after the Second World War. Hank Nelson demonstrated that PNG largely reflected Australian practise prior to the war.[125] The emergencies and exigencies of the Second World War saw a spike in numbers executed, as Nelson pointed out, the law was run by the military and he argued that temporary military judicial officers made limited reference to the existing legal regimes and precedents in Australia, NG and Papua. For example, 34 men were hanged in 1943 and 1944 due to this altered legal culture.[126] Then after the war, civilian judges regained control and PNG returned to a sentencing rate of less than one execution a year, which was more or less consistent with the various jurisdiction on the mainland.[127] Nelson makes it clear that capital punishment was used more extensively during the war than in the years preceding the war and this thesis discusses the years following.[128] With Nelson, I argue that when Australian lawyers were in charge, the results were normatively Australian. This became more pronounced as more Australian expatriates took on public sector jobs for short periods only and that intensification of Australian culture over the period provides parameters for understanding their legal and moral decisions.

Similar to civilian PNG, Australians used capital punishment sparingly in the various state jurisdictions. Indeed, Queensland had abolished the death penalty in 1922.[129] The most populous states were most clement. New South Wales hanged no one after 1940 and abolished the death penalty for all but treason and piracy in 1955, and abolished it entirely in the 1985.[130] Victoria did not hang anyone between 1951 and 1967, when the last man was hanged in Australia in 1967.[131]No one was ever executed under Commonwealth and ACT Criminal law.[132] Tasmania held what was to be its last hanging in 1946.[133] The Northern Territory had hanged only two people in total, but those were in 1952.[134] Somewhat contrary to this trend, South Australia hanged six people between the Second World War and the last hanging in 1964, and then abolished the practice in 1976. Similarly, Western Australia hanged five between the Second World War and the last hanging in 1964, and then

[125] Nelson, "The Swinging Index", p. 150-2
[126] Nelson, "The Swinging Index", p. 149.
[127] Jo Lennan and George Williams 'The Death Penalty in Australian Law"*, Sydney Law Review,* vol. 34, no. 4, 2013, pp.659-94, *p. 678.*
[128] Nelson, "The Swinging Index", p. 149.
[129] R.N Barber, "The Labor Party and the abolition of capital punishment in Queensland, 1899-1922", *Queensland Heritage*, vol. 1, no. 9, 1968, pp. 3-12.
[130] Barry Jones, "The Decline and Fall of the Death Penalty", in Barry Jones (ed.) *The Penalty is Death; Capital Punishment in the Twentieth Century*, Sun Books, Melbourne 1968, p. 257; Lennan and Williams 'The Death Penalty in Australian Law"*,* p. 680.
[131] Lennan and Williams, "The Death Penalty in Australian Law", p. 674.
[132] Lennan and Williams, "The Death Penalty in Australian Law", p. 678.
[133] Lennan and Williams, "The Death Penalty in Australian Law", p. 670.
[134] Lennan and Williams, "The Death Penalty in Australian Law", p. 672.

abolished the death penalty in 1984.[135] I will argue through the case studies that this limited use of capital punishment nationwide was one of the reasons for the lack of resort to it in PNG. Indeed, despite a large number of death sentences in PNG, Australian authorities hanged only two men after the Second World War.[136] For example, Hasluck cites one year in which he commuted 95 sentences.[137] In PNG, as it was in Australia, clemency was the most common outcome of a capital conviction.

There was also increasing alignment between PNG and the Australian bureaucracy from the 1950s because of Hasluck's expansion of the PNG public service and improvements in communication technology liking PNG to Canberra.[138] These new recruits had not been fully socialised into pre-war colonial attitudes.[139] Further, new officials, such as Patrol Officers, received more extensive formal training than before the war at the new Australian School of Pacific Administration.[140] They undertook courses in anthropology, the law, a range of practical skills, and administrative procedures. Thus, they had a more systematic understanding of the law and of PNG upon their arrival than many of their predecessors, such as Errol Flynn's haphazard entry into the New Guinea service.[141] This resulted in more openness to change, but also a point of view on Australia's debt and duty to PNG, which Nelson suggested was a consequence of the celebration of the 'fuzzy-wuzzy angels'.[142] However, these were initially junior employees who only gradually had an impact on policy and practice.

Generational change was also limited by the fact that most of the chief figures of the Administration had worked in the territories prior to the war, such as Chief Justice Phillips and his most senior judge, Ralph Gore. New patrol officers and company employees usually worked under experienced B4s thus they were indoctrinated to varying degrees into the old colonial perspective, despite the public statements of Cleland and Hasluck advocating for the new paths for advancement being built.[143] Nevertheless, the experiences of new arrivals as described in memoirs, such as Owen Genty

[135] A.R.G. Griffiths, "Capital Punishment in South Australia, 1836–1964", *Australian and New Zealand Journal of Criminology,* 1970, vol. 3, no. 4, pp. 214-222, pp. 214-216. Barry Jones, "The Decline and Fall of the Death Penalty".
[136] See Figure 0-1.
[137] Hasluck, *A Time for Building*, p. 81.
[138] Downs, *The Australian Trusteeship,* pp. 77-98.
[139] Denoon et al, *A History of Australia, New Zealand and the Pacific*, pp. 328-9. Downs *The Australian Trusteeship,* p. 98.
[140] Brown, *Governing Prosperity*, p. 65; Read, *Papers Relating to Teaching ASOPA Courses*, ANU Archives 444, Box 1.
[141] Brown, *Governing Prosperity*, p. 65. Errol Flynn *My Wicked, Wicked Ways*, Dell Publishing Co., New York, 1961.
[142] Nelson, "From Kanaka to Fuzzy Wuzzy Angel", p. 10.
[143] Genty, *The Planter*; Kerr, *New Guinea Patrol*; Read, *Papers Relating to Teaching ASOPA Courses*.

and Gloria Chalmers, show that new people could be selective in taking on the ideas of the previous generation, such as rejection of some of their racial and sexual mores.[144]

The officials charged with enforcing the law were a mix of old and new colonialists and decisions were made in the context of anxiety about changing attitudes and the contest between the ways the law and punishment might best contribute to the betterment of Nuiginians. Yet all this legal and moral reasoning occurred within the context of Australian mores and Australian standards as Australian expatriates brought with them their culture and world-view to their work in PNG.

**The Capacity of the Bureaucracy**

The capital case review process depended upon advice from PNG and punishment selection depended up on a belief in the capacity of the PNG Administration to effect that punishment. Yet, Hasluck had doubts about the quality of the work from PNG and raised many instances of incompetence in *A Time for Building* and cited his memos and letters to the PNG Administration when the incompetence emerged. For example, Hasluck quoted the PNG Public Service Commissioner from a meeting at the start of Hasluck's tenure in 1951:

> If you assume that the Commonwealth Public Service is 100% efficient then you will be taking an optimistic view if you think of the PNG public service as being twenty-five per cent efficient.[145]

Hasluck added that there were knowledgeable practitioners in areas like justice, agriculture and forestry, but that the fundamental bureaucratic process was ramshackle. He appreciated the courage and dedication of patrol officers and civil servants in service delivery, but not necessarily their administrative capacities in forward planning and developing proposals for Cabinet and Treasury.[146]

In contrary narratives on the bureaucracy capacity to follow and to advise on policy, Rachel Cleland's memoir and Ian Downs' official history of the administration disputed Hasluck's view of the colonial bureaucrats.[147] They claimed Canberra based Territories bureaucrats and politicians did not understand the inappropriateness of mainland financial planning timetables and implementation schedules in PNG given the climate and terrain.[148] In a similar vein, Downs also found many of Canberra's policy demands impossible or recklessly rapid given the unpredictability of the Nuiginian people.[149] Cleland also regretted the impact of Hasluck's style upon the public service. She found his

[144] Genty, *The Planter,* pp. 28-29; Chalmers, *Kundus, Cannibals and Cargo Cults*, pp. 17-25.
[145] Hasluck, *A Time for Building*, p. 18.
[146] Hasluck, *A Time for Building*, p. 83.
[147] Cleland, *Pathways to Independence,* pp. 147-8. Downs, *The Australian Trusteeship,* pp. 126-7.
[148] Cleland, *Pathways to Independence,* pp. 147-8. Downs, *The Australian Trusteeship,* pp. 126-7.
[149] Downs, *The Australian Trusteeship,* pp. 126-7.

abrasive personality dispirited the PNG service with every visit.[150] Thus, the question of competence is not so easily settled by the accounts of those involved.

Recent studies, such as Waiko's, provide a more balanced view that tends to resolve the different perceptions of the more contemporary accounts. Certainly, the public service in PNG had complex duties and a poorly understood population to manage. He notes that some opposed and ignored the post-war advancement policies, and others were quite new to their positions. Thus, Waiko suggests, both these groups had difficulties implementing, or were unwilling to implement, Hasluck's policies in a challenging context, which affected his views on their competence.[151] Further, Nelson noted that most senior officials chose to continue to work with Hasluck and found his style honest and direct, challenging Downs and Cleland's interpretation further.[152]

The capital case studies provide further insight into the competency of the bureaucracy and the challenges officials faced. Overall, they indicate officials were inexperienced in formal procedure, and also with Hasluck's liberal colonialism of the post-war world. Further, the case studies show instances of administrative confusion became less common as time went on and the bureaucrats gained more experience. Even so, regardless of the truth of the matter, the evidence of memoir and the capital case files allows the argument that Hasluck relied less on their advice over time because of his lack of confidence in them and his increased confidence in his own knowledge of PNG.

**Conclusion**

The punishments meted out to the murderers and rapists occurred within the context of the difficult and changing social, political, and bureaucratic environment described in this chapter. Contested notions of the role of law, of punishment, of international obligations, and of advancement affected the arguments that were posed during the capital case reviews. The enormous responsibility officials felt and the eyes they believed were watching them, made the arguments and discussions even more fraught and this will be seen in the historical case studies that follow.

[150] Cleland, *Pathways to Independence,* p. 148.
[151] Waiko, *A Short History of Papua New Guinea,* pp. 94-97.
[152] Nelson, "Papua New Guinea" in Stannage, Saunders and Nile (eds.), *Paul Hasluck in Australian History*, pp. 156-7.

# Chapter 2 – "Why should the government want to fight us when we refuse to chip grass off the roads"; the Telefomin Killings of 1954

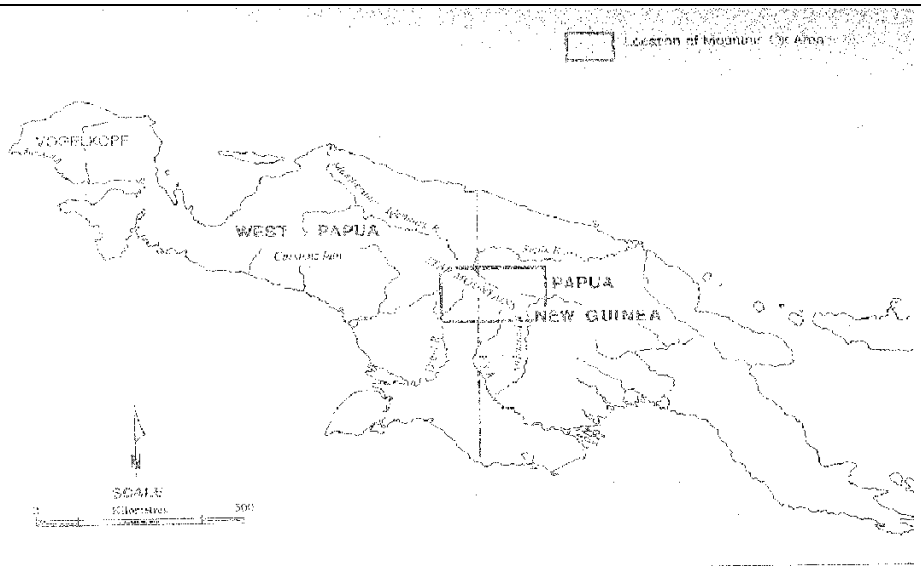


Figure 2-1 The approximate area of the Telefomin people and related cultural groups.[1]

> *Another patrol officer is missing — feared killed — in New Guinea as a result of a native attack last week in which a cadet patrol officer was killed. Native reports say that the missing man, Patrol Officer Gerald Leo Szarka, 30, of Leura, NSW, and three native policemen were killed before the attack on Cadet Patrol Officer Geoffrey Brodribb Harris, 22, of Cremorne NSW. Cadet Officer Harris was killed last Friday. An official statement from the Department of Territories tonight says fears are held for Szarka 's safety, but the natives' report of the death of Szarka and his policeman have not yet been confirmed. The two officers were at tacked by natives in the newly-opened Telefomin area.*[2]

In November 1953, 35 men of the Telefomin district plotted and carried out a plan to rid themselves of Australian control by killing four Australian officials: two Australians patrol officers and two Nuiginian constables. In the public debate– in PNG, metropolitan Australia and internationally –that followed these murders, Australia's self-image as a benevolent friend in PNG was challenged by the rejection of the legitimacy of Australian colonialism suggested by the killings. Discussions in Australia and overseas immediately began to debate the reasons for and consequences of such a violent rejection of the Australian presence.[3] When the trials of the killers returned guilty verdicts for

[1] Map by Aub Chandica from Barry Craig and David Hyndman (eds.), *Oceania Monograph: Children of Afek; Tradition and Change Among the Mountain-Ok of Central New Guinea*, Oceania Press- University of Sydney, Sydney, 1990, p. 211.
[2] "Second N.G. Patrol Officer Missing", *Advertiser* (Adelaide), 10 Nov 1953, p. 1.
[3] The mother of one of the dead, Mrs Szarka, and the journalist cast doubt on the Administration. "Second N.G. Patrol Officer Missing", *Advertiser*, 10 Nov 1953, p. 1; "White Prestige Must Be Restored", *The Courier-Mail* (Brisbane), 18

wilful murder, this questioning continued and encompassed the challenge of maintaining or repairing the legitimacy of Australian colonialism in the face of the killings, the trials, and the punishment of the killers, and that included questioning at the United Nations Trusteeship Council meeting during New Guinea's triennial review.[4] This was contemporary to colonial justice in Kenya, where killers of government officials engaged in resisting authority were found guilty of treason and hanged.[5] As Hay and Loo argue, clemency can bring legitimacy through the extension of mercy, rather than execution.[6] This may help explain how the Australian authorities reacted with clemency rather than severity in that the determination of the final punishment of the Telefomin men involved consideration of how to balance justice with the need to build Australian legitimacy for Australian colonialism in a decolonising world.

Authorities asked questions about the nature of the event to which Australian justice was responding. Was it a savage attack, or a failure of colonial policy? In either case, how should the colonised, the killers, be treated? And how would any punishment be perceived by an international community that was increasingly aware of political violence in colonial rule? Australia represented its role in PNG as an advocate for the Trusteeship Council's internationally sanctioned goals of "advancement", of peace, health and modernity.[7] Having presented its mission in PNG as civilising and just, Australia chose clemency for the killers as a means of demonstrating the benevolent character of her power to the United Nations, Australians, and Nuiginians in the sub-district of Telefomin. Yet, the Administration also had to manage the crisis of governance that had emerged in Telefomin. Mercy, it was hoped, also would rehabilitate the colonised's perception of the legitimacy of Australia.

This chapter will first examine the accounts of events in Telefomin recorded during the court cases, in the administrative aftermath, and by a subsequent oral history. These accounts explained the killings as a result of problems in the district. Moving then to the arguments deployed by both prosecution and defence during the trials, I will analyse the characterisation of the perpetrators as

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Jan 1954, p. 2; United Nations, "Index to Proceedings of the Trusteeship Council; Fourteenth Session 2 June to 16 July 1954", United Nations Headquarters Library, New York, 1950, https://library.un.org/sites/library.un.org/files/itp/t14_0.pdf

[4] United Nations, "Index to Proceedings of the Trusteeship Council; Fourteenth Session 2 June to 16 July 1954", United Nations Headquarters Library, New York, 1950, https://library.un.org/sites/library.un.org/files/itp/t14_0.pdf

[5] David Anderson, *History of the Hanged; the Dirty War in Kenya and the End of Empire*, W.W. Norton, New York, 2005.

[6] Tina Loo, "Savage Mercy: Native Culture and Modification of Capital Punishment in Nineteenth Century British Columbia", in Carolyn Strange (ed.) *Qualities of Mercy: Justice Punishment and Discretion*, UBC Press, Vancouver 1996. Douglas Hay, "Property, Authority and the Criminal Law", in (ed.) Douglas Hay et al, *Albion's Fatal Tree; Crime and Society in Eighteenth Century England*, Penguin, London, 1977.

[7] Peter Fitzpatrick *Law and State in Papua New Guinea*, Academic Press, London, 1980, pp. 65-8. Allan M Healy, "Monocultural administration in a multicultural environment: the Australians in Papua New Guinea", pp. 220-221, in J.J. Eddy and J.R. Nethercote, *From Colony to Coloniser: Studies in Australian Administrative History*, Hale and Iremonger, Sydney 1987. Hank Nelson, *Papua New Guinea: Black Unity or Black Chaos*, Penguin, Ringwood, 1972, p. 88.

responding irrationally and violently to the benefits of Australian colonialism, and the counter representation as men responding reasonably to a threat to their lives and livelihood. These possibilities then had to be accommodated in the politics of choosing punishment. I analyse how the representations of the communities, and the question of legitimacy, locally and internationally, affected recommendations for clemency. These deliberations were also informed by the wider Australian, expatriate and metropolitan, discussion of the nature and purposes of the law and punishment in this colonial setting. Ultimately, the outcome of the trials served to exonerate the Administration of charges of wrong doing, while also drawing attention to the need to maintain scrutiny of its colonial practice.

The Telefomin Case file is the most voluminous clemency file in the archive on which this thesis is based. The first reason it is so large is that there were four trials, each with multiple defendants to encompass in the clemency deliberations.[8] In, addition, there was the public defence lawyer William 'Peter' Lalor's report into conditions in the district prior to the Telefomin killings. Further, a long list of groups lobbied the Executive council and administration and called for clemency in letters and petitions.[9] These were among the few PNG capital cases that resulted in many letters to the Commonwealth on behalf of the condemned.[10] In addition, the newspaper coverage applied informal pressure on the debate over whether the men should hang.

There is clear evidence of grievances against Australian authority in the Telefomin district at the time of the murders. Oral history collated by the anthropologist Barry Craig some twenty years after the events correlates with the evidence of maladministration presented by William Lalor. Both sources highlighted weaknesses in the conduct of Australian colonialism. Further intensifying the problem for the Federal government, official submissions to the capital case reviews also noted administrative errors, but also allowed that such errors might be attributed to cultural misunderstandings. More generally, accounts of the region suggest that the relationship between the people and the Australian authorities had become tenser during the period of close contact, from 1948 to 1954, to the point that these condemned Telefomins had sought to remove Australian

[8] *Reg. v. Asogoning and others, 1954. (8 defendants) Reg. v. Tobaronsep and others, 1954. (7 defendants) Reg. v. Kabaramsep and others, 1954. (11 defendants) Reg. v. Sitkuningim and others, 1954.* (9 defendants) listed in Annexure No. 1., in *Territory of Papua and New Guinea, Telefomin Murders: November 1953, Cabinet Briefing Paper, Fifth Menzies Ministry Second* Cabinet *Submission 91-115*, 9 September 1954, NAA: A4906/Volume 4- 209114.

[9] Representations Regarding the Sentences…, in Appendix E, in *Territory of Papua and New Guinea, Telefomin Murders: November 1953, 9 September 1954, Cabinet Briefing Paper, Fifth Menzies Ministry Second Cabinet Submission,* NAA: A91-115.

[10] There were a few cases involving non-capital crimes that saw a good deal of lobbying, but that does not fall within this thesis. See for example, *R v R J Sear- manslaughter of male native Papua New Guinea*, NAA: A432/1959/2208,

authority.[11] In this context, the authorities had to choose between the use of capital punishment as a tool to assert control, or clemency to build cooperation and legitimacy through mercy.[12]


Figure 2-2 Figure 2-3 Memorial Plaque to those killed at Telefomin. [13]

**The Killings**

The combined sources for the case can be used to construct a narrative of the killings.[14] In summary, a faction of Telefomin men conspired to kill their sub-district's officers, some of whom they particularly resented. They killed Patrol Officer Gerald Szarka, Cadet Patrol Officer Geoffrey Harris, Constable Purari and Constable Buritori in three separate attacks while the officials were on patrol in the Telefomin Sub-district. Patrol Officers were also known as 'Kiaps', and exercised a wide variety of bureaucratic and policing powers to administer health, public works, taxation, economic development, and censuses, as well as serving as magistrates for low level and native offences.[15] And as Waiko notes, their efforts could be resented as aggressive interference by Nuiginians.[16] The extent to which their killings reflected interpersonal or political motives was a subject of legal and public debates, but ultimately it was unclear to decision makers, so managing both possibilities was vital in the clemency decision.

[11] Bill Gammage, *The Sky Travellers; Journeys in New Guinea 1938-39*, Melbourne University Press, Carlton Victoria, 1998, Ch. 10. Barry Craig, "The Telefomin Murders: Whose Myth?", in Barry Craig and David Hyndman (eds.), *Oceania Monograph*: *Children of Afek; Tradition and Change Among the Mountain-Ok of Central new Guinea*, Oceania Press- University of Sydney, Sydney, 1990.
[12] Michele Foucault, *Discipline and Punish; the birth of the prison*, London, Allen Lane, 1977, p. 11.
[13] "Szarka, Harris, Purari, Buritori Memorial", Keith Jackson & Friends: PNG ATTITUDE Words, ideas & issues from the Papua New Guinea - Australia relationship, http://asopa.typepad.com/asopa_people/the-kiaps-honour-roll.html, Accessed 28-7-2012.
[14] In 1954 judges kept their own trial notes, and there was no official transcript other than those notes which were sometimes subsequently typed up.
[15] Clive Moore, *New Guinea: Crossing Boundaries and History*, University of Hawaii Press, Honolulu, 2003, p. 183. Hank Nelson, *Taim Bilong Masta; the Australian Involvement in Papua New Guinea*, ABC, Sydney, 1982, p. 185.
[16] John Dademo Waiko, *A Short History of Papua and New Guinea, Second Edition*, Oxford University press, Melbourne, 2013, pp. 106-7.

In early November 1953 (a precise date was not clearly established in the trial) some 'Big Men', leaders of their communities met at Ankeivip in the Telefomin Sub-district. They included Kabaramsep, the most influential figure, Novonengim, Kornsep, Okmansep, Foritengim, and Dumarogim. While these communities had been happy to meet and trade with Australians, resentment built as many men in the district had their sense of honour offended by patrol officers, due to food and land seizures and the assertion of authority sometimes through physical violence and the burning of houses. Appropriate compensation had not been paid, or promptly paid, for goods or work, nor in recompense for offences committed by Nuiginian constables and Australian officials. Australian officials and constables were said to have violated marriage and sexual customs with liaisons with local women, further shaming Telefomin men.[17] It would seem officials attempted to use law and punishment to change behaviours and modernise people. And that was resented. As Buchan suggests of other colonial administrations in Australia, there was a determination to use Western law and colonialism as a part of an attempt to alter local culture.[18] In accord with Buchan's general observations about colonialism, Kituai's history of Nuiginian constables also notes regular physical violence and conflicts over sexual and marriage practices between local people and Nuiginian constables that were not readily resolved, yet Kituai also showed that constables saw themselves as bringing civilisation to less advanced people, as well as pursuing their own benefit.[19] Indeed, Sepik District Commissioner Sydney Elliott-Smith wrote in his submission to the capital case reviews: "these incidents did much to set alight the already smouldering pile."[20]

Summarising the feelings of the killers, Femsep, a community leader who had had close contact with the first patrols, recalled this building anger of fifteen years:

> Why should the government want to hurt us when we haven't hurt the government? Why should the government want to fight us when we refuse to chip grass off the roads? Why should the government force us to make roads specially[sic] for the white men to walk along?[21]

Prior to colonisation, the Telefomin had been an independent and politically successful cultural group. Australian colonialism chaffed. Craig, in reflecting on his later oral histories, and Justice

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[17] W.A. Lalor, "Investigation Made By Myself For the Purpose of The Defence of the Accused Natives in the Telefomin Trials", 26 August 1954, in Annexure No. 2, in *Territory of Papua and New Guinea, Telefomin Murders: November 1953*, *Fifth Menzies Ministry Second System* Cabinet *Submissions 91-115*. Lalor's account generally agrees with Craig, "The Telefomin Murders: Whose Myth?"

[18] Bruce Buchan, *Empire of Political Thought: Indigenous Australians and the Language of Colonial Government*, Pickering and Chatto, London, 2008.

[19] August Ibrum K Kituai, *My Gun. My Brother; The world of the Papua New Guinea Colonial Police, 1920-1960*, Pacific Monograph Series 15, University of Hawaii Press, Honolulu, 1998, p. 267.

[20] S. Elliott-Smith cited in Letter, D. M. Cleland, Administrator to Paul Hasluck Minister for Territories, 30-8-1954, Annexure No. 2, *Territory of Papua and New Guinea, Telefomin Murders: November 1953, Fifth Menzies Ministry Second System* Cabinet Submission *91-115*.

[21] Femsep of Telefomin, recorded by *Focus*, ABC, 1971, cited in Craig, "The Telefomin Murders: Whose Myth?", p. 125. Femsep was also involved in first regular contacts and was cited in Gammage's *The Sky Travellers,* pp. 110-11.

Gore, in his submission to the capital case reviews itself, both argued that the Telefomin hoped to replicate their historically successful use of surprise tactics against Australia.[22]

In response to such multiple discontent, those Big Men gave approval to spread the news of their decision to kill the Australian officials and to build support for this plan in the region's villages. Novonengim was also one of the men who carried out the killings; Kornsep, and Dumarogim and Kabaramsep stayed at home. *The Criminal Code of Papua and New Guinea*—following Australian legal orthodoxies—prescribed who could be a principal offender in a crime "committed in prosecution of a common purpose", including conspirators.[23] Employing this principle, the court found that Kabaramsep, Kornsep, Okmansep, Foritengim and Dumarogim together procured and counselled Novonengim and the others to kill the Australian officials, and thus were also culpable of wilful murder.[24]

At midday on Friday 6 November 1953 in Uguntemtigin Village, while on patrol, Constable Buritori was collecting firewood. Novonengim, Tobaronsep and Wavenasep set upon the policeman with axes and stones. While Buritori sought to escape down the slope on which the village sat, an axe blow to the back brought him down. He rolled further down the slope, but when he came to a stop, Asememnok, Sartengim, Kankosep and Arolengim brutally murdered him with stone axes and arrows. With the blunt blows of a stone axe he was decapitated. His body was then dumped in the bush between the rest house and the village. [25] Pigs were eating the body when it was found by the investigating patrol.[26]

At the same time, Patrol Officer Gerald Szarka, who had been in the posting only a few months, was ambushed. Village men engaged him in conversation and, once surrounded, Kaiobengal, Tigimnok, Irinsomnok, Warimsep and Olsikim attacked him. He was thrown to the ground in front of the rest

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[22] Justice Ralph T. Gore, (Transcription of Evidence), "Case Book – Telefomin Cases book "A", *Gore, R. T. and Quinlivan, Paul. Papers 1930-1964 [manuscript]*, National Library of Australia, MS 2819, Box 9.
p. 34; Craig, "The Telefomin Murders: Whose Myth?", p. 147-8.

[23] "Sections 7-8", *Queensland Criminal Code Adopted*, (the criminal code in use in PNG in 1953/4.) http://www.paclii.org/pg/legis/papua_annotated/cca254.pdf**,** Accessed 22-9-13**,** This section was not subsequently amended: see "Ordinances- Papua New Guinea: Criminal Code Amendment (Papua) Ordinance, National Archives of Australia, A518-A846/6/145, 327691 and A518- A846/6/45 Part 1, 3272356. And "Ordinances PNG Amalgamation of the laws of Papua and New Guinea - The Criminal Code", National Archives of Australia, A518- A846/6/21, 3272255. and John Greenwell, *The Introduction of Western Law into Papua New Guinea,* unpublished Manuscript*,* p. 20. On the relationship between Common Law and Griffith Code, see Andrew Hemming, "Impermissibly Importing the Common Law into Criminal Codes: Pollock v. The Queen*", James Cook University Law Review*, vol. 18, no. 6, 2011, pp. 113-143; and J.V. Barry K.C., G.W. Paton and M.C.L.G. Sawer, *An Introduction to the Criminal Law in Australia,* Macmillian and Co, London, 1948, p. 63; Sections 8 of the *Queensland Criminal Code Adopted*.

[24] Sections 7-8 of the *Queensland Criminal Code Adopted***;** Justice Ralph T. Gore, "Case Three, Reg. V Kabaramsep of Telefolip, and others", in Appendix C, Annexure No. 2, *Territory of Papua and New Guinea, Telefomin Murders: November 1953, Fifth Menzies Ministry Second System,* Cabinet Submissions 91-115, p. 4-4.

[25] The house was used by the patrol officers when staying in a village and had to be maintained in a fit state by the village.

[26] Gore, (transcription of evidence), "Case Book – Telefomin Cases book "A".

house and he and his assailants rolled down the slope struggling. Finally, overwhelmed, he was bludgeoned to death. They then dismembered his corpse and threw it into a latrine.[27]

Constable Mulai, a member of Szarka's party, was returning from gathering firewood when the shouting alarmed him. He found his colleagues gone and the village largely deserted. Fearful and suspicious upon sighting the gathered villagers, he ran. Villagers pursued him until he came into the protection of an old couple, who hid him physically and with taboos.[28] With the help of others, the couple escorted him safely to Telefomin Station; indicating the mixed feelings local people had about the Australian administration, and the fears and memories the older people had of reprisals.[29]

Even though the people of Komdavip village had not been party to the initial plan, Novonengim's messengers Awotingen, Telefakwansep and Bemsep informed the men's house, including Asogoning, Digimening, Arinening, Ivasimnok, Nasimnok and Aningapnok of the plan. Hearing of the killings at Uguntemtigin, they were encouraged to kill the widely disliked Constable Purari (also called Buka) who was then in the village preparing for a census.[30] There was resentment of Purari in the village for his aggression and violence against villagers. Tinabirengim, the second headman, overheard the message and tried to dissuade the young men. The older man told them of a past attack on the white men that had brought terrible consequences upon the attackers. Nasimnok dismissed that advice and insisted that: "They have killed the kiap and now we will go and kill Buka."[31] On the way to the rest house, this group of young men gathered Fobonening and Moriaksep, who were carrying axes for thatch gathering. Five were armed with axes. Asogoning was armed with a piece of wood, with the remaining men unarmed.[32] This large group attacked Purari on the veranda of the rest house overwhelming him and forcing him inside. Tinabirengim followed the young men, but only saw them exit the house carrying bloody axes. Argarming, the translator, was left alone because he was of the village and had been conscripted into translating. The attackers testified to their assault within the house, and that Purari's body was thrown under a waterfall in a deep pool from where it was retrieved by Australian officials some days later.[33]

Cadet Patrol Officer Harris, sometimes the role was called a Police Master, accompanied by Constables Paheki, Muyei and Kombo, medical orderly Bunat, an interpreter Sinoksep and Harris'

[27] Gore, (transcription of evidence), "Case Book – Telefomin Cases book "A".
[28] These taboos that forbade people from seeing them, were represented by an arrangement of sticks, cloth, and vines.
[29] "Native Bands Hunted Wounded Constable", *South Pacific Post*, 26 May 1954, p. 3; Gore, (Transcription of Evidence), "Case Book – Telefomin Cases book "A",
[30] Justice Ralph T. Gore, "Reg. v Asogoning and others", in Appendix A, Case One, R v Asogoning of Komdavip and others", in Annexure No. 2, *Territory of Papua and New Guinea, Telefomin Murders: November 1953, 9th September, 1954,* Fifth *Menzies Ministry Second System* Cabinet Submissions 91-115.
[31] 'Kiap' was the tok pisin word for the various Patrol Officer/ PNG Native Affairs Department positions.
[32] Gore, "Reg. v Asogoning and others", transcription of evidence.
[33] Gore, "Reg. v Asogoning and others"; transcription of evidence.

servant Tegori, were patrolling the Iliptamin Valley from 28 October 1953. They arrived in Terapdavip on 5 November, and a pig was delivered to them upon arrival as a sign of welcome.[34] On the same day, messengers informed the headman, Yanmakalinin, of the planned murders, which he agreed to follow: "All right, tomorrow we will go down and kill him [Harris]". Early on the morning of 6 November, while Harris lay in bed waiting for his shaving water to be heated, Kombo arose for his first cigarette and coincidentally covered his rifle with his blanket before leaving the barracks. He wandered over to stand under a tree near the warmth of fire and was lighting his cigarette when he was seized and struck with a cudgel and in the leg with an axe. Fighting off his attackers, he ran for his rifle, but during his retreat received an axe blow to the shoulder, but was still able to retrieve his weapon, the other police officers' arms having been surreptitiously removed. Kombo returned to the doorway in time to see Damugim strike down Harris with an axe blow to the face. With a disabled shoulder Kombo braced the rifle against his stomach and, due to his uncertain aim, shot Damugim in the shoulder, but the shot still scattered the assailants. As Harris tumbled down the rise on which the rest house was sited, Kombo fired two more shots before handing the rifle to Paheki who along with Bunat and Muyei had just survived an attack themselves and whose assailants had also scattered at the sound of the rifle blast.

Paheki stood cover as Muyei and Bunat carried Harris to the safety of the barracks. The attack then developed into a siege, the limited ammunition of the government party facing fire arrows. With the barracks on fire, the patrol retreated to the rest house, from which Tegori was sent to the Patrol Station for assistance. By 2pm, the men had retreated further to a nearby pigpen, a formidable structure designed to keep the village's most precious resource safe, but this movement and limited supplies meant Bunat could do little to relieve the sufferings of the badly wounded Harris. The assailants attempted to get closer under cover of drainage ditches, while other locals warned the police party of impending attacks. Finally at 5:20pm two armed constables reached the besieged officials and chased off the attackers, but Harris had succumbed to his wounds. The two armed constables were enough to cause the plotters to retreat into hiding in distant villages and seasonal encampments. [35]

[34] Justice Ralph T Gore, "Case Four Reg., v. Sitkuningim of Afogovip, and others", Appendix D, Annexure No. 2, *Territory of Papua and New Guinea, Telefomin Murders: November 1953, Fifth Menzies Ministry Second System* Cabinet Submissions 91-115; Justice Ralph T. Gore, (transcription of evidence), "Case Book – Telefomin Cases book "C", Box 9, and R.T. Gore and Paul Quinlivan, Paul., Gore Papers, Box 9.
[35] Gore, "Case Four, Reg, v. Sitkuningim of Afogovip and others"; Gore transcription of evidence, Case Book – Telefomin Cases book "C".

The perpetrators were hunted down with cooperation from some local people over the course of December 1953 and January 1954.[36] A prosecution case was built as police located witnesses and as they emerged from hiding. Even innocent villagers had scattered, as they had feared reprisal attacks by colonial authorities.[37] All the witnesses and accused were detained and taken to Wewak for the trials, as allowed by the ordinances.[38] The accused were first arraigned in the Magistrate's Court in June 1954 and then subjected to four separate Supreme Court trials between 7 July and 17 August 1954, with Justice Gore presiding. There was no jury required under the law in a capital case when the accused was Nuiginian.[39] This meant that the judge determined facts of the case, guilt or innocence, and the sentence.

Ralph Gore had been a judge in Papua since 1924. Prior to the unification of the two territories in 1949 he had been Chief Justice of Papua. As Chief Justice Beaumont "Monty' Phillips of New Guinea, was senior in service to Gore by a month, he was made Chief Justice of PNG.[40] Still, Gore was an established and respected person who had held various positions in the colonial administration in addition to his judicial duties, such as acting as Lieutenant-Governor of Papua prior to the war.[41] His career reflected the close ties between the bureaucracy, police and the judiciary. His sentencing record was consistent with his fellow judges.[42] Deepening his understanding of PNG, he was a long term resident, so he had a great deal of social contact with the expatriate community, and he shared many of their views, such as the view of old colonialists that Hasluck and the UN's push for political institutions and a greater role for Nuiginians was too hasty.[43] He was popular with other expatriates and was known as 'Judgie' by the young expatriates, indicating a genial and good-humoured nature.[44]

The four trials proceeded smoothly and were covered by Australian and international press. Indeed, as this chapter will show, there was a particularly spirited and principled defence. The defence was extremely critical of Australian colonialism highlighting the exploitation of local people, sexual

[36] "Wanted NG Natives Traced", *Courier-Mail*, 20 Jan 1954, p. 1.
[37] Gore, (transcription of evidence), "Case Book – Telefomin Cases book "A", p. 18b and 22b.
[38] Downs, *The Australian Trusteeship*, pp. 154-55.
[39] Donald Cleland, "Report of the Administrator of Papua New Guinea and Appendices "A" to "E"", 30th August 1954", *Territory of Papua and New Guinea, Telefomin Murders: November 1953, Fifth Menzies Ministry Second System* Cabinet Submissions 91-115, p. 2.
[40] Rachel Cleland, *Pathways to Independence; Story of Official and Family Life in Papua and New Guinea from 1951-1975*, Singapore National Printer Ltd, Cottesloe, 1985, p. 184. Gore's attitudes in his memoir are similar to those views of Rachel Cleland and Ian Downs. Ian Downs, *The Australian Trusteeship Papua New Guinea 1945-75*, AGPS, Canberra 1980.
[41] Paul Hasluck, *A Time for Building: Australian Administration in Papua and New Guinea 1951-1963*, Melbourne University Press, Carlton, 1976, p. 343.
[42] See the tabulation of sentencing records for PNG judges in figure 6-5.
[43] Ralph Gore, *Justice Versus Sorcery*, Jacaranda Press, Brisbane, 1964, pp. 217-18.
[44] Gore, *Justice Versus Sorcery*, pp. 217-8 for his views on the UN Australian policy and the future of PNG; Cleland, *Pathways to Independence,* pp. 183-4,198-99

misconduct of officials, seizures of goods, and the unnecessary use of violence to enforce regulations. Obviously, this posed a distinct problem for the Administration and Hasluck in defending Australia from local, domestic and international criticism. Partially due to this defence, despite being found guilty, the accused, as well as the victims, received a good deal of sympathy from the Australian public.

In the Telefomin cases, the accused were found guilty of wilful murder and the sentence of death was, under the legislation, mandatory, except for Timengin, who was discharged on the basis of mental incapacity in *Reg. v. Kabaramsep and others*.[45] Justice Gore had two procedural options available to him. He could 'record a sentence of death', which meant he felt that the personal and cultural circumstances of the offenders mitigated the offence such that clemency should be enacted. Alternatively, he could 'pronounce a sentence of death', which meant Gore judged the crimes to have had no significant mitigating circumstances and believed those so convicted should hang.[46] The Executive Council could not by custom and practice hang an offender whose sentence had been recorded, which gave Gore some control over their fate. [47]

Purari's killers had their sentences recorded, which meant the judge recommended clemency. Gore assessed these men as less culpable as they had been involved spontaneously in the killings: they "were not party to the plan to wipe out the administration personnel". However, the conspirators and killers of Buritori, Harris and Szarka were found to have plotted over time and thus received pronounced sentences, which was a recommendation to execute.[48] This was an unusual sentence for Gore who seldom had pronounced sentence in his long career and whose average sentence for murder was 7.5 years.[49]

The Minister for Territories then submitted the sentence to the Federal Cabinet for review and consideration for clemency. Australian newspapers covered the events, which meant that they were well-known and Hasluck's and Commonwealth Cabinet's awareness of this incident ensured that this referral of the capital case review to the Commonwealth executive occurred.[50] Cabinet considered a number of issues. There were the implications of local people trying to remove Australian authority from their ancestral lands and there was a trial defence that represented the action of the

[45] Gore, "Case 3, Reg v. Kabaramsep and others, 1954", Appendix C, In Annexure No. 2, in *Territory of Papua and New Guinea, Telefomin Murders: November 1953, Fifth Menzies Ministry Second System* Cabinet Submissions 91-115.
[46] On the meaning of a recorded sentence as opposed to a pronounced sentence- Mark Finnane, *Punishment in Australian Society*, Australian Retrospectives- OUP, Melbourne 1997, p. 126.
[47] Murray Tyrrell interviewed by Mel Pratt Mel Pratt collection, 27 May 1974, NLA TRC 121/94, http://nla.gov.au/nla.obj-221562947
[48] Gore, "Case One, R. v. Asogoning and others", p. 2.
[49] PNG Crown Law Office, "Tabulation of Sentencing by Judge, 10-7-1959." Folder 8, Box 1, Gore, R. T. and Quinlivan, Paul J. *Papers 1930-1964,* NLA; "Few Executed for Murder", *South Pacific Post*, 26 November 1957, p. 3.
[50] As this thesis will explore in the following chapter, such referrals did not always happen.

Administration as causing violence. They had to decide whether capital punishment or clemency would better remediate these problems, while accounting for great public interest in enacting mercy, and the lobbying of different groups. Ultimately, Cabinet and the Governor-General made their decision on 22 September 1954 to direct the Administrator to commute the pronounced and recorded death sentences to imprisonment for ten years with hard labour for all the men involved.[51]

Figure 2-4 Figure 2-5 An example of a Haus Tamboran, a ritual centre, from the Sepik area, where the Telefomin area lies.[52]

**"Treat-them-gently-at-all-costs-and-please-the United Nations": When the News Broke: Australian Reactions to the Killings**

At first, there was outrage at the murder of Australians by "little naked savages", but then the journalists and other observers scrutinised Australian conduct and challenged the conduct of Australian colonialism.[53] The suspicions of Australian colonialism came from two directions. Old colonialists pointed to the events in Telefomin and challenged Hasluck's assertion of a "new

[51] Notetaker A S Brown, 21 -9-54, Submission 102, p. 124, Cabinet Notebook. Notes of meetings 4 June 1954 - 27 October 1954, NAA: A11099, 1/19; "N.G. Natives to Serve Ten Years Imprisonment", *Canberra Times*, 23 Sept 1954, p. 6.
[52] Philippe Gigliotti, "Haus Tambaran, or spirit house, in the Sepik River Basin", 2007. http://www.sacredland.org/sepik-river-basin/ Note the spelling variations.
[53] "White Prestige Must be Restored", *Courier-Mail*, (Brisbane), 18 Jan 1954, p. 2.

relationship between peoples."[54] From the other direction, there were suspicions of colonialism in any form.[55] There was a ready group of commentators who wrote regularly on PNG, and who had something to say about these killings on the front pages of several major dailies.[56]

The first substantial discussion of the Telefomin killings in the Australian media built a narrative in which the killings were tragic, the result of various 'native' impulses and practices, but also that Australian policy and practice were to blame for creating the situation which allowed killings. Four days after the killings, on 10 November, both the Brisbane *Courier-Mail,* and Adelaide *Advertiser* raised accusations of administrative malpractice.[57]

The *Courier-Mail* raised the possibility that Australian mismanagement had provoked the killings.[58] It reported on 12 November 1953 that:

> Szarka is believed to have been killed by natives in revenge for the drowning of five natives from a raft under the command of a patrol officer earlier this year.[59]

Also on 12 November 1953 the *Courier-Mail* argued that Hasluck's policies to expand the area under patrol and the pressures of international scrutiny had left the patrol officers exposed to dangers for which they were not sufficiently trained or equipped to meet:

> The area in which the murders occurred has been described as one into which only patrols of maximum strength should be allowed to go. The murder of a cadet patrol officer in this area, while accompanied only by a small number of native police, seems to indicate that lives may be endangered to meet a Government deadline, which will, in turn, placate a committee of the United Nations[60]

The *Advertiser* gave a more personal dimension to the Brisbane paper's critique by reporting comments from Mrs. Szarka, the mother of the killed patrol officer, that her son's predecessor had left "a lot of cleaning up to do" and that Szarka and Harris:

> had not received sufficient advice on this area before going there as they found a wild crowd of natives and apparently were caught without any or very little ammunition.[61]

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[54] Nelson, *Taim Belong Masta,* Ch 1; Fitzpatrick *Law and State in Papua New Guinea*, p. 68; Healy, "Monocultural administration", p. 222; Hank Nelson, "The View from the Sub-district", p. 34-35, in Brij V. Lal, *The Defining Years; Pacific Islands, 1945-65,* Division of Pacific and Asian History, RSPAS, ANU, 2005; R Gerard Ward "The 1950s and 1960s—an information age for the South Pacific Islands", pp. 3-10; Anthony Yeates, "The Patrol Officers and Tom Kabu: Power and Prestige in the Purari Delta" in *Journal of Pacific History*, vol. 40, no. 1, 2005, pp. 71-90.
[55] Hasluck, *A Time for Building*, pp. 192-195.
[56] On regular commentary on PNG see Brown, *Governing Prosperity*, pp. 169-174.
[57] These papers often reported on PNG issues.
[58] The particular Defence for the murder charges used by the defence lawyer is intensively discussed later in the chapter.
[59] "Search to-day for body of missing officer, Four New Investigators in the 'Murder Area', *The Courier-Mail*, 12 November 1953, p. 1.
[60] Editor, "Danger Point in NG", *Courier-Mail*, 12 Nov 1953, p. 2.
[61] "Second N.G. patrol Officer Missing", *Advertiser (*Adelaide), 10 Nov 1953, p. 1.

Indeed, close attention was paid to the developing story of the parents' grief and criticisms.[62] The newspapers continued to quote her as credible evidence, as she quoted her son's letters about the situation in Telefomin. Indeed, Rachael Cleland described Mrs Szarka as "very persistent" in questioning Donald Cleland and the administration as to their culpability.[63]

The *Courier-Mail* over several months continued to be critical of Hasluck's policies and United Nations' intervention in Australian policy in relation to the Telefomin killings. The *Courier-Mail* editorial suggested that:

> There is a connection between the murders, which have taken place in the New Guinea Mountains, and the talk, which goes on in the conference chambers of the United Nations.[64]

Further, the editor developed the old colonial critique of Hasluck's policies by stating:

> Suggestions are being made that young men are now being pushed into responsible contact with remote tribes before they have had sufficient training.[65]

It also described Australian policy in PNG as a "monumental bluff".[66] It called on the Administration to rethink the rapid expansion of patrolled areas:

> But they were the first to be murdered since the post-war edict 'treat-them-gently-at-all-costs-and-please-the-United Nations' came into force.[67]

The *Courier-Mail's* advocacy for more vigorous action to control and police Nuiginians matched those who saw Australia retaining control and guidance of PNG long into the future.[68] This commentary was informed by pre-war conceptions of colonialism that regretted the changing world and the new liberal colonialism begun under Labor and continued by the Liberal and Country parties.[69] The approach advocated by the old colonialist policy was a return to pre-war forms of control, rather than cooperating with the UN Trusteeship Council's goals of advancement, on development, devolution and eventual independence.[70] The *Courier-Mail* and *Advertiser's* criticisms sprang from old colonialist critiques of the direction of PNG.

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[62] "New Guinea Patrol Officer Killed by Natives", *Sun-Herald* (Sydney), 8 Nov 1953, p. 1. "Geoffrey Harris", *Sun-Herald*, 8 Nov 1953, p. 2. "Lost on Patrol; Fears of 2nd NG Murder", *Courier-Mail*, 10 Nov 1953, p. 1. "Second N.G. patrol Officer Missing", *Advertiser,* 10 Nov 1953, p. 1. "New Guinea Patrol Locates Bodies of Murdered Men", *Mercury* (Hobart), 16 Nov 1953, p. 8. "Hunt Murderers in NG Jungles", *Courier-Mail*, 17 Nov 1953, p. 1. "Report on NG Massacre", *Sydney Morning Herald,* 2 Dec 1953, p. 5.
[63] Cleland, *Pathways to Independence*, pp. 273-275.
[64] "Danger Point in NG", *Courier-Mail*, 12 Nov 1953, p. 2.
[65] "Danger Point in NG", *Courier-Mail*, 12 Nov 1953, p. 2.
[66] "White Prestige Must Be Restored", *Courier-Mail*, 18 Jan 1953, p. 2.
[67] "White Prestige Must Be Restored", *Courier-Mail*, 18 Jan 1953, p. 2.
[68] Nelson, *Taim Bilong Masta*, pp. 189-190. Ralph Gore, *Justice Versus Sorcery*, p. 218.
[69] John Dademo Waiko, *A Short History of Papua New Guinea; Second Edition,* OUP, Melbourne, 2013, pp. 95-96.
[70] Nancy Shoemaker, "A Typology of Colonialism" *Perspectives on History*, American Historical Association, October, 2015, https://www.historians.org/publications-and-directories/perspectives-on-history/october-2015/a-typology-of-colonialism

A different perspective was adopted by the *Canberra Times* (CT), most accessible to foreign diplomats, and speaking to an audience charged with Territories and PNG policy. It did not highlight accusations of malpractice and instead attributed the events to the vagaries of the Nuiginians. Perhaps not wanting to alienate its audience with trenchant critiques of federal bureaucrats, its customers, might well explain the editorial choice to be more neutral. Alternatively, the representation of Nuiginians as primitive and savage was a stock of Australian literature and media, and this was just one more case of it.[71] Exemplifying that approach, on 10 November, the *CT* reported that: "a patrol officer had been killed when natives attacked a party in New Guinea" it noted that reports were unconfirmed. On 11 November the *CT* led with a page one article dismissing rumours of "widespread native uprising in New Guinea".[72] Hasluck was reported as replying to a question in Parliament, in which he emphasised that while "natives had said they had killed an officer … this statement might have been made only by way of boasting." Subsequently Hasluck was reported confirming the deaths while he characterised events as a well-equipped, routine patrol into a previously friendly area that had been ambushed, and that circumstances were being investigated. The *CT* initially made no mention of Mrs. Szarka or of criticisms of policy, only recording on 17 November that Szarka's body was to be flown to Leura, NSW, for burial, having been "the second patrol officer murdered during a tribal uprising within a matter of days." By then, the *CT* was also reporting rumours circulating in PNG that the perpetrators had " wiped out the government station at Telefomin so young men could hold ancient ceremonial rites during the next few weeks." That commentary in effect highlighted the unsophisticated nature of the Nuiginians, the *CT's* commentary seemed more focussed on justifying current gradualist policy settings and the need for Australian guidance and trusteeship to an international audience.

As press coverage brought events into public discussion, Labor politicians joined the critique of the Menzies' government. While Labor was in support of policies to advance Nuiginians, unlike the *Courier-Mail*, they wondered if the colonialism of Blamey and Hasluck's New Deal was being pursued genuinely. They asked pointed questions in both Houses of Parliament between 10 November and 1 December, whether there was an uprising in Telefomin and about the competence of the administration.[73] Mrs Szarka had passed her son's letters to her local member, Labor's Tony Luchetti, who used the letters to give specificity and authority to his questioning on the competence of the administration. By December it was clear that the Administration had to defend its own record.

[71] Regis Tove Stella, *Imagining the Other*; *The Representation of the Papua New Guinean Subject*; Pacific Islands Monograph Series 20, University of Hawaii Press, Honolulu, 2007, p. 139.
[72] "Second Case Reported in (unreadable) in New Guinea", *Canberra Times*, 10 Nov 1953, p. 1.
[73] "Search to-day for body of missing officer, Four New Investigators in the 'Murder Area'", *Courier-Mail*, 12 Nov 1953, p. 1. "He Leads the NG Killers", *Courier-Mail*, 12 Nov 1953, p. 1. "Report on NG Massacre: Specific Orders disregarded", *Sydney Morning Herald*, 2 Dec 1953, p. 5

In Port Moresby, Donald Cleland, the Administrator of PNG, defended the quality of Australia's work in PNG and asserted to the *Courier-Mail* that the killings were not the government's fault.[74]

To some commentators, malpractice was a policy that required moving too fast in bringing Nuiginians under Australian control towards autonomy and independence. To others, malpractice was an old dictatorial colonial determination to stay and control Nuiginians.[75] How was Paul Hasluck to address these delegitimising criticisms of Australia's colonial project?

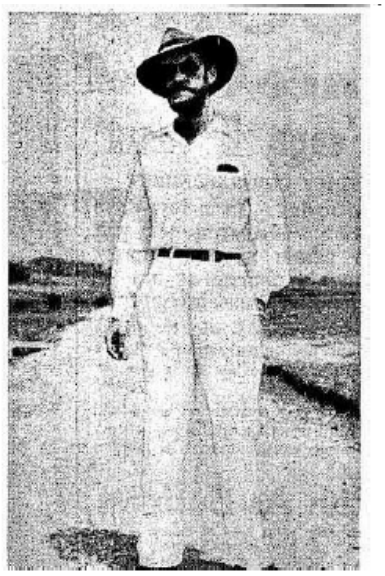

Figure 2-6 The slain Assistant Patrol Officer Geoffrey Harris was pictured in the *Sun-Herald.*[76]

**"To advance the welfare of native people." Context of Clemency: Administrative Responses to the Newspapers**

Faced with such coverage, Hasluck reasserted the Commonwealth's mission to "to advance the welfare of native people."[77] On 9 November 1953, he argued that the expansion of patrolled areas was "was the essential preliminary to measures to advance the welfare of native people."[78] Hasluck also emphasised the bipartisan efforts in PNG, that the welfare of the people had been the goal of Australia for the previous five years.[79] This is also consistent with Wolfers' and Tove Stella's arguments that the rhetoric of nobility of purpose was a consistent theme in Australian policy

[74] "NG Killing "not fault of Govt.", *Courier-Mail*, 13 Nov 1953, p. 1.
[75] "Consternation in New Guinea", *Advertiser*, 1 Jan 1954, p. 10.
[76] *The Sun-Herald*, 8 November 1953, p. 2.
[77] "Search to-day for body of missing officer, Four New Investigators in the 'Murder Area'", *Courier-Mail*, 12 Nov 1953, p. 1.
[78] "Search to-day for body of missing officer"
[79] "Search to-day for body of missing officer".

statements on PNG.[80] This positive view of advancement goals was in direct contrast to the criticisms of press commentary till that point.

Further, in trying to explain the killings, but also defuse criticisms of his policies of expanding the scope of patrolled areas, he highlighted errors in procedure made by Szarka's patrol, Hasluck defended the policy and officials, while still allowing for errors by individuals:

> Although the government accepted final responsibility for the territory, Canberra did not give detailed directions about how officers in the territory were to do their work, 'We rely on with confidence, the judgement of officers' he said.[81]

Going against the sympathy generated towards individual officers, Hasluck stated on 1 December that Szarka and Harris had "disregarded specific instructions" to always patrol in pairs.[82] He added, to further exonerate the Administration yet also provide some protection to Szarka and Harris that the attack could not have been, and was not anticipated: the patrol officers, constables and translators, had suspected nothing.[83] Thus Hasluck's arguments sought to protect his policies, while offering limited protection to his officials.

Hasluck's other strategy to protect the Administration was to cast doubt on the facts presented by early reporting. He implied that it had been sensational. Instead, he offered himself as a source of calm statements of fact. Hasluck suggested that: "until the true cause of the attack is known, as a result of careful investigation, speculation and surmise should be suspended."[84] Hasluck argued that the courts had not yet established the facts, and rather than being political, the killings were criminal matters that required a judicial determination.[85] These statements suggested that all the information presented by most newspaper reporting up until that point was unreliable.

In that vein, even after several days of Mrs. Szarka feeding trenchant criticism of his management of the territory, Hasluck expressed his sympathy to Szarka's parents.[86] That positioned them as grief stricken, and perhaps irrational. On the other hand, he placed himself within the narrative of grief by expressing his own regrets and condolences. Continuing that strategy, when the news of Harris's death became public, Territories must have ensured Hasluck's condolence calls were reported, as the newspapers were able to report on the phone calls: "The Minister for Territories (Mr Hasluck)

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[80] Edward P. Wolfers, *Race Relations and Colonial Rule in Papua and New Guinea*, Australiana and New Zealand book Company, Brookvale, 1975, p. 125. Brown, *Governing Prosperity*, Ch. 2; Stella, *Imagining the Other, p. 87*; see for example Cleland, *Pathways to Independence,* p. 195.
[81] "Defence of N.G. Policy, *Advertiser*, 12 November, 1953, p. 3.
[82] "Report on NG Massacre: Specific Orders disregarded", *Sydney Morning Herald*, 2 Dec 1953, p. 5.
[83] "Report on NG Massacre".
[84] "Report on NG Massacre"
[85] "Report on NG Massacre".
[86] "New Guinea Patrol Locates Bodies of Murdered Men", *Mercury*, 16 Nov 1953, p. 8

tonight expressed his deep sympathy with the relatives of the two officers".[87] When Szarka's body was recovered and his death confirmed, Hasluck again represented himself as one of the mourners:

> Mr. Hasluck said he wished to extend the deepest sympathy to Szarka's parents, who were informed yesterday of the death of their son. Patrol Officer Szarka, an ex-serviceman, went to the territory in 1950, he added and by his personality and keenness had quickly gained recognition as a very competent officer. [88]

This formulation shows his efforts to defuse criticisms of disregarding the safety and needs of his staff in implementing Commonwealth policy by ensuring the press was aware of his sympathy with the families.

Hasluck was also keenly aware of the need to manage the international aspects of these events. As such, there was coordination between the PNG Administration, Department of Territories, and Departments of External Affairs to ensure that consistent and accurate messages were being conveyed to both Australian and international audiences. The Department of Territories requested frequent updates from Port Moresby so that "he [Hasluck] will be in the best possible position to avoid pitfalls in shaping his replies."[89] For the UNTC audience in particular, the Department of External Affairs requested briefings on the topic because: "The Trusteeship Council's report has yet to come before the 4th Committee of the Assembly and questions might be asked and possibly exaggerated criticisms made by Soviet representatives."[90] External Affairs began preparation as early as 11 November, as Australian diplomats were certain that international critics in New York meetings would raise questions.

In the context of this heightened attention, the trials became critical to determining which explanation of the events would be accepted as truthful. If the government's message of personal rather than institutional culpability was carried, could the men be justly hanged according to the judicial norms? If there was institutional failure, could hanging be just politically? If it was unprovoked savagery, could clemency be tolerated? What would satisfy a mother's grief, a Minister's discomfort, and a suspicious decolonising world?

## "The illogical manner of the natives": Context of Clemency: The Trial Arguments and the Problem of the Defence of Emergency

The accused were first arraigned in the magistrate's court in June 1954. Then, between 7 July and 17 August 1954 Justice Ralph Gore heard four separate Supreme Court trials in Wewak, one for each of

[87] "Second N.G. Patrol Officer Missing", *Advertiser,* 10 Nov 1953, p. 1.
[88] "Second N.G. Patrol Officer Missing".
[89] Cited in Barry Craig, "The Telefomin Murders: Whose Myth?", pp. 133-4.
[90] The report went before the council during the trial the next year, 1954: NAA 1956/1166:24 11 Nov 1953, cited in Craig, "The Telefomin Murders: Whose Myth?", pp. 133-4.

the victims. Witnesses giving testimony included villagers, patrol officers, Nuiginian constables, administration officials, and the accused and there was consistency in the evidence as to the events of the killings. With the large scale response of the Administration to the killings, there were minimal doubts about issues such as witness reliability and translation, which sometimes made the Executive hesitate over punishment in some other cases. Testimony was straightforward as the accused admitted to the killings. Only one man was exonerated as too limited mentally to be held culpable.[91] Indeed in all the subsequent debate over appropriate penalties, the basic facts of the case and the fairness of the trial was not questioned, even Rachel Cleland who went out of her way to discuss, and usually refute, accusations of scandal in her memoir made no reference to anyone criticising the fairness of the trial procedure.[92] Th eight killers of Purari had their sentences recorded, so it was impossible for that group to hang, but that left the remaining 26 men with pronounced sentences, and thus left the Executive with the option of hanging them.[93]

There was one key element of the trial that became significant for the political calculations around determining whether the condemned would receive mercy. During the trial William 'Peter' Lalor, the defence lawyer assigned to the Telefomin men, used the defence of emergency to the murder charges, a defence that has rarely been successful. His defence focused attention on the inadequacies in the Australian administration and colonial practice as the cause of the men's response to a crisis. The legal defence of emergency is central to understanding the implications of the trials for the capital case reviews.

Lalor was new to his position as the public defender in the PNG Crown Law Office, but had been a patrol officer prior to retraining after a serious injury. He was already an active unionist in the Public Service Association and was known to be a reformist and willing to challenge the Administration and Commonwealth on behalf of Nuiginians. Yet he also gained the respect of senior officials such as Cleland.[94] The defence of 'emergency' was likely to embarrass the Administration and Commonwealth, even if unsuccessful. The Griffith Code defence of 'Emergency', Section 25, draws on the common law defence of 'Necessity'.[95] It is a complete defence against murder and requires the

[91] Gore, "Summation, Cases 3 R. Kabaramsep and others,", Appendix C, Annexure No. 2, *Territory of Papua and New Guinea, Telefomin Murders: November 1953, Fifth Menzies Ministry Second System Cabinet Submissions 91-115*.
[92] Cleland, *Pathways to Independence*, Chapter 15.
[93] Gore, "Cases 1-4," Appendices A-D, Annexure No. 2, *Territory of Papua and New Guinea, Telefomin Murders: November 1953, Fifth Menzies Ministry Second System* Cabinet Submissions 91-115.
[94] Cleland, *Pathways to Independence*, p. 274 and 304. Hasluck, *A Time For Building*, p. 162; 345 Letter, Barnes to McMahon, Canberra, 10 December 1969, *Historical documents: Volume 26: Australia and Papua New Guinea, 1966–1969,* Department of Foreign Affairs, Updated, 26 November 2015, https://dfat.gov.au/about-us/publications/historical-documents/Pages/historical-documents.aspx
[95] "Criminal Responsibility, Section 25", *Queensland Criminal Code Adopted*, (the Criminal Code in use in PNG in 1953/4.) http://www.paclii.org/pg/legis/papua_annotated/cca254.pdf**,** Accessed 22-9-13**,** This section was not

defence to establish that the situation was so life threatening as to permit the suspension of normal moral rules for survival's sake.[96]

In constructing his defence, Lalor repeated some of Mrs. Szarka's accusations of administrative malpractice, having been given Szarka's letters by the Administration as a part of discovery and due disclosure. There were also new accusations arising from Lalor's discussions with the accused and the villagers.[97] The people raised the seizures of food and supplies, the sexual misconduct e.g. common law marriages without dowries, the threats, beatings, uncompensated deaths, forced labour, and house burnings that outraged the pride of the previously independent people. Rather than being a desperate roll of the defence dice, the choice of this defence indicates that Lalor was disturbed by the maladministration and wished to highlight those problems. He was known as a principled man with a deep concern for the welfare on Nuiginians and this attempt to both defend them as well as highlight injustice was in keeping with the character revealed in the source material.[98]

The court, however, found that there was no 'Emergency' in the district as defined by the Code: that is, sufficient to require the suspension of normal morality, and most significantly, imminent and immediate. Therefore, the culpability of the killers was not reduced and the Telefomin killers were found guilty of wilful murder.[99] If the defence of emergency had been accepted, then Australian colonial policy would also have been condemned, as the court would have found that the administration of the Telefomin region was so bad that people were driven to kill for their own survival. Yet, even raising the possibility cast doubts upon the quality of Australian colonialism. Indeed, when Lalor was called to provide a report on the matter for the capital case reviews, he doubled down on his criticisms and did not back away from the charges of malpractice, as he could have while he was writing as a member of bureaucracy, rather than as a defence lawyer. This insistence on highlighting the complaints of the region further indicates he had used the defence of emergency out of principle, rather than a desperate or inexperienced grasping of legal straws. As

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subsequently amended see: "Ordinances- Papua New Guinea: Criminal Code Amendment (Papua) Ordinance, National Archives of Australia, A518-A846/6/145 and A518- A846/6/45 Part 1. And "Ordinances PNG Amalgamation of the laws of Papua and New Guinea- The Criminal Code", National Archives of Australia, A518- A846/6/21; David Lanham et.al, *Criminal Laws in Australia*, The Federation Press, Annandale, N.S.W., 2006, p. 50.

[96] Lanham et al, *Criminal Laws in Australia*, p. 50.

[97] W.A. Lalor, Letter to the Secretary for Law, Port Moresby, "Investigation Made By Myself for the Purpose of the Defence of the Accused natives in the Telefomin Trials- 26 August 1954", Annexure No. 3*, Territory of Papua and New Guinea, Telefomin Murders: November 1953, Fifth Menzies Ministry Second System* Cabinet Submissions 91-115,

[98] Cleland, *Pathways to Independence*, p. 274 and 304. Hasluck, *A Time For Building*, p. 162. Letter, Barnes to McMahon, Canberra, 10 December 1969, *Historical documents: Volume 26: Australia and Papua New Guinea, 1966–1969,* Department of Foreign Affairs, Updated, 26 November 2015, https://dfat.gov.au/about-us/publications/historical-documents/Pages/historical-documents.aspx

[99] Gore, "Cases 1-4"

such, the issues of malpractice remained in the mind of the Executive during the subsequent clemency considerations.

Nevertheless, Gore's rejection of the defence of emergency actually obscured the realities of "the incidents complained of". Gore argued the definition of the defence of emergency required a more immediate and specific threat than Lalor had adduced. The events Lalor adduced were too diluted by time and therefore irrelevant to the case law of the common law defence of necessity, upon which the Code defence of Emergency drew. The facts of maladministration were not disputed, but rather the meaning and significance of them. Indeed, according to the transcript of his judgement provided to the clemency deliberations, Gore found that:

> Whatever the incidents complained of were, and which had occurred so long before, they could afford no excuse for this murder, a relief from criminal responsibility for the crime. I am concerned in this charge with criminal responsibility and hardly at all with material advanced in mitigation. Perhaps the motive was revenge, and had in the illogical manner of the natives [sic], but my strong belief is that they wished to throw off administrative control, which they found irksome.[100]

As such, Gore's finding that there was no emergency was not to say there were not serious problems, but it sounded like that when reported or represented as such by the Administration and Territories.

Gore rejected Lalor's damning view of an Australian colonialism that drove people to kill, as practiced by the apparently bad tempered Misters Szarka and Harris's, and predecessors, "man bilong cross", as local people called them.[101] Gore instead found the cause of the killings in the irrationality and personal motivations of the killers. Gore found that Nuiginian men killed because they were 'irked', personally: that they were shamed by assaults from constables and patrol officers and by those same men interfering with female relatives, not because they were active political agents, warriors, or rational actors. Gore's findings were resonant of the sort of stereotypes that Regis Tove Stella argued were used to justify colonialism. Tove Stella argued that such discourses painted a picture of people "whose relegation [to a savage status] provided a justification for their domination."[102] Rather, as Gore suggested in his judgements, they were seized by emotional responses such as "revenge" and finding things "irksome". Instead of Lalor's depiction of a political struggle for survival, Gore presented an irritable and unthinking people who reacted with violence.

In explaining Gore's approach to law and sentencing in this case, we can turn to his own writing on the practice of law in PNG. Having sat in Papua and then PNG since 1924, he was a senior judge

[100] Gore, "Case Four, R, v. Sitkuningim and others", in Appendix D in Annexure No. 2, *Territory of Papua and New Guinea, Telefomin Murders: November 1953, Fifth Menzies Ministry Second System* Cabinet *Submissions 91-115*.
[101] On being a bad tempered "man bilong cross", see Craig, "The Telefomin Murders: Whose Myth?", p. 137.
[102] Stella, *Imagining the Other*, p. 139.

whose views and doctrines were extremely influential in the PNG courts, and he had had written of his firm ideas about Nuiginian behaviour and the law. Gore believed that:

> Shame is a characteristic of most people no doubt, but among dark races the force of it seems to be more intense and its reaction takes queerer forms than in the instances amongst whites. Often the satisfaction for a sense of shame is quite illogical.[103]

Gore was predisposed by the experiences of his career to see Nuiginian violence as over-reactions to treatment that bruised their "intense" sense of shame, such as the events of violence, seizures, and marriage custom violations cited by Lalor. Lalor's depiction of events fed into Gore's narrative of an emotional people trapped in "illogical" rituals of shame and redeeming honour. Indeed, Gore was of the opinion that few defendants brought before him were "what I call the true native criminal", that is motivated by premeditated, criminal intent and fully intending to break the laws.[104] Further showing his view of the reasons Nuiginians commit crimes such as killing, he was in two minds about changing the names of prisons and gaols to "corrective institutions' because he argued cultural impulses, such as shame, could not be corrected and that was what actually caused crime in PNG, rather than a moral lapse. Murder was almost never premeditated in the Western sense of crime. Men had moral responsibilities to redeem the honour of their grouping and that overrode any notion of Australian law, so their actions might be understood, if not tolerated. Yet he hoped prisons might aid in Westernisation and thus militate against honour killing, even if they failed to be "corrective" morally:

> Though a delightful euphemism, there is, however, some merit in it in relation to the native offender because most of them are not criminals in the true sense of the word. In many cases the native custom, which supplies the motive, is such an ingrained part of the social system and the urge to commit crime in obedience to it so great that although the offender may have acquired sufficient conception of the law's demands, he is mentally incapable of resisting the impulse of his tribal creed.[105]

Thus, this case is an example of how Gore saw his career in colonial justice—as an attempt to correct unfortunate cultural habits, rather than punishing criminal intent.

Following that pattern, Gore's judgment was that the Telefomin were rejecting Australian administration to return to a life more "pleasurable" out of cultural impulse rather than necessarily murderous impulse, but nevertheless that was not acceptable to him:

[103] Gore, *Justice Versus Sorcery*, p. 103.
[104] Gore, *Justice Versus Sorcery*, p. 91.
[105] Gore, *Justice Versus Sorcery*, p. 88.

> It [the conspiracy to kill] seems to have been engendered by the wish to be relieved of the white man's control, which was interfering to their way of thinking with their pleasurable existence.[106]

So despite some recognition that Australian control was unwelcome, Gore asserted that these were irascible people without awareness of the demands of the modern world: they were people in need of the instruction and correction that Australian colonialism provided. Gore intended punishment to instruct and provide boundaries for the community who observed the executions and imprisonments of the killers, to correct their cultural impulses through deterrence.

On the surface, Gore's dismissal of the defence or emergency and his finding the killers guilty of murder appeared to be an official finding that the incident of which Szarka and Lalor had complained had not happened. Ultimately, Gore's finding of an interpersonal murder, rather than the defences' implication of a legitimate rebellion, exonerated Australian colonial practice to its audiences.[107] Yet, this exoneration of the administration did not mean that the resentments and anger in the region went away. The events that Lalor described remained facts and his report to the administration on those matters would go on to have an impact on clemency considerations. The Administration and Commonwealth had to find a punishment that would deter murder, while still also recognising that the punishment was directed at an already angry community.

**Choosing their Fate: Cabinet Decides**

Once Gore's judgements were made, and so many condemned to death, political authorities had to translate that matter of law and justice into a political solution to the Telefomin's complaints in the context of heightened scrutiny within Australia and the UNTC. The advice from officials on whether to hang or grant clemency as solutions to the political, administrative and moral problem of the killings makes up a significant part of the clemency file on the Telefomin killers and reveals a great deal about the calculus of the different levels of the administration of PNG, and what those who held different ideologies of colonial law thought about whether to hang or grant mercy to the condemned men. In addition, the newspaper coverage continued into the question of clemency, so the opinions emerging in the press formed part of the context of the discretionary process. With an unusually voluminous file of advice and public lobbying, from 9 to 22 September 1954, Cabinet more actively considered this case than they did any other clemency appeal during the 1950s.

Even after the trials, during the capital case reviews, the Szarka and Harris families continued to be of interest in the press, to Paul Hasluck and therefore to Cabinet deliberations on clemency.

[106] Gore, 'Summing Up", p. 5, R v. Tobaronsep and others, Telefomin Cases Book, Gore Papers, Box 9. This summing up is in a typed version and glued into the casebook.
[107] This issue will be discussed in more detail below in considering Gore's reasoning.

Newspapers quoted both Mrs. Szarka and Mrs. Harris' objections to the executions of the killers. On 12 August 1954, the *Mercury*, reported:

> Mrs. Szarka said today that she wanted to find out why the natives murdered her son and who was responsible: 'I think these natives have been badly treated,' she said. 'But my son got on very well with them… I know Gerald would not have wished the execution of the natives. He loved them and they highly respected him…When he arrived at Telefomin there appeared to be an unfriendly atmosphere.'[108]

The *Mercury* also transcribed the telegrams the grieving mothers had sent to Cabinet:

> Mrs. Szarka's telegram to Mr. Menzies read: "Strongly object to death penalty passed on natives for the killing of my son."

The message from Mrs. Harris similarly read: "Natives must not die for Telefomin massacre. We request a full public inquiry"[109] The *Age* also noted the same telegrams in their coverage of the trials.[110] Later in August, the *West Australian*, reported on the Harris family visiting their son's grave in Wewak.[111] The Administration had actively assisted Harris's parents in touring the gravesite and meeting the Nuiginians who had worked with their son. This grave visit was reported in the papers as well the attitude of Mrs. Harris who was reported to have "no bitterness towards the natives" and as saying "They are just primitive creatures, and don't understand the white man's law."[112] The mothers' voices therefore continued to have influence on Cabinet informally through the press. The parents' comments played to what Stella has noted was an ongoing representation of PNG as undeveloped and dangerous and therefore needing control.[113] The public attention they gained also then formed a part of the context of Cabinet deliberations, a point of view to be assuaged.

The discourse on the primitive state of the Nuiginians built conceptual space for two Australian policies. On the one hand it strengthened the argument for continued occupation to advance Nuiginians.[114] Second, it created conceptual space for policy makers to reaffirm the established sentencing precedent of commuting sentences for people thought to be too 'unsophisticated' to comprehend Australian justice.

The parents' views on maladministration were also explicitly noted in the Cabinet submissions for the capital case reviews: "It appears from the above information that there has been definite bad

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[108] "Parents Plead for Natives", *Mercury*, 12 Aug 1954, p. 5.
[109] "Parents Plead for Natives".
[110] "Story of Heroism in Murder Case", *Age,* 18 Aug 1954, p. 8.
[111] "Parents to See Wewak Grave", *West Australian*, 19 Aug 1954, p. 15.
[112] "Not Bitter to Son's Killers", *Mercury*, 31 Aug 1954, p. 6.
[113] Stella, *Imagining the Other,* p. 139; Buchan, *Empire of Political Thought*, p. 5.
[114] Nelson, *Taim Bilong Masta*, p. 201.

administration on behalf of the government."[115] The families' views influenced Cabinet through the media, through the elements of the submissions that noted the parent's views, and through their direct communication to the Minister.

Cabinet was also aware of the views expressed in the many letters to the newspapers critical of capital punishment for the Telefomin killers and that formed another pressure group in relation to the decision. As an example of those opposed to capital punishment, and there were no letters for capital punishment, one correspondent to the *Sydney Morning Herald*, a former New Guinea resident, wrote:

> Not so long ago the people of the British Isles were exhorted to defend their land from invaders 'to the last man and the last ditch'. The Telefomin natives of New Guinea, now under sentence of death for defending their place of living and way of life from invaders, should not be hanged. It is my belief that the patrol officers themselves would prefer that education take the place of the carrying out of the death sentence.[116]

Again, opposition to the death penalty was prefigured on the assumption that it was Australia's role to educate and develop and this justified Australia's continued occupation and colonial project, but still cast doubt upon the conduct of officials by arguments that implied a similarity between colonial officials and Nazis.

Various concerned community groups made direct submissions to Cabinet appealing for clemency. As Hasluck informed Cabinet members in the clemency file, 42 submissions had been made on behalf of the killers and he provided a list and summary, rather than their letters.[117] The Howard League, a long-term opponent of capital punishment, wrote opposing its use in this case.[118] A range of unions, such as the Newcastle Branch of the Federated Engine Drivers and Firemen's Association, Brisbane Trades Hall, and the ACTU opposed the use of the death penalty, both in this case specifically, and because the labour movement in Australia largely favoured abolition of the death penalty.[119] Letters also came from other sectors of the community, with the Australian Natives Association and the Churches of Christ in Australia also making representations to Cabinet on commuting the sentences of the men. Hasluck wrote that: "some of these have an obvious political

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[115] "W.J. Hall [solicitor to Mrs Szarka] to Mr. Watkins, re: Gerald Leo Szarka Deceased, 31 May 1954.", Appendix E, Annexure No. 2, *Territory of Papua and New Guinea, Telefomin Murders: November 1953, Fifth Menzies Ministry Second* Cabinet Submission 91-115, pp. 2-3.
[116] "Death Sentence in New Guinea", *Sydney Morning Herald*, 5 Aug 1954, p. 2.
[117] "Representations regarding the sentences….", Annexure No. 3, *Territory of Papua and New Guinea, Telefomin Murders: November 1953, Fifth Menzies Ministry Second* Cabinet *Submission 91-115*, p. 4. The text of all those submissions does not appear to be available.
[118] *Howard Association Annual Report, October 1899*, London, 1899, Queensland State Library, G 365189—1901, Prison System Reports, p. 14.
[119] R.N Barber, "The Labor Party and the abolition of capital punishment in Queensland, 1899-1922", *Queensland Heritage*, vol. 1, no. 9, 1968, pp. 3-12; Barry Jones, "The Decline and Fall of the Death Penalty in the English Speaking World", in Barry Jones (ed.) *The Penalty is Death: Capital Punishment in the Twentieth Century*, Sun Books, Melbourne, 1968.

purpose; some are based solely on humanity". [120] Indeed, groups such as the Howard League would have opposed any use of capital punishment and there was little commentary on PNG in their opposition, but it reflected increasing opposition to the use of capital punishment generally, which was of political significance. Neither Hasluck nor the newspapers drew attention to any calls for carrying out the death sentence. The diversity of the representations clearly indicated to Cabinet that they could exercise the mercy of the crown with political support.

To some extent the critics of colonialism in Australia found similarities between PNG and other empires. The deficiencies of the traditional mode of colonialism and imperialism were obvious in the moral and practical collapse of regimes in the 1950s in Vietnam, Algeria and Kenya. Australian newspapers covered many stories about the decline of European empires in 1953 and 1954. Further, in 1953, questions in Federal parliament on PNG reflected this understanding of a changing world. For example, Labor member S.M. Keon compared Papua New Guinea to Kenya suggesting that Papua New Guinea would become a hotbed of 'Maumauism' unless development and the movement to independence was better implemented.[121] Australians seemed to feel a duty to do better in PNG and relayed that pressure to Cabinet, and better was much likely to be clemency.

The priority of Administration officials in PNG was to address the problem of the Telefomins' repudiation of Australian Colonialism that PNG officials accepted had happened in response to "incidents" and "errors" in colonial practice. Therefore, submissions from within the administration focused on the usefulness of both capital punishment and clemency in dealing with that. Gore suggested capital punishment to draw a firm line on violence and opposition to the administration, but the others favoured mercy to rebuild the relationship. Hasluck collated the views of the officials in PNG and raised two key problems for Cabinet. First, there were clear indications that mistakes had been made and what was to be done about it. Second, there was the question of whether the condemned men were sufficiently civilised to make hanging them just.[122]

The first and most influential consideration for Cabinet was how to deal with the reality of maladministration. William Lalor's use of the defence of emergency, albeit unsuccessful, and the subsequent report he wrote for Cabinet, impressed the feelings and beliefs of the people who had experienced administrative errors upon Hasluck and the Cabinet.[123] If Lalor's critique had merely been a contrivance of the defence, he could have abandoned that critique in the clemency report.

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[120] Paul Hasluck, "Summary of Cabinet Submission", *Territory of Papua and New Guinea, Telefomin Murders: November 1953, Fifth Menzies Ministry Second* Cabinet Submission, NAA 91-115, p. 4.
[121] "Mau Mau Talk 'Mischievous'", *Sydney Morning Herald*, 7 Oct 1953, p. 5.
[122] Hasluck, "Summary of Cabinet Submission", p. 1-4.
[123] Lalor, "Investigation Made By Myself For the Purpose of The Defence of the Accused Natives in the Telefomin Trials", 26 Aug 1954, NAA A518-A846/6/145

However, in maintaining a light on the issues, he showed that he was genuinely interested in assisting the Telefomin to gain redress, rather than executions.

After handing down the mandatory sentence of death, the sitting judge was also called upon to discuss what sentence a condemned person should actually receive. In making that recommendation, the judge could consider broad issues of justice and administration, rather than just the narrow context of a particular case and its burdens of proof and relevant case law. Yet, Justice Gore was the only one to recommend hanging to Cleland and Hasluck, primarily for the deterrent value. He considered Australian colonialism being a net good, despite the "errors". He wrote that:

> The administration is at Telefomin to stay, and whatever the present generation might think, the administration must not be hampered in its undertaking for the future benefit of the people. There should be, I think, a punishment sufficient to make the people realise that there must be no interference in the future.[124]

Axiomatic to his discussion was his interpretation of events that "this was a war to exterminate the administration."[125] Gore's notion of a 'war' meant that he was aware that there was dissatisfaction with the administration and that the Telefomin killers had had broader goals and justifications for their actions, despite his rejection of the defence of emergency. However, he evidently believed that the Australian project would bring benefits that outweighed those negatives. Gore was concerned that Nuiginian opposition to colonialism might limit the capacity of the Australian administration to carry out the mission to develop the land and people, and that whatever provoked the violence was not sufficient reason to stop the project to raise the people higher: advancement.

Gore sought to follow in pre-war colonial practice of clemency and building confidence, but also being: "ruthless in dealing with any abuse of authority."[126] His recommendation to use punishment to protect the work of the colonial administration is consistent with the observations of legal historians Bruce Ottley and Jean Zorn who have argued that a primary purpose of the practice of law in PNG was preservation of the unitary state—to protect the capacity of the central authority to rule.[127] Though Gore can be in no way considered a 'hanging judge', he took a hard line in this case.[128] To Gore's mind this 'war' required Australia to act, to preserve the power it had claimed for itself; that if there was to be a deterrent, or expiation of some sort, it had to be in a language understood by

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[124] Ralph T Gore J. to His Honour the Administrator, re: R. v Asogoning and others, 30 August 1954" in Annexure No. 2, *Territory of Papua and New Guinea, Telefomin Murders: November 1953, Fifth Menzies Ministry* Cabinet Submission NAA 91-115, p. 2.
[125] Gore to the Administrator (Asogoning), 30 August 1954", p. 3-4
[126] I. P. Mair, *Australia in New Guinea,* Melbourne University Press, Carlton, 1970, p. 12.
[127] Bruce L. Ottley, and Jean G. Zorn, "Criminal Law in Papua New Guinea: Code, Custom and the Courts in Conflict", *American Journal of Comparative Law*, Vol. 31, No. 2, 1983, pp. 251-300.
[128] Gore *Justice Versus Sorcery*, pp. 28, 218. On sentencing averages see Figure 6-5 in Chapter 6.

Nuiginians—death. Having pronounced sentence upon most of the Telefomin men, except the killers of Purari, he had by legal custom already recommended that most of the men involved be hanged.[129] He added, as the process required he do, an alternative sentence to execution; that if the men were not to be hanged, ten years hard labour for all would be appropriate, which was a relatively heavy penal sentence for murder.[130]

Despite Gore's differentiating between the killers in pronouncing sentence on some, but not all, Hasluck informed Cabinet that: "In this he [Gore] has indicated that he is not able to separate the thirty two prisoners to suggest that some should receive greater or lesser punishment than others."[131] In the clemency submission Gore wrote: "Neither could the rank and file appreciate a harsher treatment of their headmen."[132] Gore argued that treating the men differently, which would have been more consistent with Australian law, would appear unjust to the Telefomin and provoke more trouble. To Gore, any sentence following from clemency was less about the merits of the men and justice, than about how the colony should be managed on the ground. Gore's proposal that all be punished equally, despite differences in culpability, further indicates Gore's view that Nuiginians were a group that needed guidance and control, and that they did not understand the nuances of law.

District Commissioner Sydney Elliott-Smith, a long-term official, former military officer and B4, whose jurisdiction included the Telefomin area, was also asked by Cleland to make a submission to the capital case reviews. His expertise on the Telefomin area and on colonial practice was of interest to the Administrator and Minister. Similar to Gore, Elliott-Smith was less interested in fine points of justice, than the question of how to manage the situation on the ground. In contrast with Gore, he used this to argue in favour of mercy. He argued that due to the rapid capture of the accused, with its overwhelming show of force, the stick had already been applied, so subsequently mercy should be used as the carrot, to educate locals about the good intentions and superior morality of the Australians.[133] Elliot-Smith also suggested that actions taken by the Telefomins might be understandable as: "some of our past actions could be classed as unduly aggressive and in most instances thoughtless."[134] Elliot-Smith highlighted the problems that might arise from carrying out

[129] On the meaning of a recorded sentence as opposed to a pronounced sentence- Mark Finnane, *Punishment in Australian Society*, OUP, Melbourne 1997, p. 126.
[130] Gore to the Administrator (Asogoning), 30 August 1954; PNG Crown Law Office, "Tabulation of Sentencing by Judge, 10-7-1959., Gore Papers, Box 1, Folder 8, Box 1;-"Few Executed for Murder", *South Pacific Post*, 26 Nov 1957, p. 3.
[131] Hasluck, Summary of Cabinet Submission, *Territory of Papua and New Guinea, Telefomin Murders: November 1953*, *Fifth Menzies Ministry* NAA 91-115,
[132] Gore to the Administrator (Asogoning), 30 August 1954; D. M. Cleland to the Hon. P.M.C. Hasluck: re The Telefomin Murders Recommendations as to Sentence, 30 August 1954, in *Territory of Papua and New Guinea, Telefomin Murders: November 1953*, *Fifth Menzies Ministry* NAA 91-115.
[133] Cleland to Hasluck, 30 August 1954.
[134] Cleland to Hasluck, 30 August 1954.

capital punishment on a people already dissatisfied with the violence of Australian colonialism. Drawing on the Murray system as a B4, his experience led him to propose using mercy to build confidence between Nuiginians and the authorities in this newly patrolled area.

Similar to Elliot-Smith, the Administrator Donald Cleland also suggested to Hasluck that mercy would suit the mood of a people already smarting under maladministration, so passing on this advice, the Minister informed Cabinet that:

> although the Judge had held that there was not a complete breakdown of Administrative order, he [Cleland] could not exclude, in considering his own recommendations [as to sentencing] the fact that there had been, to say the least, bad administrative errors in the past, the memory of which may or may not have been in the native mind.[135]

Building on Elliot-Smith and Cleland's reservations, Hasluck was prepared to step carefully with a population that needed careful management, as their sense of justice had been offended over several years.

The inability of a murder trial to deal with the central question of maladministration and the legitimacy of authority in the minds of the Telefomins meant that the discretionary process was the last means by which a just rather than a merely legal outcome might be reached. Martin Wiener showed that discretionary justice was sometimes able to serve this pacifying, backstop function in other colonial settings.[136] More specifically, the Telefomin capital case files concur with Sinclair Dinnen's suggestion that the balance between Western law and Nuiginian expectations of restitution was a question of long term management by judges and Australian officials.[137] Dinnen shows that the legal system in PNG recognised the cultural pressures upon Nuiginians to act in ways not accommodated by Western jurisprudence, such as shame, and that judges and bureaucrats discussed but did not always agree on how to achieve that.[138]

In addition to the question of how to manage the problem on the ground, all those consulted in the capital case reviews also addressed the question of how the local people understood the acts of execution and clemency. Indeed, this concurs with Nicholas Brown's suggestion that the psychology of natives was a matter of great discussion amongst expatriate officials.[139] Both Cleland and Elliott-

[135] Hasluck, Cabinet Submission Summary, *Territory of Papua and New Guinea, Telefomin Murders: November 1953, Fifth Menzies Ministry,* Cabinet Submissions NAA 1-115, p. 3.
[136] See for example, Martin J Wiener, *An Empire on Trial*: *Race, Murder, and Justice under British Rule, 1870-1935*, Cambridge University Press, New York, 2009*,* pp. 158-9.
[137] Sinclair Dinnen, "Sentencing, Custom and the Rule of Law in Papua and New Guinea", *Journal of Legal Pluralism*, vol. 20, no. 27, 1988, pp. 19-54, p. 8.
[138] Dinnen, "Sentencing, Custom and the Rule of Law in Papua and New Guinea", p. 8.
[139] Brown, *Governing Prosperity*, pp. 67-72.

Smith submitted that the Telefomins did not understand the aims of the administration, or the consequences of breaching the law. Cleland wrote to Hasluck that:

> I concur with the views of the District Commissioner particularly in that the accused were not fully informed about (a) the aims and desires of the administration and (b) of the penalties that follow breaches of our newly imposed laws.[140]

Assuming this ignorance, Elliott-Smith posed the question: how would a hanging would "help the cause of the administration?"[141] There was concern that hangings would be misunderstood, both by Telefomin, and by domestic and international observers as well. Clemency, they argued, provided an opportunity for the colonial administration to be received as an alternative system based on mercy, which Elliott-Smith hoped would be preferred to a system based on death.[142] This had worked before in other districts in PNG with the tried and successful Murray system bringing peace to PNG by replacing reprisal with policing and clemency. Indeed, it was common for PNG and Commonwealth officials to celebrate the Australian repression of cycles of vendetta when justifying the Australian presence.[143] As such, Cleland and Elliot-Smith's arguments were much more conventional and tested than Gore's and therefore more likely to be persuasive.

Hasluck and Cleland had to choose a punishment and they wanted the results to be useful to the administration, as well as just. Their interest in Nuiginian responses to achieve the goal was also revealed in their close attention to the views of Norm Draper, the Baptist missionary resident near the Telefomin patrol station and who was invited by Cleland to make a submission on the specific situation in the Telefomin area after the killing. Hasluck was most interested in the submissions of missionaries and missionary groups working in Telefomin, as he valued specific knowledge of Nuiginians over general moral argument.[144] Hasluck's preference was such that he quoted the view of Rev. Norm Draper in his submission to Cabinet.[145] Hasluck summarised Draper's thoughts as:

> the multiple death sentences would not further the cause of mutual confidence between the government and the natives, but would widen the breach to such an extent that for many years there would be no hope of achieving understanding.[146]

After 'understanding' came stability, the rule of law and economic development—advancement. Hasluck wanted commentary on practical colonialism and Draper and other colonialists

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[140] Cleland to Hasluck, 30 August 1954. p. 4.
[141] S Elliott-Smith as transmitted in D. M. Cleland to the Hon. P.M.C. Hasluck: re The Telefomin Murders Recommendations as to Sentence, 30 Aug 1954, *Territory of Papua and New Guinea, Telefomin Murders: November 1953*, *Fifth Menzies Ministry* Cabinet Submission NAA 91-115. pp. 3-4.
[142] S Elliott-Smith as transmitted in Cleland to Hasluck, 30 Aug 1954, pp. 3-4.
[143] Hasluck, *A Time for Building*, p. 84; Nelson, "The View from the Sub-district", p. 30; Buchan, *Empire of Political Thought*, p. 5.
[144] Hasluck, Cabinet Submission Summary, p. 4.
[145] Hasluck, Cabinet Submission Summary, p. 4.
[146] Hasluck, Cabinet Submission Summary, p. 4.

recommended mercy as a matter of managing that relationship. Thus they seemingly believed that Mercy would further the Australian project in PNG by bringing order to the Telefomin Sub-District.

While there is no direct evidence for UN concerns about Telefomin in 1954 in Australian archives, as Wolfers suggested, fears of international criticism was often a matter of perception; that officials anticipated critiques and acted accordingly to avoid them.[147] As discussed in chapter one, both the perception of criticism and the reality of international statements on Australian colonialism had an impact on policy choices in PNG.[148] More specifically, the Department of External Affairs warned the Department of Territories, if it had needed warning, that there would be international and particularly UN interest in the issue from the very first days of the crisis and that Australia had to take care in the message it gave to those international audiences.[149] External Affairs was prompted to write because the Trusteeship Council deliberations on the state of Australian governance in PNG were occurring at the same time as the trials and international reporting on the trial.[150]

That UN scrutiny affected PNG policy and practice seemed to be commonplace knowledge, as the Adelaide *Advertiser* opined:

> The recent sentencing of New Guinea natives for the murder of a patrol officer in the Telefomin district will inevitably be publicized far beyond. The natives' primitive state will be discussed. References to the subject in the UN Trusteeship Council must be expected… But such questioning may be salutary, if it prompts a review of the Commonwealth's programme for New Guinea.[151]

The *Advertiser* repeated its displeasure and complaints about international pressure and its suspicions of maladministration at Telefomin from the first days of the crisis, again, a few days after the conclusion of the three trials, placing pressure on the Cabinet with its expectations of foreign criticism, rather than with any evidence of actual criticism.

Repeated links between the Telefomin situation and international scrutiny and criticism were made in newspapers. For example, the decision to keep Lalor's investigation into the Administration in the Telefomin area secret from the public fueled suspicions about the impact of the international

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[147] The final chapter will show that there was some interest in the Telefomin killers in The Trusteeship Council ten years after the trial. Wolfers, *Race Relations and Colonial Rule in Papua and New Guinea*, p. 126.
[148] Nelson, *Papua New Guinea*, p. 25; Downs, *Australian Trusteeship Papua New Guinea 1945-75*, p. 299-300; Hasluck, *A Time for Building,* pp. 94, 163; W.J. Hudson, *Australia and the Colonial Question at the United Nations*, East-West Centre Press, Honolulu, 1970, e.g. p. 37, 45-47.
[149] Department of Territories, 1956/1166:24, 11 November 1953, cited in Craig, "The Telefomin Murders: Whose Myth?", pp. 133-4.
[150] "8 New Guinea Natives to Die", *New York Times*, 16 July 1954, p. 3; "The Proceedings in the U.N.", *New York Times*, 16 July, 1954, p. 5; "Clemency Advocated for natives", *Leader-Post* (Regina, Saskatchewan), 3 Sept 1954, p. 20; "News in Brief." *The Times* (London), 9 Nov 1953, p. 6; "54 Police Search New Guinea Valley" *The Times,* 11 Nov 1953, p. 7; "News in Brief" *The Times,* 17 Mar 1954, p. 7; "New Guinea Murders", *The Times,* 23 Sept 1954, p. 5.
[151] "Progress in New Guinea", *Advertiser*, 23 Aug 1954, p. 2.

arena on domestic decisions. The *SPP* linked the secrecy over the report to Australia's announcement of its commitment to SEATO and the desire not to offend its post-colonial allies with stories of its own colonialism.[152] In August 1954, Labor Party Queensland State Secretary Jack Schmella wrote in the *Courier-Mail* of his concerns about the impression the UN might form of PNG and Australia's actions in Telefomin and PNG.[153] That link between Telefomin and Australia's international reputation must have been apparent to Cabinet and Paul Hasluck during their consideration of capital punishment or clemency for the killers. The problem for Cabinet was the strong idea in Australia that the world did care about its conduct in PNG. The fears of domestic Australian politics had to be managed. And these fears could be managed through the politics of discretionary justice.

**Mercy Keeps Things Quiet**

The Commonwealth Cabinet instructed the Administrator to commute all the sentences to ten years with hard labour. According to the Cabinet notebooks, they "Suggested that administrator be instructed to commute sentences."[154] Further, Paul Hasluck told Cabinet that there was little difference between the four crimes, so that similar punishment was suitable. The notebooks further noted that: "All the people with knowledge agree on ten years" and the recommendation was approved.[155] The categorisation of advisors from PNG as people with knowledge seems to suggest that credence was placed upon those submissions from PNG that recommended ten years, such as Gore's. Significantly, at this stage in the evolving process of clemency decisions, Canberra paid close attention on the judgement of PNG officials in clemency cases. Further, despite some sentences being pronounced and some being recorded, thereby some being more serious than others, Cabinet made no distinction between the offences in punishment. Evidently, regaining the confidence of the community by presenting an identical punishment to aid in the understanding of the local people was prioritised over finer points of justice of differentiating between levels of culpability, as recommended by PNG officials.

Yet despite the Cabinet thinking that officials in PNG were "the people with knowledge", the Cabinet wanted to direct the Administrator in the final decisions and transfer that power to the Governor-General in Executive Council. As such, they determined to continue with plans to legislate

[152] "Telefomin Report to be Kept Secret", *South Pacific Post*, 11 Aug 1954,
[153] Jack Schmella, "Party's Concern on New Guinea Affairs", *Courier-Mail*, 11 Aug 1954, p. 8.
[154] Notetaker A S Brown, 21 September 1954, Submission 102, p. 124, Cabinet Notebook. Notes of meetings 4 June 1954 - 27 October 1954, NAA: A11099, 1/19
[155] Cabinet Notebook, 21 Sept 1954, p. 124.

to remove the Royal prerogative of mercy in PNG from the hands of the Administrator to the Governor-General:

> It looks from the act as though it is the administrator's business to commute. Decisions by the Cabinet and not Executive council. Form of amendment to be discussed.[156]

This indicates that the decision of late 1952 to amend the *Papua and New Guinea Act, 1949* to move the Royal Prerogative to the Governor-General still had not been enacted. However, it was presented to Parliament in 1954 and was enacted.[157] It also indicates that these cases reminded Cabinet of the decision to transfer that power to Canberra and that it needed to refine its legislation. The determination to take control suggests that there was some discomfort with leaving the power of life and death specifically in the hands of the chief colonialist. Hasluck's suspicions of 1951 of the raj-like B4s and old colonialists seemed to manifest itself in this measure. In addition, it regularised the process in PNG to be more like the other Australian jurisdictions with the formal heads of state having the prerogative invested in them. This regularisation reflected Hasluck's liberal legal ideological leanings as it made the Australian territories consistent and equal in applying the rule of law.

Having determined to commute sentences, Cabinet also discussed how best to represent the use of mercy to the public. Cabinet determined to make it clear that the trial and sentence review process was what an Australian would have been entitled to. It was noted that: "Whole process available to the condemned person available to native." Cabinet wanted Australians and other audiences to know that Nuiginians experienced the due process of law. They added of the press release that: "Commutation should be accompanied by the sort of statements in judges and others reports… Judge's report not to be quoted from."[158] That is they decided not to quote Justice Gore's reports of possible warfare and that they needed to be executed, yet they were willing to draw on his conclusion that there was no emergency in the district. This insistence on the fineness of principle does seem clearly connected to the Commonwealth's work in producing an outcome acceptable to international audiences. Indeed, as Loo suggested clemency was useful to colonialists in presenting colonialism as merciful and just in contrast to violence.[159]A court case run on liberal principles of equality of justice ending in clemency was something that could be sold to the world, and in which Hasluck believed, as he attempted to bring a liberal colonialism to PNG to replace the old colonial variety.

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[156] Cabinet Notebook, 21 Sept 1954, p. 124.
[157] Hasluck, Cabinet Submission Summary, pp. 3-4.
[158] Cabinet Notebook, 21 September 1954, p. 124.
[159] Loo, "Savage Mercy'; Hay, "Property, Authority and the Criminal Law", in Douglas Hay et. al. (ed) *Albion's Fatal Tree,* p. 135

Once the decision to commute the sentences was made, Hasluck made the public announcement. That announcement was not included in the files, so I relied on newspaper reporting of the statement to see what reasons Hasluck gave for the decision and thus flesh out the decision of Cabinet beyond the few lines in the Cabinet notebooks. The *SPP* and the *SMH* reported on the statement in depth. [160]

The *SPP's* reporting on Hasluck's clemency statement focused on the aspects that exonerated the work of PNG officials. They reported that Hasluck then dismissed the allegations of mismanagement as: "incidents alleged to have happened".[161] Seemingly, he sought to build on the findings of the court that there had been no emergency. He was also reported as emphasising the minimal level of influence the patrol had achieved in the area: "only partly under control"[162] By minimising the extent of administrative control in the area he tried to position the colonial government as less liable, as if they were not really in a position to affect people for good or ill; apparently an original contribution, as it was not included in the reports. Further, it drew attention to Hasluck's claims that Cabinet had considered the lobbying efforts, by expatriates, the families, and officials.[163]

Second, the Minister was reported as arguing that the Nuiginians demonstrated their savagery in their irrational choices. Reflecting Gore's arguments, Hasluck asserted that the most irrational act was to remove the colonial control:

> They acted to exterminate the administration as they knew it so that they could lead their old life … Any sense of grievance on any particular matter would appear to have been used as an excuse and was not the actual motive. The attack apparently occurred when it did because a long-awaited opportunity was seen and not because of any recent events or, any event with which the victims were personally associated.[164]

He configured the Telefomin as savages who acted violently for irrational reasons. Scholars of colonialism have highlighted the discourse of savagery as a common justification for occupation.[165] Indeed, at a time in Australia when progress and modernity were so prized, the Telefomin clinging to their old life marked them as needing Australia's assistance all the more and highlighted the need for intervention and colonialism.[166] Murder, in Hasluck's statement, revealed the nature of the colonised and highlighted the challenges Australians faced, thus drawing attention to the justification for Australia's presence—its trusteeship council endorsed project to advance Nuiginians. These

[160] Hasluck's statement to the press was not included in the file.
[161] "Cabinet Commuted Telefomin Murder Sentences", *South Pacific Post,* 29 Sept 1954, p. 9.
[162] The causes proposed by Hasluck and Australian officials have been subjected to a severe critique by Barry Craig: see Craig, "The Telefomin Murders: Whose Myth?"
[163] "Cabinet Commuted Telefomin Murder Sentences".
[164] "Cabinet Commuted Telefomin Murder Sentences".
[165] Loo, "Savage Mercy"; Nelson, "The View from the Sub-district", p. 30; Buchan, *Empire of Political Thought,* p. 5.
[166] On Australian modernity and arguments for being in PNG see Brown, *Governing Prosperity*, p. 53; Healy, "Monocultural administration", pp. 222-224; Fitzpatrick *Law and State in Papua New Guinea*, pp. 68-69; Veracini, *Israel and Settler Society*, p. 4.

propositions also played to the precedent of clemency for those Nuiginian offenders deemed too 'unsophisticated' to comprehend Western justice. Thus Hasluck placed this mercy within a history of similar decisions and made it conventionally just.

In the same article, the *SPP* quoted Hasluck statement that Cabinet had been influenced by the advice from the territory on how to bring order and peace to the Telefomin:

> Cabinet was influenced by a belief that the execution of the death sentences would not help the cause of the Administration in bringing law, order and improved conditions to the people of Telefomin.[167]

The *SPP* highlighted Hasluck's reference to the dynamics of colonialism to position those closest to the events as the greatest advocates for clemency further presenting the Administration as enlightened and benevolent. The statement suggested that mercy was chosen because of local advice that it would not exacerbate the dissatisfaction of the Telefomin, even if Hasluck had previously said it was irrational. Also, having criticised publically the conduct of officials in PNG in the initial phases of the crisis, this credence given to views from PNG might have been intended to remediate the relationship with Administration staff, or the *SPP* was engaged simply in praising its readership, PNG officials and continuing its editorial direction of supporting and defending the colonial project in PNG.

Therefore, while configuring the Telefomin as irrational, Hasluck was able to formulate the announcements to grant clemency without having to acknowledge the 'bad administrative errors' that Cabinet intended clemency to ameliorate. He agreed with PNG officials that clemency would better serve the needs of the administration in bringing peace to the area, rather than pursuing more abstruse ideas of justice, or more visceral ideas of retribution.

The *Sydney Morning Herald (SMH)* also endorsed these acts of clemency further suggesting it was a politically successful choice by Cabinet. They were apparently satisfied with the rightness of Australia's project and Hasluck's policies. Indeed, the *SMH* editor wrote:

> The decision, announced yesterday, to commute the death sentences passed on 32 Telefomin natives will be generally acknowledged as wise and humane.[168]

The editor gave two reasons why. First, the Telefomin could not understand 'white' justice and second because their motives: "were not even entirely discreditable in the context of tribal resentment of white interference."[169] Yet, curiously, the editor also wondered if it might not have been better just to grab a few of the accused killers and hang them on the spot. Even as it advocated

[167] "Cabinet Commuted Telefomin Murder Sentences", *South Pacific Post,* 29 Sept 1954, p. 9.
[168] Editorial, "The Telefomin Murders", *Sydney Morning Herald*, 23 Sept 1954, p.2.
[169] Editorial, "The Telefomin Murders".

for coercive, Australian control, it was suspicious of Australian colonialism and mercy. To the *SMH*, there were good reasons for holding PNG and acting humanely when one did so, but Australia was to make sure it was the boss. The *SMH*'s commentary was rife with the tensions and contradictions inherent to the modern colonial project and suggests the difficulties Hasluck faced in politically navigating this policy area. Yet, the decision to grant clemency was one that pleased most parties involved. The commentary on the decision also indicates that Hasluck was never able to shift the public attention away from the errors, despite taking a generally approved of policy measure to address those errors.

The Administrator Donald Cleland was also shaping the representation, with a focus on PNG expatriates, while Hasluck's focus was also on broader audiences. Cleland was reported in *the SPP* after the clemency decision:

> "However, we are there and there we must remain particularly after recent events … The people of the Telefomin area still need close watching with care and patience."[170]

He was not satisfied with using merely the capital case reviews to bring peace to the district. Bringing peace and restitution, Cleland pointed out, would be the continuing work of the Administration, with investments to make in agriculture, health, education and policing.[171] This formulation clearly indicated the sort of paternalism and authoritarianism noted by Wolfers and Healy.[172]

However, there is little data on the reactions of the Telefomin to the sentencing. Craig's collection of oral history indicates that it was a well-remembered event and the misconduct of the patrol officers and constables was equally well-remembered, but the testimony of witnesses in court indicates that the killings had limited support, with much aid being given to the police and officials even in the midst of the attacks.[173] Evidence which would tend to minimise the notion of widespread dissatisfaction, if not for the history of violent reprisals against such attacks on officials from before the war, and the testimony that the conspirators were warned about such reprisals. People could have been both dissatisfied, but fearful of attacking the officials to the extent that they would tolerate the Administration. Also indicating that clemency and prison went some way to reconciling the parties, a report written by the Administration for the UNTC in 1961, when the sentences were almost completed, showed that most of the offenders had cooperated during their incarceration and learned

[170] "Telefomins Still Need Close Watching, Mr Cleland Says", *South Pacific Post*, 20 Oct 1954, p. 2.
[171] Cleland, *Pathways to Independence*, p. 275.
[172] Wolfers, *Race Relations and Colonial Rule in Papua and New Guinea,* pp. 126-127.
[173] Craig, "The Telefomin Murders: Whose Myth?"; R. Gore, (transcription of evidence), "Case Book "A" – Telefomin Cases book.

farming and/or brick related trades.[174] A few of the imprisoned men decided to take up jobs with administration upon the completion of their ten years, but most returned home even though they could have taken jobs elsewhere with the skills gained in prison, such as Pidgin and brick work.[175] Perhaps that decision indicates their final view on the colonial project—most sought to minimise their contact with it.

**Conclusion**

It is significant that Hasluck's memoir of his work in Papua and New Guinea, which is in many ways a justification of his work there, is silent on Telefomin. This unexpected silence suggests that he was aware that Telefomin was an incident that took away from his narrative of just governance. Hasluck's omission thus points to a then unresolved question of legitimacy. The Telefomin incident and trials raised questions about whether Australia's place in PNG was just and legitimate and as Hay and Loo suggest, mercy was a way of reclaiming political legitimacy.[176] The use of mercy in the face of Nuiginian violence also drew attention to the purpose and justification for the colonial project to advance PNG.[177] The justification was that the Telefomin needed help and guidance to become clement and law abiding Westerners. Therefore, clemency served the purpose of colonial administration.

The decision to grant clemency to the killers accommodated the many concerns of the Federal government, including being aware of the Telefomins' dissatisfaction with Australia. Hasluck determined the best way to achieve justice in that context was to depend on the experience and judgements of the B4s and their approach to handling justice on the ground. However, at the same time he was able to point to the defensible conduct of the trial and clemency. At the beginning of this period, that the Administration was in control, was affecting justice, but not to the extent that it was allowed to carry out punishments that appeared autocratic and unjust.

This case reminded the Cabinet to legislate for the process that became standard post-Telefomin: the referral of all death sentences for a capital case review by the Governor-General in Council instead of it being the Administrator's decision. Cabinet commentary indicated that it was just this kind of case, well-known and with international implications, which prompted the decision to instruct the Administrator as to what penalty to hand down, and to alter legislation to have the royal prerogative

[174] From Crown law Officer W. Watkins to the Secretary, Department of Territories, Reply to memorandum 28th February, 1962, *Petition to United Nations from Kilsyth Communist Party and Others, Re: sentence of Death Passed on PNG Natives,* Department of Territories, NAA: A452, 1961/4256.
[175] Watkins to the Secretary, 28th February, 1962.
[176] Hay, "Property, Authority and the Criminal Law",
[177] Brown, *Governing Prosperity*, p. 53; Healy, "Monocultural administration", pp. 222-224; Fitzpatrick *Law and State in Papua New Guinea*, pp. 68-69; Veracini, *Israel and Settler Society*, p. 4; Buchan, *Empire of Political Thought,* p. 5.

exercised in Canberra. There was too much danger that the wrong decisions might be made by the Administrator in PNG.

Despite the difficulties posed, the notorious nature of the case offered a chance for the Australian government to legitimise its colonial rule. The commutations cast the administration in a favourable light. This counteracted the possibility of a controversial legal case delegitimising Australian colonialism. Calavita argued that a controversial legal case that highlights a dying discourse in the public eye can act to extinguish support for that discourse entirely.[178] Calavita's insight into causation suggests that with colonialism as a dying discourse and viewed suspiciously by the world and Australians, there was a danger that hanging would have emphasised Australia's disagreeable colonial past and undermined the ennobling discourse with which Australia justified its presence. Hasluck's handling of the killings avoided that. Clemency gave sanction to the idea that the Administration had a legitimate role to play in bringing McAuley's "seal of peace" to the rugged mountains of New Guinea.[179]

Yet the question of Australasia's goals and colonial legitimacy in PNG was again raised in 1954, far from the rugged mountains, when a Nuiginian man raped a white woman in Port Moresby; and that is discussed in the next chapter.

[178] Kitty Calavita, "Blue jeans and the "De-constitutive" Power of law", *Law and Society Review*, Vol. 35, No. 1, 2001, pp. 89-116.
[179] McAuley, "In Memory of Arch-bishop Alain de Boismenu, MSC" in *A Vision of Ceremony*, cited in Brown, *Governing Prosperity*, p. 46.

# Chapter 3 - "Mentally upset and a nymphomaniac": R. v Kita Tunguan, 1954


Figure 3-1 Ela Beach Native Hospital Port Moresby, Papua New Guinea, 1953.[1]

> *"A native houseboy had raped a European woman who had once saved his life, the woman told the Port Moresby District Court last week."*[2]
>
> *"'I don't see any indication in this case which calls upon me to record the sentence,' Mr. Justice Gore said."*[3]

At the same time as the widely known and well-publicized Telefomin murders were being investigated, Nuiginian Joseph Kita Tunguan raped his employer's wife, Dr. Blanka Nesbit, in her Port Moresby home on 25 May 1954. Tunguan was convicted under the *White Women's Protection Ordinance 1926-1934 (Papua)*, (*WWPO, 1926-34*) which under sections two and three made the rape, or attempted rape, of a European female by a Nuiginian man a capital offence, whereas the rape

[1] Terence E. T. Spencer," Ela Beach Native Hospital Port Moresby, Papua New Guinea, 1953", Part of Spencer, Terence E. T. (Terence Edward Thornton), 1917-2002. Spencer collection of slides of Papua New Guinea, 1953-1978 [picture] [1953-1978], nla.pic-an22703325
[2] "Native on Trial", *South Pacific Post,* 2 June 1954, p. 1.
[3] "Native Sentenced to Death" *South Pacific Post*, 9 June 1954, p. 1.

of a Nuiginian woman was punished by imprisonment.[4] While a sentence of death was pronounced upon him, it was commuted to life with hard labour, a determination that reflected the addition of the intersection of gender and inter-racial relations to the themes discussed in the previous chapter. The Administrator commuted the sentence conscious that if PNG was to advance, and be seen to advance in the eyes of the world, it could not do so under racist ordinances.

The orthodox view of white women's place in the gender politics of colonial societies is that colonists were anxious about women's relationships with the colonized within the home in particular because of what Stoler called "the disarray of unwanted, sought after and troubled intimacies of domestic space".[5] Supporting that notion in PNG specifically, Wolfers and Bulbeck noted the concern of Australian expatriates with situations that placed white women in contact with the colonised in open spaces, bathrooms, bedrooms, kitchens, and gardens and the many legislative steps that were taken to control the movements of Nuiginian men.[6] Amirah Inglis documented and analysed the thinking and fears that had motivated the passing of the *WWPO, 1924-1936* and its use in the 1920s and 1930s, so Tunguan's case allows the examination of the application of this ordinance after the Second World War, a period affected by the pressures of decolonization and extends to the post-war period her argument that Executive clemency and oversight limited the impact of such a racist ordinance upon Nuiginians, with no executions under the ordinance since 1934, and that for the rape of a child.[7] Further, I will build on Inglis' injunction to consider the way the Administration worked around *WWPO*, *1926-34*, with its most serious penalties rarely being needed or invoked, rather than its presence being indicative of pervasive use of executions.[8] Indeed, indicating the self-consciousness of the Administration over the ordinance, it was not reported separately in the justice statistics sent to the UN and the Commonwealth Parliament after 1953/54, a decision that was contemporary to the prominence of this case.[9]

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[4] Text of legislation cited in Amirah Inglis *The White Women's Protection Ordinance; sexual anxiety and politics in Papua*, Sussex University Press, 1975, p. 71; "The Criminal Code (Queensland Adopted) 1903", Sections 347- 349.
[5]Ann Laura Stoler, *Carnal Knowledge and Imperial Power: race and the intimate in colonial rule*, University of California Press, Berkeley, 2002, p. 2.
[6] Edward P. Wolfers, *Race Relations and Colonial Rule in Papua and New Guinea*, Australian and New Zealand book Company, Brookvale, 1975, pp.127-29. Chilla Bulbeck, *Australian Women in Papua and New Guinea; Colonial Passages 1920-1960*, Cambridge University Press Melbourne 1992, p. 37.
[7] Inglis, *The White Women's Protection Ordinance*, pp. 123 and pp. 89-90. On not hanging offenders see for example, R. *v. Hahaea-Koaeia, 1948*- an attempted rape prosecuted under the ordinance, *Papers of Ralph Gore, 1930-1964,* NLA MS2819, Folder 2, Box 1.
[8] Inglis, *The White Women's Protection Ordinance,* p. 78-80.
[9] Statistics taken from the: Australian Commonwealth, *Annual Reports for the Territory of Papua for the Commonwealth of Australia* and the annual Commonwealth of Australia, *Report to the General Assembly of the United Nations on the Administration of the Territory of New Guinea. 1949/50-1965/66.*

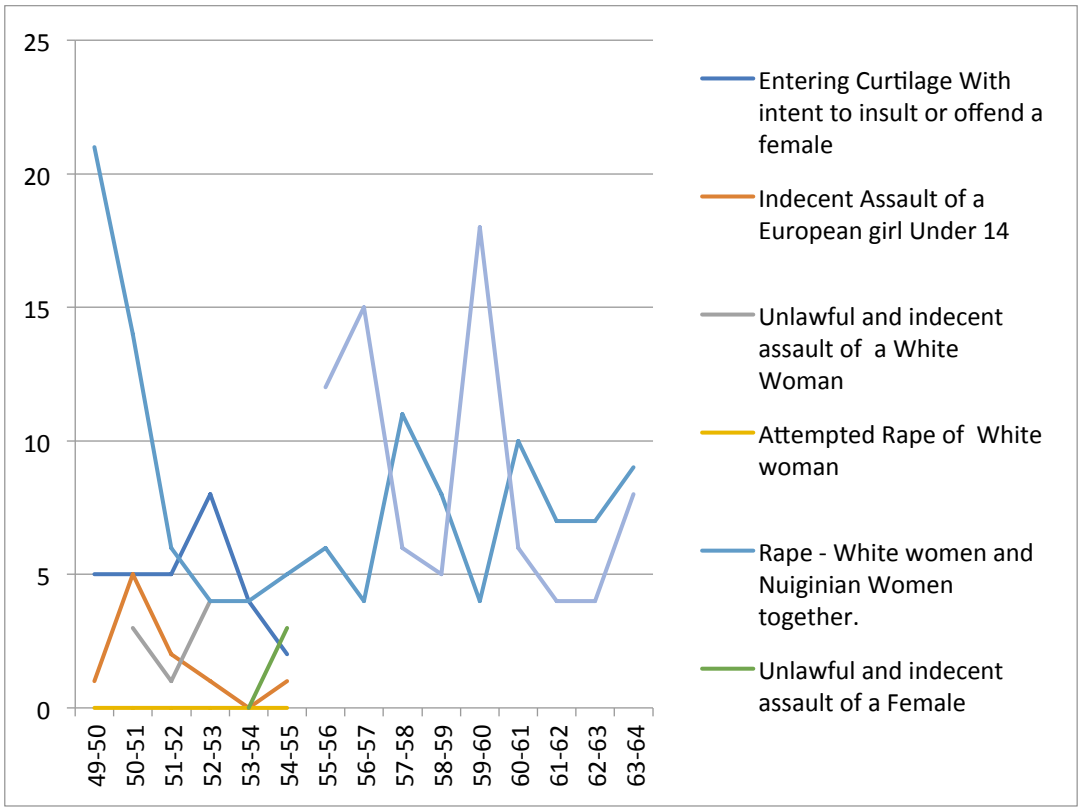


Figure 3-2 Offences Against women in Papua[10]

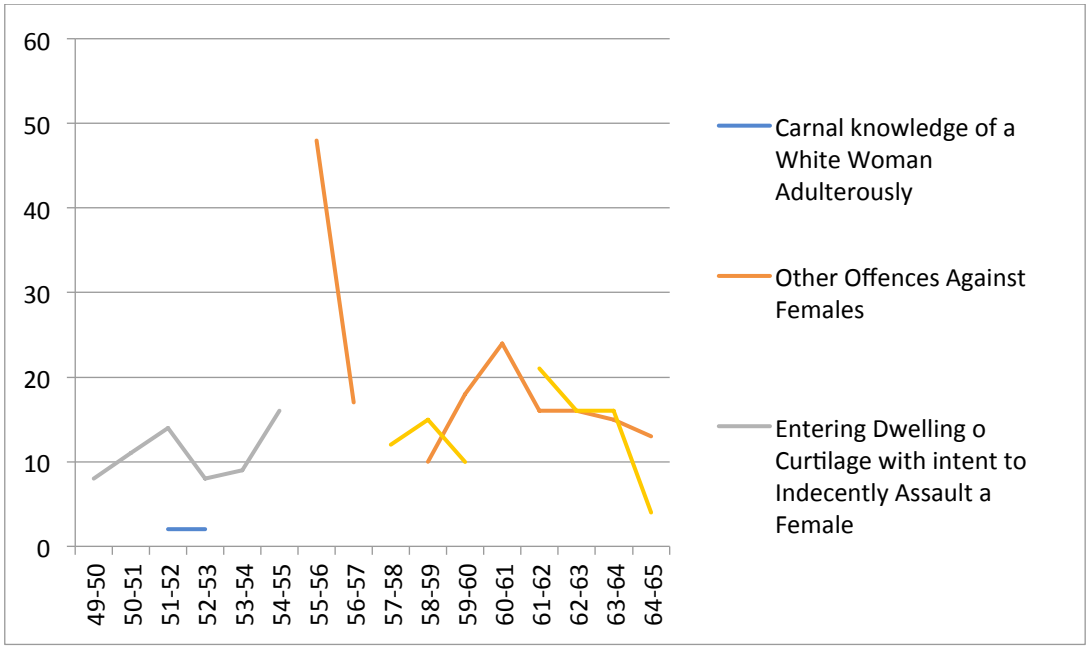


Figure 3-3 Offences Against women in New Guinea[11]

Despite the anxieties of long-term residents, 1954 itself was not a year of high crime in the territory

[10] The Parliament of Australia, *Territory of Papua; Annual Report*, Commonwealth Printer, Canberra. Statistics on crimes in annual reports from 1949/50 to 1965-66.
[11] Commonwealth of Australia Department of Territories *Report to the General Assembly of the United Nations on the Administration of the Territory of New Guinea*, Commonwealth Government Printer, Canberra, 1947/8 to 1965/66

directed against women.[12] (See figures 3-2, 3-3) Nevertheless, concern about the possibility of Nuiginian men committing crime was translated into calls for sterner punishments for Nuiginian men who endangered the security of white women.[13] Yet, by 1954, recent expatriate arrivals were developing a stronger sense of confidence and security in working and living with Nuiginians, particularly in urban areas. In contrast, seemingly enmeshed in pre-war racial prejudice, long-term expatriates, rejected the newcomers' outlook, and were anxious that any relaxation of boundaries between white and black would undermine colonial power and authority.[14] There was cultural change afoot which challenges making a more complex picture of gendered racial anxiety.[15]

As with the Telefomin trials, the punishment of Kita Tunguan was determined amid tensions within the white community, as much as between coloniser and colonised. Central to these tensions was contestation over the place of white women's bodies in the policy hierarchy of the PNG system. Indeed, the decision to grant clemency to Kita Tunguan shows that women's bodies had shifted in the hierarchy from being the repository of colonial power and authority to the degree described by Stoler and Inglis in their studies of pre-WWII colonies. Rather, it was the treatment of Nuiginian bodies that had become much more the source of colonial power and authority, stemming from the approval of the international community. Australia had to be a careful provender of advancement of Nuiginians under the UNTC's requirements and that began to moderate racist thinking about the strength and honour of the colonial white, racial regime. Indeed, Cleland's decision to grant clemency reflected the policy goal of producing a positive perception of the regime that Douglas Hay, Tina Loo, and Stacey Hynd argued builds legitimacy.[16] As Wiener suggested, these larger questions for empire were

[12] The Parliament of Australia*, Territory of Papua; Annual Report*, Commonwealth Printer, Canberra, 1950. Statistics on crimes in annual reports from 1949/50 to 1965/66. Note the shifting of reporting categories. Commonwealth of Australia Department of Territories *Report to the General Assembly of the United Nations on the Administration of the Territory of New Guinea 1948/49 to 1965/66*, Commonwealth Government Printer, Canberra, 1947/48 to 1965/66.
[13] Wolfers, *Race Relations and Colonial Rule in Papua and New Guinea*, pp.127-29; Durba Gosh "Gender and Colonialism: Expansion or Marginalisation?", *The Historical Journal*, vol. 47, no. 3, 2004, pp. 739-741.
[14] Wolfers, *Race Relations and Colonial Rule in Papua and New Guinea*, pp. 127-128.
[15] Margaret Spencer, *Doctor's Wife in New Guinea*, Angus and Robertson, Sydney, 1959, p. 52; Gloria Chalmers, *Kundus, Cannibals and Cargo Cults,* p. 17-25*; Papua New Guinea in the 1950s*, Books and Writers Network, Watson's Bay, 2006; The Parliament of the Commonwealth of Australia, *Report to the General Assembly of the United Nations on the Administration of the Territory of New Guinea*, Department of Territories, Canberra: Commonwealth Govt. Printer, 1948/49-1965/66; Commonwealth of Australia Department of Territories, *Territory of Papua: Annual Report, Commonwealth of Australia,* Commonwealth Government Printer, Canberra, 1947/48-1965/66.
[16] Douglas Hay, "Property, Authority and the Criminal Law", in (ed.) Douglas Hay et al, *Albion's Fatal Tree; Crime and Society in Eighteenth Century England*, Penguin, Harmondsworth, 1977; Tina Loo, "Savage Mercy: Native Culture and Modification of Capital Punishment in Nineteenth Century British Columbia", in Carolyn Strange (ed.) *Qualities of Mercy: Justice Punishment and Discretion*, UBC Press, Vancouver 1996; Stacey Hynd, "'The Extreme Penalty of the Law': mercy and the death penalty as aspects of state power in colonial Nyasaland, c. 1903-47", *Journal of East African Studies*, vol. 4, no. 3, 2010, pp. 542-559, p. 552; Stacey Hynd, "Murder and Mercy: Capital Punishment in Colonial Kenya, ca. 1909-1956, *International Journal of African Historical Studies*, vol. 45, no. 1, Toward a History of Violence in Colonial Kenya, 2012, pp. 81-101, p. 92.

being worked out at the level of the colonial administration and through the lives of individuals.[17]

In terms of the development of the clemency process, this case study also shows how Cleland's error in granting clemency to Tunguan himself, in violation of Hasluck's instructions to pass such decisions to Commonwealth Cabinet for instructions on how to use his power, renewed the Federal resolution to legislate for the capital case reviews to go to the Governor-General. Cabinet wanted that power to ensure good decisions were made and to remove too much moral responsibility from the Administrator and share it across the Executive. This error also compounded Hasluck's perceptions of inefficiencies in the PNG Administration, such as their racism, their poor use of bureaucratic procedures, and incapacity to formulate and carry out projects. Hasluck had been unhappy with the professional standards of PNG administration and this was one more example of that failure, a theme that will be expanded upon in subsequent chapters.

Further on the process, this case in particular also shows the way that information decision makers gained from informal, expatriate social networks, and that gossip could prove decisive in decision making within a discretionary and political process. Informal sources of information, such as gossip about Nesbitt and her reputation compared to Tunguan's were decisive in this clemency bid.


Figure 3-4 Figure 3-5 The view from Margaret Spencer's House in Minj, Highlands, 1954.[18] An example of a house in which a white woman married to an administration official might live.

[17] Martin J. Wiener, *An Empire on Trial; Race, Murder, and Justice under British Rule, 1870-1935*, Cambridge University Press, New York, 2009, p. ix.
[18] Terence E. T. Spencer, "Our house Minj Station, Wahgi Valley, Papua New Guinea, 1954", Part of Spencer, Terence E. T. (Terence Edward Thornton), 1917-2002. Spencer collection of slides of Papua New Guinea, 1953-1978 [picture] [1953-1978], nla.pic-an22703355.

**LEFT:** Vaccination line-up for natives of New Ireland after arrival at Port Moresby. Dr. Blanka Parcen, of the Moresby

Figure 3-6 Figure 3-7 Dr. Blanka Parcen [Nesbit's maiden name] inoculating patients, 1951. [19]

**What happened? The assault, conduct the trial and the subsequent review of administrative procedures**

*"No Matter. You kill me. No matter, I go along Calaboose. I make this trouble."*[20]

According to the report by Police Sub-Inspector John Fisher, Joseph Kita Tunguan was born in 1928 or 1929 in Sutmili in the Sepik District. His widowed mother died when he was 14 or 15, after which a foster mother cared for him.[21] Between 1948 and 1950, like many village boys, he was a part-time student at the Sutmili village school. As a result of his perceived potential, he was then sent to a Catholic mission school on Kairo Island near Wewak, but was sent home after seven months for fighting.[22]

Subsequently, he found work in Wewak as a labourer for a month, returned home, found more work in Madang, and was then hired as a contractor in Bulolo. In 1951, he changed jobs and worked as a house servant in Lae, a well-paid job for a largely unskilled person, but indicates that he had good pidgin and English language skills. He then moved with his employer to Port Moresby.[23] In

[19] Dr. Blanka Parcen Nesbit and patients, "Top Hats were Dressed for the Part", *The Courier-Mail,* (Brisbane) 14 Dec 1950**,** p. 6.
[20] Reported word of Kita Tunguan upon his arrest. "Native on Trial", *South Pacific Post,* 2 June 1954, p. 1.
[21] His age was uncertain as census processes were still rudimentary in the twenties and the Second World War destroyed many NG records.
[22] John Fisher, Letter, John Fisher, Sub-Inspector of Police to The Superintendent of Police, re: Kita-Tunguan, alias Kita-Sone, alias Joseph Kita, alias Joseph Tunguan- Convicted of rape on a European Woman, 12 June, 1954, R v. Kita Tunguan, 1954, *Commutation of Sentences on Natives in Papua and New Guinea*, NAA: 518, CQ840/1/3 PART 1, 3252669.
[23] John Fisher to The Superintendent of Police, 12 June 1954.

December 1951, he changed jobs to work for the Australian Petroleum Company until he fell ill and was hospitalized for two months. Dr. Nesbit treated him at the Ela Beach Native Hospital. He was sick long enough that he had to find a new job.. Shortly after that though, he lost that job for brawling with Australians from his previous workplace, the Australian Petroleum Company, but the report does not explain why they fought.[24]

Tunguan could read and write in Pidgin, Motu and, at the time of his arrest, his English was reportedly "reasonably good".[25] In 1953, his language skills enabled him to move between several employers, using variations of his names before being hired by the Port Moresby European Hospital. Once again he was dismissed for threatening one of his previous short term employers, Captain Barr. Then came two more jobs, and again he was dismissed for fighting with his employer's colleagues at the Department of Civil Aviation. He promptly found work at the Steamship Company Mess, but then in early 1954 he was employed by Lloyd Nesbit, of the Civil Aviation office, to work in his home.[26] It is an interesting picture of labor mobility for a skilled Nuiginian in the 1950s.

Even though his work life was disrupted, the defence adduced that Kita Tunguan attended his Port Moresby church regularly, as well as doing odd jobs for a priest at Taurama. In addition, he pursued classes in English and in reading and writing. His former employer Sub-Inspector Collins described Kita Tunguan as a large and strong man with a quick temper. He was also described as "difficult to manage": he appears to have been a man who would not tolerate being treated poorly and was willing to use violence in search of respect.[27] Yet, he kept getting jobs, so Kita Tunguan's demeanor was perhaps persuasive, or his skills worth employment. Kita Tunguan was both an example of advancement, but also of the social change that old colonialists found discomforting. He was mobile and adapted to an expanding labour market, but was also volatile and independent.

Born in Yugoslavia in 1922, Blanka Parcen qualified as a medical doctor, achieving high scores in her studies at Graz, Austria, during the Second World War. She subsequently worked in a research facility in Croatia, Yugoslavia before migrating to Australia in 1949.[28] Facing difficulty in having her qualifications and experience recognized, Parcen was working as a cleaner when she applied to the PNG Health Department, which was then actively recruiting 'New Australians' due to skill shortages in the territory. She went where she could practice, and was joined by her married lover,

[24] John Fisher to The Superintendent of Police, 12 June 1954.
[25] John Fisher to The Superintendent of Police.
[26] John Fisher to The Superintendent of Police.
[27] John Fisher to The Superintendent of Police.
[28] Prof. D.J. Bock, Graz, to Australian Military Mission (migration Office), Koln, re: Frau Dr. med. Blanka Parcen, am 16 Janner, 1951, *Application for Employment- Dr B Parcen,* NAA: A518, 280/3/2544, 3309370. And "Blanka Parcen", *Passenger Arrival Index*, 1921-1950, NAA: K269, 8 MAY 1949 MOHAMMEDI, 9245201

Dr. Otruba, also a European trained doctor. Their relationship ended when Dr. Gunther, the head of the PNG Health Department, posted them far apart after he learned of their relationship.[29]

Shortly after their separation, Otruba attempted suicide and was subsequently deported. In the small gossipy community of expatriate PNG, their relationship had become common knowledge, and was also known to the police.[30] In 1951 Dr. Parcen met and married Mr. William Nesbit, who worked for the Department of Civil Aviation.[31] However, her life seemed to remain emotionally troubled. In 1953 she took leave from the native hospital in Port Moresby, suffering depression after a fellow doctor, also a European immigrant, had attempted to engage her in a suicide pact. It is easy to imagine her distress amid such dramatic transformations in her life. Compounding matters, she was dismissed from her position later in 1953, in part because of her protracted sick leave and in part because she was reported to have demonstrated hostility towards Nuiginians.[32] Her circumstances, again, were the subject of much gossip.[33]

On 25 May 1954, Dr. Nesbit was home alone, her husband having been working away from Port Moresby for several weeks. That afternoon she was engaged in sewing a skirt. As the trial was told, her husband's servant, Kita Tunguan, hired seven weeks before, knocked at the back door. As he had before, he asked permission to iron his own clothes for his day off. He was the gardener and did the heavy laundry. However, true to established etiquette, he did not wash Blanka Nesbit's clothes.[34] He began to iron and she sat down to sew in an adjoining room, with no door separating them, until she joined him, seeking to press a part of the skirt she was making. The evidence presented in Kita Tunguan's trial did not clearly establish whether she had first demanded that he iron the skirt panel, and if so whether he had refused.[35] Neither did the court rule clearly on what happened next. Either Nesbit kneed Kita Tunguan sharply and painfully in the buttocks while passing him, and he then grabbed her from behind; or, while peacefully returning to the dining room, Nesbit was grabbed from behind and thrown to the floor. It is clear that she was thrown to the floor as her head damaged the woven palm wall near the dining room door. What is unclear is whether she first assaulted Kita

[29] C. Normoyle, A/Commissioner of Police to His Honour the Administrator, Subject: Mrs Blanka Nesbit- Rape, 15 June 1954, *Commutation of Sentences on Natives in Papua and New Guinea*, National Archives of Australia, NAA: 518, CQ840/1/3 PART 1 .
[30] Normoyle to the Administrator, 15 June 1954; Chalmers, *Kundus, Cannibals and Cargo Cults*, p. 67.
[31] Normoyle to the Administrator.
[32] Normoyle to the Administrator; D.M. Cleland to the Secretary, 5 October 1954.
[33] Cleland to the Secretary; Chalmers, *Kundus, Cannibals and Cargo Cults*, p. 67; Normoyle to the Administrator, 15 June 1954.
[34] J. Wyatt, *A New Comers Guide to Papua and New Guinea by a Port Moresby House Wife*, Country Women's Association- South Pacific Post Print, 1957, p. 12.
[35] Cleland to the Secretary, 5 October 1954; Gore, "R v. Tunguan- Transcription of trial", *Commutation of Sentences on Natives in Papua and New Guinea*, Gore Papers, NLA MS2819, Folder 6, Box 1. He compiled a full transcript only a handful of times in the 1950s.

Tunguan. He claimed she did and he was enraged. She claimed she did not.[36] Despite the prosecutor's interest in pursuing this matter, Justice Gore determined not to rule on the matter as he found it irrelevant to what followed. Yet, Kit Tunguan's claims were not dismissed out of hand, indicating Nesbit's precariously balanced reputation.

In 1957, J. Wyatt's *Guide to Newcomers to Papua-New Guinea* provided a guide to what most long-term expatriates accepted as precepts for relationships between white women and their Nuiginian male servants in the years preceding its publication. Wyatt suggested servants could interpret familiar behavior, such as physical contact, as an invitation to sex.[37] That in part explains the prosecutor's interest in trying to establish that physical contact during the trial. The ambiguity over Nesbit's actions, her proximity to her husband's servant, shadowed understandings of the case.

Other servants testified that they heard her call his name in their testimony. Justice Gore accepted testimony that Nesbit struggled against Kita's grasp and shouted his name asking him to stop. She testified that she then tried to shame him into letting her go by reminding him that she had cared for him when he was sick and that he was a mission boy and a Christian. She explained to the court that that she then tried to trick Tunguan by asking to be placed on her bed. She hoped for a chance to run away. However, the defence construed the use of the bed to be further evidence of consent. Tunguan placed her on the bed, but without releasing his hold on her. He tore at her clothes and he raped her. He kept his hold on her and threatened that if she told anyone, he would tell Mr. Nesbit that she had been sleeping with many men while he was away. In his own evidence, Tunguan claimed that he had watched her with her lovers through the window while sitting in a mango tree.[38]

Nesbit's testimony continued that, fearing for her life, she agreed to his terms. When he let her go and left, she ran to the nearby single women's quarters. Finding no one home, she ran to the house of her neighbor, Mrs. Woodmansey. Taking note of Nesbit's torn clothes and distressed state, Woodmansey called the police. Nesbit then telephoned a friend to come help her. However, as Nesbit did not speak in English, Woodmansey added in her account that she could not confirm what was said. Shortly after, a doctor examined Nesbit and found physical injuries consistent with rape. The police set out to find and arrest Tunguan, who was found at the Nesbit house wearing his freshly ironed shirt. He was arrested on the charge of rape.[39]

Kita Tunguan's trial began on 3 June 1954 and ended five days later. In his judgment, Gore stated that he found Dr. Nesbit to be honest, while he found Tunguan "cleverly evasive". He believed

[36] Cleland to the Secretary, 5 October 1954; Gore, "R v. Tunguan- Transcription of trial".
[37] Wyatt, *A New Comers Guide.* p. 12
[38] Cleland to the Secretary; Gore, "R v. Tunguan- Transcription of trial".
[39] Cleland to the Secretary; Gore, "R v. Tunguan- Transcription of trial".

Nesbit's testimony, and took into account her physical injuries, the accounts of neighbors, and of other servants. Gore found Tunguan guilty of rape and pronounced a sentence of death.[40] Kita Tunguan with his experience of trouble with the police was apparently unwilling to incriminate himself. He had some understanding of the processes of the Australian law.

A pronounced sentence, was an explicit recommendation that Tunguan should hang and also indicated that Gore determined him to be a more dangerous criminal than the many murderers and violent men he had convicted in his career and for whom he had recorded a sentence instead.[41] Gore's views on Nuiginians and the law was that violent crime was usually a result of the irresistible demands of custom and pride rather than the individualised behaviour of habitual criminals.[42] By pronouncing sentence on Kita Tunguan's behaviour, Gore indicated that in this case he saw a vicious crime, not some compulsion of custom: that his actions were those of a criminal who knew what he was doing, an observation compounded by Kita Tunguan's "evasive" testimony. However, Gore also noted that the Executive would make the ultimate decision in the case, and the judge knew that very few were ever hanged.

This case was then referred to the Administrator who commuted Tunguan's pronounced sentence of death to a sentence of life with hard labour. That was a severe sentence compared to the 5-8 years most murderers received.[43] But, whatever might have been past practice, Cleland's decision violated a Federal Cabinet decision of 1952 in which the prerogative of mercy in cases of pronounced sentences was to be left it in the hands of the Commonwealth Cabinet to give the Administrator directions until the *Papua and New Guinea Act, 1949 (Cth)* could be amended and the power of mercy be given to the Executive Council and Governor-General.[44]

The Tunguan case came to Paul Hasluck's attention when he noticed a newspaper article in the *South Pacific Post (SPP)* about some members of the Port Moresby Country Women's Association's (C.W.A.'s) opposition to the commutation of Tunguan's sentence. The Minister then demanded to know why he and Cabinet had not reviewed this case.[45] Still unaware of his mistake, Cleland responded to his minister with the full capital case file, a precis of the reports on which he made his decisions and also a letter which explained his decision to commute the sentence, including his

[40] Cleland to the Secretary; Gore, "R v. Tunguan- Transcription of trial".
[41] See figure 6-5 for sentencing statistics
[42] R.T. Gore, *Justice Versus Sorcery*, Jacaranda Press, Brisbane, 1964, p. 91.
[43] "Women Sign Petition", *South Pacific Post,* 11 Aug 1954, p.7.
[44] Note taker E J Bunting "Case of Gebu-Ari", Notes of meetings on 30 Oct 1952, NAA: A11099/ 1/30
"Minute to the Minister- Papua and New Guinea Act – Proposed Amendments, Draft, 4-8-54", *Commutation of Sentences on Natives in Papua and New Guinea*.
[45] C.M Lambert, Secretary of Department of Territories, to D.M. Cleland His Honour the Administrator, 20 Aug 1954, *Commutation of Sentences on Natives in Papua and New Guinea*, NAA: A11099/ 1/30

suspicions of Nesbit's character, drawing to a large extent on the gossip around Nesbit's sex life to which he had been privy.[46] Hasluck was shocked at his administrator's candor and requested that the Secretary of the Department of Territories Cecil Lambert inform Cleland that he should have replied with why the new procedure had not been followed, not the details of Nesbit's affairs.[47] Cleland was apologetic and wrote that he had not intended to "thwart" the Minister.[48] Cleland wrote that had not remembered that verbal direction and had received no paperwork to support the 1952 decision.[49] Cleland went on to explain to Lambert and Hasluck that that he had commuted this case along with the high volume of recorded sentences that had come across his desk. Evidently, the process for clemency Hasluck ordered in 1952 had not been clear to Cleland in 1954.

Cleland was subsequently instructed to maintain attention to the recorded cases until the legislation transferred that duty to the Governor-General. However, he kept commuting recorded sentences beyond the legislated end of his powers in that regard as well and had to be reminded by Lambert in May 1955 to forward all cases, several months after the legislation requiring that passed in October 1954. Finally, all the recorded cases were sent from November 1955, including the backlog from between October 1954 and May 1955.[50]

This case, and the chain of mistakes that followed it, reinforced Hasluck's mistrust of territory officials that first arose after touring in PNG in 1951 at the start of his Ministry. He wrote: "The incompetence of the senior men was frightening".[51] In combination with highlighting their incompetence, Paul Hasluck satirized expatriates in his memoir as having been intent on reliving the Raj.[52] Consequently, he was mistrustful of the PNG Administration, and it was in that vein that he insisted that in an age of modern communications, the Department of Territories in Canberra could and would take a more interventionist approach to the administration of PNG and meeting the obligations to advance PNG.[53]

**Race and Gender in the Expatriate Community: The Context of Discretion**

Cleland made the decision to commute the sentence, and in July 1954 Hasluck could not override it, only instruct Cleland to follow the Minister's instructions in future. However, the question remains as to why Cleland commuted the sentence, rather than hang a Nuiginian man who had raped a white

[46] D.M. Cleland to the Secretary, re: R v Kita Tunguan.
[47] Lambert to Cleland, 20 August 1954.
[48] Cleland to the Secretary, re: R v Kita Tunguan.
[49] Cleland to the Secretary, re: R. v Kita Tunguan..
[50] D.M Cleland to the Secretary, Department of Territories, 16 July 1955, re: Commutation of Death Sentence
[51] Hasluck, *A Time for Building*, pp. 16-18.
[52] Hasluck, *A Time for Building,* pp. 14-15.
[53] Hasluck, *A Time for Building*, p. 17.

woman. In contrast to the other cases, the question of influence on Cleland must take into account that the Administrator, a bureaucrat, felt less pressure to respond to the community than politicians in Canberra who had to take into account electoral politics and popular opinion to a greater degree, if they hoped to retain office. As a result of this greater discretion, influenced by his own notions of gender, race and justice, Cleland's decision commuting Tunguan's sentence reflected the direction of Australian norms for the punishment of rape, and a desire to protect PNG's international reputation, in spite of the judge's preference for hanging and lobbying for hanging by a significant section of the expatriate community.

Gender ideology among politicians and officials in the bureaucracies was a salient aspect of the advancement policies in PNG. Therefore it was significant to decision-making in the clemency cases in this thesis, and particularly in Kita Tunguan's case. Officials' understandings of masculinity and femininity affected their judgement of the seriousness of capital cases and the characters of the people involved.[54] This finding reflects the conclusions of scholars of colonialism prior to the Second World War who have proposed that interracial relationships and appropriate masculinity and femininity were loci of social tension in colonial settings.[55] And further, that discourses of savagery and civilisation surrounding Nuiginian men led people to believe they were dangerous company for white women.[56] However, moving into the post-war period, these case studies show that the gender ideologies of PNG officials and Canberra officials were fairly similar in the 1950s, and the attitudes of Commonwealth officials were significant to PNG outcomes, as technology, such as a reliable telephone connection to PNG, allowed them to intervene more in PNG issues.

The way politicians and lawyers thought about punishment of gendered crimes, such as rape and attempted rape, were similar in PNG and mainland Australia. For example, the case of *R. v. Gebu-Ari, 1952*, saw very similar outcomes to rape cases in Queensland at the same time.[57] In both situations flogging as a punishment was contemplated to protect women and children, but similar terms of imprisonment were the final results, despite the option of hanging or flogging Gebu-Ari for his crime under the *White Women's Protection Ordinance, 1926-1934 (WWPO, 1926-34)*.

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[54] See for example, Gore, *Justice Versus Sorcery*, Ch 26.
[55] See for example, Gosh "Gender and Colonialism", pp. 739-741; Stoler, *Carnal Knowledge and Imperial Power*, p.2.
[56] Regis Tove Stella, *Imagining the Other*; *The Representation of the Papua New Guinean Subject,* Pacific Islands Monograph Series 20, University of Hawaii Press, Honolulu, 2007, pp.144-145.
[57] Notetaker E J Bunting - Notes of meetings 2/12/1952 (Cabinet), NAA: A11099, 1/30, p. 31. See *Criminal Code of Queensland Adopted Papua/New Guinea,* Sections 18-19, 208-216, 315, 350, 420, 425-66, 319, 655, 666, 1939-1949, Pacific Islands Legal Information Institute, http://www.paclii.org/pg/legis/PG-newguinea_annotated/cca254.pdf Lisa Durnian, "Research Brief 21: Whipping as a criminal punishment",*The Prosecution Project*, Griffith University, https://prosecutionproject.griffith.edu.au/whipping-as-a-criminal-punishment, 14 March 2016, viewed 19 July, 2016. "The Charleville Rape Case. Three Youths Found Guilty", *Charleville Times*, (Queensland), 7 Aug 1952, p. 8. "Would the Cat reduce sex crimes?" *Courier-Mail*, 18 Jan 1951, p. 2.

More generally, the sexual lives of both men and women were also significant to judgements about the appropriate punishment for offenders. Historians of gender and sex in post-war Australia and PNG have noted that the attempt to return to traditional gender roles in the 1950s was in conflict with gender relations recalibrated by the Second World War towards more freedom from social restrictions.[58] Similar to Australia, the PNG Administration was concerned about the independence and sexual autonomy they observed in young women. Old colonialists in the Port Moresby community were afraid that such independent women would incite Nuiginians into acting on their presumed desire for white women. The punishment of death for the rape of a white woman indicated the seriousness of the assault on colonial authority that was perceived to be encapsulated in the assault of a white woman; it was an offence comparable to treason and piracy, which also rejected the primacy of white authority. Accordingly, the expatriate community, as well as authorities, sought to police the sexual behavior of women. Mrs. J Wyatt and the Country Women's Association (CWA) in PNG wrote a pamphlet in 1957 advising women, particularly new arrivals, on how to treat Nuiginians. Called: *A New Comers Guide to Papua and New Guinea by a Port Moresby House Wife*, the pamphle recommended behaviors that would ensure physical and social distance to maintain power over the Nuiginians in the household.[59] Wyatt was concerned about the 'newcomers' and particularly the new category of 'business girl'.[60] 'Newcomers' was in part a code for 'New Australians', post-war non-Anglo-Saxon migrants, people like Blanka Nesbit nee Parcen. Consistent with my analysis of Wyatt's pamphlet, Featherstone and Kaladelfos noted the anxieties that Australians expressed about the sexual behaviour of non-Anglo-Saxon migrants.[61] These newcomers were of particular concern to Wyatt, who feared such women would place themselves in vulnerable positions through excessive familiarity and thus break the sexual taboo around inter-racial sexual encounters that was at the heart of white solidarity and power.

The provision of live–in servants created complex relationships between white women and Nuiginian men, which Wyatt was most anxious about, particularly as most Australians were unused to servants. Consequently, expatriate men and women thought that women living in villages, outstations, and

[58] Anne Summers, *Dam Whores and God's Police*, Penguin Books, Ringwood, 1994, p. 471; Frank Bongiorno, *The Sex Lives of Australians: A history,* Black Inc, Collingwood, 2012*,* Ch. 7; Jill Julius Matthews, *Good and Mad Women; the Historical Construction of Femininity in Twentieth Century Australia,* Allen and Unwin, Sydney 1984; Christine Stewart, "Men Behaving Badly" *The Journal of Pacific History*, vol. 43, no. 1, 2008, pp. 77-93. Robert Aldrich, *Colonialism and Homosexuality*, Routledge, London, 2003, pp. 247-8. Human Rights Watch, *This Alien Legacy; The Origins of Sodomy Laws in British Colonialism*. Human Rights Watch, New York, 2008. Garry Wotherspoon, "The Greatest Menace Facing Australia; Homosexuality and the State in N.S.W. During the Cold War", *Labour History*, no. 56, 1989, pp. 15-28.
[59] Inglis, *The White Women's Protection Ordinance*, p. 146.
[60] Wyatt, *A New Comers Guide to Papua and New Guinea,* p. 5-9; see for example: "Public Aid Sought To Check Port Moresby Crime Wave", *South Pacific Post,* 16 May 1954, p. 3.
[61] Lisa Featherstone and Amanda Kaladelfos, *Sex Crimes in the Fifties,* Melbourne University Press, Carlton, 2016, Ch. 6.

suburbs, often isolated from the immediate protection of men, were vulnerable.[62] Such concern is consistent with evidence analyzed by scholars of other colonial settings.[63] Ann Stoler found connections between increased numbers of white women in Java and Sumatra and increased anxiety among colonists over sexual and social practices of white women in the community.[64] This suggests that in PNG anxiety was heightened by an increasing number of white women arriving in PNG in the 1950s.[65] Indeed, indicative of PNG's practice of policing colonial relations in the home, a Mrs. Fawkner was investigated and prosecuted in 1952 in the case of *R. v Fawkner, 1952* for her consensual, but still illegal, relationship with a Nuiginian man under Section 9 of the *Papua and New Guinea Criminal Code* in which: "Any European woman who voluntarily permits any native (other than a native to whom she is married) to have carnal knowledge of her shall be guilty of an indictable offence."[66] Yet Mrs. Fawkner did not seem to share their anxieties. The determination of the authorities to project authority by deeming inviolate the white home and the white female body was an important policy objective for many expatriates. However, the extent of that concern was subject to change from pre-war standards to post-war standards as the concern for white women's bodies increasingly was trumped by the concern for the welfare of male Nuiginian bodies, as I will show in this chapter.

Indeed, the policy scrutiny of the sexual lives of Nuiginian men and expatriates is shown in the level of knowledge an Administrator might come to possess about members of the small expatriate community. Nesbit's superiors knew about her relationships, and Mrs. Fawkner's relationship became known to the police. This microscopic and informally-acquired knowledge held by officials, in addition to the formal channels of information, and such information was important to Cleland's decision to grant Tunguan clemency.

Cleland's decision was consistent with similar and contemporary cases in New South Wales (NSW), where rape could also be punished with execution and comparisons to NSW rape cases and punishments were explicitly made in the PNG newspaper's discussion of Tunguan's punishment. NSW legal decisions were on the mind of *SPP* readers, such as Cleland, even as he chose to oppose the direction advocated by the paper.[67] Indeed, any reading of the *SPP* should regard it as the

[62] See for example, "Public Aid Sought to Check Port Moresby Crime Wave", *South Pacific Post,* 16 May 1954, p. 3.
[63] Gosh "Gender and Colonialism", pp. 739-741.
[64] Stoler, *Carnal Knowledge and Imperial Power,* p.2.
[65] For statistics on crimes against women see: The Parliament of Australia, *Territory of Papua; Annual Report for the Period 1st July, 1949 to 30th June, 1950*. Compiled from annual reports from 1949/50 to 1965/66. Note the shifting of reporting categories. Commonwealth of Australia Department of Territories *Report to the General Assembly of the United Nations on the Administration of the Territory of New Guinea 1948/49-1965/66*.
[66] R.T. Gore, "*R. v Fawkner (1952)*, Judgement", Hand written notes, Gore Papers, Box 1, Folder 6, p. 1.
[67] The editor, "The Death Sentence", *South Pacific Post,* 7 July 1954, p. 12. Jo Lennan and George Williams, "The Death Penalty in Australian Law", *Sydney Law Review*, vol. 34, no. 4, pp. 668, 680; *Crimes Act 1900* (NSW), ss63.

mouthpiece of the expatriate society. As Nelson suggested, the *SPP* was in English and written for expatriates, by expatriates and so we should read its commentary as expatriate pressure on the Administration.[68] Emphasizing that link, Cleland's role in reviewing Tunguan's sentence was to ensure that punishment was in line with community expectations and standards, and with the scrutiny of Australian colonialism in PNG, those community standards encompassed in Australia and by international critics, not just as accepted in Port Moresby.

Altering PNG's position, in 1954, after extensive debate over the appropriate penalties for rapists, capital punishment for rape was repealed in NSW.[69] That change brought NSW in line with the rest of Australia, leaving PNG the only jurisdiction to hang rapists, and even more morally isolating in the international postcolonial mood, in hanging only Nuiginian rapists of white females and not the rapists of Nuiginian females.[70] Administrators in PNG were clearly aware of this change in standards, as NSW's debate was discussed in relation to Tunguan's case in the Port Moresby paper. Nevertheless, the *SPP* used the NSW abolition of execution for rape to warn PNG and to decry the commutation of sentences as causing a perceived upsurge in sexual crimes in PNG and NSW.[71]

The most significant rape case in NSW that allows insight into normative understandings about justice for rape victims, and which was discussed in relation to penalties in PNG in the *SPP,* was the Lawson case. Lawson, a Sydney photographer, was condemned to death for raping his models, but then had his sentence commuted.[72] The Lawson case was discussed in conjunction with the Kita Tunguan case in an editorial in the *SPP* and was used as a touchstone by the editor for the failures of NSW legal standards around rape:

> In his pronouncement of sentence, Mr. Justice Gore made specific mention to the fact that the case had nothing in it which merited clemency. In Sydney last month Mr. Justice Clancy in the NSW Supreme Court when sentencing a man to death for a similar offence said that he could see no reason why the death sentence should not be carried out. There is apparently a hardening of the mind to this form of offence no doubt brought about by the increasing numbers of people who have been tried and convicted for it and the consequent increase in the numbers of life prison sentences which have been imposed on those found guilty.[73]

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[68] Nelson, *Papua New Guinea*, p. 126.
[69] "Widespread Search in Rape Case", *Singleton Argus*, 8 March 1954, p. 2; "Appeal of Rape Case, Solicitor", *Sydney Morning Herald*, 22 June 1954, p. 11; "Savage Penalties for Rape", *Sydney Morning Herald*, 18 June 1954, p. 2; "Q'land Men Gaoled Ten Years", *Sydney Morning Herald*, 18 June, 1954, p. 7; "Changed Law Urged on Rape Penalty", *Sydney Morning Herald*, 18 June, 1954, p. 3; "Youth 14 Gaoled for Life", *Barrier Miner* (Broken Hill, NSW), 22 June 1954, p. 2; "Letters", *Sydney Morning Herald*, 19 June 1954, p. 2; "Letters", *Sydney Morning Herald*, 21 June 1954, p. 2.
[70] For other systems comparable to PNG see Mark Finnane, *Punishment in Australian Society,* OUP, Melbourne, 1997.
[71] The editor, "The Death Sentence", *South Pacific Post,* 7 July 1954, p. 12.
[72] "Sentence of Death for Rape", *Sydney Morning Herald*, 25 June 1954, p. 1; Onlooker, "Candid Comment", *Sun-Herald*, (Sydney), 27 June 1954, p. 18.
[73] The editor, "The Death Sentence", *South Pacific Post,* 7 July 1954, p. 12.

This comparison led the editor to the conclusion that a judge's verdicts, such as Gore pronouncing death upon Kita Tunguan, should be upheld, so that there would be certainty to deter crime, rather than law and order being undermined by Executive mercy, just as should have happened with Lawson in NSW.[74] The *SPP* thought imprisonment to be no deterrence for rape: they argued that only death would deter rapists.[75] Cleland apparently disagreed and aligned himself more with the NSW Executive, though he still gave Tunguan a life sentence, a severe punishment. Cleland, involved as he was in the social life of his community, was well aware of the position of the newspaper and the preference for deterrent penalties among its expatriate readers. However, he also knew that the *WWPO, 1926-34* was an unusual law and that it isolated PNG morally. PNG was outside the mainstream of metropolitan thought on punishment for rape and the Administrator knew that when he chose clemency, even as PNG expatriates and the *SPP* pushed for harsher punishments for rape.

The perpetrator was not the only person judged during a rape trial in the 1950s in metropolitan Australia. The victim experienced their own inquisition and judgment, as the men making the decisions also made moral judgments about the victim in deciding on a just punishment. Yet, surprisingly given the dreadful history of interracial sex and violence in the Western and colonial world in the 1950s, this case study indicates that it was little different in this colonial setting of PNG, even in the context of an interracial rape.[76] There is historical scholarship on such judgments that help to explain the direction of arguments about punishment in cases of rape. For example, Jill Julius Matthews traces the ways in which officials employed social ideologies of gender in making decisions about female victims of crime.[77] Featherstone and Kaladelfos also show the ways in which social judgments of gender permeated thinking about rape and punishment of rape, yet also argue that there was increased condemnation of sexual violence across this period as the flip side of that emphasis on traditional gender roles, such as protecting women.[78] Nevertheless, the input of social ideologies was what the discretionary process was for, to ensure justice was done in the eyes of the community, rather than the law being carried out without reference to contemporary standards. Building faith in the state through just punishment seems to have manifested itself in NSW and PNG by enforcing traditional gender modes upon men and women as rapists and victims, and these attitudes towards victims were explicitly discussed in the mainstream media and in private

[74] The editor, "The Death Sentence", *South Pacific Post.*
[75] The editor, "The Death Sentence", *South Pacific Post.*.
[76] See for example Joanna Bourke, *Rape: Sex, Violence, History*, Counterpoint Press, Berkley, 2007.
[77] Matthews, *Good and Mad Women*, Ch 7.
[78] Featherstone and Kaladelfos, *Sex Crimes in the Fifties*, p. 8.

conversations in 1954.[79] Despite the expectations that might arise of punishments in PNG as a colonial legal regime, this case suggests that PNG generally followed mainland standards in determining the justness of penalties for rape, and also in the ways that it questioned the conduct of victims of rape, and those standards will be outlined below.

This nexus of blame and pity can be seen in the case of Blanka Nesbit and the clemency granted to Joseph Kita Tunguan, despite what the *SPP* editor called a "hideous crime".[80] That nexus was evident in the writing of Kay Melaun, a regular advice and social affairs columnist, who wrote a feature article for the hugely popular *Australian Women's Weekly (WW)* on 14 July 1954. A mainstream magazine that revealed conventional discourse around sex and crime. She asked as the title of her essay "Is virtue old fashioned? No!" written in response to the NSW debate on penalties for rape. Her argument was that many of the rapes highlighted in the recent cases could have been avoided if 'old fashioned' virtue and rectitude were practiced by more young women; they needed to behave more modestly and remain in the protection of their families longer. Melaun equated rapists and single mothers morally: "Sympathy and pity? For the girl who is to become an unmarried mother? For the man who raped a young girl?" To Melaun, these people were victims of a permissive society and women who slept with men before marriage foolishly destroyed their reputations. Therefore, women who put themselves in the situation which endangered their physical security, foolishly increased the chances of being raped. 'Men of today' Melaun warned were less trustworthy and less chivalrous than in the past and girls most certainly did need protection.[81] The *WW* article and its subsequent correspondents on the topic reveal a normative understanding of rape in Australian society. It was a wicked crime, but it was also largely avoidable. A victim, such as Dr. Nesbit, was both blameworthy and to be avenged, the perpetrator, Tunguan, to be pitied and also punished.

This harsh standard for rape victims in NSW in the 1950s is consistent with the literature of the history of and legal theory of rape. Looking at the history of rape trials in the UK, Zsuzsanna Adler noted that:

> We have seen that the victim's chastity and sexual reputation remain crucial issues in rape trials. Her general character, however, also seems to be a salient factor and attempts are frequently made to discredit her in this respect. Anything other than totally 'proper' and 'respectable' behavior may be used for this purpose."

[79] Kay Melaun, "Is virtue old fashioned? No!", *The Australian Women's Weekly*, 14 July 1954, p. 21; "Women Sign Petition", *South Pacific Post,* 11 Aug 1954, p. 7.
[80] The Editor, "Death Sentence", *South Pacific Post,* 7 July 1954, p. 12.
[81] Melaun, "Is virtue old fashioned? No!", p. 21.

This includes psychiatric history, such as Nesbit's depression and institutionalization.[82] In an Australian context J.E. Newton argued that:

> Within the ambit of this broad approach courts give recognition to factors such as the use of violence, the circumstances and behaviour of the victim and the degree of mental ill-health of the defendant in terms of sexual deviance.[83]

As in other western jurisdictions, in Australia, a lack of injuries, familiar behaviour, and a sexual history affected the calculus of determining a just sentence. It usually reduced the sentence given to the offender, if they were found guilty at all. This standard in particular is suggestive in the context of Cleland commuting Tunguan's sentence for rape.

Adler also noted that: "one of the main rape myths, as we have already discussed, is that women have a marked tendency to make hysterical, unfounded allegations of rape for a variety of somewhat obscure psychological reasons."[84] An allegation of rape was not taken at face value. Susan Estrich echoed this in reflecting on the legal history of rape trials that:

> Evidentiary rules have been defined to require corroboration of the victim's account, to penalize women who do not complain promptly, and to ensure the relevance of a woman's prior history of unchastity. [85]

She further analysed the volume of rape cases in which the victim is simply not believed.[86] "Real rape", a perception which Estrich incisively critiqued, for judges and officials had a definite moral and physical character, and there was to such a men a hierarchy of rape and women might be blamed for some types of rape.

As these were the criteria judges and politicians used to resolve the equations of victimhood and blame, pity and punishment in 1954, this criteria will be used to judge the treatment of perpetrator and victim in the Kita Tunguan case.

**How a Nuiginian was defended like a White Man**

The prosecutor worked to establish a vision of Nesbit as matronly and respectable. They emphasised her virtues to prove that she was worth the law's full protection. For example, Blanka Nesbit was not called Dr. Nesbit during the trial, though her occupation was briefly cited.[87] The prosecutors insistence on the more traditional and matronly title 'Mrs.' represented her as a respectable woman

[82] Zsuzsanna Adler, *Rape on Trial*, Routledge and Kegan Paul, New York, 1987, p. 102.
[83] J.E. Newton, *Factors Affecting Sentencing Decision in Rape Cases*, Australian Institute of Criminology, Canberra, 1976, p. 23.
[84] Adler, *Rape on Trial*, p. 105.
[85] Susan Estrich, *Real Rape*, Harvard University Press, Cambridge, 1987, p. 5.
[86] Estrich, *Real Rape*, Ch. 2.
[87] Her medical qualifications were recognized in PNG

entitled to the protection of the law.[88] Using Mrs. and her married name also obscured her 'foreign' origins. As Matthews, Adler and Estrich suggested, such implied respectability was vital in a rape trial. Nesbit's domesticity and respectability was further emphasized to the judge by describing her sewing in great detail; even the particular panel of the skirt she was making at the time of the rape was precisely identified, as was the process she was using to construct the garment, as what was more respectable than sewing?

The prosecution used witness testimony to confirm Nesbit's injuries, bruises and torn clothing. The hole in the wall made by her head, her distress and disheveled state after the assault were also highlighted in testimony.[89] This evidence of resistance, as Estrich noted, was a key evidentiary matter for the prosecution to adduce, as it was perceived to demonstrate what Estrich satirically calls 'real rape'.[90] As there were no witnesses to the crime, such evidence bolstered her credibility as a witness. Alongside her prompt report of the crime, such testimony was strongly suggestive of rape. Further, Gore found her testimony to be more reliable than Tunguan's.[91] Her word as a white woman carried more weight with him, however much the expatriate community found otherwise. Thus Nesbit's lack of witnesses was overcome by her whiteness, trappings of respectability, and some physical evidence.

The defence raised Nesbit's past and her character. The scholarship suggests that if the defence could paint the victim as a 'loose woman', the accused would likely be exonerated.[92] Thus there were references made to the attempted suicide and suicide of the men construed to have been her previous lovers. They raised her affair with a married man, Dr. Kocenas, prior to her marriage, who later committed suicide in an attempted suicide pact with her.[93] Also to discredit Nesbit, the defence asked several times if she had kicked or kneed Tunguan while he was ironing and thus provoked an attack; or, as outlined by Wyatt in her guide to behavior, invited sexual advances by physical contact.[94] Nesbit denied it.[95] To prove she was a loose woman she was asked if she had had men in the house while her husband was away, as Tunguan had charged.[96] She replied that she had had many friends to visit. When pressed in cross-examination with the proposition that men had been sleeping in her

[88] D.M. Cleland, Letter, D.M. Cleland, to the Secretary, Department of Territories, 5 October 1954, re: R v Kita Tunguan, *Commutation of Sentences on Natives in Papua and New Guinea*. And R.T. Gore, "R v. Tunguan- Transcription of trial", Gore Papers, Box 1, Folder 6.
[89] R.T. Gore, "R v. Tunguan- Transcription of trial", Gore Papers. Box 1, Folder 6
[90] Estrich, *Real Rape*, p. 7.
[91] Gore, "R v. Tunguan- Transcription of trial".
[92] Estrich, *Real Rape,* p. 7; Adler, *Rape on Trial*; Newton, *Factors Affecting Sentencing Decision in Rape;* Matthews, *Good and Mad Women*, Ch 7. Featherstone and Kaladelfos, *Sex Crimes in the Fifties*, pp. 47-48.
[93] Gore, "R v. Tunguan- Transcription of trial", p. 32.
[94] Wyatt, *A New Comers Guide to Papua and New Guinea by a Port Moresby House Wife*.
[95] Gore, "R v. Tunguan- Transcription of trial", p. 26.
[96] Gore, "R v. Tunguan- Transcription of trial".

house while her husband was away she refused to answer the question. The defence went on to suggest repeatedly that she consented to the sex and only decided to call rape when she thought Tunguan might tell stories about the encounter, or that perhaps people had heard her calling his name. She denied it absolutely.[97] Further, the defence suggested that immediately after the rape when she fled to the neighbours' she made phone calls of a suspicious nature, perhaps to her lovers. They found it suspicious because the call was not conducted in English.[98] Additionally, the defence subjected the medical evidence of bruising to questioning to try to indicate that it was the result of consensual sex rather than rape. There was an attempt to cast doubt upon the extremity of the injuries and make it evidence of depravity and thereby not corroborate Nesbit's story.[99]

The defence thus did his best to cast Nesbit's character into disrepute and suggest that in her depravity, she was the type to have had sex with her 'haus boi' and then cry rape when she thought it might get out. She was this type because she had had lovers in the past and one of them had killed himself.[100] Dr. Blanka Nesbit was being painted as the kind of woman the *Women's Weekly* felt might have invited an attack by her own behaviour. Certainly, according to the prosecution she had broken Wyatt's test of distance and respect with Nuiginian men by allowing Kita into the house to perform personal tasks and perhaps touching him.

The defence's attack on Nesbit's character is significant to a study of colonial justice, as the perpetrator was defended in the manner a white rapist in Sydney might have been defended. This was not a kangaroo court determined to hang him, as literature on gender and colonialism suggests it might have been, particularly as the defence and prosecution were both members of the Administration. Further, the defence publically argued the notion of consensual, interracial sex initiated by a white woman to protect a Nuiginian man. Rather than being railroaded, Tunguan was accorded an all too common defence against the rape charges. Certainly, Featherstone and Kaladelfos's survey of cases suggests that Aboriginal men would not necessarily have received such a defence on the mainland in the Fifties.[101] While the penalty was severe, it was not as severe as death, so indicates that this case marks a shift in the way gender, crime and colonial authority interacted. The scope of the arguments was consistent with rape cases cited by Adler, Newton and Estrich. Thus even in the PNG context Western ideologies about gender were significant in the way the case was defended and prosecuted, rather than only racial, colonial ideologies.

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[97] Gore, "R v. Tunguan- Transcription of trial", pp. 30-31
[98] Gore, "R v. Tunguan- Transcription of trial", pp. 31-32
[99] Gore, "R v. Tunguan- Transcription of trial", pp. 35b 37
[100] Chalmers, *Kundus, Cannibals and Cargo Cults*, p. 67.
[101] Featherstone and Kaladelfos, *Sex Crimes in the Fifties*, p. 43.

**Community Pressure on Cleland**

In Port Moresby, the news of the rape of Blanka Nesbit was a front-page story and this news came in the middle of the widely reported Telefomin trials and that notoriety created a local context for Cleland's deliberations, a context that expected harsh punishment for Tunguan. As seen in Chapter Two, the Telefomin trials resulted in anxiety in PNG over the image of PNG overseas and how best to punish offenders. In addition, both formal and informal representations of Nesbit had a great impact upon Cleland's deliberations on clemency. Yet, it is plain from the defence's line of questioning and the tone of the CWA proposed petition, analysed below, that private discussions of Nesbit were less sympathetic than those arguments seen in the newspaper.

First, the *SPP* presented Nesbit as a largely blameless victim of Kita Tunguan's perfidy and emphasized the likelihood of his hanging, both placing pressure on the Administration, but also suggestive of the informal commentary on the case Cleland likely encountered in his social life in PNG. "Native on Trial" was the relatively mild header for the story that launched the news into the public domain. However, as the *SPP* was a weekly, it was likely the rape was already known about by most townspeople when it was finally reported.[102] The page-one article led with a narrative of ingratitude: "A native houseboy had raped a European woman who had once saved his life, the woman told the Port Moresby District Court last week."[103] The characterization of Kita Tunguan as ungrateful resonated with the story telling of the Telefomins' irrational ingratitude for Australian colonialism that was in the courts and newspaper at the same time. The Telefomin too were blamed for not appreciating the opportunities they had been given.

The *SPP* story then emphasized Nesbit's matronly and respectable nature by reporting that she was quietly "sewing in her living room in Konodobu" prior to the attack.[104] This was followed by a paragraph of explanation about why Kita was in the house. The length of the explanation seems to suggest that it was an unusual privilege for a servant to be allowed to iron his clothes in the main house. Then, emphasis was placed upon the injuries that Nesbit bore, the bruising on her wrists and arms, a key element in proving a rape charge. To emphasize the idea that he was dangerous, Kita Tunguan was described as "a powerfully built Sepik River native."[105] The Sepik River was an area known to the *SPP* readers for the warlike propensities of its people: the Telefomin sub-region is also near the Sepik. This description played to the fears the *Post*'s readership had about the servants in

[102] "Native on Trial", *South Pacific Post*, 2 June 1954, p. 1. As the *Post* was a bi-weekly paper, this was first opportunity to report on the events.
[103] "Native on Trial".
[104] "Native on Trial".
[105] "Native on Trial".

their midst; Stoler's "troubled intimacies"[106] The *SPP* characterized Kita Tunguan as dishonest by reporting that the police said he told conflicting stories. This again resonated with the dishonesty of the Telefomin ambushes. The *SPP* was campaigning for a severe penalty.

Finally, the plaintive words of Kita upon his arrest were reported: "No matter you kill me. No matter. I go along calaboose. I make this trouble." This could be a confession, or a recognition of his weak position in a colonial context. Inglis for example noted the extreme caution of Nuiginian men in their dealings with white women even into to the seventies due the *WWPO, 1926-34*.[107] Inglis' analysis further suggests that Kita Tunguan believed that he could not win once the accusation was made "no matter" what he said. From his experience of accusations of violence against whites, he knew that he would be punished to be an example "no matter" what the facts of the case might be. He believed that the penalty was likely to be death, reflecting a Nuiginian understanding of the way gender and colonialism interacted in PNG. It would seem that Nuiginians believed that whites in Port Moresby would react in a pre-war colonial manner to a rape charge and that death was likely.

Indeed, the *SPP* lobbied for hanging. They endorsed Gore's sentence and carried the story of the sentencing on the front page in its next edition the following Wednesday.[108] The article led with Justice Gore's pointed refusal to merely record the mandatory sentence of death and his determination to pronounce sentence: "I don't see any indication in this case which calls upon me to record the death sentence."[109] This indicated Gore thought Kita Tunguan was too westernized, with his experiences of working and trouble in Port Moresby, to receive merciful treatment on the basis of incomprehension of Australian society and justice as often happened to non-westernized offenders. Further, offenders under the *WWPO*, *1926-34* had usually had sentences pronounced.[110] The newspaper quoted at length Gore's recitation of evidence that pointed to rape and included Gore's characterization of Kita Tunguan: "This is a powerfully built native and she had little chance against him. The accused is a highly intelligent native who was cleverly evasive in answering questions."[111]

Indicating Gore's doubts that a hanging would occur, the article concluded with him washing his hands of the ultimate sentencing process: "What the Executive chooses to do after I have done my part is their business."[112] This choice of words suggests that the judge and newspaper thought a

[106] Stoler, *Carnal Knowledge and Imperial Power,* p. 2.
[107] Inglis, *The White Women's Protection Ordinance*, p. 146.
[108] "Native Sentenced to Death", *South Pacific Post*, 9 June 1954, p. 1.
[109] "Native Sentenced to Death", p. 1.
[110] For example *R. v. Gebu-Ari, 1952*, Note taker E J Bunting - Notes of meetings on 2/12/1952 (Cabinet) NAA: A11099, 1/30. R. *v. Hahaea-Koaeia, 1948*- an attempted rape prosecuted under the ordinance, Gore Papers, Box One, Folder Two; Inglis, *The White Women's Protection Ordinance*.
[111] "Native Sentenced to Death", *South Pacific Post*, 9 June 1954, p. 1.
[112] "Native Sentenced to Death".

commutation was likely, even if Kita Tunguan did not. The newspaper gave prominence and authority to Gore's finding that Kita Tunguan could hang in conjunction with a warning that the process would then be political, in the sense of being influenced by diplomatic expectations and the influence of Federal policy. The *SPP* and Gore, in their comments about the Executive and punishment, obviously sought to influence the capital case reviews and Cleland, though recognizing the liberal ideas that Cleland and Hasluck championed might well lead to commutation.

Expatriates' lobbying in the newspaper after the commutation indicates that they believed that there was pressure to commute sentences coming from Canberra and internationally. Their lobbying on punishment continued after clemency was announced, as they seemingly sought to influence future cases by attempting to counter or mitigate the influences that they saw had led to Cleland's decision to commute the sentence. Cleland's mercy prompted the *SPP* editor to write:

> The Administrator's decision to commute the death penalty recently imposed on a native found guilty of a hideous crime against a European woman was to be expected, but nonetheless will be received with misgivings among a wide section of the community.[113]

The *SPP* asserted that while people had expected clemency, they still railed against it and feared that crime, particularly sexual crime, would escalate as a result. That they expected clemency shows their awareness of the punishments and racial ideologies beyond the islands, but did not accept them. PNG exceptionalism, noted by historians such as Healy and Fitzpatrick, was clearly at work in this case. Despite not seeing themselves as colonialists, the B4s and old colonialists were enmeshed in gendered notions of colonial power scholars have noted in such cases from before the war.[114] This is because they thought it would be suitable to punish crimes against white women more severely than crimes against Nuiginian women.

Further, there was also pressure on the capital case reviews from Australian norms. The editor had cited Australian rapes cases and punishments in building his case for execution, regardless that these had been commuted too. His conclusion was that the rise in rape cases in Australian jurisdictions had led to a "hardening of the legal mind to this form of offense no doubt brought about by increasing numbers."[115] In echoing arguments from NSW newspapers, the editor of the *SPP* showed the continuities between Australian and PNG legal norms. However, there is little evidence to support a rise in the rate of rape cases in PNG.[116] Nevertheless, the SPP seems to have thought that there was

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[113] Editor, "The Death Sentence" *South Pacific Post*, 7 July 1954, p. 12.
[114] Healy, "Monocultural administration in a multicultural environment"; Peter Fitzpatrick *Law and State in Papua New Guinea*, Academic Press, London, 1980, p. 68.
[115] Editor, "The Death Sentence".
[116] The Parliament of Australia, *Territory of Papua; Annual Report*, Commonwealth Printer, Canberra. Statistics compiled from annual reports from 1949/50 to 1965/66. Note the shifting of reporting categories. Commonwealth of Australia Department of Territories *Report to the General Assembly of the United Nations on the Administration of the*

and wanted to place pressure on future decisions by drawing a nexus between commutations and rising crime.

The editorial's discussion also indicates that the expatriates in PNG believed that Cleland was influenced by international scrutiny and anti-colonial sentiment in Australia in citing the general mood of PNG expatriates who sympathied "with the political difficulties which could face the Administrator had he confirmed the court's verdict".[117] "Political difficulties" could refer to the policies of Hasluck and other liberals who were focused on advancement and a more colour blind approach to the law, and the *WWPO* was of course the most unequal of the laws on the PNG books. Alternatively, or also, it refers to the UNTC and its scrutiny of the Territories. The editor pointed out that expatriates in PNG were aware that the Administrator faced international political pressures to appear benevolent, to satisfy UN attitudes. They were also aware that Australia was engaged in the triennial review of the Trusteeship in the UN Trusteeship Council in New York in June and July, and embarrassing legal cases were best avoided.[118] Indeed the *SPP* often reported on criticisms of PNG colonialism, so they were aware of how outside opinions of Australian colonialism might be affected by executing a Nuiginians for raping a white woman and how that would be seen as an extraordinary penalty.

Cleland's justification of his sentence to the expatriate community in statements to the *SPP* revealed some of the considerations that were significant to him in reaching his decision. He justified it as a harsh deterrent, and indeed it was, as most murderers were sentenced to around 7 years of hard labour. Cleland emphasized to the *SPP* that his sentence meant Kita's release "would remain at the Administrator's discretion."[119] Gore's declaration that there was no reason to recommend mercy stood in stark contrast with the act of mercy.[120] The differences in approaches to colonialism were evident in these contrasting decisions between Gore, an old colonialist, and Cleland who usually acted as Hasluck's leading agent of the liberal project for advancement.

**Informal Sources of Knowledge and its Influence on the Discretionary Process**

Politics, both international and Australian, had to be considered by the Administrator in exercising the Royal Prerogative. Expatriates wrote that they were in favour of capital punishment for their own security, but as the Editor of the *SPP* acknowledged, there were political difficulties, thereby

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*Territory of New Guinea,* Commonwealth Government Printer, Canberra, Statistics compiled from annual reports from 1948/49 to 1965/66.

[117] Editor, "The Death Sentence".

[118] *Index to the Proceedings of the Trusteeship Council; Eleventh Special Session 10 April 1961 Twenty-seventh Session 1 June to 19 July 1961*, United Nations Headquarters Library Bibliographical Series No. T.22, United Nations, New York, 1961, https://library.un.org/sites/library.un.org/files/itp/t27_0.pdf

[119] "Death Sentence Commuted", *South Pacific Post,* 7 July 1954, p. 9.

[120] "Death Sentence Commuted".

revealing their awareness of the racist overtones of that view.[121]

However, the matter did not rest there for advocates of B4 colonial justice, Mrs. M.H. Jewell, from a family long resident in Papua, a B4, attempted to mobilize the Country Women's Association (CWA) in Port Moresby to support capital punishment for interracial rape and better migration controls through a petition, but failed. Her attempted petition and failure was reported in the *SPP*:

> The petition points out that a similar petition was successful several years ago and the government of the day allowed the death sentence to be carried out. It says that there were no more cases of rape against women for fifteen years. The petition also asks that people who apply for Territory entry permits should be more thoroughly screened before they are allowed into the country.[122]

The historical basis for the claims of the petition is unclear. The last hanging for rape seems to be the Stephen Gorumbaru case in 1934 of the rape of a white, female child, which had involved much community activism in which Mrs. Jewell's father-in-law, Arthur Jewell, played a leading role.[123] Nevertheless, Jewell's reported comments reflected two beliefs apparent amongst some B4s; deterrence by hanging was the best response to serious crime by Nuiginians, and that the rape of a white woman was a more serious crime than the rape of a black woman.

However, Jewell's failure to carry the CWA in pursuing this course of action suggests two things. First, it suggests that women did not feel as vulnerable in 1954 as they appeared to in 1926 when the Ordinance was passed. Secondly, it indicates that not all expatriates agreed and that most members of the CWA did not feel comfortable calling for hangings for the rape of a white woman in 1954. Of course, it should also be noted that the wife of the administrator, Rachel Cleland was active in the CWA, and we should consider that she may have had a hand in the defeat of the measure with its implicit critique of the Administrator.

Additionally, the criticism of Nesbit's character that Cleland made in his comments to Hasluck were apparently general knowledge and the community gossip suggested by the petition by Jewell indicates from where Cleland gained the knowledge about Nesbit that influenced his decision to commute the decision. The public reputation of a woman was apparently significant to reasoning around the justness of penalties for rape as the petition's call for "screening" immigrants is also a veiled reference to Blanka Nesbit, a migrant, the gossip surrounding her supposed affairs with Dr. Kocenas and Dr. Otruba, and her mental health.[124] The careful screening process proposed by Jewell seemingly was intended to catch people such as Nesbit. Implicitly, Nesbit was being blamed for her mismanagement of Kita Tunguan. Her general conduct was being explicitly conflated with

[121] Editor, 'The Death Sentence", *South Pacific Post*, 7 July 1954, p. 12.
[122] "Women Sign Petition", *South Pacific Post*, 11 August 1954, p. 7.
[123] Inglis, *The White Women's Protection Ordinance*, pp. 130-135.
[124] "Women Sign Petition".

discussion over appropriate punishment for Tunguan indicating that they were seen as connected by sections of the community. Her sexual conduct was obviously widely known and thought to be germane to clemency deliberations.

Indeed, drawing on such wide spread gossip, Cleland explained to Hasluck that the screening proposition in the petition was motivated by Nesbit: "It is no doubt inspired by the knowledge of the woman's history whilst in the territory."[125] The petition attacked both Dr. Nesbit and Tunguan. The screening issue also suggests the anxieties Anglo-Saxon Australians, Featherstone and Kaladelfos noted, held about new migrants to Australia and their different sexual habits.[126] Local gossip was not kind towards Dr. Nesbit, but that was not directly expressed in the papers. Publically, there was racial solidarity in the direct attack on Kita Tunguan. The disjunction between public and private discussions suggests that officials and expatriates believed that Kita Tunguan had to be punished despite Nesbit's failure to manage her sexual behaviour properly, but not as severely as he might be had she not been to blame. The question for Cleland had then become about how much Nesbit was to blame for Tunguan's actions and how this should be accommodated. Estrich's theories about and criticism of "real rape" seem to be highly relevant here, for while Gore found there was a rape, it seems, as Estrich theorized, that Nesbit's past meant the assault on her was not considered precisely a "real rape". Judgments were being made about the victim.

**Clemency- Cleland Decides**

When Hasluck enquired as to why clemency was granted to Kita Tunguan without reference to the Commonwealth Cabinet, he was asking a procedural question. However, the reply from Cleland mistakenly went to the substance of his decision to grant clemency. Hasluck's handwritten note, suggesting he was shocked enough not to wait for it to be typed, to Secretary Lambert of the Department of Territories, points out Cleland's misapprehension of Hasluck questioning the commutation. Nevertheless, Cleland's letter gives a good picture as to how the decision to grant clemency was made because it outlines his and his community's low opinion of Dr. Nesbit, and the cruel view that the rape of such a person was a lesser sort of crime.[127]

Cleland drew on both formal documents and the recollections and opinions of his officials in forming a picture of Dr. Nesbit and Joseph Kita Tunguan. For the deliberations on commutation, Cleland had a report on Nesbit prepared by C. Normoyle, the Assistant Commissioner of Police, which he

[125] D.M. Cleland Administrator to The Secretary Department of Territories, 3 September 1954, re: R V Kita Tunguan, *Commutation of Sentences on Natives in Papua and New Guinea*.
[126] Featherstone and Kaladelfos, *Sex Crimes in the Fifties* pp. 144-48
[127] Cleland to the Secretary, 3 September 1954.

forwarded to Lambert and Hasluck as a part of his explanation in response to Hasluck's questioning of the commutation. Normoyle's report contained an unflattering account of Dr. Nesbit's life and rumored affairs in PNG.[128] The reports on Tunguan were also prepared for the commutation process, but also covered material that was adduced in court, unlike all of the information about Nesbit.

The Head of the PNG Health Department, Dr. John Gunther reported to Normoyle that Nesbit spent several months from June 1953 in "a halfway house in lunacy" due to her depression and anxiety after her alleged lover Dr. Kocenas' suicide. Cleland went on to write:

> In a recent conversation with Dr. Gunther he informed me that he considered Mrs. Nesbit to be mentally upset and a nymphomaniac. According to local gossip she is a woman of loose morals. However, in examining the evidence in the case of Kita Tunguan, there is no doubt in my mind that she was raped.[129]

Cleland developed a picture of Nesbit based upon imprecise and informal knowledge and using the traditional view of gender of the sort promoted by Melaun: that women should not place themselves in situations in which men might attack them and that women could invite attacks through their conduct and reputation. Gunther characterized Nesbit as "mentally upset and a nymphomaniac" and Cleland did not challenge that view. These perceptions and rumors went to questions of character of the type raised by theorists of gender and rape; that a 'mad and loose' woman was not raped as much as a 'good' woman was.[130] The acceptability of such ideas was further underscored when he relayed this gossip and innuendo about the victim to the very formal Paul Hasluck, suggesting that he found his actions and thoughts perfectly reasonable.[131] And indeed, Cleland was engaging in a conventional discussion for mainland Australia and the Western world: Nesbit made a very poor example of someone whom the ordinance had been designed to protect.

Joseph Kita Tunguan's background and reputation also was germane to the decision to grant mercy. Firstly, this was because being 'unsophisticated' was a usually a significant reason for a sentence to be commuted and Tunguan's status in that regard had to be established. There was also the question of character and just deserts with which the discretionary process usually engaged. Police Sub-Inspector John Fisher prepared a report for Cleland, which indicated that Tunguan was known to the police for being provoked by insults into violent crimes such as fighting and assault. He was proud, stiff-necked, and volatile. Further, he was also an educated Nuiginian, with language skills, and a

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[128] C. Normoyle A/Commissioner Police to his Honour the Administrator, re: Mrs Blanka Nesbit- Rape, 15 June 1954, *Commutation of Sentences on Natives in Papua and New Guinea*.
[129] Normoyle to the Administrator.
[130] Estrich, *Real Rape,* p. 7; Featherstone and Kaladelfos, *Sex Crimes in the Fifties.*
[131] For commentary on Hasluck's frosty reactions to violations of procedure and hierarchy see generally Tom Stannage, Kay Saunders and Richard Nile, (eds.), *Paul Hasluck in Australian History; Civic Personality and Public Life,* University of Queensland Press, St. Lucia, 1999

basic school and vocational education.[132] The testimony of his priest was that Kita Tunguan was honest and ambitious.[133] He could not use ignorance, or an 'unsophisticated' state, as ground for commutation as with the many convicted criminals in PNG. Cleland had to search for other grounds for commutation.

He was one of the growing numbers of urban, educated and advanced Nuiginians who were—in a future still very indefinitely sketched—the aim of the colony, yet PNG had difficulty accommodating them with respect and meaningful work. And Tunguan seems to have challenged colonial demarcations with violence. In short, he was the kind of man that could expect the full force of the law to go against him. And while Gore's sentence did condemn him, Cleland commuted his sentence despite the proposition that a Westernised person should probably hang.

The still more profound ideologies of gender, liberal paternalism, and liberal justice seemed to trump gender, racism and colonialism. Wide reporting on contemporaneous rape cases and NSW's abolition of capital punishment for rape and murder, in mainland newspapers and the *SPP,* meant Cleland clear information about how to make decisions consistent with NSW and therefore acceptable to the wider world. So the Executive discretionary justice ensured that a Nuiginian rapist was punished similarly to a white man in Sydney. Cleland kept PNG more in step with the Australian norms for punishment than Gore did.

Indicating how he resolved this information into a conclusion about sentencing, in his own letter to Hasluck and Lambert, Cleland précised the information from the reports of the judge, police and investigators and what he took from them. He highlighted the following points that were germane to his decision to commute the sentence to justify his decisions to commute the sentence to Hasluck. First, Cleland highlighted Kita Tunguan's claim that Nesbit kicked him and about which Gore was unsure. Second, Cleland asserted that Kita Tunguan not attempting to escape showed that the actions were from a flare of temper and just as soon regretted, so he was not irretrievably bad. Third, that despite his tendency to brawling, Tunguan's priest told Sub Inspector Fisher that: "the native was a good lad and regular communicant." Fourth, he added the hitherto unmentioned information that "it is also known that she [Nesbit] had a strange vindictiveness against natives in general. This was in evidence when she was employed at the Native Hospital and because of it she was removed from employment therein."[134] It is evident from Cleland's letter to Canberra that even if he accepted that

[132] John Fisher, Sub-Inspector Police to Superintendent of Police, 12 June 1954, re: Kita-Tunguan, *Commutation of Sentences on Natives in Papua and New Guinea*.
[133] Fisher to Superintendent of Police.
[134] D.M. Cleland to Secretary, 3 September 1954, re: R v Kita Tunguan, *Commutation of Sentences on Natives in Papua and New Guinea*.

the rape happened, he highlighted provocative actions by Nesbit. To Cleland, as Estrich theorized, it was not a "real rape", or at least a much less serious one.[135]

In highlighting gossip as to her affairs and mental health, Cleland engaged in the discourse common to rape trials and to the discussions of rape; that promiscuous women brought rape upon themselves and did not deserve the same protection as virtuous women. Nesbit had broken the rules of female behaviour laid out by B4s such as Wyatt, and proposed by scholars such as Matthews, Estrich and Adler. Nesbit had 'brought it upon herself'. If Nesbit had been provocative, to Cleland's mind, an execution was not just, but not to the extent of disbelieving the rape, but rather to the extent of thinking it a lesser sort of rape better punished by imprisonment. Thus, in combination with the recommendations of his character, Tunguan did not deserve to die and with that, considerations such as international scrutiny, Cleland felt a lesser punishment was more just.

Despite Cleland not mentioning it directly to Hasluck, the *SPP* also had argued that there was political pressure on Cleland from Australian liberalism and international scrutiny. Yet, given that it was raised in other cases in this thesis, it does seem plausible here as well. That pressure referred to was the international and domestic Australian suspicions of colonialism. However, Cleland does not mention that directly in his letter. Rather, Cleland wrote that "the circumstances" meant that life in prison was enough.[136] The circumstances encoded Cleland and Hasluck's shared understanding of the colonial context and its vulnerability to critique in a decolonizing world. It is a clear signal of the shift of in thinking on race and colonialism that in 1954, the "circumstances", of the rape of a white woman in a colonial setting did not require expiation in blood, as in the last use of this penalty against Stephen Gorumbaru in 1934. Neither was the idea of corporal punishment raised, as in the Gebu-Ari attempted rape case in 1952.[137] The circumstances meant that hanging a colonial subject using a racist law in 1954 would not have encouraged critical powers to see Australian colonialism as legitimate, temporary and benevolent as liberal colonialism required: primarily because the punishment was so extreme compared to general standards for the punishment of rape and other sexual offences, particularly as seen in metropolitan NSW, the only other place that might have executed an offender for rape.[138] Cleland in noting the "circumstances" indicated his desire not to delegitimize his colonial project with a fundamentally racist use of capital punishment, rather he wished to use mercy as a bulwark to colonial legitimacy.

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[135] Estrich, *Real Rape,* p. 7.
[136] Cleland to Secretary, 3 September 1954.
[137] On *R. v Gebu Ari, 1952,* Notetaker E J Bunting - Notes of meetings on Cabinet Notebooks 2 December /1952, p. 31.
[138] On liberal paternalism and colonialism see- Peter Gibbon, "Lineages of Paternalism: An Introduction" *Journal of Agrarian Change,* vol. 14, no. 2, 2014, pp. 165-189.

Times had changed. Sexual violence against white women was answered with imprisonment and that contrast between brutal rape and gentle mercy emphasised the legitimate role Australia had in colonizing and advancing PNG.[139] The Kita Tunguan case demonstrates that colonialism in PNG, under Cleland and Hasluck, had begun to adopt the more colorblind, liberal ideology of justice and that, for Cleland, advancing Nuiginians was incompatible with inequitable laws such as the *WWPO, 1926-1934.* And as Inglis argued of the pre-war period, in some circumstances, discretionary justice could fix that disjunction between benevolence and harsh laws. Further, the B4s, the *SPP,* and Gore acknowledged the shift of that tide when they accepted that it was unlikely that Tunguan would hang, even if they thought he should.

**Conclusion**

This historical case study addressed the questions that I raised in the introduction: How did the international climate of decolonization affect clemency decisions? How did contested legal ideologies affect clemency decisions? How did concerns of the day affect clemency decisions? How did clemency happen? How was it discretionary justice? And what was the significance of formal and informal sources of information?

The discussion around the punishment of Kita Tunguan in the clemency file and newspapers show that both expatriates and Cleland were aware of the constraints of international scrutiny on Australian colonialism when Gore and the *SPP* cited the "political" pressure, and when Cleland cited "the circumstances", which affected Cleland's decision to commute the sentence. And as established in chapter one, concern about the reaction of the international community was recurring and axiomatic concern to most policy decisions. The B4s and liberals were aware of the Australian norms of punishment that militated against the hanging of a rapist being acceptable to the Australian and UNTC's sense of justice and morality. As Hay, Loo and Hynd have theorized, Cleland had to consider the wider reaction to an execution to maintain the legitimacy of the colonial government. As with Telefomin, the discretion of the capital case reviews allowed the Administration to play both sides of the fence, to foster and protect colonial governance by punishing the rape with a life sentence, while also allowing for doubts as to the moral worth of its bearers, like Nesbit, by commuting the death sentence.

Nevertheless, there was a contest of ideologies of law: the old colonial ideas of justice based on deterrence and the sanctity of white bodies were put forward by Justice Gore and the editor of the *SPP,* despite considering themselves likely to lose. They were aware of the shift from the old

[139] Tina Loo, "Savage Mercy'; Stella, *Imagining the Other*; Peter Gibbon, "Lineages of Paternalism: An Introduction" *Journal of Agrarian Change,* vol. 14, no. 2, 2014, pp. 165-189.

colonial notions of law enforcement, but they regretted that change. Cleland instead opted for a more colorblind version of justice in refusing to respond with reflexively, colonial vengeance to protect white female bodies, which the reaction of some expatriates suggests might have been expected, and certainly was expected by Kita Tunguan.

It was affected by the gendered beliefs about women and sex, about Nesbit's sexual conduct, held by Cleland and the expatriate community. The perception that Nesbit was a bad, mad woman entered into the calculus of discretionary justice when Cleland determined not to hang Kita Tunguan. The documents show that Nesbit's reputation was at the forefront of Cleland's mind when he explained his commutation decision to Hasluck. The petition developed by Mrs. Jewell of the CWA also shows that this case was connected, in the minds of B4 expatriates, to concerns about changing gender roles and the influx of new Australians into the Anglophone community.

Significantly for this thesis, this case also was also a turning point in the process of determining clemency in PNG. The newspaper reporting on this case drew Hasluck's attention to the fact that Cleland had commuted a pronounced sentence against directions from Canberra and that focused Hasluck's attention on changing the process. The time it took to clarify the status of recorded sentences and finalise a coherent process for referring all sentences to Canberra, even after the amendments passed in October 1954, contributed to Hasluck's suspicions about the reliability of the PNG public service.[140]

The use of formal submissions combined with general gossip in Cleland's decision to commute Kita Tunguan's sentence also indicates that both sources of information were significant in the views Cleland.

As Wiener has suggested, and has been done here, looking at the uniqueness of each colonial setting is vital in examining and evaluating the legal process.[141] This case highlights the relative significance of ideologies of gender and race in place in PNG and Australia in 1954 and highlights the ways that the legal system both cooperated with and resisted those ideologies in an attempt to build a positive image of PNG in Australia and across the world.

In another case in 1954, analysed in the next chapter, the calculus fell the other way, and execution was used to reach the same outcome of legitimacy.

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[140] Cleland to the Secretary, 5 October 1954; R. March Ass Sec, Memo to the Minister, 26/10/54 Territory of PNG; Commutation of Death Sentences, in *Commutation of Sentences on Natives in Papua and New Guinea*, NAA, A518, CQ840/1/3 PART 1.

[141] Martin J Wiener, *An Empire on Trial; Race Murder and Justice Under British Rule, 1870-1935*, CUP, New York, 2009.

# *Chapter 4* – The limits of Mercy in Australian PNG; *R. v. Usamando, 1954*

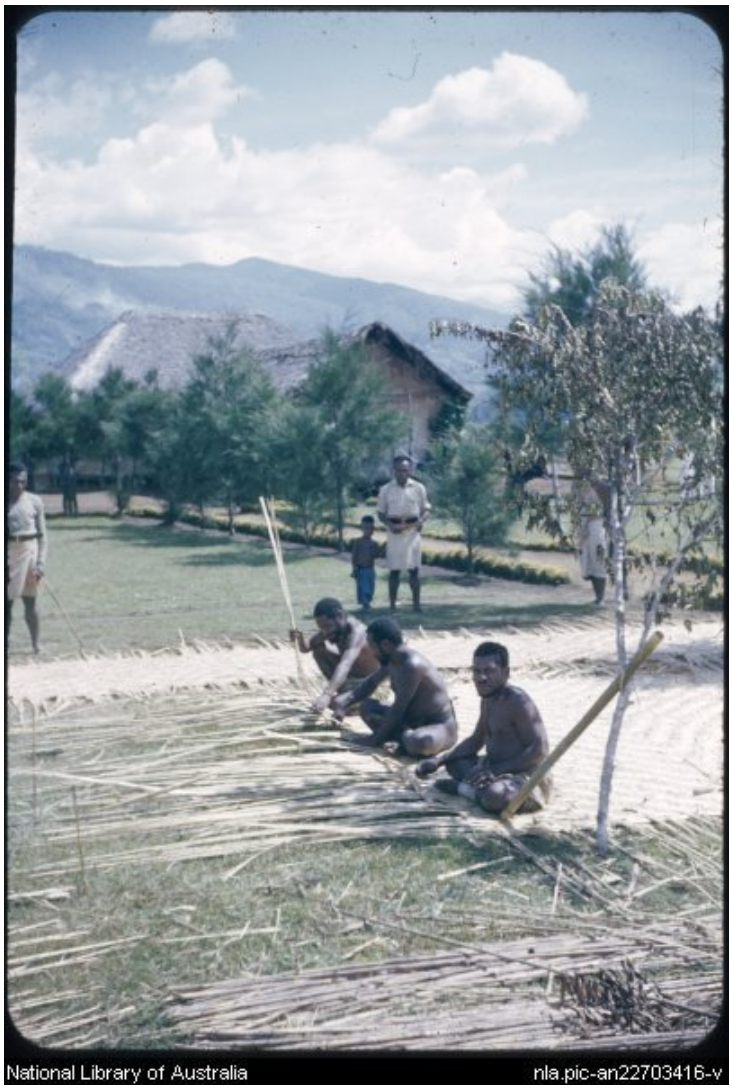


Figure 4-1 Figure 4-2 Native prisoners weaving house walls Minj Station, Wahgi Valley, Papua New Guinea, 1954.[1]

*It is for the court to say what will happen to me. I have been in gaol nine years altogether. If I don't go back to my place and remain in prison, these thoughts will come into my mind, - the thoughts of killing. Before the war, I was never like this. I worked for seventeen years in Wau without any trouble. It is now for the court to decide. If you feel sorry for me, you can send me back to my village. If not, it rests with you. I have said everything I want to say and you are the judge: but I have spoken the truth. This is all. If you want to send me to another gaol, or if you want to kill me, I would like to get tobacco, sugar and betel-nut. That is all.*[2]

[1] Terence E. T. Spencer, "Native prisoners weaving house walls Minj Station, Wahgi Valley, Papua New Guinea, 1954", Spencer collection of slides of Papua New Guinea, 1953-1978 [picture] [1953-1978], nla.pic-an22703416

[2] "Usamando's allocutus", in Letter, F.B. Phillips, C.J. to His Honour the Administrator, The Queen–v-Usamando, 29th September, 1954, p. 5-6, Fifth Menzies Ministry, *Cabinet Submission Territory of Papua New Guinea- Sentence of Death on the native Usamando*, 23 Nov, 1954. NAA: A4906/ 205.

Usamando was a New Guinean, from the Madang area, thought to be 55 years old at the time of his fifth murder trial in 1954. He had murdered Iwar in 1928, a man who had slept with his wife at the time, for which he served a sentence of five years. In 1946 he killed both his new wife and her sister, who was also his lover, and was sentenced to life with hard labour. The fourth and fifth murders in 1951 and 1954 were committed in prison and were associated with his sexual conduct in prison. He was hanged, after being found guilty of his fifth murder.

Usamando's fifth murder was not a crime that drew the attention of newspapers in PNG, or in Australia. That a Nuiginian man had killed another Nuiginian man in prison was of little interest to Europeans in PNG who were the primary readership of the *South Pacific Post (SPP)*. Indeed, the *SPP* rarely reported crimes that only affected Nuiginians, despite such crimes being regularly investigated and prosecuted by the authorities. The press in PNG, Australia and abroad did, however, report the execution of Usamando, as it was unusual and also judged significant to wider perceptions of colonialism in PNG.

Chapters Two and Three have noted that, while Nuiginians transgressed colonial authority and challenged white supremacy, after discussions between those entrusted with control of the capital case reviews, they did not hang the transgressors.[3] Yet, Usamando was hanged. In accounting for that outcome, the analysis of the trial and the following discretionary process exposes many questions and problems. As Wiener reminds us: "neither the narrative of celebration, nor that of indictment prepares us for the complex struggles that these trials stimulated and focused."[4] Wiener's observation encourages us to ask: why was Usamando's crime so much more serious than the many other murders that crossed the desks of the Minister and Federal Executive? How can his hanging be reconciled with the liberal approach to the law that Hasluck championed? These questions examine the threshold for capital punishment and the limits of mercy in PNG. More particularly, the decision about whether or not to hang this murderer became entangled in four important issues for Papua and New Guinea's relationship with Australia.

First, the debate over the safety of prisons and their effectiveness at reforming and 'advancing' Nuiginians to Australian ways was highlighted by this case. Hasluck had ordered prison reforms, but the bureaucracy had been unable to implement those changes by 1954. Usamando had twice murdered other prisoners while in Australian custody. Thus, he was a symbol of the challenges facing Nuiginian prisons, and their accountability as institutions significant to the management of the

[3] Hank Nelson, *Papua New Guinea; Black Unity or Black Chaos*, Penguin, Ringwood, 1972, pp. 66-67; Francis West, *Hubert Murray*; The Australian Pro-Consul, OUP, Melbourne, 1968, pp. 87-90.
[4] Martin J. Wiener, *An Empire on Trial; Race, Murder, and Justice under British Rule, 1870-1935.* Cambridge University Press, 2009, p. 231.

colonial project. The decision to hang Usamando should be understood in the context of processes of prison reform that spanned from 1949 to 1958 and an intention to deter violence and sodomy in prisons.

Second, *R. v. Usamando, 1954* revealed how officials engaged with gender ideologies and social anxiety in ways comparable to the issues raised in *R. v. Kita Tunguan, 1954*. The discretionary nature of clemency often depended on the decision makers' moral judgements about the character of the accused within a framework of ideas about the 'advanced' Nuiginian the colonial project sought to create. Such scrutiny found Usamando's predatory sexual behaviour and violence in particular to be too immoral to be granted clemency from the penalty of death. He was a man who hovered between two worlds and violated the mores of both. He was a test of the proposition that only the sophisticated that understood the law and punishment would hang and execution reflects the difficulties of making that judgement when retributive justice and deterrence were at stake.

Third, the punishment of this multiple murderer occurred with conscious reference to anxieties about violence and crime in the PNG community, as well as international and national norms. Australian officials and other observers were conscious of the possibly critical reception of the execution, yet also sought to address the perception in PNG among Nuiginian and expatriate communities that a hanging was needed to deter further crime and maintain the precedent for hanging in the face of what seemed to be a de facto abolition of the penalty. Advisors to the Cabinet – more explicitly than usual – took international scrutiny of the PNG criminal justice system into careful account in their recommendations. They considered ways to maintain the sanction of the death penalty while still seeking to present a positive image of Australian colonialism to a range of audiences. Usamando's case illuminates the limits of international pressure in a UN Trust Territory and the ways in which old colonialists and liberals found common cause despite such pressure.

Further, Usamando's case highlights gaps in bureaucratic capacity in PNG. Justice Phillips struggled to construct Usamando's criminal history because so many records were destroyed in the war and by the eruption of Mount Tavurvur and Mount Vulcan in 1937. The information that initially classified Usamando as a multiple killer in 1951 came to the judge accidently through a delegation of local people, and through the inadvisably frank testimony of the accused, rather than through official processes. It reflects the peculiarities of a system re-establishing itself over territories that had been subject to war and disaster and that had only partially been under control prior to the war.

Finally, Nuiginians made their views clear on capital punishment and on Usamando. They wanted hangings for punishment and to deter further crime. In this case, the judge and officials knew that

people from Usamando's area found him dangerous and had favoured his execution since his fourth murder. There was much less ambiguity than usual about the possible impacts of the execution on the community. As such, in the execution of Usamando, the Administration could find common cause with its subjects.

This chapter will first outline the narrative of the case and the conduct of the trial. Then it will examine the particular policy context of those engaged in determining the ultimate punishment for Usamando. Subsequently, the clemency discussions will be analysed and the arguments that were presented for and against execution will be discussed in relation to this particular confluence of interests cited above.

**"Had I not known about this business I would have thought him a normal native": The Events, Trial, and Clemency Discussions**

This narrative of the case and capital case review process is based on the reports that Chief Justice Phillips of the PNG Supreme Court and Walter Watkins, Secretary of the PNG Crown Law Office, wrote on the matter for the Administrator, Donald Cleland, and in turn for a Cabinet Submission on the question of clemency for Usamando in the capital case review file. For Cleland and Watkins, as was often the case, the issues at stake included wider concerns for the administration. Usamando also presented distinct questions of principle and procedure for the presiding judge.

Frederick 'Monty' Phillips had been resident in Melanesia since 1920, as a Lands Commissioner in the Solomon Islands, and a magistrate and judge in New Guinea. He was made Chief Justice of New Guinea in 1938, due to a few months seniority to Ralph Gore, the Chief Justice of Papua. The first Chief Justice of a unified PNG, his biographer and colleague Paul Quinlivan, lauded Phillips as both an experienced judge and a sympathetic, kind man. Having travelled widely in the territories, he was known to many Nuiginians and expatriates.

Quinlivan presented Phillips as a defender of Nuiginians, as his decisions through the twenties and thirties did much to repress the flogging of Nuiginian workers. Phillips had an extensive knowledge of the administration of the colony from acting as the Administrator of New Guinea during emergencies, including the volcanic eruption that destroyed Rabaul in 1937. He had also taken on an administrative role during the reconstruction effort immediately following the Second World War, before returning to the bench.[5]

[5] Paul Quinlivan, "Phillips, Sir Frederick Beaumont (1890–1957)", *Australian Dictionary of Biography*, Online edition, Accessed 8-12-2012, http://adb.anu.edu.au/biography/phillips-sir-frederick-beaumont-8034

To Rachel Cleland, his contemporary, Phillips, like Gore, was a "mighty" man of the law. She also wrote that he was a leader in expatriate society, jovial and approachable.[6] Hasluck paid him the compliment, but also the criticism, of being "the best of the old school" – a group that Hasluck thought sometimes made decisions on the merits of the law, sometimes due to a "kindly interest" in Nuiginians, but at other times in the interests of the colony.[7] They were, the Minister considered, less concerned with the fine details of the separation of powers and the rules of evidence and more in favour of managing outcomes for Nuiginians and in keeping order as they saw fit. These standards, with their implicit suggestions of paternalism, inconsistency and unaccountability concerned Hasluck as he sought a more ordered system of government and law, one also more acceptable to a critical world audience in the Trusteeship Council.

Little about the individual killings in Usamando's case would have surprised Phillips; it was the number of them that was surprising. Killings by machete and axe were common. Men murdering wives and murdering due to shame and pride were not unusual. Phillips' long residence in Melanesia had given him broad experience of cultural differences and, as Aldrich suggests, expatriates were broadly aware of the diverse sexual practices among some Melanesian groups.[8] As acting Administrator, he had been involved in earlier attempts at prison reform, and was well aware of deficiencies, disorder and violence in PNG's penal system.[9] Indeed, Philips was familiar with Usamando himself, who had been brought before him for the murder of Lula, a fellow prisoner, in 1951.[10] The judge would not have been surprised by Usamando's reactions to shame, his sexual conduct, or the means of the murders. Five murders across 26 years, however, were more surprising.

The basic facts of Usamando's previous murders were summarised in his clemency file.[11] On 12 January 1946, he had murdered his wife and her sister who, to the villagers' disgust, had also become Usamando's lover without her family receiving bride price. Usamando attributed the murders to their neglect of gardening responsibilities and failure to cook for him. It was assumed that he was also seeking to deal with the shame arising from the victims' disrespect of him, according to the mores of the village. The Australian New Guinea Administrative Unit (ANGAU) court, the military legal

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[6] Rachel Cleland, *Pathways to Independence; Story of Official and Family Life in Papua New Guinea from 1951 to 1975,* Singapore National Printers, Cottesloe, 1985, pp. 183-186.
[7] Paul Hasluck, *A Time for Building: Australian Administration in Papua and New Guinea 1951-1963*, Melbourne University Press, Carlton, 1976, p. 177.
[8] Robert Aldrich, *Colonialism and Homosexuality*, Routledge, London, 2003, p. 262.
[9] F.B. Phillips, Deputy Administrator, to the Secretary of External Territories, 18 January 1951, re: Prisons Control Board, in *Administration of Prisons- Policy and – Papua and New Guinea*, NAA: A452/ 1959/4611, 231528.
[10] F.B. Phillips C.J. to His Honour the Administrator, re: The Queen –v- Usamando, 29 September, 1954, in *Fifth Menzies Ministry*, Cabinet *Submission Territory of Papua New Guinea- Sentence of Death on the native Usamando*, 23 November, 1954. NAA: A4906/ 205, 4678943, p. 4.
[11] *Cabinet Submission Territory of Papua New Guinea- Sentence of Death on the native Usamando*, 23 Nov, 1954. NAA: A4906/ 205, 4678943

apparatus in place during the war and during its immediate aftermath, recorded a sentence of death for those murders, which was subsequently commuted to life in prison with hard labour.[12]

He was serving this sentence at Madang Gaol, when in September 1951 he killed Lula, a fellow prisoner, because the other prisoners had accused the two of them of having a homosexual affair. The prisoners' gossip had not caused an immediate reaction, but then Lula moved his bed in the open prisoners' barracks away from Usamando, who felt that this confirmed the accusation in the eyes of other men. Feelings of shame perhaps were compounded by the public rejection, being seen as a sodomite, and by being seen as predatory. He plotted to acquire a knife and then stabbed Lula to death. Usamando immediately attempted suicide, but was unsuccessful, which is indicative of his shame. He was charged and convicted of the wilful murder of Lula.[13]

Phillips only learned of the first murder conviction from Usamando's statement prior to sentencing, or allocutus, during the trial for killing Lula. No documentation for the first conviction in 1928 had been put to the court by the prosecution, possibly because of the destruction of records, and all of Rabaul, by volcano. Phillips was able to note a short entry in the defunct *Rabaul Times* that cited a conviction for murder of a man with a similar name in 1928.[14] Usamando's unguarded confession was accepted as indicative evidence, and evaluated in Phillips' determination of sentencing. The judge found him guilty of murdering Lula, and recorded a sentence of death.

Following sentencing, Phillips received a delegation from Usamando's community who confirmed the first undocumented murder. They insisted that he be hung, or, villagers warned, he would kill again. They indicated they thought executions would help prevent violence. All Phillips could do was to warn prison authorities that Usamando, now accepted as the killer of four people, not three, was very dangerous, should be watched carefully[15] Given the nature of his crimes, his perceived demeaned status, his own personality and the flaws within administrative systems, Usamando was already a complex figure for the exercise of colonial law.

By 1952, however, Usamando's demeanour in prison had led to him being trusted, indicating he had some capacity to behave in ways that a colonialist expected of a servant. He was not perceived to be dangerous by experienced prison officials who ceased to watch him carefully and gave him

[12] F.B. Phillips, C.J. to His Honour the Administrator, re: The Queen –v- Usamando, 29 September, 1954, in *Fifth Menzies Ministry, Cabinet Submission Territory of Papua New Guinea- Sentence of Death on the native Usamando*, 23 Nov, 1954. NAA: A4906/ 205, p. 2.
[13]Walter Watkins to His Honour the Administrator, re: Prisoner Usamanda [sic],13 November 1954, *Fifth Menzies Ministry, Cabinet Submission Territory of Papua New Guinea- Sentence of Death on the native Usamando*, pp. 2-3.
[14] F.B. Phillips, C.J. to His Honour the Administrator, The Queen –v- Usamando, 29 Sept, 1954, in *Fifth Menzies Ministry, Cabinet Submission Territory of Papua New Guinea- Sentence of Death on the native Usamando*, p. 5.
[15] Phillips to Administrator.

additional responsibilities, including the trust of gardening at employee's family quarters, with access to axes and machetes. This relative freedom gave him access to other prisoners and to weapons. Around 15 June 1954, the chain of events that culminated in Usamando's fifth and final murder began. Usamando either raped, or had consensual sex, with another prisoner called Kago: Usamando's testimony did not give precise dates of the sexual encounter. Kago then refused to speak to Usamando. On 22 June, Usamando walked away from gardening at the gaoler's house to where Kago's work party was engaged in tending cattle. In Phillips' summary of the trial, Usamando either requested, or demanded, that Kago, "submit to sodomy" again, but Kago refused.[16] Usamando was carrying his machete from his gardening duties and Kago felt threatened enough to call for help from his work mate, Monkap. When Monkap came running, Usamando threatened to kill him if he came closer.[17] Kago again refused a demand to go into the bush for sex. Monkap then witnessed Usamando hit Kago in the head with the machete. Monkap ran for the warders. The coroner found that on 22 June, Usamando struck Kago six times fatally and then ran off into the bush. A protracted search failed to find him.[18]

In the early hours of the following morning of 23 June, cold and hungry, Usamando gave himself up to the senior gaoler, Kelleher, whose garden he was tending at the time of the offence. He insisted that he had wanted to give himself up to Kelleher rather than a native policeman whom he did not trust, further indicating his marginal status between the communities. When questioned, Usamando told Kelleher: "I asked him to commit sodomy with me; he refused; I got wild and cut him with a knife. I then became frightened and ran away."[19] Kelleher reported that Usamando seemed dazed and spoke brokenly, but was coherent.[20] Some of his confusion was put down to the cold. Yet the confusion and inadvisable frankness was not necessarily the sign of a sophisticated man with a clear understanding of his situation.

Usamando's trial occurred, again before Phillips, on 23, 24, 27 and 30 August. The defence called no evidence and did not dispute the presentation of facts by the prosecution. The accused made no statement in defence.[21] During his closing address, the defence lawyer presented one factor in mitigation, arguing that Usamando's past record should have precluded his access to weapons and that the gaol had been negligent in its duty to Usamando and Kago.[22] The defence played to existing

[16] Phillips to Administrator.
[17] Phillips to Administrator.
[18] Phillips to Administrator, pp. 1-2
[19] Phillips to Administrator, p. 2.
[20] Phillips to Administrator.
[21] Phillips to Administrator.
[22] Phillips to Administrator, pp. 2-3.

concerns about PNG prisons, yet also highlighted the need for alternative means of enforcing order, as the reform process had been unsuccessful.

Preceding final sentencing for killing Kago, and given four previous murders, the fifth being so blatant, Phillips ordered an investigation of Usamando's psychological health. Apparently, his conduct was so unusual to the judge who had a long experience with Nuiginian criminality, and even though the matter of criminal capacity hadn't been raised in the trial, Phillips felt he was possibly mad. Phillips was also concerned that he might become more violent with the senility of age.[23] In further evaluating the matter of mental illness, Phillips was perhaps reflecting a wider tendency to see sodomy itself as evidence of mental illness.[24] The psychological expertise available to the judge was limited, the only doctor available being a general practitioner who found Usamando to be in good mental health. Dr. Bruce remarked to Phillips that: "had I not known about this business I would have thought him a normal native."[25] Without an insanity plea, nor any evidence of mental illness significant to sentencing, Phillips determined his sentence could not be mitigated by mental illness while also seeming to consider Usamando's sexual behaviour anomalous within conventions of either "native" custom or westernised pathology.[26]

After Usamando was found guilty of murdering Kago on 27 August 1954, he made a statement, or allocutus, to the court in which he pleaded his general good behaviour. His rambling and fatalistic remarks gave no compelling reasons for commutation, but did highlight his ambiguous place between two cultures; an ambiguous place also suggested by his apparently limited understanding of codified law. His approach, with its appeal to personal relationships and feeling, was more suitable to the Nuiginian manner of settling disputes by interpersonal negotiation and consensus building. He concluded by saying, through the translator:

> It is for the court to say what will happen to me. I have been in gaol nine years altogether. If I don't go back to my place and remain in prison, these thoughts will come into my mind - the thoughts of killing. Before the war, I was never like this. I worked for seventeen years in Wau without any trouble. It is now for the court to decide. If you feel sorry for me, you can send me back to my village. If not, it rests with you. I have said everything I want to say and you are the judge: but I have spoken the truth. This is all. If you want to send me to another gaol, or if you want to kill me, I would like to get tobacco, sugar and betel-nut. That is all.[27]

[23] Phillips to Administrator, p. 3.
[24] Lisa Featherstone and Amanda Kaladelfos, *Sex Crimes in the Fifties*, Melbourne University Press, Carlton, pp. 175-182.
[25] Phillips to Administrator, p. 3.
[26] Phillips to Administrator.
[27] Phillips.to Administrator, pp. 5-6.

This statement is remarkable for its naivety and lack of comprehension of the circumstances in which he was placed, even though the court considered him to be relatively sophisticated and westernised. It was also resigned with the specific request for the 'last meal'.

Philips had been sympathetic enough to Usamando's situation to investigate his mental health, but also concerned enough about the extremity of his behaviour to gather what documentation could be found about his previous murders so that these facts could be considered during sentencing and clemency.[28] These papers were added to what became an extensive file to be forwarded to Canberra. Chief Justice Phillips then took the unusual step of pronouncing the sentence of death on Usamando on 30 August 1954. He also made no recommendations as to alternate sentencing as per the standard practice. Phillips was either resigned to the likelihood that, or determined that, Usamando would hang.

The case then went to Cleland to be forwarded to Hasluck and Cabinet. Cleland also took advice from the Crown Law Office with a report from its head, Wally Watkins who also recommended execution. Cleland endorsed Phillips and Watkins' reasoning. Hasluck, however, made no written commentary or recommendations, as he had done in other cases.[29] After Cabinet made its decision on 21 November, Hasluck informed Cleland that:

> When Cabinet was considering your recommendations regarding the sentence of death passed on the native Usamando, today, some concern was expressed at the fact that a prisoner, who was in the custody of the Administration and was known to have a record as a killer, was able to find further opportunity for murdering a fellow prisoner. It was felt that close administrative attention should be given to the conditions under which such prisoners are held in the territory and the nature of the supervision over them.[30]

On 23 November the decision to execute was transmitted to PNG.[31] This was officially confirmed by the paperwork from the Governor-General in Council on 8 December.[32] The announcement of execution was made on 16 December; Usamando was executed promptly on 17 December 1954.[33]

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[28] Phillips to Administrator, p. 3.
[29] D.M. Cleland to the Hon. P.M.C. Hasluck, the Queen V. Usamando, 13 November 1954, and Confidential Minute For Cabinet: Territory of Papua New Guinea- Sentence of Death on the Native Usamando, in Fifth Menzies Ministry, *Cabinet Submission Territory of Papua New Guinea- Sentence of Death on the native Usamando*.
[30] Paul Hasluck to D.M. Cleland, 23 Nov. 1954, Fifth Menzies Ministry, *Cabinet Submission Territory of Papua New Guinea- Sentence of Death on the native Yerimbe. Commutation of Sentences on Natives in Papua and New Guinea* NAA: A518, CQ840/1/3 PART 1
[31] Cabinet Minute, Decision No. 207, Canberra 23 November 1954; Paul Hasluck, Confidential Submission No. 25, For Cabinet: Territory of Papua and New Guinea- Sentence of Death of Death on the Native Usamando, Fifth Menzies Ministry, *Cabinet Submission Territory of Papua New Guinea- Sentence of Death on the native Usamando*.
[32] "Native Murderer Died Silently on Lae Scaffold", *South Pacific Post*, 22 Dec 1954, p. 5.
[33] "First N.G. Hanging For 16 Years", *Advertiser*, (Adelaide), 17 Dec 1954, p. 28.

The father of Kago, Usamando's last victim, and the luluai of Usamando's village, an elder who liaised with the Administration, were witnesses to the hanging. He received the last rites from Reverend Father Bernarding and, as recorded in the file, but not mentioned in the press, was given a "heavy sedative dose of morphia". Even so, Cleland still noted to Canberra that those who witnessed the execution considered Usamando's conduct brave.[34] At this point, media attention began. His execution received newspaper coverage in Port Moresby, Australia and London. He was represented both as a multiple killer and stoic in his death. The coverage also highlighted that it was the first hanging since 1938.[35] The newspapers were seemingly unaware of the hangings conducted by military authorities in the 1940s.[36]

**The Context of Discretion: Enforcing Security and Public Safety**

> *A deputation of hundreds of people waited on me [Hasluck] and with great eloquence asked that the prisoners be put to death lest they would be back again, fat and boastful...They believed strongly in capital punishment.*[37]

First, the Administration was aware of lingering concerns raised by the commutations of the perpetrators of previous well-publicised and disturbing capital crimes, including the Telefomin killings and the rape of Blanka Nesbit. Discretionary justice offered the possibility of addressing that concern with an execution. Following from that concern, equally, officials were concerned that the almost habitual commutation of capital crimes was setting a precedent against hanging. Usamando's case both addressed these concerns yet seemed to be in a category of its own, given that his crimes were so numerous. Settling qualms about hanging in a territory, his sentence seemed in line with the punishment of white Australian offenders on the mainland, and so an execution could be represented as a just punishment for a Nuiginian. As well as deterrence and security in the wider community, discretionary justice from the executive could also address prison disorder with the deterrent effect of an execution. Indeed, Cabinet had raised concerns about disorder in this case and in the absence of substantial reform in PNG prisons, and the presumed deterrent effect of capital punishment was one solution to this dilemma. Linked to concern about prisons, and further cementing Usamando's fate, was the Administration's concern about sodomy and homosexuality in prisons in particular, and in the wider community. Punishment's presumed deterrent effect, it was hoped, would impact on the prevalence of such behaviour in prisons and beyond.

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[34] D.M. Cleland to The Secretary, Department of Territories; Conviction of Murder and Sentence of Death: Native Usamando; 17 December 1954", *Commutation of Sentences on Natives in Papua and New Guinea*, NAA: A518, CQ840/1/3 PART 1, 3252669

[35] "Native Murderer Dies Silently on the Scaffold", *South Pacific Post,* 16 Dec 1954, p. 5.

[36] Hank Nelson, "The Swinging Index: Capital Punishment and British and Australian Administration in Papua and New Guinea, 1888-1945", *The Journal of Pacific History*, vol. 13, no. 3, 1978, pp. 130-152.

[37] Hasluck, *A Time for Building*, p. 179.

Sodomy was of concern to the PNG legal system as a behaviour representing the worst of both cultures, which Usamando also seemed to represent. These concerns about sexuality in PNG were paralleled by heightened concerns in Australia and the West in general. Gary Wotherspoon traced an increase in investigations, prosecutions, and penalties, for sodomy across the early 1950s in NSW, the UK and the USA.[38] Lisa Featherstone and Amanda Kaladelfos's research on sexual violence and crime in Australia in the 1950s place Wotherspoon's findings in the context of an increase in prosecution for all sexual offences.[39] Similarly, the case studies of this thesis show that Australian legal practitioners in PNG were enmeshed both culturally and legally in this stringency that was occurring across the West, but with aspects of concern that reflected the particular mediating role of law in colonies.

Reflecting this general trend in the West, authorities also policed gender behaviour more actively in PNG in the 1950s than they had before the war. There was a common awareness among expatriates that homosexual practices were common in some Nuiginian cultural groups both ritually and as a matter of sexual pleasure, but that did not lessen the Administration's anxieties at the interface of law, custom and morality.[40] As Robert Aldrich shows, authorities policed sexual crime and gender boundaries more actively in PNG in the 1950s than they had before the war when homosexual practices among Nuiginians had been of little concern to authorities.[41] For expatriates too, there were lines that could not be crossed. In her memoir, for example, Gloria Chalmers recalled an Australian being deported from PNG in 1953 for propositioning another white man.[42]

Indicative of this changed stance, prosecutions for sodomy and permitting sodomy were actively pursued at the PNG Supreme Court level in the 1950s. The offence of permitting sodomy under the criminal code made it a crime to be penetrated, and in Christine Stewart's analysis, the anxiety around gender was such that it is probable that rape victims were prosecuted on that basis.[43] The reports of colonial administration show that there were three successful and three unsuccessful

[38] Gary Wotherspoon, "The Greatest Menace Facing Australia; Homosexuality and the Stat in NSW During the Cold War", *Labour History*, no. 56, 1989, pp. 15-28.
[39] Featherstone and Kaladelfos, *Sex Crimes in the Fifties*, Ch. 7.
[40] Christine Stewart, "Men Behaving Badly: Sodomy Cases in the Colonial Courts of Papua New Guinea", *The Journal of Pacific History*, vol. 43, no. 1, 2008, pp. 77-93; Robert Aldrich, *Colonialism and Homosexuality*, Routledge, London, 2003, pp. 247-8; Human Rights Watch, *This Alien Legacy;* Dr Kenneth Read, "Papers Relating to teaching ASOPA Courses", ANU Archives, ANUA444, Box 1, "The ASOPA Lectures", c. 1950s; Gilbert Herdt "Intimate Consumption and New Sexual Subjects Among the Sambia of Papua New Guinea" *Oceania*, vol. 89, no 1, 2019, pp. 36–67; Gilbert Herdt, "The Ethnography of Trobriand Sexual Culture in the 21st Century", *Anthropology Now*, vol. 5, no. 3, 2013, p. 139.
[41] Aldrich, *Colonialism and Homosexuality*, pp. 250- 252, 253-6.
[42] Gloria Chalmers, *Kundus, Cannibals and Cargo Cults; Papua New Guinea in the 1950s*, Books and Writers Network, Watsons Bay, 2006, p. 25.
[43] Christine Stewart, "Men Behaving Badly"; *The Criminal Code (Queensland Adopted) in its Application to Papua,* 1945, Chapter XXII, Section 208(1-3),

prosecutions for the crime of sodomy between 1952 and 1955. The extent of concerns were such that authorities began pursuing these cases despite the apparent difficulty in mounting a prosecution, as the three incidents of 'nolle prosequi' (in which the prosecutor withdraws their own charges) indicate in figure 4-2, below. From 1955/56 on, prosecutions for sodomy/ permitting sodomy in the NG reports to the UN were collected under the category 'Unnatural Offences' with crimes such as bestiality and necrophilia making the statistics harder to read. [44] The nomenclature alone indicates the role homosexual practices played in the imagination of the territories' administrators. The penalties were serious, with terms of imprisonment comparable to those for assault.[45] With the sex lives of Nuiginians and expatriates being captured by policing and the courts, the administration was making plain what was and what was not appropriate behaviour on the path to advancement, reflecting the typical use of law as a didactic institution in colonies.[46] The determination to prosecute and the serious penalties demonstrated the willingness to use punishment and the courts to police the boundaries of sexual behaviour in PNG.

Such gender ideologies are significant to analysing cases of discretionary justice because the capital case reviews required judgments regarding the character of an offender and their moral fitness to continue to live, and also to deter criminal behaviour from similar people in the wider community. The authorities were concerned to find and prosecute the conduct of people whom they regarded as possessing a serious moral flaw, of a character difficult to redeem, and send a message of deterrence and good behaviour to the community through punishment. A good character, a manly character, could save you from the rope when authorities deliberated on clemency for men such as Usamando.

*Figure 4-3 Supreme Court Prosecutions for Sodomy*

| New Guinea- Reporting Year – July-June-[47] | Charged | Convicted | Discharged | Nolle Prosequi | Sentencing |
|---|---|---|---|---|---|

[44] See Aldrich, *Colonialism and Homosexuality*, pp.251 on lower court prosecutions.
[45] The Parliament of the Commonwealth of Australia, *Report to the General Assembly of the United Nations on the Administration of the Territory of New Guinea*, Department of Territories, Canberra, Commonwealth Govt. Printer, 1949-1966.
[46] Rick Sarre, "Sentencing in Customary or Tribal Settings: An Australian Perspective", *Federal Sentencing Reporter*, vol. 13, no. 2, 2000, pp. 74-78; Heather Douglas and Mark Finnane, *Indigenous Crime and Settler Law; White Sovereignty and Empire*, Palgrave Macmillan, Basingstoke 2012, pp. 5-8; Bruce L. Ottley, and Jean G. Zorn, "Criminal Law in Papua New Guinea: Code, Custom and the Courts in Conflict", *American Journal of Comparative Law*, vol. 31, no. 2, 1983, pp. 209–249.
[47] The Parliament of the Commonwealth of Australia, *Report to the General Assembly of the United Nations on the Administration of the Territory of New Guinea*.

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|---|---|---|---|---|---|
| 1952- 53 - Sodomy | 2 | 2 | | | 9 months to one year with hard labour (IHL) |
| 1953-54 - Sodomy and Permitting sodomy | 4 | 1 | | 3 | 5 months IHL |
| 54-55 - Sodomy and similar not reported as a category | | | | | |
| 55-56- Unnatural offences – A new category including bestiality, necrophilia, sodomy | 6 | 4 | | 2 | 18 months to three years. |

In addition to anxiety about sodomy in prisons and in the community, there was also anxiety about crime and the belief that a lack of hangings was encouraging criminality in PNG among expatriates and Nuiginians. The high profile capital cases discussed so far, the Telefomin cases and *R. v Kita Tunguan, 1954,* had resulted in clemency. But, old colonials had been arguing that the existing penalties were ineffective in deterring serious crime, and that public confidence in the law was faltering.[48] The role of sentencing and punishment was evident in the general law text used in training kiaps at the Australian School of Pacific Administration (ASOPA). Eminent Australian jurist of the 1940s and 1950s, J.V. Barry, counselled that capital punishment was reserved for "cases which present some features which shock the public conscience".[49] Sentencing was to restore public confidence in the law and provide security through retribution, deterrence, rehabilitation, or exclusion from the community. Usamando met many of these provisos.

So while the community had been shocked by Kita Tunguan's offences, as seen in chapter three, the expatriate community outrage had not been substantially assuaged by the punishment. There followed a rise in public campaigning in favour of the death penalty.[50] In 1954, newspaper editorials added to, reflected or fed calls for the use of the death penalty, such as those surrounding Kita Tunguan's commutation. Adding to this disquiet, the sparing of the Telefomin men begged the question of why, previously, Nuiginians who had killed officials had been hanged, and even their villages burned.[51] Both expatriates and Nuiginians were asking questions about the efficacy of the current system of penalties in deterring sexual violence and crime, particularly the practice of almost

[48] "Women Sign Petition", *South Pacific Post*, 11 Aug 1954, p. 7. Editor, 'The Death Sentence", *South Pacific Post*, 7 July 1954, p. 12. Experts in punishment, such as the Howard League, had long proved that deterrence did not in fact work; it remained a strongly held belief in all parts of society. See for example, *Howard Association Annual Report, October 1899*, London, 1899, held at Queensland State Library, G 365189—1901.
[49] J.V. Barry, G.W. Paton and G. Sawyer, *An Introduction to the Criminal Law in Australia*, Macmillan and Co., London, 1948, p. 95.
[50] "Women Sign Petition", *South Pacific Post*, 11 Aug 1954, p. 7. Editor, 'The Death Sentence", *South Pacific Post*, 7 July 1954, p. 12.
[51] Hank Nelson, "The Swinging Index: Capital Punishment and British and Australian Administration in Papua and New Guinea, 1888-1945", *Journal of Pacific History*, vol. 13, no. 3, 1978, pp. 151-52.

automatic commutation across Australian jurisdictions.[52] After a string of crimes, the capital case reviews gave an opportunity for the Executive to attend to the outrage of the community. In these small communities, judges such as Phillips could easily gauge sentiments on such issues, including through the village deputation that followed Usamando's trial.

Yet, the expatriate and Nuiginian community feelings of insecurity and desires for retribution were not the only constituency that the Executive considered. Australian policy was to make justice and punishment uniform in PNG comparable to mainland Australian practices, while also following practices of which the international community could approve.[53] As Heather Douglas and Mark Finnane suggest:

> While the weight of historical debate about sovereignty has focused on land and property, it was when settler prosecutors and settler courts dealt with indigenous violence, especially that of indigenous assailants or Indigenous victims, that the exercise of sovereignty was truly tested.[54]

Hasluck and his department were determined to use similar punitive practices for expatriates and Nuiginians.[55] Thus mainland Australian thresholds for hanging guided the Executive. Multiple murderers hanged in Australian jurisdictions, which, as sentencing aims to be consistent in similar cases, suggested the acceptable sentence for punishing a multiple murderer, such as Usamando.[56] Therefore, imposing such a penalty in a colonial setting was less likely to be contentious and draw condemnation from the Australian public and observers in the UNTC.

Nuiginians of Usamando's culture also felt that multiple killers should be executed. Most Nuiginian cultures, according to the legal advice Greenwell provided to the administration, believed in social consensus and harmony: those who disturbed the consensus, order and honour of others with killings were required to pay high compensation, with their lives, or the lives of their group members.[57]

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[52] Jo Lennan and George Williams 'The Death Penalty in Australian Law"*, Sydney Law Review,* vol. 34. No. 4, 2012, pp.659-94; The editor, "The Death Sentence", *South Pacific Post,* 7 July 1954, p. 12. Emile Durkheim, (trans. Cornelia Brookfield), *Professional Ethics and Civic Morals*, Routledge and Kegan Paul Ltd, London, 1957.
[53] Hasluck, *A Time for Building,* Ch. 16.
[54] Heather Douglas and Mark Finnane, *Indigenous Crime and Settler Law; White sovereignty and Empire*, Palgrave MacMillan Socio-Legal Studies, Basingstoke 2012, p. 2.
[55] Hasluck, *A Time for Building,* p. 176, p. 180; *Administration of Prisons- Policy Papua and New Guinea,* National Archives of Australia, A452/1959/4611, 533996; *Prisons Ordinance- New Guinea,* NAA: A518/A846/1/12, 107135
[56] See for example- **"**Sodeman v R. [1936] HCA 75; (1936) 55 CLR 192 (2 April 1936)", *Australian Legal Information Institute*, University of Technology Sydney and University of New South Wales, http://www.austlii.edu.au/au/cases/cth/HCA/1936/75.html, Accessed 19-4-13. And George Marshall Irving, "Sodeman, Arnold Karl (1899–1936)", *Australian Dictionary of Biography*, http://adb.anu.edu.au/biography/sodeman-arnold-karl-8574, Accessed, 19-4-13.
[57] John Greenwell, *The Introduction of Western Law into Papua New Guinea*, Unpublished Manuscript given to author by John Greenwell the former First Assistant Secretary and Director of Papua New Guinea Office Government and Legal Affairs Division, Department of External Territories, 1970-1975.

Phillips clearly knew of local views on Usamando's punishment.[58] Hasluck too was well aware that most Nuiginians favoured capital punishment for murder. In his memoir he recalled of his 1951 PNG tour: "A deputation of hundreds of people waited on me and with great eloquence asked that the prisoners be put to death" lest "they would be back again, fat and boastful...They believed strongly in capital punishment".[59] Yet meeting these expectations was not a simple obligation, with other interests in Australia and abroad to consider.

That Usamando's last two crimes had been committed in prison highlighted both the need for prison reform and also the role of execution in sending a message of deterrence to those already within the system. Intensifying the concern of the Executive about prisons, at the same prison at which Usamando murdered his last victim, another Nuiginian, Yerimbe, awaiting the outcome of his capital case review for murder, committed suicide, an act itself exposing a lack of effective protection.[60] Usamando's crimes and sexual violence were features of disorder in the prisons. As punishment theorist David Garland wrote: "Punishment, among other things, is a communicative and didactic institution."[61] An execution offered elements of a temporary solution to disorder within the prisons, and it would be a deterrent to disorder amongst the surviving prisoners.[62] But the process of reform was still a long way from complete.

Finnane showed that one of the more compelling arguments used to oppose the abolition of capital punishment presented in Australian debates on capital punishment was that death was the only means of deterring and punishing those desperate offenders who had been imprisoned for life.[63] Prison guards and supporters of retaining capital punishment feared that prisoners incarcerated for life would act with impunity and violence, as they had nothing to lose. Similarly, Mike Richards suggests this argument was at its most potent in the case of the last man hanged in Australia.[64] Such arguments were familiar in the public domain. Therefore, the execution of Usamando should be understood in the context of these concerns about prisons and the submissions on Usamando's

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[58] F.B. Phillips, C.J. to His Honour the Administrator: The Queen –v- Usamando, 29 Sept 1954, p. 2, in Fifth Menzies Ministry, *Cabinet Submission Territory of Papua New Guinea- Sentence of Death on the native Usamando*.
[59] Hasluck, *A Time for Building*, p. 179.
[60] Paul Hasluck, letter, Paul Hasluck to Donald Cleland, 23 Nov 1954, *Cabinet Submission Territory of Papua New Guinea- Sentence of Death on the native Yerimbe*, in *Commutation of Sentences on Natives in Papua and New Guinea* NAA: A518, CQ840/1/3 PART 1, 3252669
[61] David Garland, *Punishment and Modern Society; a study in social theory,* University of Chicago Press, Chicago, 1990, p. 251
[62] Walter Watkins, letter, Walter Watkins, to His Honour the Administrator, re: Prisoner Usamanda [sic],13 Nov 1954, in Fifth Menzies Ministry, *Cabinet Submission Territory of Papua New Guinea- Sentence of Death on the native Usamando*, pp. 3-4. Also news paper article on execution cited the need to manage prison disorder "Native Murderer Died Silently on the Scaffold", *South Pacific Post,* 16 Dec 1954, p. 5.
[63] Finnane, *Punishment in Australian Society*, pp. 137-9.
[64] Mike Richards, *The Hanged Man; the life and death of Ronald Ryan*, Scribe Publications, Melbourne, 2003, pp. 255-6. Richards also highlights the argument that suggests Ryan was innocent of this crime.

sentence from officials raised these issues of protecting guards and remediating prison disorder, which will be analysed later in the chapter.

**"Our law provides for no further punishment in his case than death": PNG Officials Advise that Usamando Should Hang**

PNG legal officials Justice Phillips and Crown Law Officer Wally Watkins made recommendations to the Minister that Usamando hang. They framed their recommendations around the concerns of the colonial administration. They engaged with the debate on deterrence generally, and in calibrating penalties to deter murder and the disorder of the prisons. Both men were concerned primarily about the number of Usamando's murders, the lack of provocation and his fundamental failure to reform and show remorse. They also wanted to deter in prisons the sort of homosexual conduct that lead to the final two murders and reinforced their messages of Usamando's depravity by arguing that he also had outraged the mores of his own people. Thus, he was condemned as immoral on several levels. Finally, Phillips and Watkins both culminated their arguments with reference to the freedom of the discretionary process to engage with the problem of selecting punishments that would protect the reputation of the colony from criticisms in PNG, from the UNTC, and from mainland Australia in regards to the fairness of the criminal justice system.

The first step of the capital case review process was the judge's advice to the Executive. In explaining his decision to pronounce the death sentence, and to offer no alternative advice, Phillips indicated that Usamando had not taken advantage of earlier chances to redeem himself: "if his record of earlier killings were also taken into account, a recommendation by the court that he be shown mercy would still be less warranted."[65] Usamando, Phillips advised, "is a confirmed 'killer', and his own words confirm it."[66] The rapacious and violent nature of Usamando's sexual behaviour, which the judge considered separately to the numbers of murders, compounded his conviction that Usamando had little likelihood of reform. An attempted sexual encounter while in prison, or perhaps an attempted rape in prison with the threat of weapons, crossed a particular threshold in the judge's thinking. Phillips also reported that Usamando's' community had spoken about their preferred punishment for him at the time of his fourth murder of Lula in 1951:

> Madang natives called on me and stated that Usamando had killed a native at Modilon, Madang before he had killed the two women at Bogia: they forcibly expressed their opinion that Usamando should be executed forthwith and prophesied that, if Usamando were not executed, he would kill again.[67]

[65] F.B. Phillips to His Honour the Administrator: The Queen –v- Usamando, 29 September 1954, p. 6, in Fifth Menzies Ministry, *Cabinet Submission Territory of Papua New Guinea- Sentence of Death on the native Usamando.*
[66] Phillips to the Administrator, p. 6.
[67] Phillips to the Administrator, p. 5.

There was often anxiety in clemency discussions that the local people would not understand or support capital punishment, as was argued in the Telefomin case. That there was a clear direction from local people in this case seemed to circumvent the conventional argument for clemency that the offender's community was too non-westernised, or 'unsophisticated' for hanging to be just.[68] Phillips' report on the local delegation reassured the Executive that the offender's community would welcome a hanging and that they understood its purpose and both retribution and deterrence.

Phillips also recognised that the ultimate decision on clemency would be the product of wider political and social considerations, as is often significant to discretionary justice. The Executive Council, he advised, must decide whether to hang him, as "wide fields of inquiry are open to you that are not always open to a judge."[69] Those wider considerations included international and domestic political questions, and particularly the awareness of the negative ramifications for the reputation of Australian colonialism that might come from an execution, to some extent regardless of the particular sensitivities of the crime.

Before forwarding Phillip's recommendation to Canberra, Cleland commissioned Wally Watkins, the head of the PNG Crown Law Office, an experienced bureaucrat and lawyer, to report on the case. Cleland particularly wanted assurance on the fit between the law and the intricacies of managing the territories. Accordingly, Watkins' report methodically explored the nature of Usamando's offences as matters of law and with reference to their implications for the PNG Administration. Watkins is remembered as a "legal eagle" among local officials, but with his "justice … always tempered with mercy and understanding."[70] Historian Donald Denoon, however, has described him as "irascible" and "abrasive" in his commitment to maintaining Australian colonial authority over a population he saw as unfit to rule itself.[71] This mix of traits is evident in his report.

Watkins' first placed an emphasis on the homosexual encounter that triggered Kago's "unusually vicious" murder.[72] He established that it was the moral circumstances of an armed rape that made it particularly vicious, not the murder in itself. Watkins also tested the proposition that Usamando was

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[68] See for example the discussion on the 'sophistication' of the community in D.M. Cleland, letter, D.M. Cleland to the Secretary, Department of Territories, The Queen –v- Bok, 9 September 1958; D.M. Cleland, letter, D.M. Cleland to the Secretary, Department of Territories, The Queen –v- Warira, 9 September 1958, Cabinet *Submission No. 1442, Territory of Papua and New Guinea- sentence of death on natives Warira and Bok- No decision*, NAA: A4926/1442, 4361818.
[69] Phillips to the Administrator, p. 6.
[70] "Walter (Wally) Watkins (22 March 1984)" *Vale*, Papua and New Guinea Alumni Association, http://www.pngaa.net/Vale/vale_june84.htm#Watkins, Accessed 12-5-2012.
[71] Donald Denoon, *A Trial Separation; Australia and the Decolonisation of Papua New Guinea*, ANU-Pandanus Books, Canberra, 2005, p. 52, 55.
[72] Watkins to the Administrator, p. 1.

provoked into a rage by the sudden cessation of sexual access within an established relationship.[73] The criminal code held that murder might be reduced to manslaughter were a reasonable person to conclude that the offender was understandably in too passionate a state to make a rational decision due to a sudden and enraging circumstance.[74] Watkins rejected such a defence: Usamando likely had raped Kago before, as shown by Kago's refusal to talk to him for a week. And further Watkins argued that Usamando intended to do so again, explaining why he had gone armed to the encounter. These assessments were informed by Usamando's past sexual behaviour: for example: that he had transgressed by having sex with his sister-in-law without observing the customs of a bride price.[75] There was also significance evidence of pre-meditation in each of Usamando's crimes.[76] Not only had Usamando broken the rules of sexual conduct by Western standards, but also the sexual mores of his own people. Further, he had done so with a reasonable degree of familiarity with each. Usamando, as Watkins noted, had been under European influence all his life, having been born into a community under the supervision of the Germans and then worked for Australians. As a mature man, who had experienced trial and gaol for four previous murders, he knew Australian law. In summary, Watkins wrote:

> Nothing in the circumstances of this case, or in what is known of his past history indicates a reason for extending clemency to Usamanda[sic]. His history shows that when frustrated in the gratification of his sexual passion, he resolves to kill and carries that resolve into effect in a most brutal way. Twice the death sentence has been commuted in his favour to one of imprisonment for life, and our law provides for no further punishment in his case than death.[77]

Beyond Usamando's culpability for his crimes, Watkins reviewed the administrative implications of his punishment. The kinsman of Kago, he argued, must be prevented from engaging in payback killings by an execution that would satisfy their cravings for revenge.[78] Within the prison system, Watkins argued it was important also to maintain a clear standard of justice to protect and control prisoners; Watkins insisted "it is patent that a further commutation of the death sentence in favour of

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[73] Watkins to the Administrator, p. 1-2. On the history of the defence of provocation in Australian jurisdictions see: New South Wales Law Reform Commission, "Provocation, Diminished Responsibility and Infanticide", *Discussion Paper 31*, 1993 New South Wales Law Reform Commission, 1993, http://classic.austlii.edu.au/cgibin/sinodisp/au/other/lawreform/N.S.W.LRCDP/1993/31.html?stem=0&synonyms=0&query=provocation%20defence%20murder%20denial%20of%20sex#DP31CHP3

[74] New South Wales Law Reform Commission, "Provocation, Diminished Responsibility and Infanticide", *Discussion Paper 31*, 1993 New South Wales Law Reform Commission, 1993, Section 3.104

[75] Watkins to the Administrator, pp. 2-3.

[76] Watkins to the Administrator, pp. 1-2.

[77] Watkins to the Administrator, p. 3.

[78] Watkins to the Administrator, pp. 3-4.

Usamanda[sic] must have a detrimental effect on all prisoners undergoing life sentence".[79] The importance of a clear message to metropolitan and international observers was made in similar terms:

> At any time a case may arise of a murder by a native of a European, or by a native of a European woman or girl, where the Executive would feel strongly that the sentence of death should be carried out. A commutation in Usamando's case would be a powerful precedent to the contrary, and if in the later cases the sentence were executed, it would be very hard to rebut the criticism that there is one law for the protection of the European and another for the native.[80]

His report had built to this particular point, the necessity of the retention of the death penalty to punish the murder of an expatriate "European woman or girl". This seemed to be his greatest concern. Indeed, the *SPP* also reported on 8 December 1954 that Justice Kelly at the Supreme Court sittings in Madang, expressed concern that punishments, such as clemency for Tunguan, were not effective in deterring crimes against Europeans.[81] Watkins therefore reflected expatriate concerns about security from violence from Nuiginians and posited the old colonial solution, the deterrent effect of capital punishment.

Given Watkins role in managing the reception of the Telefomin, he was particularly aware of the problems Australia faced in defending its colonial presence in PNG from critiques in the UNTC and in the Australian electorate. For example, he had been instrumental in persuading the parents of Harris and Szarka not to attend the trials of their son's killers in PNG to minimise the negative publicity.[82] Only a few months later then, the audiences of concern during the Telefomin trials, such as the UNTC and domestic Australian constituencies were obviously on his mind when he drew the Executive's attention to the need to maintain the precedent for hanging. He argued that Usamando would have to hang for his murders, so that PNG authorities could appear to be just if they hanged a Nuiginian for killing an expatriate. Immersed as he was in the old colonial ideologies of justice and colonial management, implicitly the lawyer saw such hangings as necessary for preserving the authority of Australian colonial officials and the integrity of the criminal justice system. Watkins wanted the law to appear even handed to an international audience, and even be so, while also being able to protect whites from disorder and challenges to their power.

With Phillips and Watkins' reports to hand, Cleland forwarded them to Hasluck with a covering letter endorsing their arguments. Contrary to his usual habit, Hasluck made no commentary, and

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[79] Watkins to the Administrator, p. 4.
[80] Watkins to the Administrator.
[81] "Concern Over Sex Cases", *South Pacific Post*, 11 Aug 1954, p. 8.
[82] W.J. Hall, letter, W.J. Hall to Mr W.W. Watkins, Crown law Officer, PNG re: Gerald Leo Szarka Deceased, 31 May, 1954, in Cabinet Submission, Territory of Papua and New Guinea, Telefomin Murders: November 1953, *Fifth Menzies Ministry Second System Cabinet Submissions 91-115*, NAA: A4906/4, 209114.

while he presumably spoke to the submission in Cabinet and also supported the arguments, his remarks are not recorded in the Cabinet notebooks.[83] Cabinet upheld the pronounced sentence.

**The Administration and Commonwealth Justify the Executions**

> *For the first time for 16 years the authorities today carried out a sentence of death when a native was hanged for murder….the condemned man had a record of four murders.*[84]

Cleland sought to minimize the publicity about the capital sentence prior to the execution, but after it had occurred it was reported on and officials spoke about it.[85] The statement, as reported in the press, as the public statement was not in the file, indicated an interest in deterring crime inside prisons and in the community, and in finding a just outcome to the extreme crimes of Usamando.

The *SPP's* reporting focused on the local consequences they perceived would flow from the execution. The themes raised by Phillips, Watkins and Cleland in their submissions, about controlling prisons and wider questions of deterrence and community security, were also highlighted by the paper in Cleland's statement on the execution. On December 16, the *SPP* recorded its appreciation of the Administration's attempt to use punishment as a deterrent, and that the decision was of particular interest to those who had expressed concern about rising crime rates in the context of the Kita Tunguan trial.[86] The paper justified that by reminding readers that the execution had occurred because Usamando's case was extreme. The paper then cited the official explanation for choosing execution from an unnamed official who told them: "The native, Usamando, in his 50 years, had killed five people including his wife and sister."[87] In addition, the official explained that the prisoner had been deemed sound of mind, so it was appropriate to hang him. The official also explained that if he were not hanged, prisons would become difficult to manage and the official asserted that: "there was no guarantee Usamando would not murder another prisoner."[88] The newspaper coverage reassured the expatriate community that the government was acting to improve the quality of prisons and also protect the wider community.

Newspaper coverage in Australia and overseas, largely accepted the punishment as reasonable given the extremity of the crimes. Far from PNG, they were less interested in questions of community or prison safety. They reflected on the question of justice and the appropriate expiation for crime. The

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[83] Paul Hasluck, Confidential Minute For Cabinet, Territory of Papua and New Guinea, Sentence of Death on the Native Usamando, 21 Nov, 1954, *Fifth Menzies Ministry,* Cabinet *Submission Territory of Papua New Guinea- Sentence of Death on the native Usamando*, 23 Nov 1954, NAA: A4906/ 205, 4678943, p. 1.
[84] "Execution in New Guinea-News in Brief", *The Times*, (London, UK), 17 Dec 1954, p. 7.
[85] J.C. Archer, Minute to First Assistant Secretary to The Secretary, 13-12-54 [re: execution arrangements], *Fifth Menzies Ministry,* Cabinet *Submission Territory of Papua New Guinea- Sentence of Death on the native Usamando*, p. 1.
[86] "Native Murderer Died Silently on the Scaffold", *South Pacific Post,* 16 Dec 1954, p. 5.
[87] "Native Murderer Died Silently on the Scaffold".
[88] "Native Murderer Died Silently on the Scaffold".

newspapers in Australia and London reported on the magnitude of Usamando's crimes and drew attention to the rarity of execution in New Guinea. *The Times* in London reported that:

> For the first time for 16 years the authorities today carried out a sentence of death when a native was hanged for murder….the condemned man had a record of four murders.[89]

The *Canberra Times*, *West Australian,* the Adelaide *Advertise Central Queensland Herald* and the *Townsville Daily Bulletin* all utilized the wording of the A.A.P.-Reuters report on the execution:

> Police officials at Lae this morning hanged a New Guinea native, Usamando, who was found guilty on August 30 of having willfully murdered a fellow prisoner, Kago, at Lae on June 22. Usamando had a record of four previous murders dating back to 1928. He was hanged for having killed Kago while he was a prisoner in the Lae Gaol. The last natives to be hanged in New Guinea were three on February 2, 1937, and a Papuan native hanged in 1938.[90]

With such reporting, the administration seems to have been successful in controlling the public relations of this execution. None of the coverage was condemnatory and it largely repeated the message of the officials- Usamando was a multiple-murderer and execution was an extraordinary step for an extraordinary criminal. Legitimacy here was built by the reporting that represented authorities as reasonable and just, as it had used execution only in the most serious cases. It was hard for the many countries that retained the death penalty to argue that this was an unjust punishment.

Further, the account of the actual hanging in PNG conformed to the standard gallows narratives: the story of a stoic acceptance of fate as just, legitimizing the power of the government in the eyes of the community.[91] The *SPP* report featured the sub-heading: "Native Murderer Dies Silently on Lae Scaffold".[92] The spectacle of cooperating with one's own execution indicated that even the executed approved of the sentence, and that alleviated discomfort with capital punishment, reinforced the moral beliefs that underlay the law, and legitimated the system that handed down the sentence. As Tim Castles wrote of reporting on executions in New South Wales

> The execution reports, therefore, went beyond a mere account of what occurred in a factual sense. Instead they used those facts to create or share a sense of meaning about the use of violence by the state in inflicting death upon a subject, which was sanctioned by law and carried into effect by the Executive government.[93]

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[89] "Execution in New Guinea-News in Brief", *The Times*, 17 Dec 1954, p. 7.
[90] "Native Hanged in New Guinea", *Canberra Times*, 17 Dec 1954, p. 8; "New Guinea Native Goes To Gallows", *West Australian,* (Perth, WA), 17 Dec 1954, p. 15; "First N.G. Hanging for 16 Years", *Advertiser,* (Adelaide), 17 Dec 1954, p. 28; "Native Hanged for Murder", *Central Queensland Herald,* (Rockhampton, Queensland) 23 Dec 1954, p. 17; "Native Hanged", *Townsville Daily Bulletin*, (Queensland), 17 Dec 1954, p. 1.
[91] See for example- Karen Halttunen, *Murder Most Foul; The Killer and the American Gothic Imagination*, Harvard University Press, Cambridge, Massachusetts, 1998; Daniel A Cohen, *Pillars of Salt and Monuments of Grace,* University of Massachusetts Press, Amherst and Boston, 2006.
[92] "Native Murderer Dies Silently on the Scaffold", *South Pacific Post,* 16 Dec 1954, p. 5.
[93] Tim Castle**,** "Constructing Death: Newspaper reports of executions in colonial New South Wales, 1826-1837", *Journal of Australian Colonial History*, vol. 9, 2007.

Thus the *SPP* reporting acted to support and legitimise the decision to execute to the expatriate community. However, the press did not know that Usamando had been drugged to achieve that outcome of stoic silence. Yet, Cleland informed Canberra that he was given a "heavy sedative dose of morphia", but added that those who witnessed the execution considered Usamando's conduct brave.[94] To the extent that Usamando enters the press, it was as a cypher, a representation of some other concern. He was a lesson to others, a symbol of justice done, a legitimisation of Australia's conduct.

**Conclusion**

Usamando was a man between worlds whose entry into the historical record demonstrates fractures and tensions in the rapidly changing societies of PNG. He was seemingly uncomprehending of both colonial and his own societies, and condemned by both. His allocutus in last two trials showed little actual awareness of the process, or his culpability, yet the system saw him as sophisticated enough to hang. Philips, who was sensitive to Nuiginian culture, and had been sympathetic to Usamando in the past, heard his cases. Yet the fifth killing was a bridge too far for the Chief Justice.

It demonstrated the weaknesses of discretion in terms of maintaining a clear test for being sophisticated enough to hang. The primary purpose of executive review in PNG was to ensure that those who didn't understand the system being imposed upon them did not hang. And plainly Usamando indicated in his confused and self-incriminating statements that he did not understand. Yet, it would seem that even that purpose could be subsumed in the need for retribution and restitution when the crimes were extreme, as in Usamando's case. The executive was also able to use discretion to break its own rules in the interests of justice, and as they saw it, community and prison safety.

Usamando seemed to both desire men and be shamed by sleeping with them, and react with violent rape when refused his desires. It is unclear if he was from a Nuiginian community that had a diverse range of sexual practices, or if he was enmeshed in the colonial proscriptions against sodomy, or if as Phillips seemed to suspect, senile or mad. Again, he was a man between worlds, not understood by either, and violating the rules of both.

From another part of the expatriate community, Watkins saw Usamando's pronounced sentence as an opportunity. The lawyer-administrator sought to protect the white expatriate community and the security of the Administration by retaining the death penalty. Yet those colonial institutions, in part,

[94] D.M. Cleland, letter, D.M. Cleland to The Secretary, Department of Territories; Conviction of Murder and Sentence of Death: Native Usamando; 17/12/54, in *Commutation of Sentences on Natives in Papua and New Guinea*.

had failed Usamando by allowing him weapons and running prisons that were disordered. Further, Usamando's tragic history revealed the difficulties faced by the judiciary and discretionary justice in the 1950s in terms of ensuring accurate information, as his records were destroyed and the full extent of his crimes were only brought to the attention of the courts by his own testimony that he should have been advised not to give. He was failed by and a failure of, the project to advance, so far as it had progressed by 1954.

This case also indicates that Nuiginians in the 1950s supported capital punishment for murderers, particularly in terms of deterrence and significantly, that the documented views of Nuiginians could constitute a persuasive argument in making policy decisions in 1950s PNG. Phillips had relayed the views of Usamando's community and their strong view that he should have been hanged for his murders in 1951, and it was unusual to have such certain data on local views. With Phillips' report of the local preferences, officials felt more confident that an execution would be welcomed and be productive of social order and obedience to the law.

In many ways it was an easy decision to make for executive. All interests agreed that he should hang. There was a pressing need to hang to deter crime and prison disorder and to maintain the death penalty. The facts of the case, so different from the Telefomin matters and the Kita Tunguan case, and telling a story of such blatant wickedness, meant it was a justifiable choice on many grounds. Hanging Usamando allowed the courts to appear, and perhaps actually be, even-handed in their use of punishment.

The colony wanted a particular kind of man produced by new Australian institutions and Usamando was not that man. As this execution was a dramatic departure from the generally merciful nature of the post-war administration, it was a particularly clear message about how the modern Nuiginian man should behave in prison and beyond. The prisoners of Lae Gaol knew the nature of his crimes and they were addressed by this execution in the didactic sense suggested by Garland, Ottely and Zorn and others. The message was: to kill in prison was to tempt the noose, and to kill over sodomy was doubly dangerous.

# Chapter 5 "The crown as the fount of justice": R v Ako Ove, 1956 and R v Sunambus, 1956


Figure 5-1 Native village, Port Moresby, 1955 or 1956.[1]

> *Furthermore, I have an old fashioned regard for the crown as the fount of justice and old-fashioned respect for English law. In a dependent and primitive society such as that in Papua and New Guinea, I think the individual native would have a greater expectation of justice in the fullest sense of the term by arrangements that would make courts in the British tradition more accessible to him.*[2]

Ako-Ove of Arahavi and Sunambus of Puto were two very different men. Ako-Ove was employed as a servant in suburban Port Moresby. Sunambus lived traditionally in the mountains of Bougainville Island. Ako-Ove murdered his wife, by whose perceived behaviour he felt shamed. Sunambus killed a witness to his crime of rape. Justice Gore heard both cases at different sittings. He found Ako-Ove's crimes to be more serious than Sunambus's and sentenced Ako-Ove to a longer term of imprisonment. The Governor-General considered their capital case files on the same day and their fates became entwined.

Field Marshall Sir William Slim was the Governor-General of Australia from 1953 to 1959. By 1956, he had seen quite a few clemency cases out of PNG and was not by temperament and experience prepared to act as a rubber stamp. While the crown's prerogative of mercy in Papua and

[1] Tom Meigan, "Native village, Port Moresby, 1955 or 1956", Part of *Meigan, Tom. Papua and New Guinea, 1955-1960 [transparency] 1955-1960*. National Library of Australia, .nla.pic-an25046810.
[2] Paul Hasluck, *A Time for Building; Australian Administration in Papua and New Guinea 1951-1963*, Melbourne University Press, Carlton, 1976, pp. 186-91.

New Guinea was invested in the Governor-General of the Commonwealth, by convention, this authority was exercised with advice from the Minister for Territories, Federal Cabinet, and the presiding judge through the Commonwealth Executive Council. Despite this convention, Slim's actions in spite of that advice, due to his moral judgements and subsequent intervention led to the equalisation of punishments of Ako-Ove and Sunambus.

Typically in PNG cases, the evidence of a Governor-General's impact upon clemency considerations is limited in scope and detail, as it was undocumented and un-minuted. These two case files provide an unusually dense paper trail of the Governor-General's impact. Both the direct text and the conversations implied by those letters illuminate the Governor-General's role in imposing Australian law on Nuiginians. The cluster of evidence surrounding these two cases indicates the growing importance of the Executive Council and the Governor-General in the capital case reviews in PNG, once all capital cases were referred to Canberra after 1954.

Wiener's has concluded of colonial jurisdictions that they were invariably:

> all conditioned by the tug of war between judges, Governors and other officials on the spot (backed up in varying degrees by the colonial office) attempting for the most part to enforce empire-wide laws and principles, and local white populations pushing to expand their own autonomy.[3]

This "tug of war" in this chapter was between distinct ideas of colonialism among old colonialists, the B4s, the new liberal colonialists, the progressive legal pluralists and the conservative colonialism of William Slim. Gore, as an old colonial, pursued a punitive regime that considered the relative sophistication of the offender, the pressures of cultural conventions, the needs of colonial control, and with a very cautious approach to the reception of capital punishment in regional communities. As Douglas and Finnane note of Australian colonial justice, that similar to Gore's:

> courts constantly adjusted their proceedings to circumstances before them - makeshift translation, forcible detention of witnesses, mitigation of sentences - were all characteristics of white justice as it proceeded against Indigenous offenders.[4]

Despite this tendency in PNG, liberals such as Hasluck wished for the law to be enforced more equally, regardless of cultural background and a more uniform implementation of legal standards across PNG and Australia. Slim's views were more similar to Hasluck's than Gore's, Slim and Hasluck shared a more universal sense of right and wrong and determined belief in the deterrent and retributive effects of capital punishment, resulting in a greater desire for the uniformity of punishments, rather than Gore's highly particularised sentencing. Complicating that level of mistrust,

[3] Martin J. Wiener, *An Empire on Trial; Race, Murder, and Justice under British Rule, 1870-1935*. Cambridge University Press, New York, 2009, p. 230.
[4] Heather Douglas and Mark Finnane, *Indigenous Crime and Settler Law; White Sovereignty after Empire*, Palgrave McMillian, London, 2012, p. 10.

mistakes and scandals in the criminal justice system further raised Hasluck and Slim's concerns. Progressive legal pluralists had little or no presence in this debate, with all of the other groups pursuing the implementation of Australian law leavened by discretion rather than plurality.

These cases also demonstrate the informal networks that shaped judicial decision-making in PNG. As sentencing, in part, served to expiate the outrage felt by the community and promote its security, the immersion of Justice Gore in his small community gave him informal insight into how that might be achieved.[5] Gore's decisions in these cases, reflected his personal knowledge, and that of his brother judges, of this small expatriate community.

In this chapter, after presenting the events of the cases, the first dimension to be considered will be the character and evolving role of the Governor-General, Sir William Slim in the Executive Council. Then this chapter will consider the nature of the legal scandals that affected Slim's and Hasluck's trust of advice from PNG and resulted in the Minister's advocacy for a more liberal, Australian legal process there. In light of these pressures, ultimately, the Executive determined punishment through a negotiation between the different levels of government and their competing liberal, conservative, and old colonial understandings of how best to pursue the colonial project in PNG.

**"My head went no good"; The Events of the Crimes and Trials**

This section of the chapter will outline the events of the murders, trials and punishments of Ako-Ove of Arahavi and Sunambus of Puto.

Ako-Ove was a house servant to the Vanderiet family in Boroko, Port Moresby in Papua. He was born in Aurua near Port Romily in the Gulf District of Papua. In 1948, he received one year's training as a medical assistant, but left to take up a position as a house servant with the Australasian Petroleum Company until 1955.[6] Such positions were desirable as they were quite well-paid by Nuiginian standards. He then took a job with the Vanderiets in 1956. He was about 24 years old at the time of the trial. Both Mr Jan Vanderiet and Mrs Eugenie Vanderiet were employed by the Administration. She was a clerk and he was Registrar for the Department of Agriculture.[7] Ako-Ove's crime was committed during their second year in Port Moresby.

Ako-Ove was married to Muruku-Ako and they lived in the servants' quarters of the Vanderiet home, a separate building in the grounds. Ako-Ove suspected Muruku-Ako of having an affair with a Kairuku man whom he had found in his quarters with his wife on two occasions. His shame and

[5] J.V. Barry et al, *An Introduction to the Criminal Law in Australia*, MacMillan, London, 1948, p. 95.
[6] This was not unusual. The administration struggled to keep Nuiginians in education programs in the 1950s as people with some English were in great demand as servants, for which they were relatively well paid.
[7] PNGAA, "Vale: Jan Vanderiet" *Vale*, PNG Alumni Association, http://www.pngaa.net/Vale/vale_june01.htm#Vanderiet

outraged honour drove him to search around town for the offending man on his day off on 29 January 1956. He told all his 'wontok's[8] that he was looking for the man and added that his wife was causing trouble.[9]

Ako-Ove failed to find the man, so he returned home just before six in the evening. Muruku-Ako was in the house with Mrs. Eugenie 'Gene' Vanderiet who reported that Muruku-Ako seemed nervous or afraid. Ako-Ove then entered the house and spoke at length to the frightened woman in their language. After that, he took Muruku-Ako by the arm and pulled her out of the house. Mrs Vanderiet watched them from a window as he took her into their quarters about twenty meters across the garden.[10]

Ako-Ove testified that he threatened to call the police unless Muruku-Ako gave up the Kairuku man. Adultery was an offense under the ordinances controlling Nuiginian behaviour.[11] He claimed she told him that she had betrayed him eight times and that she wanted to leave him. Ako-Ove claimed that his "head went no good" and he grabbed a knife and he attempted to cut her throat.[12] However, she fell over, and while she was down, he stabbed her repeatedly. He struck her in the head with the knife so hard that it broke, so he took up an iron bar and hit her in the head with that.[13]

Unaware of the bloody murder occurring meters from where she stood, Gene Vanderiet started to cook dinner. At about seven o'clock, she testified, Ako-Ove came into the kitchen dressed only in his rami and looking wild.[14] He dragged Eugenie into another room and attempted to rape her. She struggled free and ran to her next-door neighbour's house. Her neighbour, Mr. E. Clough, grabbed his unloaded rifle and went outside. Ako-Ove's subsequent move towards Mr. Clough was interpreted as an attack and he struck Ako-Ove in the head with the rifle butt, a blow that fractured the Nuiginian's skull and broke the rifle. The police arrived shortly after and Ako-Ove was taken into custody.[15]

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[8] A term referring to friends and/or fellow villagers who spoke the same dialect
[9] R.T. Gore, J. To His Honour the Administrator, Re: Ako-Ove of Arahavi, A prisoner, 8 May 1956, *Commutation of Sentences on Natives in Papua New Guinea*, NAA: A518, CQ840/1/3/PART 2, 434881; "Eugenie (Gene) Vanderiet (30 June 1997)", *Vale- Papua and New Guinea Association of Australia*, http://www.pngaa.net/Vale/vale_sept97.htm#Gene, Accessed, 7-1-2013.
[10] Gore to the Administrator; R.T. Gore hand written transcription of R v Ako-Ove, *Case Book "P.M. Criminal 1.5.56-18.6.56", Gore, R. T. and Quinlivan, Paul J. Papers 1930-1964 [manuscript],* National Library of Australia, MS 2819.
[11] Native Regulation Ordinance, 1908-1930- Native Regulations 1939, (Papua), Section 84, *Laws of the Territory of Papua 1888-1945*, PACLII, http://www.paclii.org/pg/legis/papua_annotated/nro19081930nr1939446/
[12] Gore to the Administrator; Gore hand written transcription of R v Ako-Ove.
[13] Gore to the Administrator; Gore hand written transcription of R v Ako-Ove.
[14] A rami is a sort of sarong or skirt like garment that was often incorporated into uniforms for workers.
[15] "Amok Native Gets Death Sentence", *South Pacific Post*, 16 May 1956, p. 5.

In contrast, Ako-Ove's testimony records that after killing Muruku-Ako, Ako-Ove ran into the house to call the police. He was bleeding and upset and Ako-Ove felt Mrs Vanderiet did not understand him and was scared of the blood and ran away. He followed her at which point Mr. E. Clough struck him down. He recalled waking in custody. Allowing him time for recovery, and after he had been cautioned that he could remain silent, the police interviewed him on 1 February.[16]

He was placed on trial in Port Moresby before Justice Gore on Tuesday, 1 May 1956. The court-appointed defence lawyer attempted to plead insanity as Ako-Ove's defence. The defence argued with the evidence of witnesses from Ako-Ove's past, from the testimony of general practitioners and the presentation of medical textbooks that Ako-Ove suffered from a form of epilepsy and attacked his wife during a seizure. However, contrary medical evidence from textbooks in the possession of the other General Practitioner called to give evidence indicated that in a seizure the sufferer would have no memory of actions committed during the seizure. As Ako-Ove clearly remembered and described his murder of his wife the contrary evidence suggested he did not murder his wife during a seizure. For Gore, the key fact was that Ako-Ove remembered his actions when the medical testimony tended to suggest he should not have. The burden of proof in an insanity plea is on the defence, thus, Justice Gore found the medical evidence insufficient to overcome the presumption of sanity and Gore found Ako-Ove guilty of wilful murder. Ako-Ove had nothing to say when invited to respond to the verdict. Gore recorded a sentence of death, indicating an implicit recommendation for mercy, and subsequently made a recommendation for a term of 10 years imprisonment.[17]

According to Gore's report to the Administrator on clemency, Sunambus was from the village of Puto, on the less accessible western coast of Bougainville Island. This area was not subject to regular patrolling until 1955, though irregular patrols had occurred since 1946 and there had been some prior contact with Australians seeking contract labour for plantations.[18] Despite few patrols, there was a Christian mission 10 miles from Puto, which indicated some notion of Westernisation in the area. There had been no serious cases heard in the Supreme Court from the Puto area in the years prior to this killing in 1956.[19] However, the lack of trials does not necessarily mean a lack of violence. There was a belief amongst Administration officials that, in these isolated areas, only cases the villagers could not resolve themselves made it to the attention of patrol officers. According to Dr Kenneth Read the anthropology instructor at the Australian School of Pacific Administration (ASOPA)

[16] Gore to the Administrator; Gore hand written transcription of R v Ako-Ove.
[17] Gore to the Administrator; Gore hand written transcription of R v Ako-Ove.
[18] It was not clear from the source material if that actually meant black-birding.
[19] R.T. Gore J. to his Honour the Administrator, Re: Sunambus of Puto, Bougainville Island- A prisoner, 27 April 1956, in *Commutation of Sentences on Natives in Papua New Guinea*, NAA: A518, CQ840/1/3/PART 2, 434881.

attended by the patrol officer cadets: "The respected village official in fact is the man who is successful in keeping cases from the courts."[20]

On 15 November 1955, Sunambus came across two girls who were collecting firewood, Dabi and Ributeivi. Sunambus approached them, drew a frightened Ributeivi aside, and raped her. Dabi stood by and then ran away when she saw what was happening. Fearful that Dabi would tell Ributeivi's relatives, Sunambus took a bush knife, like a machete, from the scattered belongings of the two girls and chased down Dabi and cut her throat with the knife.

Sunambus' boasted to his friends about the crime and officials were told about it, indicating that there were repercussions to the local social order that traditional systems of reconciliation could not accommodate. Australian officials arrested him and detained him and witnesses and parties to the case in the district's capital Sohano to appear at the Supreme Court when it was in session on 10 April 1956.[21] Holding accused and witnesses for months in district capitals to await trial was a usual practice for offences committed in isolated places. Even so, the detention of witnesses and interested parties ran counter to the rule of law.

Gore found Sunambus guilty and recorded a sentence of death, with a recommended alternate sentence of 8 years with hard labour.[22]

**"1956 was about the time to make a change": granting clemency in 1956**

Sunambus and Ako-Over committed their crimes at a time in which the Commonwealth Executive, and particularly the Governor-General Sir William Slim, wanted to change the direction of sentencing and punishment in PNG. The Executive's beliefs formed over several years of supervising clemency in PNG. Their personalities and experiences beyond PNG also shaped their decision-making about these two Nuiginian murderers. In addition, after some errors and scandals in the law in PNG, Hasluck expressed his dissatisfaction with the legal culture in PNG by rejecting proposed reforms and appointing a new Chief Justice from outside on PNG, and that appointment was emblematic of the change in direction be wanted for PNG.

Field Marshall Sir William Slim was sworn in as the Governor-General of Australia on 8 May 1953. He fought in the First World War in the Middle East and then transferred to the Indian army in which he progressed rapidly and commanded Indian forces in Africa against the Italians and in Burma

[20] Dr Kenneth Read, "Native Attitude to European Law", p. 4, *Papers Relating to Teaching ASOPA Courses*, Box 1, Folder Seven, The ASOPA Lectures Folio 1 c. 1950s, Australian National University Archives (ANUA), ANUA444
[21] Low security detention cells. Detainees would also undertake maintenance on infrastructure and grounds of administration buildings.
[22] Gore to the Administrator, Re: Sunambus of Puto; On seeing many violent crimes – Ralph Gore, *Justice Versus Sorcery,* Jacaranda Press, Brisbane, 1965.

against the Japanese. He was lauded in particular for maintaining the morale of soldiers in the retreat from Burma and by leading the defeat of the Japanese in its recapture. After the war, he commanded the Imperial Defence College, as well as visiting British commands in a range of colonial settings and military bases around the world. His tenure as Governor-General was very successful in terms of gaining respect and popularity amongst Australians.[23] However, more recently reputation has been shadowed by allegations of the sexual abuse of children.[24] In 1960, he was created Viscount and styled Viscount Slim of Yarralumla and Bishopston, showing his sense of connection to his vice-regal role in Australia.[25]

Paul Hasluck and Slim's Official Secretary Murray Tyrrell remember Slim as having a great interest in Papua New Guinea. Further, Hasluck wrote favourably of Slim and quoted a 1960 letter to himself from Slim in his memoir:

> I don't admire everyone in your Government and I don't admire everything your Government has done. In fact I think they've done some damn silly things and some of your colleagues have said even more silly things than they have done. But there is at least one thing that your Government has done well and perhaps it is their best job.
>
> I do admire you and I do admire what you have done in New Guinea. I know something about this. It is the sort of thing that I was trying to do during most of my life. Your young chaps in New Guinea have gone out where I would never have gone without a battalion and they have done on their own by sheer force of character what I could only do with troops. I don't think there's been anything like it in the modern world

Hasluck used this praise in his memoir as the conclusion for his chapter on law and order, which both praised PNG officials and highlighted his own claims to success. Indeed, Hasluck glossed the quotation by writing:

> What moved me was his [Slim's] particular reference to our patrol officers. When every other word of criticism has been spoken and other defects in our administration have been discussed, I stand in amazement close to reverence at what was done, to my personal knowledge, in the ten years between approximately 1952 and 1962 by young Australian patrol officers and district officers in areas of first contact. There were a few mistakes and a few weak brothers, but the achievement, with the resources available, revealed a quality of

[23] Michael D. De B. Collins Persse, "Slim, Sir William Joseph (1891–1970)", *Australian Dictionary of Biography,* National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/slim-sir-william-joseph-11713/text20937, published first in hardcopy 2002, accessed online 16 April 2019.

[24] Independent Investigation Child Sexual Abuse, " Inquiry - Child Migration Programmes case study public hearing transcript Day 7", 8 March 2017, *Independent Investigation Child Sexual Abuse*, United Kingdom, https://www.iicsa.org.uk/key-documents/5746/view/public-hearing-transcript-17-july-2018.pdf , p. 114; Mick Gentleman MLA, - "William Slim Drive is set to be renamed following a review into place names in the ACT", *Mick Gentleman MLA Media Releases*- 06/06/2019, https://www.cmtedd.act.gov.au/open_government/inform/act_government_media_releases/gentleman/2019/place-names-to-meet-community-standards

[25] Yarralumla is the official residence of the Australian Governor-General in Canberra.

> character and manhood that should make our nation mightily proud that these fellows were Australians.[26]

The prominence Hasluck gave to Slim's praise suggests that he respected the Governor-General and that they shared some ideas about law and order in PNG.

Slim had an interventionist approach to his position. Memoirs of Administration officials such as Ian Downs and Rachel Cleland concur with an oral history recording with his Official Secretary Murray Tyrrell who recalled Slim as actively engaged with his vice-regal responsibility to PNG, he drew on his work in India and Burma, which gave him confidence to speak out on issues of colonial administration.[27] For example, during his tenure, he and his wife Aileen Slim visited PNG in 1953, 1956 and 1957. And those experiences further bolstered his confidence in applying his own judgements to policy on PNG.

The first characteristic of that influence was that the memorialisation of the Second World War dominated Slim's early interactions with PNG, and as a senior military officer, he was well briefed on the geopolitical significance of the territories to Australia and challenges to the continued possession of the territories. Slim visited PNG to officially open the war cemeteries and monuments for the Second World War dead.[28] Yet, Slim was interested in more than PNG as a battlefield.

He was also interested in the mechanics of colonial administration and he gave speeches at the openings of development projects in PNG. In his speeches, he discussed tutelage and loyalty and pictured Australia controlling and educating a loyal ally. Newspapers throughout Australia reported positively on Slim's views and the *Cairns Post* quoted from one of his speeches to Nuiginians:

> I have been struck by the way you natives, especially through your village councils, are taking an increasing share in the control of your own affairs," he said. He added, "This is a house you cannot build too fast if it is to stand."[29]

The *Cairns Post* also noted Slim's interest in the work of colonial officials:

> Field Marshal Slim said he had gained an admiration for the devotion of the officers of the administration for the manner in which they undertook their duties. Aided by their wives, and often in remote areas, they played a major part in the progress.[30]

The Burnie *Advocate* quoted Slim's sentiments indicating the tutelary relationship he pictured for Nuiginians:

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[26] Hasluck, *A Time For Building,* p. 83.
[27] Persse, 'Slim, Sir William Joseph (1891–1970)'.
[28] "Governor-General To Visit New Guinea" *Canberra Times*, 11 Sept 1953, p. 2; "Sir William Slim Visits New Guinea", *West Australian*, 19 Oct 1953, p. 20; "New Guinea Unveiling", *Courier-Mail*, (Brisbane) 23 Oct 1953, p. 3; "First Victory was in New Guinea", *Canberra Times*, 20 Oct 1953, p. 2; New Guinea Greets Number One", *Advocate*, (Burnie, Tasmania), 22 Oct 1953, p. 2.
[29] "Governor-General Back from New Guinea", *Cairns Post*, (Queensland), 26 Oct 1953, p. 1
[30] "Governor-General Back from New Guinea".

> Sir William told the native people (his speech was later translated into pidgin by a government official) that he represented the Queen and that when she came to Australia soon, he intended to tell her what loyal men and women they were.

*Figure 5-2 "His Excellency the Governor-General of Australia, Field Marshal Sir William Slim inspects a guard of honour of the Pacific Islands Regiment at Port Moresby*

Slim's Official Secretary Sir Murray Tyrrell also recalled Slim's interest and influence on PNG policy in PNG:

> He took a keen interest in Papua-New Guinea and would return from visits to demand of Minsters (including the present Governor-General, then Minister for Territories), "What are we doing about this… or that…[31]

Tyrell also indicated that Slim's views were given great credence in the Executive Council. Slim's commanding style ensured, for example, that papers sent to the council were promptly delivered, that matters were well explained, and significant issues were discussed.[32] Tyrrell recalled that:

> He [Slim] was very firm with the government, the Ministers. Nobody took liberties with him, not even Prime Minister Menzies. He was a Field Marshall and a leader, a natural leader, every inch of the way. He didn't mind telling Ministers at all if he thought what they were doing was wrong or he didn't approve, he said so.[33]

Slim's experiences in PNG and Tyrell's observations are indicative of Slim's commanding role in the Executive council, including during clemency case reviews.

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[31] "Slim's Code was Based on 'duty and discipline: A tribute, By a Special Correspondent'" *Canberra Time*s, 15 Dec 1970, p. 2. The resemblance to the then closed oral history file on Slim by Tyrrell is substantial.
[32] Murray Tyrrell interviewed by Mel Pratt, 27 June 1974, NLA TRC 121/54, transcript pp. 60-63 and pp. 43-46.
[33] Tyrrell interviewed, p. 49.

A similar increase in the role of the Minister was also indicated by both these cases and related decisions. In the first years of his ministry, Paul Hasluck had been reluctant to interfere in the administration of justice until he felt he had learned more about the operation of the courts in the territory. Hasluck wrote in response to a petition to intervene in a legal proceeding in 1951:

> I am extremely unwilling to intervene politically in the processes of justice, and in any case I have not yet had time to familiarise myself with the operations of the courts in the Territory, but from the present case and from three or four other matters that have come under my notice, I am beginning to think that the whole of the processes of justice in the Territory may need review. Will you let me know whether the Department has formulated any views on this matter... at present I have little knowledge, but a very uncomfortable feeling on the subject.[34]

By 1954, he was much less reluctant. He began to look more closely at legal issues as he became more familiar with his portfolio. After the questioning of officials who had outraged the Telefomin, and his annoyance at the failures revealed by the Kita Tunguan clemency decision, combined with his perception of inequity before the law, he exerted greater influence on deliberations at the Executive level, showing his mistrust of the evidence and processes presented to him. Yet he still tended to maintain a presumption that judges would generally know better than politicians and that there should be some separation in those roles. There are several ways in which that greater intervention and the obvious tensions between trust in the rule of law and mistrust of a particular judicial culture played out.

Indicative of a determination to change and control the direction of the law in PNG, in 1956 Hasluck rejected a PNG Administration proposal to introduce Native Courts which were intended to blend indigenous and Australian legal practices, but which Hasluck concluded gave Australian officials too much power and violated principles of the rule of law.[35] Hasluck wrote back to his ministry astonished at the proposed legislation, which represented a major change in policy, and which he had never heard of before. He criticised the process, thoughtfulness and practicalities of the proposal in a damming critique of the proposed legislation and report.[36] Downs described Hasluck's opposition to this proposal as implacable and based on mistrust of the informal practices at work in PNG.[37] Hasluck was a knowledgeable writer on colonial situations having written a history of Western Australia's native policies including its haphazard native court system, which Douglas and Finnane

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[34] Paul Hasluck, A minute to the Secretary of the Department of Territories, Cecil Lambert, on 8 January 1952, cited in Hasluck- *A Time for Building,* pp. 182-91.
[35] John Greenwell, *The Introduction of Western Law into Papua New Guinea*, unpublished manuscript given to the author by former First Secretary PNG Crown Law Office John Greenwell, p. 23; Hasluck, *A Time for Building,* pp. 186, p.435. Ian Downs, *The Australian Trusteeship, Papua New Guinea*, 1945-1975, AGPS, Canberra, 1980, pp. 149-50.
[36] Hasluck, *A Time for Building,* pp. 186-91.
[37] Downs, *The Australian Trusteeship*, pp. 149-50.

argued drew on the PNG model, but did not translate it well.[38] The injustices and idiosyncrasies of the WA system more recently have been critically examined both by Kate Auty, and Heather Douglas writing with Mark Finnane and suggest certain wisdom in Hasluck's suspicions that the law was being distorted by the whims of kiaps and was inherently racist.[39] He told his officials that he favoured a traditional view of British Law and emphasised its fairness and objective rigour:

> Furthermore, I have an old fashioned regard for the crown as the fount of justice and old-fashioned respect for English law. In a dependent and primitive society such as that in Papua and New Guinea, I think the individual native would have a greater expectation of justice in the fullest sense of the term by arrangements that would make courts in the British tradition more accessible to him.[40]

Hasluck's comprehensive rejection and critique, according to Downs, was dispiriting and engendered much bitterness in the PNG public service.[41] There was divergence in the thinking of the Administration and the Executive about the proper direction of legal policy.

This divergence further manifested itself in the appointment of the new Chief Justice of the Supreme Court of PNG in 1956. When Chief Justice Monty Philips announced his retirement, Hasluck noted in his memoir, that he rebuffed Cleland's attempt to advise him on a new Chief Justice. He told Cleland, that as an Administrator, it was none of his concern. Further indicating the divergence, Hasluck decided that while Gore was the "best of the old system…1956 was about the time to make a change". [42] He appointed a Victorian QC, Alan Mann, as Chief Justice, rather than Gore, the next in seniority and Cleland's preferred candidate. By appointing as the senior judge a mere QC from a different jurisdiction, Hasluck demonstrated his extreme suspicion of the PNG bench's culture, systems and traditions. Gore, who was acting as Chief Justice, and others were completely surprised and flummoxed, indicating the extent to which there was a divergence of expectations between the minister, the PNG Administration, and the legal fraternity in PNG. [43]

This divergence also manifested itself in Hasluck's dissatisfaction with what he saw as the differential treatment of people. Hasluck intended to remediate that with a greater separation of powers to prevent "weak brothers" having too much control over the lives and possessions of the

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[38] See Hasluck's *Black Australians: A Survey of Native Policy in Western Australia, 1829-1897*, Melbourne University Press, Melbourne, 1942; Douglas and Finnane, *Indigenous Crime and Settler Law*, pp. 114-117;
[39] Downs, *The Australian Trusteeship*, pp. 149-50. Kate Auty, *Black Glass; Western Australian Courts of Native Affairs 1936-54*, Freemantle Arts Centre Press, Freemantle, 2005, pp. 12-21. Douglas and Finnane, *Indigenous Crime and Settler Law,* p. 4.
[40] Hasluck, *A Time for Building*, pp. 186-91.
[41] Downs, *The Australian Trusteeship*, p. 150. Hasluck, *A Time for Building*, pp. 191.
[42] Hasluck, *A Time for Building*, pp. 344-345.
[43] Rachel Cleland, *Pathways to Independence*; *Story of official and Family Life in Papua New Guinea from 1951-1975,* Singapore National Printer Ltd, Cottesloe, 1985, pp.198-9.

people, such as in Telefomin.[44] Despite the PNG legal system's view of itself, Hasluck had concluded that British legal traditions in which he expressed such confidence were not entirely in operation.[45] For example, Hasluck in 1956 wanted inquests be held into the deaths of Nuiginians, which did not usually happen prior to that.[46] And that this double standard was another way the PNG system was not, to Hasluck's mind, an orderly Australian one capable of supporting the advancement of the people to independence.

Hasluck did not spare himself from this criticism. Hasluck noted there was a heightened interest amongst observers in his work in PNG, in Australia, and abroad and the subsequent decrease in his capacity to act as a "benevolent autocrat."[47] Hasluck did not want the increased scrutiny to observe a system dominated by mistakes and injustice, nor a system that was autocratic, as opposed to advancing PNG towards some sort of self-management.

Thus by 1956 there was less rubber-stamping of clemency recommendations as the views of the Executive and Administration had diverged and the Executive depended less on advice from within the territories and more on their own judgement. These changes can be seen in the Ako-Ove and Sunambus cases and these will be discussed in subsequent sections of this chapter.

**"What's this bloody rubbish; we'll hang the bastard"[48]: Determining Clemency**

Ako-Ove and Sunambus of Puto's clemency reviews entered into that climate and became a forum for the Executive to attempt to reorder the process and relationship between the parties of clemency decisions.

As was usual, the documents for reviewing capital sentences arrived as a bundle of several cases to be considered together by the Governor-General in Executive Council. As Justice Gore recorded sentences of death, he had also recommend that Sunambus receive eight years imprisonment with hard labour in lieu of the death penalty and that Ako-Ove receive ten years of imprisonment with hard labour instead of death. As Douglas and Finnane suggest, it was the particularly brutal killing of a woman that drew the attention of white colonists, and drew Slim's attention to Sunambus.[49]

In the submission to the Administrator, and therefore to Cabinet and Executive Council, on Sunambus of Puto, Gore did not explain why he had judged a recorded sentence most appropriate,

[44] Hasluck, *A Time For Building,* p. 185-191.
[45] Hasluck, *A Time For Building.*
[46] Hasluck, *A Time For Building.*
[47] Hasluck, *A Time for Building,* p. 197; Allan M Healy, "Monocultural administration in a multicultural environment: the Australians in Papua New Guinea", in J.J. Eddy and J.R. Nethercote, *From Colony to Coloniser: Studies in Australian Administrative History*, Hale and Iremonger, Sydney 1987, p. 224.
[48] "Slim's Code was Based on 'duty and discipline'".
[49] Douglas and Finnane, *Indigenous Crime and Settler Law,* p. 3.

nor why he had settled on eight years as a suitable alternative punishment. He did give details of the isolation of Sunambus' home village, which implied that Gore had determined that he possessed a low level of modernity, or Westernisation, or as it was phrased then, 'sophistication'.[50] What Gore implied by his uncharacteristically brief submission was the assumption that his recommendation was sufficient and that this case should follow the established precedent of citing a low level of Westernisation to justify a commutation.

Gore did explain his decision to recommend a ten-year sentence for Ako-Ove. He emphasised: "I am considering the place where the murder was committed, the circumstances of the killing and the reason therefore." Gore took into account that this was a murder by a relatively well-educated man of his possibly adulterous wife, in suburban Port Moresby that had subsequently risked the safety of expatriates. Such a crime struck at the heart of Australia's advancement project in PNG. If Ako-Ove could not resist the impulse to kill out of shame, with all his education and exposure to Australian practices, what hope could there be for the less Westernised, unless they could be intimidated by penalties? 10 years was a long sentence for Gore.[51] Further, Gore was seemingly aware that the Port Moresby expatriate community required that their fears be expiated through strong punishment and deterrence.

However, Gore did take into account the mitigating factor of Nuiginian cultural practices in relation to masculine honour and provocation. In recording a sentence of death for Ako-Ove, Gore had considered the powerful effect he thought that shame and honour had upon the behaviour of Nuiginian men in relation to adultery.[52] The mitigating effect of cultural issues was only considered in commutation, not as meeting the legislative requirements that might result in a reduction of sentencing to the manslaughter range, as the relevant sections of the *Criminal Code* on provocation defences were interpreted very strictly.[53] Nevertheless, consistent with his decision in *Ako-Ove*, Gore had theorised in his memoir that shame was often an overpowering impulse to action for Nuiginian men: "Shame is a characteristic no doubt of most people, but among the dark races the force of it seems to be more intense and its reaction takes queerer forms."[54] Gore discussed it particularly in relation to their sexual status if their wives became known as adulterers, and that perception of his was significant to his recommendations on sentencing.[55] Further, in the case of Sunambus, the powerful impetus on him to prevent the knowledge of his actions causing shame was relevant to

[50] Gore to the Administrator, Re: Sunambus of Puto.
[51] See figure 6-2 for average sentencing.
[52] Gore to the Administrator, Re: Ako-Ove of Arahavi, 8 May 1956.
[53] Sections 268 and 304 *Queensland Criminal Code, (PNG Adopted)*.
[54] Gore, *Justice Versus Sorcery, p. 103*.
[55] Gore, *Justice Versus Sorcery*. See ch 15 "Shame" and Chapter 32 "A Wanton's Antics" and Chapter 26 "The Wives of the Beautiful Valleys".

Gore. PNG legal practice and Gore's socio-legal theorising indicate that provocation defined by the Code was a difficult concept to translate to Nuiginian behaviour. The solution had been to leave such considerations to clemency pleas to deter the cultural practice of vendetta, as many of the murder cases related to questions of shame and sexual fidelity.

With Donald Cleland on leave, the Acting-Administrator was Assistant Administrator Rupert Wilson, an experienced Public Servant in both state and federal services. Appointed during Hasluck's tenure, Wilson had less experience in PNG than Gore, or Cleland, by many years.[56] He endorsed the recommendations of Gore as "might be apt."[57] The phrasing might indicate he in fact had no view on the matter at all, or that as a career public servant, the distance Wilson maintained from legal matters perhaps indicated the change to the more formal Australian bureaucratic culture that Hasluck wanted.[58]

Yet Sir William Slim found Gore's and Wilson's lack of moral reasoning inadequate and disputed the justness of the sentencing. Sir Murray Tyrrell said of William Slim's interventions in clemency:

> On one occasion I remember, years and years ago, there was a particularly bad murder in New Guinea and the culprit was duly sentenced to death by the Supreme Court of Papua New Guinea, the papers came to the Governor-General for consideration, with the advice of the then Minister for Territories, and the Minister advised in his wisdom that the penalty should be reduced to imprisonment for life and the death penalty shouldn't be carried out.

However, Slim found the lawlessness and self-interested cruelty of Sunambus' slaying of an innocent woman serious enough to warrant hanging.

> Dear Bill Slim was so enraged about the facts of the case that he wouldn't listen to the Minister, simply refused to listen to him. He said, "If I was in the Far East, Tyrrell, that man would have been hung long since." I pointed out to him that he had the right to reduce the sentences, but that was all. If the judge and the minister in their wisdom recommended a reduction of sentence, he couldn't increase the sentence.

Slim was frustrated by the limits convention placed upon his notional powers, that in PNG a recorded sentence was always commuted, despite this not necessarily being the practice in other jurisdictions, Slim was specifically advised that he did not have the power to confirm or change the sentence.[59] Tyrell continued:

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[56] Hasluck, *A Time for Building,* p. 433.
[57] R.W. Wilson to the Secretary, Department of Territories, re: Ako-Ove of Arahavi- Sentence of Death, 22 May, 1956 in *Commutation of Sentences on Natives in Papua New Guinea*, NAA: A518, CQ840/1/3/PART 2, 434881.
[58] Hasluck, *A Time for Building.* The push for a regularised bureaucracy is a consistent theme.
[59] Tyrrell interview, p. 45; Stacey Hynd, "'The Extreme Penalty of the Law': mercy and the death penalty as aspects of state power in colonial Nyasaland, c. 1903-47", *Journal of East African Studies*, vol. 4, no. 3, 2010, pp. 542-559; Stacey Hynd, "Murder and Mercy: Capital Punishment in Colonial Kenya, ca. 1909-1956, *International Journal of African Historical Studies*, vol. 45, no. 1, Toward a History of Violence in Colonial Kenya, 2012, pp. 81-101; Andrew Novak, "Capital Sentencing Discretion in Southern Africa: A Human Rights Perspective on the Doctrine of Extenuating Circumstances in Death Penalty Cases", *African Human Rights Law Journal*, vol 14, no. 1, 2014, pp. 24-42; And The Assistant Secretary, Attorney-General's Department "The Assistant Secretary Advisings, 1956-58", *Criminal Code*

> Well, he was adamant about this, so I got on to my old friend Professor Bailey, then Solicitor General and secretary to the Attorney-General's Department, and said "You'd better come out and talk to the Governor General and tell him some law." So Professor Bailey did come out and we finally convinced him that the man wasn't to be hung. That particular episode went on for two or three days, it wasn't just a flash in the pan job at all.[60]

Being thwarted in his desire to confirm the death sentence, Slim worked more circuitously and wrote a minute to the Executive Council expressing concern over the differentiation in punishment between Sunambus and Ako-Ove. The apparent differences in the cases indicate that Slim's moral judgement of Sunambus seems to revolve around the fact that Sunambus killed out of self-preservation and cold calculation, whereas Ako-Ove was in more of an agitated state and a cuckold. Subsequent to the reception of the Cabinet papers, but prior to the meeting, Slim wrote to his officials in the Department of Territories:

> I realise—having had experience in such matters—that it is difficult to balance relative guilt when one has not been present at the trials but it does seem to me that the offence in Minute No. 131 [Sunambus] is palpably much greater than that in No. 132 [Ako-Ove].
>
> If the criminal in minute 131 is not to be hanged, I would suggest an increase in the sentence of hard labour, in his case, or a reduction in that of the murderer in minute 132, preferably the former.
>
> Before I sign these warrants may I invite you to give them further consideration? [61]

Slim was attempting to alter established custom and practice of the Governor-General, or Governor, signing off on the decisions of the Executive Council. Slim wanted to increase the recommended punishments and 'invited' a reconsideration of these matters. Slim's 'invitation' to reconsider the sentencing recommendations pre-empted any decision and therefore skirted around questions of procedure. It also placed pressure on judges to sentence more harshly. Tyrell remembers the Field Marshal saying "What's this bloody rubbish; we'll hang the bastard."[62]

Slim sought to influence the outcome and argued in a letter to the Department of Territories that Sunambus had been very reasonably condemned to death as Sunambus lived in a well-regulated area, received no provocation, and showed no remorse in his boasting about his crime. Slim deplored what he saw as a trend towards commuting vicious murders of young women.[63] In contrast, it would seem he found the suspicion of adultery sufficient provocation to moderate the punishment from death to imprisonment in Ako-Ove's case.

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*Amendment Ordinance 1907 (Papua) Section 2 - Criminal Code Amendment Ordinance 1923-1939 (New Guinea) Section 8 - whether 'recorded' sentence of death can be enforced*, NAA: A432, 1958/3143- 7801743.

[60] Tyrrell interview, p. 46.

[61] Sir William Slim to Executive Council, 15 June 1956, in *Commutation of Sentences on Natives in Papua New Guinea*, NAA: A518, CQ840/1/3/PART 2, 434881.

[62] "Slim's Code was Based on 'duty and discipline'".

[63] Slim to Executive Council, 15 June 1956.

This was the means by which Slim hoped to circumvent the limits placed on his authority and better reflect his experiences of pre-war colonialism in Asia: he sought new recommendations from the judges. He wanted the recommended sentence to be re-examined and at the very least, the justification for the proposed punishments stated clearly, so that he could be happier confirming what he thought would be a more just sentence for Sunambus's brutal murder of Dabi.

Hasluck confirmed the restriction on Slim's notional power to confirm the recorded death sentence, and responded to this request by writing to the Secretary of the Department of Territories requesting a review of recommendations from Gore:

> I informed Mr Tyrell [Sir Murray Tyrell Secretary to the Governor-General of the Commonwealth of Australia 1947-1973] that I would be quite willing to give further consideration to the Warrants mentioned in Minutes 131 and 132 and that in cases affecting the prerogative of the Crown, I recognise the propriety of the Governor-General's action and appreciate the way in which the action has been taken.[64]

Hasluck's endorsement of Slim's request indicated the increasing centralisation of the capital case reviews and also the diverging views and trust of the Executive and the PNG judges, and movement towards the greater enforcement of Australian norms and judgments on PNG cases. Accordingly, Hasluck suggested to Lambert to suggest to Justice Gore that he recommend that Sunambus's punishment be increased to 15 years imprisonment with hard labour. Hasluck also invited the Secretary to invite the trial judge to justify his recommendations more fully, if he wished them to stand.[65] Secretary Lambert then conveyed these invitations to reconsider to the Administrator who conveyed them to Ralph Gore.[66]

However, Justice Gore was immune to the vice-regal and ministerial pressure and rejected Slim's assumptions and defended his original recommendation. He raised a series of points differentiating between the two crimes on the basis of the central issues of the acculturation of offenders and the boundaries to Nuiginians comprehension of exercises of power by the colonial law. Further, his contrast of the two cases also exposes his use of informal channels of information to inform his decisions, channels similar to those Cleland had used in the Kita Tunguan case.

Gore's first point in his justification of his recommendations went to the key question of the relative acculturation of the perpetrators. Gore argued that Ako-Ove was more acculturated and therefore more culpable: he had tacitly accepted colonial authority, and understood its laws, by his immersion

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[64] Paul Hasluck to the Secretary Department of Territories, Ministerial Schedule No. 206, 28-6-56, *Commutation of Sentences on Natives in Papua New Guinea*, NAA: A518, CQ840/1/3/PART 2, 434881.
[65] Hasluck to the Secretary.
[66] C.M. Lambert to His Honour the Acting Administrator of Papua New Guinea, Re: Sunambus of Puto and Ako-Ove of Arahavi-Sentence of Death, 2 July 1956, *Commutation of Sentences on Natives in Papua New Guinea*, NAA: A518/, CQ840/1/3/PART 2, 434881.

in the westernised economy of Port Moresby. He asserted that Ako-Ove at 24 "was a sophisticated Native who had some training at the Idubada Technical School and was a married man". His people "have been under government control for fifty years"; whereas Sunambus by contrast was younger and "had not been away from his village." And his people: "had not had a great amount of contact with the administration." Gore determined that Ako-Ove was more culpable because he had been brought up with the Australian legal system. However, Sunambus was little used to Australian ways and had killed Dabi "owing to tribal customs".[67] This formulation further implied Gore's awareness that there would be limits to Sunambus' and his community's acceptance of severe punishment due to their limited contact and that successful colonialism required working within those boundaries, and following Murray's injunction to build confidence gradually in newly controlled groups. Employing the case law of the PNG bench, Gore presented the two common mitigating factors for commutation by arguing that lack of 'sophistication' and the pressure of customs placed a limit on culpability for crimes.

Gore's second point was that Ako-Ove's murder of Muruku-Ako was more painful, crueller and more brutal than Sunambus' relatively quick and clinical execution of Dabi. Gore asserted that Sunambus: "killed the girl with no evidence of brutality". Yet Ako-Ove "killed his wife in a very brutal manner. She was horribly mutilated."[68] This seems to take account of the retributive function of sentencing. Gore was entering into the explanation of crimes in culturally-mediated terms, with an eye to the acceptance of punishment within each community: that cruelty required greater retribution on the part of society for justice to be restored.

The final reason in Gore's report was evidently the most significant to him given its prominence in his text by its development, volume and placement as the take away point at the end of his text. Gore's reasoning went to the community reaction to the crimes and the need to deter crimes in the towns that had caused fear and dismay among expatriates. Gore went on to contrast the location of Sunambus' crime on a distant island with Ako-Ove's suburban rampage.[69] However, with limited coverage of the events in the *SPP*, it is likely that Gore gained his knowledge of community outrage and fear from conversations on the street, at parties and the club, from his immersion in the small community, and from his own perceptions of the world.[70] Expatriates did not like murder in their

[67] Gore J. to His Honour the Acting Administrator, Sunambus of Puto, Bougainville Island and Ako-Ove of Arahavi, 6 July 1956, in *Commutation of Sentences on Natives in Papua New Guinea*, NAA: A518, CQ840/1/3/PART 2, 434881.
[68] Gore to the Acting Administrator, 6 July 1956.
[69] Gore to the Acting Administrator, 6 July 1956.
[70] See the interaction between sentencing and public opinion in Mark Finnane, *Punishment in Australian Society,* Oxford University Press, Melbourne, 1997, for example, p. 94.

neighbourhood, so they wanted a severe punishment, and Gore knew of their, and his own, preference.

Less significant to Gore than the need to deter crime in the towns, Gore went on to assert that he would have given a heavier penalty, if not for the "consideration which has been advanced by His Excellency", the provocative nature of Muruku-Ako's adultery.[71] Muruku-Ako was a 'bad woman' whose death would have been regretted more if her husband had not doubted her fidelity. Such a motivation was enough to mitigate the sentence, but not constitute a defence of provocation. This is consistent with the sort of gender ideology in which offender's culpability for their murders of women were judged as to their liability according to their victim's perceived sexual morality.

Finally, Gore went on to discuss the meaning of time to a man like Sunambus. He was adopting the Papuan judicial and administrative practice of 'thinking black' and taking anthropological advice in observing the behaviour of perpetrators.[72] He asserted the following rather extraordinary understanding of Nuiginian thinking:

> Whether the prisoner is given eight, ten, twelve or fifteen years' imprisonment, it is still to him just a long time. I do not believe an unsophisticated native has a clear conception of difference between, say eight, ten or twelve years. The paramount object of the punishment is the prevention of crime. If this object can be achieved by the awarding of a lesser term of imprisonment, then I think one is justified in imposing the lesser term.[73]

This conflation of reasons marked the diverging views of Gore's consideration of administrative and cultural issues, which challenged Hasluck and Slim's assumptions of a more universal sense of proportion and retribution.

This debate illuminates in the PNG context Matthew Hilton's argument about the old norms of colonialism continuing alongside the post-war goals and attempts to change. Gore's older ideas about differentiation and benevolence were challenged by Hasluck's determination to be equal, while Slim's determination to maintain order through deterrence challenged both.[74] While Gore accepted difference, Hasluck wanted to change difference with uniform development and through the force of

[71] Gore to the Acting Administrator, 6 July 1956.
[72] 'Thinking black' was advice the long term Lieutenant-Governor Hubert Murray and some of his experienced officials would advise new officials to practice. Gore professed some suspicion of it, but nevertheless, seemed to practice it. R. Gore, *Justice Versus Sorcery*, p. 28; Francis West, *Hubert Murray; The Australian Pro-Consul,* Oxford University press, Melbourne,1968*,* p. 211; Clive Moore, *New Guinea, Crossing Boundaries and History*, University of Hawaii Press, Honolulu, p. 185. Moore notes some acceptance and some rejection of the concept amongst officials.
[73] Gore to the Acting Administrator, 6 July 1956.
[74] Matthew Hilton, "Ken Loach and the Save the Children Film: Humanitarianism, Imperialism, and the Changing Role of Charity in Postwar Britain", *Journal of Modern History*, vol. 87, no. 2, 2015, pp. 357-394.

the criminal law.[75] Certainly, it is also consistent with what Douglas and Finnane noted of Australian colonial practice:

> Legal interventions variously thought of as a civilising influence in which savage or barbarous subjects would be transformed in governable one (nineteenth and early twentieth century), or more recently as a program of citizenship, rights and normalisation.[76]

However, Hasluck criticised Gore's sort of attitude as a barrier to that civilising process in his memoir:

> But some of the native affairs officers spoke too confidently of their own wisdom and I was gradually confirmed in my own ideas about the need to ensure that the courts and the police and the prisons were not regarded simply as instruments to serve the ends of orderly administration.[77]

He wanted consistency and equal treatment across the territories.[78] Gore presumed that Nuiginians needed different treatment. Yet with the appointment of Mann as Chief Justice, and the Minister's cooperation with Slim on Sunambus and Ako-Ove's sentences, Hasluck's rejection of this sort of reasoning was made clear.

**Changing the Recommendations: Slim manipulates the Capital Case Review**

*"Amok Native Gets Death Sentence"*[79]

Gore's reply to Slim and Hasluck's criticisms and failure to take up the invitation to reconsider the recommendations did not satisfy Hasluck and Slim. They disagreed with Gore's differentiation between the offenders, so they did not follow the judge's recommendation as was usual. Executive Council, in an unusual piece of executive activism, equalised the punishments at ten years, increasing Sunambus' punishment from eight to ten years with hard labour.

A minute from Hasluck rejected Gore's reasoning: "The youth and lack of sophistication of the offender may be sufficient reason for commutation, but are insufficient reason for reducing his [Sunambus's] punishment below a sentence of ten years imprisonment."[80] Further, the minute asserted that Gore had not addressed the Governor-General's questions about lack of provocation and the barbarity of Sunambus's crime.[81] Hasluck found reasons to bend conventional arrangements, but also pursue his own convictions, which in this case aligned with the Governor-General's. While Slim

[75] Frederick Cooper and Ann L. Stoler, "Introduction Tensions of Empire: Colonial Control and Visions of Rule" *American Ethnologist*, vol. 16, no. 4, 1989. p. 616.
[76] Douglas and Finnane, *Indigenous Crime and Settler Law*, p. 8.
[77] Hasluck, *A Time for Building*, p. 176.
[78] Hasluck, *A Time for Building*. P. 176.
[79] "Amok Native Gets Death Sentence", *South Pacific Post*, 16 May 1956, p. 5. Amok here means crazy rather than the Nuiginian place name.
[80] Paul Hasluck to His Honour the Acting Administrator, Re: Sunambus and Ako Ove – Sentence of Death, 1 August 1956, *Commutation of Sentences on Natives in Papua New Guinea,* NAA: A518, CQ840/1/3/PART 2, 434881
[81] Hasluck to Acting Administrator, 1 August 1956.

wanted greater severity, Hasluck wanted greater consistency. He had concluded that the judges placed too much weight upon their own interpretations of Nuiginian culture in making decisions, which he saw as not necessarily with a rule of law that could progress towards advancement and autonomy.

Hasluck thus proposed a compromise between Slim's severity and Gore's determination. He used his authority as Minister of Territories to advise Executive that both men should receive ten years with hard labour.[82] Executive Council made the decision to equalise punishment at ten years each. The Executive Council was guided by Hasluck's advice, but Hasluck had also listened to the views of the Governor-General in recommending sentences more acceptable to Slim's sense of justice. This level of negotiation was either unprecedented, or previously undocumented.

The divergence between Canberra's and Port Moresby's perceptions of the crimes is possibly a product of their different experiences. And indeed to the sense of retribution or proportionality of a metropolitan politician or public servant such as Lambert or Hasluck, a deadly pursuit of a witness to rape through the jungles of Bougainville likely would be thought more harrowing than a suburban, kitchen murder. One might then assume that to an expatriate colonial official, the jungle was less terrifying and the possibilities of murderous events between Nuiginians were taken more philosophically; after all, such officials had been quite forgiving of the Telefomin killers in allowing that they should live despite the conspiracy to kill their colleagues and friends. In fact the harsher sentence for Ako-Ove shows it was the home that they feared for, that Mrs. Wyatt feared for, that Mrs. Jewell feared for, that Gore feared for, in his relatively harsh sentences for Kita Tunguan and Ako-Ove. Their oasis from the jungle needed to be inviolate. Thus they were inclined to demand harsher punishments for men like Ako-Ove who endangered the security of white families. This does not seem to be entirely in keeping with the aims of post-war colonialism for advancement and uniform development, and thus was altered by Hasluck, but not with a hanging as Slim's brand of old colonialism preferred.

Nevertheless, these discussions over these two cases resulted in a new understanding amongst Executive Council members about the limits of their role in regards to mercy. The Executive Council was empowered to review capital cases, but the Executive Council was required by custom to depend upon the advice of the Minister and Judge. Now the Governor-General had contrived a larger role for his own judgements, and his sense of suitable punishment was not based on the same ideas as Hasluck, and nor was it consistent with Gore's use of the Murray System.[83]

[82] Hasluck to Acting Administrator, 1 August 1956.
[83] "Slim's Code was Based on 'duty and discipline"; Tyrrell interview, p. 48.

The question might be asked as to whether Slim and Hasluck's intervention was inappropriate, or contrary to the principles of discretionary justice. Legal scholarship of the time supported specific discussion and negotiations by those with responsibility for making decisions about clemency. This was juxtaposed against the practice of automatic commutation. For example, Peter Brett, an eminent and respected Anglo-Australian scholar at the University of Melbourne, wrote a 1957 article for the *Modern Law Review* critiquing automatic commutation.[84] In this article, he argued in favour of active discretionary negotiations of penalties within the Executive Council, rather than the practice of automatic clemency; which Brett felt was an inappropriate, de-facto change in law.[85] Brett analysed the history of Labor Prime Ministers and Premiers commuting all death sentences as a matter of conscience and belief, rather than considering the particulars of each case.[86] Brett reasoned that if capital punishment was to end, it should be done legislatively and not through discretionary practice alone. He objected to the apparent subversion of the will of the citizenry as expressed through the existing legislation and the failure to properly consider the case of each condemned person. Brett recommended vigorous debate over an appropriate penalty, with deference to the judicial decision, rather than discretion being completely repressed by a misuse of the royal prerogative. The more extensive than usual debate over Sunambus and Ako-Ove was certainly in keeping with Brett's ideas and suggests that the intervention of the Executive was not inappropriate, but rather it was robustly democratic. Nevertheless, it was unusual for PNG.

The divergence of views on the relative severity of crimes and the appropriate way to encompass Nuiginian cultural diversity in sentencing and punishment indicates a tension between conservative, liberal and old colonial interpretations of colonial law enforcement. And it was the negotiation between these points of view, within the parameters of conventions that resulted in the final punishment for Sunambus and Ako-Ove. Slim had conservative ideas about how colonies should be run and this involved hanging and deterrence. As Slim wrote to Hasluck "I realise- having had experience in these matters."[87] Slim's position was that "bastards" like Sunambus should be hanged. He rejected the mitigating factors of cultural misapprehension, the sort of mitigating factors PNG judicial culture encouraged judges to consider. Australia's policy of advancement and trusteeship, argued for by Hasluck, called for liberality, but in treating people equally, in practice, it called for

[84] Louis Waller, "Brett, Peter (1918-1975), *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/brett-peter-9577, published in hardcopy 1993, Accessed 15-6-14.
[85] Peter Brett, "Conditional Pardons and the Commutation of Death Sentences", *The Modern Law Review*, vol. 20, no. 2, 1957, pp. 131-147.
[86] Barry Jones 'The Decline and Fall of the Death Penalty in the English Speaking World", in Barry Jones (ed.) *The Penalty is Death; Capital Punishment in the Twentieth Century,* Sun Books, Melbourne, 1968.
[87] Sir William Slim to Executive Council, 15 June 1956.

sterner punishments. In this case then Slim's pre-war colonialism and Hasluck's liberal desire for more equal treatment did lead to Sunambus receiving a harsher punishment than he might have otherwise. However, once the judge had recorded a sentence of death, rather than pronouncing, it could not be overridden. The convention was inflexible. If a judge pronounced a sentence of death, the condemned might hang, but a recorded sentence of death could not result in death, whatever the Governor-General wanted.

**Conclusion**

Under Sir William Slim, the role of the Governor-General in the capital case reviews was more than a disinterested nod. His commanding nature led him to make firm judgements about the cases he was reviewing and in some cases demand changes that suited his conservative view of law enforcement and justice. He learned to use the process and change the advice he was given, which allowed him to then more agreeably enact the royal prerogative of mercy. He was able to express his more conservative approach to colonial control through harsher punishments for offenders; in this case Sunambus, and after this case he intended to do so again.[88]

Slim's intervention found a partner in Paul Hasluck who was increasingly uncertain about the quality and impartiality of the justice system in PNG, while still wishing to respect the role and expertise of judges. Hasluck found the exercise of justice too entangled with administration and wished for a more independent legal system exercised in a uniform manner across the territories. He wished for colour-blind liberality, rather than permissiveness, idiosyncrasy, and conversations between mates: jabber. As Cooper and Stoler suggest of other post-war colonies, he wanted advancement, development, and he wanted the legal system to pursue it.[89] In these two cases, these questions came into play in the clemency considerations.

The cases of Ako-Ove and Sunambus were then watershed cases in the PNG capital case reviews with William Slim and Paul Hasluck demanding different outcomes from that proposed by the PNG Supreme Court. Hasluck felt that a liberal, equalitarian model of justice to be better for Australia's developmental goals and therefore Australia's reputation than an individualised system that depended on paternalistic and racist judgements about the nature of the colonised. As Wiener argued of post-war colonialism, Hasluck had to walk the walk of the modern colonial power.[90] While previously the Department of Territories and the Executive had leaned heavily on the advice from the colony, as

[88] Sir William Slim o the Honourable P. Hasluck M.P., 5 December 1957, *Capital punishment [Territory of Papua and New Guinea,]* NAA: M331, 8, 511120.
[89] Cooper and Stoler, "Introduction: Tensions of Empire: Colonial Control and Visions of Rule" p. 616.
[90] Wiener, *An Empire on Trial*, p. 230.

they did for the Telefomin cases, Kita Tunguan and Usamando, in these two cases they showed a greater confidence in engaging with the substantive reasoning and exercise of sentencing discretion in the cases and challenged the expert status of the colonial officials. They were attempting to impose their new direction for capital punishment and clemency on B4s, on its most experienced old hands, judges such as Ralph Gore.

# Chapter 6 "We do not think this is a sufficient deterrent": R. v Aro of Rupamanda, 1957

Figure 6-1 Local People by the new Markham River Bridge, "Papua New Guinea", 1957.[1]

> *We have seen people receive a sentence of yours for killing and they come back, at its expiration, well fed and able to speak pidgin, and we do not think this is a sufficient deterrent.*[2]

Governor-General Sir William Slim believed strongly in the educative and deterrent effect of the death sentence in the wider community and used Aro of Rupamanda's case to extend his views of justice to Aro's region. This was possible in 1957 because Slim, and Paul Hasluck had actively exercised their power in the previous years. Further, Hasluck in particular had become increasingly concerned about leniency stemming from racism, however benevolently intended, in the sentencing practices of the judges of the Supreme Court in PNG. Thus, Slim and Hasluck welcomed Justice Bignold responding to Executive prompting for harsher sentences by pronouncing a sentence of death on Aro, which allowed his execution.

Should clemency or execution, or both, be considered paternalistic and oppressive? Martin Wiener

[1] Local People by the new Markham River Bridge, Papua New Guinea, 1957, NAA: B6295, 1, 30905872.
[2] Kerapim quoted in E.B. Bignold letter, E.B. Bignold J. to His Honour the Administrator, re: The Queen v Aro, 2-9-57, *Submission No. 882- Territory of Papua and New Guinea – Sentence of Death on Native Aro, Territory of Papua and New Guinea- Sentence of Death on native Aro, Decision 1035,* NAA: A4926, 882, 4361268.

highlights the tensions between the projects of metropolitan officials, colonial administrators and settlers within a colony, and the tensions between colonial rule and ostensible preparations for "civilization", autonomy and independence, in the post-war period.[3] In PNG too, paternalism was a part of liberal post-war colonialism, with its goals to "advance" PNG through the UN Trusteeship; to inculcate Nuiginians body, mind and soul with western modernity—"civilization". Wiener's observation of the nature of colonialism hold true in in PNG as well that:

> Throughout the nineteenth and twentieth centuries, most officials saw most of the peoples they ruled over as simply less advanced in the universal march of civilization, a march led by themselves. Full 'civilization' was, in the view of most them, attainable by virtually all subjects, in the fullness of times.[4]

Adding to Wiener's observations, Peter Gibbon argues, the paternalism inherent to trusteeship and colonialism was tolerable to liberals only because it was temporary, even if the end date was unclear.[5] Indeed, the killing of wives, decried by Australian officials as not in keeping with people on a forward march into civilisation, was a particular justice issue that Slim and Administration officials wanted to deter with strong penalties, a response local people supported. Yet even in pursuing an apparent good there was a colonial power play, as in highlighting their work to prevent the killing of women they employed a classic trope of savagery that, as Regis Tove Stella argued, further justified the colonial presence.[6] Decrying Aro's killing of two innocent women was a particularly powerful and gendered representation of the savage other; killers of women that needed the colonial project to control them. Execution in this case would, in Slim's mind, assist the community to advance morally and politically. As with Usamando, Aro was not the kind of man, or embodiment of masculinity, they wanted for the new country they claimed to be building.

In 1957, the problem for Australian officials was determining at what point on the "march", as Wiener termed it, Nuiginians were, and that placement was the meat of much discussion in the capital case review file for *R. v Aro of Rupamanda, 1957*. What the clemency files usually called a lack of sophistication, a mitigating factor in granting mercy, had to be interpreted differently in this case as it was seen to show Nuiginians using Australian justice selectively.[7] While many studies have shown that a synthesis of local systems and imported law was common in colonial settings, this case,

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[3] Martin Wiener, *Empire on Trial; Race, Murder, and Justice Under British Rule*, *1870-1935*, Cambridge University Press, New York, 2009, pp. 231-233.
[4] Wiener, *An Empire on Trial*, p. 231.
[5] Peter Gibbon, Benoit Daviron and Stephanie Barral, "Lineages of Paternalism: An Introduction" *Journal of Agrarian Change,* vol. 14, no. 2, 2014, pp. 165-189.
[6] See Regis Tove Stella, *Imagining the Other; The Representation of the Papua New Guinean Subject*, University of Hawaii Press, Honolulu, 2007, p. 139.
[7] John Greenwell, *The Introduction of Western Law into Papua New Guinea*, Unpublished Manuscript given to author by former First Assistant Secretary Director of Papua New Guinea Office Government and Legal Affairs Division John Greenwell, 1970-1975.

unlike others in the study, provides clear evidence for the nature of Nuiginians' synthesis of Australian and their own practices in this region of PNG in 1957.[8] The difficulties of interpreting Aro's idiosyncratic embrace of the rule of law led to different interpretations on the measure of sophistication and civilization of Aro and his community. Nevertheless, Slim and the Executive Council overruled Donald Cleland's suspicions that the embrace of Western rule of law in Wabag and Rupamanda was insubstantial. They preferred a strong deterrent message to make clear the limits of "civilization" and Australian justice for a community that had produced an individual who had tried to game the system.

This case also highlights Hasluck and his Department's increasing mistrust of the Supreme Court and policing systems in 1957, suspicions that compounded their preexisting suspicions of the B4s and the old colonial Murray system. The reliability of the arrests and investigations undertaken in PNG came under question as a series of scandals shook the institutions of law enforcement. Cleland also recommended mercy for Aro because he also was shaken and uncertain about policing and the courts. While Hasluck recognized that there were administrative problems in PNG at that time and tended to mercy, Slim and the Executive Council rejected the advice to commute Aro's sentence of death as a message of deterrence and racially blind justice.

Nineteen-fifty seven was the year of the last hanging in colonial PNG, as the courts' punishment standards moved away from the death penalty, edging towards legislation to end the mandatory sentence of death in 1964.[9] As Aro was the last person to be hanged by Australian authorities, this case provides a description of the limits of mercy, and the nature of the messages intended to be sent by such punishment. The case helps to describe both the evolving moral imperative Australia felt and the shifting policy demands of maintaining a legitimate, and strategic, hold on PNG across the period of this thesis.

**"He is what we call a rubbish man": The Killings and the Trial**

> *He is what we call a rubbish man… So far as I am aware Tipiwan and Ruai were hardworking women and faithful to the defendant.*[10]

[8] See for example: Manuela Lavinas Picq, "Between the Dock and a Hard Place: Hazards and Opportunities of Legal Pluralism for Indigenous Women in Ecuador", *Latin American Politics and Society*, vol. 54, no. 2, Summer, 2012, pp. 1-33, pp. 6-7; Robert Cribb, "Legal Pluralism and Criminal Law in the Dutch Colonial Order", *Indonesia*, no. 90, Trans-Regional Indonesia over One Thousand Years, October 2010, pp. 47-66; Sally Engle Merry, "Legal Pluralism", *Law & Society Review*, vol. 22, no. 5, 1988, pp. 869-896, pp. 873.

[9] The end of mandatory sentencing is analysed in the next chapter.

[10] Tul-tul- deputy to the Australian appointed leader/liaison of the village. Testimony- Lipi of Rupamanda, Tul-Tul of Rupamanda, *The Queen v Aro of Rupamanda, Wabag Criminal Sittings 6/8/57, Trial Transcript, (First Indictment*, Murder of Tipiwan), p. 1, in *Submission No. 882- Territory of Papua and New Guinea – Sentence of Death on Native Aro.*

Aro had lived all his life in the neighborhood of Wabag in the Highlands village of Rupamanda.[11] Wabag was a sub-district headquarters with a mission, a native hospital, primary school, airfield and calaboose, or police gaol cells.[12] While Aro was too old to have attended the school and the mission, his adult life had been spent under Australian law, like Usamando he was poised between two worlds, as Albert Maori Kiki put it, "ten thousand years in a lifetime". [13]

Due to a spear injury suffered in his youth, he was largely unemployed and lived off the labour of his two wives, Tipiwan and Ruai, as well as the sustenance derived from his family grouping. He had little property other than a hut in the 'garden', a small farm, and a 'woman's house', a separate house for women, a custom of his people. Evidently his community regarded his claims of incapacity with some suspicion: the villagers saw him as indolent. Similar to Usamando, he was not successful by the terms of either local or Australian standards. In contrast, the big men of his village regarded his wives positively as the Tul-tul Lipi told the court: "He is what we call a rubbish man… So far as I am aware Tipiwan and Ruai were hardworking women and faithful to the defendant."[14] Tipiwan had borne a daughter three months before the murders and Ruai had two children by him, Preak, aged 4 and Pusi aged, 6.

According to the testimony adduced to the court, Aro was suspicious and litigious in regard to his wives. He suspected the villagers and Tipiwan and Ruai, and their families, were conspiring to cheat him. Aro had suspected Tipiwan of adultery early in their marriage. Adultery was an offence under the Native Ordinances.[15] Tipiwan had eventually allayed these suspicions and worked hard in the garden and at child-raising, but in the months prior to her murder, Aro's suspicions had returned.[16] He had also taken Ruai to court the week before her murder, accusing her of adultery.[17] The action

[11] Unusually for this period, there is a full typed transcript of the trial available in addition to the usual summaries and judgment by the judge and other officials.
[12] D. M. Cleland, letter, D.M. Cleland to the Secretary, re: The Queen v Aro, 17-9-57, Cabinet Minute, Canberra 15th October 1957, Decision No. 1035, *Submission No. 882- Territory of Papua and New Guinea – Sentence of Death on Native Aro, Territory of Papua and New Guinea- Sentence of Death on native Aro- Decision 1035,* NAA: A4926, 882, 4361268.
[13] Albert Maori Kiki, *Kiki, ten thousand years in a lifetime; a New Guinea autobiography,* Cheshire Melbourne, Canberra, 1968.
[14] Tul-tul- deputy to the Australian appointed leader/liaison of the village. Testimony- Lipi of Rupamanda, p. 10,
[15] "Native Regulation Ordinance, 1908-1930- Native Regulations 1939, (Papua), Section 84., Laws of the Territory of Papua 1888-1945, PACLII, http://www.paclii.org/pg/legis/papua_annotated/nro19081930nr1939446/
[16] Statement of Defendant, Aro of Rupamanda, 10-4-57, in *Submission No. 882- Territory of Papua and New Guinea – Sentence of Death on Native Aro*; Testimony of Aro, in The Queen v Aro of Rupamanda, Trial Transcript (Second Indictment Murder of Ruai), pp. 7-8, in *Submission No. 882- Territory of Papua and New Guinea – Sentence of Death on Native Aro*
[17] Adultery was an offence under the Native Regulations and was heard by the District Officer, the leading Australia administrative official within the area designated as a district, in the Court of native affairs that dealt with issues pertaining to village life such as adultery, sorcery and theft: See Greenwell, *The Introduction of Western Law into Papua New Guinea*, p. 20.

did not succeed, which made him angry.[18] He then attempted reconciliation with Tipiwan by offering a pig, but this upset Ruai who threatened him with court action for giving away the pig. He also testified that he was angry that they thought that, just because the Europeans were near, he could not hurt them.[19] At the same time as rejecting the idea that Australian law could protect his wives, he had tried to use those same courts to protect his own honor and prerogatives. At the time of his capital case review, this selective use of Australia law made it unclear if he was embracing only those aspects of Australian colonialism that he thought would benefit him, or if he had understood its fundamental principles to the extent required for execution instead of clemency. Nevertheless, that apparent hypocrisy evidently marked him as a man of poor character in the minds of both groups, his Tul-tul Lipi of Rupamanda, and Anglo-Saxon gentlemen like Slim.

On 10 April 1957, Tipiwan, Ruai and Aro sat with their children in the garden hut. Ruai made up a little song about Aro always wanting to 'make Court' and that his father had probably been the same. As the song caused such a reaction, it would seem the Ruai implied in the song that Aro was the child of adultery, as accusations of adultery were taken to court. Tipiwan joined in and sang with her. In his testimony, Aro said that he warned them: "Are you trying to make me angry?" They continued to sing and Aro shouted: "I didn't buy you so that should misbehave all the time. You two are humbugging. I will teach you not to."[20]

He took up his axe and attacked his two wives in the midst of their children. It took repeated blows about the head and abdomen with his axe to kill the women. Tipiwan's fingers were severed as she sought to protect herself. Ruai's abdomen was torn open by the blows.[21]

Aro then gathered up his children and took them to his relative, Piagon, who was employed at the local Hospital. He told him: "I have killed my wives" and asked his relative to care for the children.[22] He then hurried up the track to the Sub-district headquarters office and confessed. He was taken into the security of Australian custody, in which he was safe from revenge attacks. This decision seemed to Administration officials and the Executive to indicate that he expected to survive under Australian

[18] Allocutus of Aro, The Queen v Aro of Rupamanda, Trial Transcript (Second Indictment Murder of Ruai), pp. 9-10. *Submission No. 882- Territory of Papua and New Guinea – Sentence of Death on Native Aro.*
[19] Allocutus of Aro, pp. 9-10.
[20] Crown Prosecutor J Smith, Prosecution Opening, The Queen v Aro of Rupamanda, Wabag Criminal Sittings 6/8/57, Trial Transcript, (First Indictment, Murder of Tipiwan), p. 1, in *Submission No. 882- Territory of Papua and New Guinea – Sentence of Death on Native Aro.*
[21] Testimony- John William Jensen, Senior Medical Assistant in Wabag and Tagaboi, Wabag Interpreter, The Queen v Aro of Rupamanda, Wabag Criminal Sittings 6/8/57, Trial Transcript(First Indictment, Murder of Tipiwan), pp. 6-8. in *Submission No. 882- Territory of Papua and New Guinea – Sentence of Death on Native Aro.*
[22] Testimony-Piagon, The Queen v Aro of Rupamanda, Wabag Criminal Sittings 6/8/57, Trial Transcript (First Indictment, Murder of Tipiwan), p. 2. in *Submission No. 882- Territory of Papua and New Guinea – Sentence of Death on Native Aro.*

justice, but that he knew he would not have survived a community-based vendetta. He was arraigned in the lower court where he again confessed to the murders.[23]

In the Supreme Court sitting at Wabag, the murders were heard as two separate indictments: Tipiwan's murder first and then Ruai's. The Crown Prosecutor J. Greville Smith, later to become the PNG Secretary for Law, planned this separation to ensure at least one successful case.[24] In the court transcript the prosecutor cited the Australian High Court judgement in *R. v. Packett, [1937]* HCA 53; (1937) 58 CLR 190 (3 September 1937), which suggests that he feared that Aro might have had his liability mitigated to manslaughter on the basis of a loss of control due to provocation in one if not both of the counts, and further that such cases should be heard separately so that facts of one did not contaminate the facts of the other.[25] Further, the failures of due process in the courts in PNG that had occurred in 1957 may well have made the prosecutor wary of procedural and technical disqualifications of the charges.[26] The prosecution was apparently intent on punishing a brutal crime.

Mr. Justice Esme Bignold, the presiding judge, agreed to two separate trials. He had a family background in colonial law. His grandfather had been a judge in Calcutta and his father Harold Baron Bignold a writer, lyricist, barrister, editor and legal scholar in NSW before and after federation.[27] Esme Bignold practiced as a barrister in NSW from the 1920s in chambers with his father. In 1930 he had moved to Papua to be Crown Law Officer.[28] He enlisted in the Royal Australian Air Force in 1939 and served until 1948, then returned to the law in PNG.[29] Bignold had broad experience in PNG and was well regarded by his fellow judges, although his poor health meant that he did not travel the circuit very often.[30]

Pronouncing Aro guilty of the willful murder of both women, Bignold stated that: "I am sorry to say that there seemed to me to be no mitigating circumstances." He dismissed adultery as a mitigating provocation in the murders by citing Aro's long history of suspecting adultery as suggestive of

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[23] E.B. Bignold, J. to His Honour the Administrator, The Queen v Aro of Rupamanda, 13 Sept 1957, *Submission No. 882- Territory of Papua and New Guinea – Sentence of Death on Native Aro.*
[24] Bignold to the Administrator, 13-9-57.
[25] *R. v. Packett, [1937]* HCA 53; (1937) 58 CLR 190 (3 September 1937), High Court of Australia, *AUSTLII*, http://classic.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1937/53.html?stem=0&synonyms=0&query=%20Packett,%201937 ; Mr. Justice Barry, "The Defence of Provocation", *Res Judicatea*, University of Melbourne, No. 35, 1950. http://www.austlii.edu.au/au/journals/ResJud/1950/35.pdf
[26] Those mistakes and problems of the justice system are laid out later in the chapter, pp. 192-196.
[27] "Bignold, Hugh Baron", *Australian Dictionary of Biography*, http://adb.anu.edu.au/biography/bignold-hugh-baron-5234, Accessed 10-1-13
[28] Alfred James Kent, "Bignold, Esme Baron", *NSW Law Almanac 1924*, Government Printer, Sydney, *NSW Law Almanac 1930*, Alfred James Kent *ISO,* Government Printer, Sydney, p. 75; *NSW Law Almanac 1944*, N.S.W. Attorney-General's Department, Government Printer, Sydney, 1944, p. 70.
[29] Bignold, Esme Baron: Service Number-139813*,* Service Personnel file, NAA, A9300, Bignold E B, 5372360
[30] R.T. Gore, *Justice versus Sorcery*, Jacaranda Press, Brisbane, 1965 p. 203.

premeditation. He also pointed out that Aro having immediately reported his own crimes "appears to show to me that he well knew that his acts were unlawful."[31] Unusually for his sentencing record, Bignold pronounced the sentence of death on both indictments, seeming to find the crimes more than usually abhorrent. In recommending that the sentence be carried out in the capital case review submission, Bignold saw the crime as inexcusable willful murder, and he also took into account the desire of local people for Aro's death.[32] Unusually, he made no alternate recommendation for a term of imprisonment, which underlined his pronounced sentence of death.

As the capital review process moved to the Administrator, Donald Cleland recommended clemency with the relatively severe sentence of twelve years with hard labour.[33] Cleland argued that while Aro seemed to know what the law was, he asserted that the people of the Wabag area were primitive and the effect of a hanging on the area could not be predicted, and also might lead to the "framing of those who [local] people wanted put out of the way."[34] He also "found it difficult" to differentiate this crime from others of a similar type that had resulted in clemency, thus raising a justice question about consistency of punishment.[35] Unconvinced that an execution would further the administrative project of modernising and folding people into a community policed by Australian law, he thought imprisonment to be a better vehicle for acculturation.

Hasluck recorded no recommendations under his own signature, but the notes for the Department of Territories Cabinet submission for this capital case review endorsed Cleland's recommendation.[36] The Department "assumed that considerations of native policy other than fit punishment" for Aro motivated Cleland's recommendation.[37] While that was not an enthusiastic endorsement, it emphasised to Slim the tendency of the Administration to avoid heavier punishment, which he saw as risking the proper work of justice and deterrence.

Despite the recommendations of the Administrator and Department of Territories, the Executive Council ordered Aro's execution, for reasons that will be explored in this chapter.[38] While the Council usually followed the recommendation of Territories officials, the precedent of Usamando,

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[31] Bignold to the Administrator;, *Submission No. 882- Territory of Papua and New Guinea – Sentence of Death on Native Aro*.
[32] Bignold to the Administrator.
[33] On relative leniency, see Figure 6-5 in this chapter, p. 226.
[34] D.M. Cleland, letter, the Administrator to the Secretary, Department of Territories, re: The Queen –v- Aro, 17th September, 1957, *Submission No. 882- Territory of Papua and New Guinea – Sentence of Death on Native Aro*.
[35] Cleland to the Secretary, 17th September, 1957; On similar cases see Gore, *Justice versus Sorcery*, Chapter 26- "Wives of the Beautiful Valleys"
[36] Notes of Submission No. 882, Territory of Papua and New Guinea- Sentence of Death of native Aro, *Submission No. 882- Territory of Papua and New Guinea – Sentence of Death on Native Aro*.
[37] Notes of Submission No. 882.
[38] Cabinet Minute, Decision No. 1035, Submission No. 882, Canberra 15 Oct1957, Decision No. 1035, *Submission No. 882- Territory of Papua and New Guinea – Sentence of Death on Native Aro*.

another rubbish man, and the failure to hang Ako-Ove and Sunambus were seemingly being extended in Aro's case. A more assertive position for the Council was being normalized.

Aro was hanged in Lae on the 16 November 1957.[39]

Administration officials local to Wabag and Rupamanda, advocated for a public hanging, or the public return of the body to Wabag and Rupamanda, as they asserted the people would not believe that the hanging had happened otherwise. Cleland did not take their advice, and one of the Patrol Officers who had advocated for the public hanging, Graham Hardy, wrote that some local people did not believe Aro was hanged: some said they saw him walking around instead of punished.[40] Hardy's anecdotes suggest that Slim failed in his purpose in terms of local deterrence. Without the deterrent effect of the hanging, even the supposed legitimation provided through clemency seemed to Hardy and his colleagues to have no impact on the local community. That it was believed by expatriate officials that Nuiginians did not believe the hanging happened might also go some way to explaining why judges rarely resorted to that penalty. In contrast, the favourable Australian and international newspaper coverage of the execution suggests that an external legitimation of Australian colonialism in this case was more successful.

**"The question has caused me considerable concern over the past two or three years": PNG and Australia in 1957**

How can this difference in judgment between Cleland and Canberra be explained? Bignold and Canberra saw that expatriates were concerned about safety, with crime by urbanized Nuiginians perceived as high. There was also a growing belief in Canberra that PNG Supreme Court judges were both too racist and subsequently too lenient in their sentencing and that the Executive Council would have to counterbalance that tendency. Scandals in the courts and policing in 1957 had also eroded Cleland's confidence in PNG courts. In addition, he was concerned that the varying levels of Westernization amongst Nuiginians made judgments about sophistication much more complex. Nuiginians adapting to and using Australian justice for their own purposes compounded this confusion.

**Expatriates, and Commonwealth Officials Held Concerns about Personal Safety, the Rule of Law and the Processes of Justice in PNG**

Australians in PNG in 1957 were concerned that Australian law was not successful in deterring crime. Alarm in the expatriate community over personal security was reported in the *South Pacific*

[39] "Death Penalty Carried Out On N.G. Native", *Canberra Times*, 18 Nov 1957, p. 7.
[40] Graham Hardy, "Murder trial of Aro of Rupamanda: Graham Hardy", *PNG Alumni Association Library*, https://www.pngaa.net/Library/Aro.htm, Accessed 12-3-18.

*Post*, spurred by incidents of unusual attacks on women and several sensational and unsolved murders. The rhetorical use of women's security to demand greater colonial power, also evident in the *Kita Tunguan* decision in 1954, was an ongoing trope that heightened the call for harsher punishments and deterrence.[41] Additionally, several scandals over the legality of police practice and the reliability of the courts compounded expatriates' and the Commonwealth's distrust.

After the *South Pacific Post* reported two assaults on white women during January 1957, Cleland stated that he would investigate the prevalence of such attacks.[42] Subsequent attacks on women saw the paper report claims from an expatriate politician Mr. E. A. James that people were leaving the colony out of a sense of insecurity and that something had to be done.[43] Such reports kept coming, heightening the paper's campaign for more severe punishment.[44] Territories and Hasluck monitored the *SPP*'s agitation; Cleland was well aware of its contents.

Vicious and unsolved murders in Rabaul in 1957 contributed further to the perception of insecurity. Carol Wright and Daniel Ng's bodies were found in dense bush on the outskirts of Rabaul. Wright was the child of a mixed race relationship and Daniel Ng was a son of a well-off Chinese family. Local Tolai people felt so insecure and aggrieved at being suspected of the murders that they initiated a vigilante rampage in February to try to find the killer.[45] In October, just days before Aro was condemned by the Executive Council, the coroner returned a finding of 'murder by person or persons unknown'.[46] This further prompted calls for decisive action against crime among both Nuiginians and expatriates.

This lack of faith in the policing and security of the community was only intensified by other news stories of 1957. At the same time as the Wright/Ng murder was captivating Rabaul, the 1956 conviction of Fredrick Smith for the murder of another Rabaul inter-racial couple, Adele Woo and Leo Wattemena, was overturned by the High Court of Australia on the basis of poor evidence, poor police methods and the nature of the confession extracted from Smith, a young, mixed-race man.[47] This censure of policing in well-staffed and Westernised Rabaul was a shock to all sections of the PNG expatriate community. The High Court essentially accused Rabaul police of victimizing the

[41] "Report Called For: Two More Women attacked" *South Pacific Post*, 9 Jan 1957, p. 1.
[42] "Report Called For: Two More Women attacked" p. 1.
[43] "People leaving the Territory", *South Pacific Post*, Jan 1957, p. 1.
[44] "People leaving Territory" and "Council Backs Judge on Native Attacks", *South Pacific Post*, 16 Jan 1957, p. 1 and p. 11; "Two Servants Gaoled for Sex Offences", *South Pacific Post,* 24 April 1957, p. 5; "Women attacked in Port Moresby", *South Pacific Post*, 24 April 1957, p. 12; "TAC Seeks Protection for Boroko Women", 29 May 1957, p. 13;
[45] "Tolais Seek Murderer", *South Pacific Post*, 13 Feb 1957, p. 1.
[46] "Coroner Ends Inquest on N.B. Murder", *South Pacific Post*, 2 Oct 1957, p. 3.
[47] "Smith Acquitted", *South Pacific Post,* 23 Jan 1957, p. 1.

'half-caste' Smith.[48] The editor of the *South Pacific Post* wrote that this judgement "must give Territory legal authorities and the police misgivings about how the course of justice runs in this country."[49] Cleland was so unsettled by the incapacity of the police to prove their case to an Australian standard that he promised to use scarce funds to purchase scientific instruments and new equipment such as tape recorders and cameras to raise the standard of police investigations and evidence gathering.[50] The Port Moresby Town Advisory Council, an NGO and a group of expatriate residents similarly called for a finger print expert to be hired by the PNG police. [51] Those findings also raised concerns about the independence and capacity of Chief Justice Phillips who heard the case, but he had retired in January 1957.[52] While there obvious concerns about the capacity of the police to conduct enquiries, there was also alarm at the unsolved murders. The *Post* reported that Rabaul shops had completely sold out of guns, demonstrating disquiet in the community.[53]

Adding insult to expatriate disquiet and anxiety about racism to Canberra's concerns, a scandal broke involving Assistant District Officer Anderson, who was accused by a European Medical Assistant, a doctor, of beating and torturing Nuiginians in the process of investigating crimes at his District headquarters. While an investigation by the Law Office led to a recommendation of reprimands and transfers for all involved, once publicity about the accusations reached Australia, the Department of Territories insisted instead on prosecution.[54] Anderson was charged, convicted and sentenced to twenty-one months imprisonment by the new Chief Justice Alan Mann in the PNG Supreme Court and sent to Long Bay Gaol, in Sydney, as the Administration did not imprison white offenders with Nuiginian prisoners. The High Court, on appeal, found the sentence of 21 months for assault and unlawful custody too severe and reduced it considerably to time served, approximately 8 weeks, and the rest on bail.[55] Anderson's case seemed to provide yet another instance of uncertainty, discord and distrust in the legal affairs of the Territory. Rachel Cleland recalled that: "I know how troubled about it all both Don and the Minister were at the time."[56] And mistrust was further intensified by controversies over unreliable translations by court translators, seeking to manipulate the outcomes,

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[48] **"**Smith Released", *South Pacific Post,* 30 Jan 1957, p. 1; **"**Smith v. R. [1957]" HCA 3; (1957) 97 CLR 100 (21 January 1957), http://www5.austlii.edu.au/au/cases/cth/HCA/1957/3.html

[49] "Editorial- The High Court Judgement", *South Pacific Post,* 30 Jan 1957, p. 14

[50] 'Scientific Equipment Promised to Police", *South Pacific Post*, 1 Feb 1957, p. 1.

[51] "Finger-Print Expert Wanted", *South Pacific Post*, 20 Mar 1957, p. 5.

[52] He died of cancer in May of 1957 indicating a probable reason for retirement rather than being dispirited at having his judgment so criticized. Paul J. Quinlivan, "Phillips, Sir Frederick Beaumont (1890–1957)", *Australian Dictionary of Biography*, http://adb.anu.edu.au/biography/phillips-sir-frederick-beaumont-8034

[53] "The Drum", *South Pacific Post, Wednesday,* 30 Jan 1957, p. 1.

[54] Rachel Cleland, *Pathways to Independence*; *Story of official and Family Life in Papua New Guinea from 1951-1975,* Singapore National Printer Ltd, Cottesloe, 1985, p. 202.

[55] "Former Native Affairs Officer Wins Appeal", *Canberra Times*, 13 Dec 1957, p. 3; Cleland, *Pathways to Independence,* pp. 204-5.

[56] Cleland, *Pathways to Independence*, p. 205.

compounded these concerns.[57] These controversies struck at the heart of the reliability of judgments in the Supreme Court.

According to Rachel Cleland, whose memoir *Pathways to Independence* was in many ways a response to Hasluck's and challenged his positive representation of his work, such events "cast long shadows, seriously affecting the respect for the institutions [of the courts and police] … and undermining the confidence, both to the people of Papua New Guinea, and of those responsible for governing them".[58] Many Native Affairs officers, including as patrol officers, feared that their usual ways of managing Nuiginians would lead to prosecution. Indeed most expatriates felt that Anderson was prosecuted on poor evidence and only because Canberra politicians, in particular Hasluck, feared the public reaction to sensationalised reportage. Indicating expatriate rejection of the judgment of the metropolitan authorities, a large fund was raised among expatriates to support Anderson and his wife through the legal process and Anderson was welcomed back to PNG as a private businessman after his release.[59] All of that signaled to Hasluck that his concerns about Raj-like colonialism in PNG, and racism were in fact pervasive features of the B4 and Administration communities. To address these concerns, a Commission of Inquiry into PNG policing followed and public service commissioners travelled about the Territory investigating other areas for the violent enforcement tactics allegedly used in Anderson's district. Again, Cleland recalled "a trail of humiliation, offence and gloominess followed behind it and that 1957 was a "watershed year" in the mutual suspicions of Administration/Canberra relations."[60] She collected stories of senior officials being escorted without notice back to head office where they were made to stand before commissioners and answer "leading" and "loaded" questions without representation.[61] In district offices, wives, servants and staff were questioned in a similar manner. Equally unsettling, findings of the enquiry were never communicated back to the staff.[62] Donald Cleland was left unsure of his staff and their judgment.

Then, on 2 October it was reported that an innocent man had served five years of a twelve-year gaol term because he had conspired with the village Big Man and the court interpreter to plead for another man's murder.[63] Hasluck relates a similar story in his memoirs as a startling and bizarre event that

[57] "Man Discharged: Interpreter Says He Would Falsify Evidence", *South Pacific Post,* 6 Jan 1957, p. 9.
[58] Cleland, *Pathways to Independence*, pp. 200-2.
[59] Cleland, *Pathways to Independence*, p. 205; *South Pacific Post*, 21 Aug 1957, p. 1.
[60] Cleland, *Pathways to Independence*, pp. 200-5.
[61] Cleland, *Pathways to Independence*.
[62] Cleland, *Pathways to Independence*, pp. 205-9
[63] Big Man is the term used in PNG to describe the influential men of the areas. "Prison Inquiry: Native Says He Took Murder Rap", *South Pacific Post*, 2 Oct 1957, pp. 1, 2.

hinted at similar events having occurred before.[64] This was a shock to the community, further reducing confidence.

Evidently, these problems of process had an impact upon Cleland's thinking about the Administration, as in his 1957 address to new recruits to the territory's public service, Cleland pointedly took integrity and trust as his theme. He warned that: "There are however some within the Administration who have been false to the trust."[65] This uncertainty was also reflected in Cleland's submission on clemency in Aro's case, as he carefully drew attention to possible errors in policing and court processes, noted the uncertain reception an execution might have in the area and chose clemency as a safer course.[66]

Hasluck's handling of the case was very different to his position in 1952, when he had been "extremely unwilling to intervene politically in the processes of justice".[67] By 1957, as Hank Nelson observed, the Anderson case seemed to Hasluck just another in a long line of Administrations mistakes.[68] The month before Aro's case came to Canberra, Hasluck had sent Cleland a damming indictment of all areas of his Administration using phrases including: "repeated inability to produce a satisfactory programme"; "continued inability"; "major imperfections"; "a falling off of promptness"; "a failure to correct"; "a slowness in implementing policy".[69] Hasluck's "uncomfortable feelings" of 1952 had grown into dissatisfaction. Thus Territories' lukewarm endorsement of Cleland's recommendation becomes more explicable: the Minister was not satisfied with the advice and information in general, and particularly with the inclination of the Administration to use clemency as a default solution for uncertainty and poor policing.

**Canberra Wants Greater Severity in Sentencing from the PNG Supreme Court Judges**

Even more pointedly, Canberra was at variance with the push of the PNG Supreme Court to exercise even more discretion, and to have a more conclusive role, in determining sentencing. In 1956, the Department of Territories asked Chief Justice Phillips to prepare a report on a proposal from PNG Supreme Court Bench that judges in PNG no longer be constrained by a mandatory sentence of death when a person was found guilty of a capital offence. The bench proposed that judges would be free to sentence with greater discretion and "empower the court to impose such penalty as, having regard

[64] Hasluck, *A Time for Building*, p. 178.
[65] "Mr D. Cleland Addresses New Recruits", *South Pacific Post,* 13 Feb 1957, p. 10.
[66] Cleland to the Secretary, 17 Sept 1957.
[67] Hasluck, *A Time for Building,* p. 182.
[68] Hank Nelson, "Papua New Guinea", in Tom Stannage, Kay Saunders, and Richard Nile, (eds.), *Paul Hasluck in Australian History; Civic Personality and Public Life,* University of Queensland Press Australian Studies, St. Lucia, 1999, p. 154-55.
[69] Nelson, "Papua New Guinea", in Stannage et al, *Paul Hasluck in Australian History* p. 155

to the circumstances of the case, appears to the Court to be just and proper" in sentencing Nuiginians.[70] This was reform that had occurred over time in other colonies and jurisdictions within the British tradition.[71] The judges wanted greater control over sentencing, so that they could deal with local conditions more precisely and speed up the judicial process, with hopes that the Australian processes would then be more comprehensible to local people.

The Attorney-General's Department (AGDs) reviewed these proposals. Subsequently, the Acting Solicitor-General wrote to the acting Secretary of the Department of Territories that: "The proposals raise questions of policy rather than questions of law". He was unsure of conditions in the territory: "My own inclination would be to be much swayed by the considered views of the Chief Justice and the other judges in the matter."[72] However, exposing the worldview of the bench, he also argued that the amendment should apply to both Nuiginians and Europeans in PNG: "it would be an undesirable departure at this stage of development of the territory to make the proposed distinction." [73]

However, Hasluck seemingly did not support the presumption that the PNG legal community knew best. Hasluck's office withdrew the request for advice on this topic and the Minister never officially saw these arguments, presumably because he did not like their conclusions.[74] This effective dismissal of advice that depended heavily on the wisdom and experience of PNG judges indicates that that Hasluck did not trust their wisdom and experience.

Hasluck's also shared his concerns about the leniency and apparent racial disparities in the justice system with Slim. Hasluck and Slim's correspondence referred to conversations in which those concerns were the meat of discussions with Slim over a period of time. For example, expressing this disquiet, Hasluck wrote to Slim in the month after their capital case review that saw Aro executed and discussed their shared concerns about sentencing:

> Will you permit me to express my personal appreciation of your letter of 5th December discussing the problems of the commutation of sentences of death passed by the supreme court of the Territory of Papua and New Guinea? As you will be aware, the question has caused me considerable concern over the past two or three years. In general, I think that the tendency to commute all death sentences to a term of imprisonment—often a very short term—is lessening the deterrent effect of the penalty for

[70] Acting Secretary Attorney-General's Department, J.Q. Evans to The Secretary Department of Territories, re: Territory of Papua and New Guinea; Sentencing of Native Offenders Convicted of Wilful Murder: Pronounced or Recorded Sentence of Death, March, 1957, *Territory of Papua and New Guinea - General question of sentencing of native offenders convicted of wilful murder - pronounced or recorded sentence of death,* NAA, A432, 1956/3371, 7801327.
[71] Andrew Novak, "Capital Sentencing Discretion in Southern Africa: A human Rights perspective on the Doctrine of Extenuating Circumstances in Death Penalty Cases", *African Human Rights Law Journal*, vol. 14, no. 1, 2014, pp. 24-42.
[72] Evans to The Secretary.
[73] Evans to The Secretary.
[74] Hasluck, *A Time for Building,* p. 343-345.

murder.[75]

Hasluck was particularly thinking of discriminatory judgments based on judicial and Administration perceptions Nuiginian sophistication and the apparent tolerance of cruel murders, the practice of judicial decisions taking too much account of Administration policy and violating the separation of powers, and also using clemency as a means of dealing with the suspicion that mistakes in policing and evidence may well have occurred. In the years up to December 1957, Hasluck and Slim had been discussing their preference that the courts to deter crime by being more severe.

In early 1957, Hasluck had a conversation with the new Chief Justice Alan Mann, whom he had appointed from the Victorian bar, asking him to give more emphasis to deterrence, while also being humane.[76] Mann had been appointed specifically as Chief Justice over the head of Ralph Gore because: "I [Hasluck] thought 1956 was about time to make a change."[77] In appointing Mann, then a mere barrister, rather than a PNG judge, despite the obvious superiority of Gore's and others' experience and knowledge of PNG jurisprudence, Hasluck wanted to work towards a new legal culture that pursued deterrence and justice through tougher penalties.[78]

The impact of Hasluck's and Slim's requests to be more stringent and the appointment of Mann had some effect. Figure 6-5, below of average sentencing for willful murder handed down by Phillips, Mann, Gore, Kelly and Bignold reveals that after Mann's arrival and after Hasluck and Slim's discussions, while there were fewer pronounced sentences of death and no executions, periods of incarceration after recording a sentence of death became longer by an average of 1.6 years.

[75] Paul Hasluck, letter, Paul Hasluck, Minister for Territories to His Excellency the Governor-General of Australia, 18-12-57.", Capital Punishment (Territory of Papua New Guinea)", NAA: M331/8, 511120.
[76] Hasluck, *A Time for Building,* pp. 343-345.
[77] Hasluck, *A Time for Building*.
[78] Hasluck, *A Time for Building*, pp. 176-177.

| Average Sentence after Recorded Sentence of Death | Gore | Bignold | Kelly | Phillips | Mann |
|---|---|---|---|---|---|
| 54-57<br>(Life sentences given a value of 25 yrs.) | 7.1<br>(3 life sentences) | 5.01 | 4.36 | 9.36<br>(1 life sentence) | 5 |
| 58-59 | 5.76 | 9.67 | 7.25 | Retired | 8.87 |
| Average Sentence after Pronounced Sentence of Death | 10 (54)<br>(+ one life sentence) | | | | 15 (58) |
| Executions | | 1 (54) | | 1 (57) | |

*Figure 6-2* Tabulation of PNG Supreme Court Judges' Sentencing Records 1954-9)[79]

Soon after Aro was executed, the SPP published an article "Few Executed for Murder", which indicated the sentencing statistics of the judges and sought to emphasise the how rare Aro's execution was against a background of clemency.[80] This celebration of leniency and mercy soon after the execution must be seen in contrast to Slim and Hasluck's concerns about leniency. Canberra and Port Moresby's views were at variance and undermined the confidence of those who determined clemency.

### *R. v. Gaumbu, 1957* and the Executive's determination for Longer Sentences

As well as the appointment of Mann, *R. v Gaumbu, 1957* reveals the manner in which Hasluck and Slim placed pressured the PNG bench to increase the severity of their sentencing, which culminated in Aro's pronounced sentence of death and execution. Just prior to the Executive deliberations on Aro, Ministers also considered the cases of *R. v. Gaumbu, 1957* heard by Justice Andrew Kelly.

In a hamlet close to Mt. Hagan, Gaumbu murdered Kongoba who had resisted fiercely his attempts to rape her. He killed her with repeated blows with his axe to her head and abdomen as she attempted to flee through her doorway. In this case, similar to the innovation to the process Slim introduced in Ako-Ove and Sunambus, Slim and the Executive were unhappy with the recommended sentence they felt bound to approve and instead requested that Donald Cleland and Justice Andrew Kelly reconsider the recommended alternate sentence of 6.5 years to the recorded sentences of death for Gaumbu. They found this killing of a woman during a rape particularly brutal and deserving of execution.

Andrew Kelly had been a PNG judge since 1950 and his sentencing philosophy and his sentencing

[79] I have averaged and retabulated statistics from: PNG Crown Law Office, Tabulation of Sentencing by Judge, 10-7-1959. Folder 8, Box 1, *Gore, R. T. and Quinlivan, Paul J. Papers 1930-1964 [manuscript],* National Library of Australia, MS 2819. And "Few Executed for Murder", *South Pacific Post*, 26 Nov 1957, p. 3.
[80] "Few Executed for Murder", *South Pacific Post*, 26 Nov 1957, p. 3.

average for willful murder of 4.36 years typified Slim and Hasluck's concerns. He was a B4 having been a solicitor and barrister in Rabaul before the Second World War.[81] He wrote to Cleland with his repose to the Executive to explain his choice of sentence for Gaumbu and in doing so, outlined his sentencing philosophy to Slim and Hasluck. Kelly's explanation encapsulated the Murray system and valorized those very notions which Hasluck thought undermined justice:

> My personal approach to sentences on natives is that they should not be severe. Although natives are presumed to know our law, they do not fully understand the implications of our law. Therefore, generally, we should impose sentences as will be corrective rather than punitive. If we adopt the latter course, then I think we fail in achieving the objective of the administration—to convey to the natives that the administration desires to help them, but at the same time to mete out reasonable punishment when the occasion demands, rather than to impose sentences which, in the mind of the native, are excessive, whereon he convinces himself that the Administration is a hard taskmaster, ready to punish him severely when the opportunity arises, rather than educate him, with any necessary corrective punishment, to the stage of complete understanding of the Administrations/s aims and ideals. Perhaps your honour will appreciate my approach to sentences on natives—perhaps lenient—when I say that on very few occasions have I recommended, or imposed sentences over five years.[82]

In regards to *R. v. Gaumbu, 1957*, in particular, having noted that previously all his recommendations had been accepted, he wrote in his response to the Executive that: "Previously, I was under the honest belief that sentences recommended by me were deemed appropriate."[83] Kelly's surprise suggests that fellow expatriates or judges had never challenged his particular ideas about the relationship between sentencing, Administrative control, and the Nuiginian people: it was an accepted wisdom. It suggests that his views were unexceptional and can be generalized to his brother judges.

Nevertheless, Hasluck, Slim and Cleland corresponded on the solution to Slim and Hasluck's dissatisfaction with the sentences they were being asked to approve. Slim and Hasluck gave several criticisms of sentencing practice including; that such a short sentences for the brutal killing of women was unjust and did not deter violence; that it did not consider the need to maintain a sentencing precedent for execution, so that they could execute "a native murderer of a white woman" so that PNG would not be, or appear to be, unjust; and, that not executing Nuiginians even in the

[81] "Brisbane man N. Guinea judge", *Courier-Mail*, 12 Jan 1950, p. 5.
[82] A. Kelly, J. to His Honour the Administrator, re: The Queen –v- Korpil (female), 10th June, 1957, in *Territory of Papua and New Guinea - sentence of death recorded against the native Gaumbu - Decision 889*, NAA: A4926, 754.
[83] Kelly to the Administrator, 10 July 1957.

case of this brutal murder was unjust because it placed to little value on Nuiginian lives in actuality and in the eyes of external audiences.[84]

In the face of Executive activism, Cleland was wary of the possibility of "setting up outside of the judiciary a scale of punishments on an administrative level." [85] More in line with Kelly, Cleland too preferred a: "Corrective punishment rather than a punitive one, unless the sentence recommended is manifestly wrong in all the circumstances of any particular case."[86] Nevertheless, Cleland agreed with Hasluck and Slim and concurred that Gaumbu's crimes were similar to those of others recently condemned to ten years and made the recommendation of ten years that Slim and Hasluck wanted. Ultimately, the Executive Council commuted Gaumbu's recorded sentence of death to one of ten years hard labour.

Slim's activism was resulting in more punitive sentencing for murders. He sent a clear message to the judges in PNG via his demands in the Sunambus and Ako-Ove reviews and most pointedly in his demands during the review of Gaumbu's sentence. Kelly reoriented his sense of appropriate sentencing in response to this correspondence. He noted that his philosophy of sentencing no longer seemed to be acceptable.[87] From 1958 to 1959, Kelly's sentencing average rose to 7.25 years. Similarly, Bignold also increased in average sentencing from 5.1 to 9.67 and the Chief Justice established an average sentence of 8.87. (See Figure 16) However, Gore defied the trend and adhered to his Murray era sentencing philosophy and reduced his average sentence, which was inflated in the period 1954 to 57 at any rate by the mass sentencing of the Telefomin offenders. In 1957, there was a shift in favour longer sentences and a more punitive system and what were intended to be deterrent messages.

**"He well knew that his acts were unlawful": Deciding to Execute Aro**

Hanging Aro was unusual, as so many willful murderers received recorded sentences of death that resulted in commutations. However in 1957, the Executive Council wanted to meet brutality with harsher punishments than had previously been the case. The written submissions to the clemency process, including the Nuiginian leaders of Wabag, the judge, Administrator and Minister, when

[84] Sir William Slim to Minister for Territories, re: Rex v Gaumbu, 16/6.57, in *Territory of Papua and New Guinea - sentence of death recorded against the native Gaumbu - Decision 889*; Paul Hasluck to the Secretary, re: The Queen –v- Gaumbu and the Queen –v- Korpil, 27/5/57, in *Territory of Papua and New Guinea - sentence of death recorded against the native Gaumbu - Decision 889*; D.M. Cleland, letter, D.M. Cleland to The Secretary, Department of Territories, The Queen –v- Gaumbu, 11 July, 1957, in *Territory of Papua and New Guinea - sentence of death recorded against the native Gaumbu - Decision 889*.
[85] Cleland to the Secretary, 11 July 1957.
[86] Cleland to the Secretary.
[87] Kelly to the Administrator, re: The Queen –v- Gaumbu, 10th July, 1957, in *Territory of Papua and New Guinea - sentence of death recorded against the native Gaumbu - Decision 889*.

compared to the historical context of the decision outlined above, provides evidence for why Aro was the last man Australians hanged in PNG. However, the section of the Cabinet notebooks for Aro's case is missing, so the decision to hang Aro must be explained by relating the decision to the particular pressures of 1957, by examining the documents put forward to the clemency review, and by examining the public statements that were reported after the execution.

After sentencing Aro, Justice Bignold was approached by a delegation of eight Luluais, Kibunki, Timun, Kerapim, Kifarin, Kunda, Lui, Neap, and Mabasiun, from the Wabag area. Justice Bignold conveyed the wishes of these luluais that Aro be hanged. Further, the testimony of Aro's tul-tul, the deputy luluai, was condemnatory.[88]

They "wanted it known by the proper authority that they wished the hanging to be at Wabag."[89] Bignold asked them why this was their preference. In reply, the delegation, and Kerapim in particular, argued that:

> If the people see it, it will make then understand more fully that the killing [prevalence of murder] must stop; it will be a lesson to the local people… We have seen people receive a sentence of yours for killing and they come back, at its expiration, well fed and able to speak pidgin, and we do not think this is a sufficient deterrent. The people of Wabag wonder if these persons were ever in gaol, as they disappeared from Wabag and that was all the Wabag people knew about them, except they later returned fat and well.[90]

This desire to make an example of Aro indicates that the people of Wabag had clear ideas about the limits of mercy and that they believed that Australian justice was not a deterrent to crime.[91] Aro was not respected in his community as he relied upon his relatives and members of his 'line', or totemic grouping, for subsistence. In his testimony, Lipi the tul-tul of Rupamanda labeled him a "rubbish man".[92] He was not the kind of man that was wanted by Nuiginians.

John Greenwell argued that prior to the introduction of local government into all areas, luluais: "played a significant dispute settlement role as an adjunct to the District Officer." and as: "the channel of communication between District Officer and indigenes"[93] Indeed, Bignold took note enough of the luluais complaints about Aro and the general preference for more capital punishment that he forwarded a summary to Cleland who passed on those views to Hasluck and Cabinet.

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[88] Luluai and their deputy the Tul-tul were the Administration appointed liaison between the Administration and the village, a sort of headman.
[89] E.B. Bignold J. to His Honour the Administrator, re: The Queen v Aro, 2-9-57, Submission No. 882- Territory of Papua and New Guinea – Sentence of Death on Native Aro, *Territory of Papua and New Guinea- Sentence of Death on Native Aro.*
[90] Bignold to the Administrator, 2 September 1957.
[91] Testimony of Lipi of Rupamanda, p. 10.
[92] Testimony of Lipi of Rupamanda, p. 10.
[93] Greenwell, *The Introduction of Western Law into Papua New Guinea*, p. 20.

The ‘rubbish man’ epithet was repeated in all submissions in the clemency file indicating its influence.[94] However, this local view did not necessarily solve Cleland’s concern that Aro’s community might understand his execution as a form of vengeance.[95] Bignold was, in contrast to Cleland, confident that local people would understand it as just punishment and a deterrent.

Similarly, the judge, Justice Bignold recommended death for Aro by pronouncing the sentence of death. In doing so, he employed the standard criteria for circumstances that could be used to commute death sentences. He analyzed Aro’s level of sophistication and noted that Aro had lived for a considerable amount of time adjacent to the Sub-district headquarters, so the operation of Australian law and order was familiar to him. Further, he gave himself up to the law and confessed. Bignold concluded that these two elements indicated Aro’s clear understanding of the law and his wrongdoing. He also dismissed the defence of provocation, due to adultery inducing uncontrolled rage, because Aro had confessed that he had been thinking about the perceived adultery for some time.[96] Bignold was also concerned about Aro’s strategic use of Australian justice and observed that that the accused “well knew that his acts were unlawful, and… his long residence almost on the station precludes any other conclusion, in my view.”[97] Bignold also read Aro’s immediate confession as an awareness of the danger he was in from the women’s relatives. By contrast, Aro’s lack of fear of Australian justice was of concern: he sought shelter in the presumed leniency of colonial authority. That was just what Hasluck and Slim were afraid of: Aro had not been deterred by the consequences in this premeditated crime.

Bignold pronounced the sentence of death indicating that he thought Aro should be hanged. This was consistent with the punishment for multiple murderers, such as Usamando. The pronouncement was underlined when he made no recommendation for an alternate punishment. However, this was an unusually severe punishment for Bignold who had not in the period since 1954 pronounced a sentence of death, or even recommended a life sentence. In combination with the multiple murder, Slim’s communications with the Administration and Justice Kelly apparently had affected Bignold’s sense of what was an appropriate expiation for the community in the face of a brutal murder. Certainly, from 1958 to 1959 after the execution, Bignold increased the severity of his sentencing to an average of 9.67 years, but did not go so far as to pronounce sentence again.

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[94] Notes on Submission No. 882, 8th October 1957.
[95] Cleland to the Secretary, 17 Sept 1957.
[96] Statement of Defendant, Aro of Rupamanda, 10 April 1957, and Testimony of Aro, The Queen v Aro of Rupamanda, Trial Transcript (Second Indictment Murder of Ruai), pp. 7-8. *Submission No. 882- Territory of Papua and New Guinea – Sentence of Death on Native Aro.*
[97] Bignold to the Administrator, 2 Sept 1957.

Cleland disagreed with Bignold and recommended clemency with the relatively long sentence of twelve years of hard labour. Cleland argued that there had been many cases of husbands killing wives due to suspicions of adultery and none of those killers had been hanged for that crime. Indeed, such killings were common and previously this 'provocation' and more significantly a lack of sophistication, was enough to result in a recorded sentence and then a commutation. He thought that these common, domestic murders left little reason to individualise punishment to the extent of requiring an execution.[98] Further, Cleland thought the community was not sophisticated enough for a hanging and that:

> The Wabag people and those of the sub-district are still in a primitive state and a hanging could have just the opposite effect of leading to a framing of those people wanted put out of the way. If the murders had taken place in an area fully controlled and where there is a degree of sophistication and advancement, the significance of hanging would be appreciated and act as a deterrent.[99]

He did not take the luluai at their word and did not think the local people would understand hanging as a deterrent as opposed to vengeance. He also seems to have had doubts about Aro's confession, as he particularly cited the danger of people being framed in his submission; a danger highlighted by recent scandals in the legal system in PNG. In particular, Cleland had recently discovered a case of a man confessing to murder and being imprisoned to protect the village 'Big Man'.[100] To Cleland, Aro's immediate confessions were indicative of a need for caution. As a 'rubbish man' he would have seemed an ideal 'patsy' for that kind of conspiracy. The legacy of the recent cases of legal malfeasance apparently weighed heavily on Cleland's mind.

Despite contradicting Bignold on precedents and sophistication, Cleland emphasised his uncertainty in this case, as he repeated variations on the phrases: "I find it very difficult to assess…I find it very difficult to differentiate".[101] For Cleland, the finality of capital punishment did not allow for the possible errors in policing, translation and local conspiracies, thus he thought clemency was more just and would bring more order to Wabag.

Hasluck departed from his usually more fulsome summations of the cases for the Cabinet submission and did not provide specific recommendations to Cabinet signed under his own name.[102] However,

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[98] There are many such files held in the NAA. See also Gore *Justice Versus Sorcery*, Ch. 26. See chapter three. On consistency in sentencing see Fiori Rinaldi *Essays in Australian Penology: Penology Monograph No. 7*, Law School-ANU, Canberra, 1976, p. 33.
[99] Cleland to the Secretary, 17 Sept 1957.
[100] *South Pacific Post*, 28 Aug 1957, p. 11; *South Pacific Post*, 2 Oct 1957, p. 1 and 2.
[101] Cleland to the Secretary, 17 Sept 1957.
[102] Paul Hasluck, Submission of Minister for Territories, Confidential for Cabinet, Territory of Papua and New Guinea-Sentence of Death on Native Aro, *Submission No. 882- Territory of Papua and New Guinea – Sentence of Death on Native Aro.*

there is a set of notes introducing the Submission and signed by the Acting Secretary for the Department of Territories.[103] The notes record Hasluck's views in the third person that he endorsed the Administrator's views.

> We see no reason to disagree with the recommendation of the Administrator, and assume that considerations of native policy other than the fit punishment for the particular individual have been the reasons for his recommendation for commutation. There could be no grounds for commutation on extenuating circumstances. [104]

The usual extenuating circumstances would have been primitiveness, or some sort of cultural motivation. Despite noting that there were no "extenuating circumstances", Hasluck endorsed Cleland's recommendation for mercy.[105] Further, Territories concluded that there were recent precedents for commutations of similar cases.[106] It was not a thorough endorsement. Given Hasluck's support of greater severity and a more thorough separation of powers, his support of Cleland's views suggests a similar mistrust of judicial processes, such that he was willing to support Cleland's uncertainty. Indeed, Territories explicitly states that Cleland's reasoning was not about "fit punishment": that the reasons were "administrative." This effectively drew attention both to the recent scandals in the administration of the law.

With two influential officials recommending clemency, the eventual decision to hang Aro is then puzzling. It would seem that the Governor-General and his Executive Council disagreed as Aro was hanged despite the Minister's recommendation. Thus, we must look to the Governor-General to account for this outcome.

**"I think this might be aided by the occasional enforcement of the death penalty": The Governor General's Intervention**

William Slim's determination to hang Sunambus of Puto had failed, yet he succeed in gaining more severe sentences for Sunambus and Gaumbu; and by his activism, longer sentences over the next few years. Thus Aro's pronounced sentence of death fits into this pattern and was the first opportunity to enact his view that capital punishment was needed in PNG to maintain law and order and have both justice done, and seen to have been done. Slim's strengthening of the Executive Council's role in clemency can be seen in particular, as the Administrator and Department of Territories' officials were overruled by the Executive Council to hang Aro. However, as there are no minutes to the discussions of the Executive, the reasons for the Executive decision must be inferred. Slim used the

[103] Signature is illegible, but not Secretary Lambert's.
[104] Notes on Submission no. 882.
[105] Notes on Submission no. 882.
[106] Notes on Submission no. 882; Cabinet Minute, Canberra 15th October 1957, Decision No. 1035, *Submission No. 882- Territory of Papua and New Guinea – Sentence of Death on Native Aro.*

opportunity offered by the unusual and clear statements by the Wabag leadership, which had been reported by Bignold, the careful legal reasoning of the judge, and the clear confession of Aro as opportunities to argue in the Executive for his preferred policy goals for justice and deterrence in PNG.

Slim had been looking for a case in which a hanging could take place to pursue just retribution for the victims, to deter crime and to protect the expatriate community, while also keeping an eye on the reputation of the colony for perceptions of racism. Slim argued that they needed to hang a man for murdering a Nuiginian so hanging for murdering or raping a white woman would not look so unjustly colonial to an anti-colonial audience. This argument shows he was aware of recent criticism. For example, his local paper, the *Canberra Times,* had reported in 1956 on Australia being criticized by the Anti-Slavery Society in London for the unjust imprisonment of New Guineans, the Telefomin killers, in imprisoning them for resisting administration officials, as well as the regular criticisms of Australian in the UNTC.[107] Bignold pronouncing a sentence of death on Aro, despite Cleland's and Hasluck's thoughts on the matter, gave the him a chance to convince the Executive Council to confirm the sentence of death, maintain the death penalty, give a just outcome, and significantly for him also provide for future colonial justice for white victims that would minimize criticisms being leveled at Australia in PNG.

Slim largely focused his particular outrage against clemency in relation to crimes against women. His sense of justice was affected by his understanding of women as deserving particular protection from the justice system, as more vulnerable than men to crime. As such, he also understood crimes against women to be particularly egregious and that men who committed them were more wicked than men who murdered men. Stella argued that such rhetoric in relation to PNG by Australian writers and politicians constructed these men and their cultures as being in particular need of guidance and thus colonisation.[108] Apparently, a society that could not protect its women was a society that needed Anglo-Australian governance and justice, provided it was conducted with suitable attention to the kind of penalties he thought such crimes deserved, death. In executing men for killing women both white and black, Slim was seeking to justify Australian control of what seemed to him to be cultures in need of such moral guidance.

Slim had engaged in frank discussions with Hasluck on the state of PNG and of the state of justice in the territory. It is evident in the references in correspondence that Slim had listened to a range of

[107] "Anti-slavery Body Told Of Cruelty to Aborigines", *Canberra Times*, 13 July 1956, p. 9. (Despite the title it is about PNG)
[108] Stella, *Imagining the Other*, p. 139.

standard objections since he had become engaged in reviewing sentences of death, such as those listed in Justice Kelly's rationale for lenient sentencing. Indicative of his efforts to change Australian policy on capital punishment and clemency in Papua and New Guinea, Slim wrote after the Aro decision on 5 December 1957. Slim referred to discussions that were held during the deliberations as to why the Administration and Territories generally preferred clemency to capital punishment, "such as the difficulty of obtaining accurate facts though unreliable interpreters and the prejudices and ignorance of the people themselves" and dismissed them as problems that should always preclude execution.[109] However, the clemency papers read by and submitted to Slim did not raise the issue of accurate facts, conspiracies and unreliable interpreters.[110] These reasons must, then, have been given during ministerial briefings with Hasluck and also during Executive council deliberations and therefore sketches the extent and scope of the undocumented discussions Hasluck and Slim had on such matters. Further, to justify his views, Slim also cited his experience: "after four years of studying such cases at the Executive council" that he had a good idea of the mistaken direction of PNG justice and of what was an appropriate punishment.[111] It would seem in this case he rejected the usual list of reasons and favored capital punishment in favor of making a definite statement about state retribution and deterrence; and also to allow execution to remain in the state's arsenal to avenge the murder of a white person.

The clear preference of the Wabag people seems also to have played a role in this decision. Indeed, the Luluais indication that deterrence was failing was coherent with Slim's views that more deterrent sentences were required. Rather than paternalistic second-guessing, the Executive Council, or at least William Slim, seems to have taken them at their word. In accepting the Luluais capacity to understand capital punishment, the Executive Council was accepting that the Wabag community was capable of comprehending Australian justice, indicating that they had found Wabag, Rupamanda, and ultimately Aro to be sophisticated enough to hang.

Executing Aro and others like him was a change in policy direction and that was certainly what Slim wanted: "The first step towards law and order in a country like New Guinea is the suppression of violent crimes. I think this might be aided by the occasional enforcement of the death penalty."[112] As Cleland's letter did not strongly argue for a particular position, but rather emphasized the difficulty in reaching a particular position, the effect seems to have been to give space to the Executive Council

[109] Sir William Slim to the honourable P. Hasluck, M.P., 5 Dec 1957, *Capital punishment [Territory of Papua and New Guinea],* NAA: M331, 8, 511120.
[110] Having read many of files this is my own conclusion.
[111] Slim to Hasluck, 5 Dec 1957.
[112] Slim to Hasluck.

to make its own conclusions.[113] With Hasluck providing only qualified support for Cleland in this case, the way was open for the Executive Council's deliberations to determine the justice of hanging Aro of Rupamanda.

In previous case studies fear of international criticism had been used to frame an argument for clemency. Slim turned that argument on its head when he argued that the precedent for execution must be maintained to allow the avenging of white deaths, and thus cultivate international legitimacy through equitable punishment, as opposed to mercy. He argued that the need for law and order would be productive of greater Australian influence and power in the area.[114] Cleland's uncertainty over the reception of capital punishment in Wabag was the closest response to these arguments, but the weakness of the questions he raised held little weight against Slim's certain belief in deterrence and the requests of local people.

**Building Moral Legitimacy: Representations of the Execution**

The representations of the execution of Aro and the representations of official statements on the execution of Aro can be analysed to indicate which ideas about the reasons for executing Aro resonated with the public sufficiently to extend into public discussions. The *Canberra Times (CT)* and the *South Pacific Post (SPP)* reported in detail on the execution, including comments on the official statements on the execution.

The *SPP* led with the fact that a group of Luluais came to witness Aro's execution, and that witness was clearly highlighted in the newspaper. This sort of witnessing of the ritual of execution, Tim Castle, and others such as Daniel A. Cohen and Karen Halttunen, argues, signifies local participation and approval of the ideas and processes of execution; that it confirms moral standards.[115] Understanding the hanging using that conceptualisation, the *SPP* report then confirmed the Nuiginian and expatriate acceptance of Australia's authority and rule of law to its readership. It suggests an acceptance of the moral correction of the community and Aro through hanging.

The *SPP* also reported on Cleland's explanation for why the unusual step of execution was taken. Cleland was paraphrased to explain that Aro was considered sophisticated because he had lived so long on the Wabag Station. In addition, Cleland also spoke to the concerns expatriates had been

[113] Cleland to the Secretary, 17 Sept 1957; Cabinet Minute, 15 Oct 1957, Decision No. 1035, *Submission No. 882- Territory of Papua and New Guinea – Sentence of Death on Native Aro.*
[114] Slim to Hasluck, 5 Dec 1957.
[115] Tim Castle, "Constructing Death: newspaper reports of executions in colonial New South Wales, 1826-1837, *Journal of Australian Colonial History*, vol. 9, 2007; Karen Halttunen, *Murder Most Foul; The Killer and the American Gothic Imagination*, Harvard University Press, Cambridge Mass., 1998; Daniel A Cohen, *Pillars of Salt and Monuments of Grace,* University of Massachusetts Press, Amherst and Boston, 2006.

expressing through the *SPP* after the failures in policing and trial processes in 1957 in emphasizing the decisiveness and sternness of the Administration: "'this is the second hanging in the territory in the last two years.' Mr. Cleland said", Usamando having been hanged in 1955.[116] This stern tone addressed a community anxious about unsolved murders and violence against women. It would seem then that for the *SPP*, the execution was a policy decision aimed primarily at the audiences of Nuiginians and expatriates to address their concerns about law and order.

However, the representation of the execution to a more international community characterized the event differently. The *CT* did not discuss Aro's level of sophistication, his 'place on the march'. The *CT* was content to cite the crime of murdering his two wives. The administrative questions were not highlighted. It would seem then that for a Canberra audience, a double murder was justification enough for an execution. Indeed, in mainland Australia, sane, multiple murderers usually hanged.[117] The *CT* article also noted that few executions had ever been carried out in PNG: "Although many sentences of death have been passed on natives during the post-war period this is only the second occasion the sentence has been carried out."[118] Thus the *CT* article cited issues more useful to defending the just character of Australian justice to the Australian and diplomatic audience of Canberra. The effect of citing the heinous crime and then citing the rarity of execution suggested to the reader that Australian justice was capable of reaching just verdicts appropriate to the situation; that it was working well.

Ultimately, the newspapers in their presentation of the executions found the execution acceptable, but for different reasons. This suggests either journalists selecting material that seemed to them to be of most interest to their audiences, or that Territories' sources in Port Moresby and Canberra gave out differently worded justifications. Either way, it clearly indicates the differing demands being placed upon the discretionary process in PNG. Territories and the PNG administration were walking the narrow path between two different audiences and tailoring the representation of the same phenomena to be both tough on crime, and alternatively, legitimately clement.

The representation of the execution to local people in Wabag is unclear. Yet, it is also further evidence that the clear preference of the Wabag people seems also to have played a role in this decision to execute, as the Administration brought all the Luluais of the Wabag area, as well as the

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[116] "Native Murderer Hanged at Lae" *South Pacific Post*, 20 Nov 1957, p. 1.
[117] See for example- **"**Sodeman v R. [1936] HCA 75; (1936) 55 CLR 192 (2 April 1936)", *Australian Legal Information Institute*, University of Technology Sydney and University of New South Wales, http://www.austlii.edu.au/au/cases/cth/HCA/1936/75.html, Accessed 19-4-13. And George Marshall Irving, "Sodeman, Arnold Karl (1899–1936)", *Australian Dictionary of Biography*, http://adb.anu.edu.au/biography/sodeman-arnold-karl-8574, Accessed, 19-4-13.
[118] "Death Penalty Carried out on N.G. Native", *Canberra Times*, 18 Nov 1957, p. 7.

Mount Hagan area, to Lae to witness the hanging, rather than just Aro's local Luluai and the family members of the victims, as was more usual.

However, there is the suggestion that the message failed to reach its audience in Wabag. Graham Hardy, a patrol officer in the Wabag/Mt Hagen area at the time of the case, wrote of his research into Aro's hanging and its consequences around Wabag for the PNG Association of Australia website. This website is devoted to sharing research and recollections and the sense of community amongst former and current expatriates in PNG. He wrote that the local officials had wanted a public hanging in the district, or the very least a public display of the body in Rupamanda and Wabag. He reported anecdotal evidence that local people did not believe that hanging had happened and argued that wife-murder continued to occur because deterrence had failed due to the disbelief.[119] This shows first that expatriate officials saw hanging as an object and direct lesson in power to deter crime and second that they doubted the capacity of local people to believe in abstractions. Seemingly, they doubted the sophistication of Aro's community. Further, Hardy's anecdotal evidence of the memoir suggests that there was limited success in sending a message to the Nuiginian community.

Of course, public hanging had ended in Australia, and in most places worldwide, in the previous century and it would have been morally courageous to say the least to bring it back in a colonial setting purporting to be advancing the people to embrace a contemporary legal system. Seemingly the Executive had their eyes on a wider audience for this hanging, as despite expert advice about how to communicate with locals, they maintained an international standard.[120] Slim's reference to the possibility of the future need to avenge a white death means that his hanging's audience was equally Australian and international. A man had been hanged for killing Nuiginian women, so now there was now a precedent for hanging a man for killing a white person and the colonial authorities need not be embarrassed by a perception of brutality. As such, it also demonstrates that Executive clemency might communicate different messages to different audiences.

**The Limitations of Severity- *R v. Bok, 1958 and R v. Warira, 1958*.**

In August 1958, Chief Justice Alan Mann pronounced sentences of death in two cases that subsequently came to the attention of the Minister of Territories and Prime Minister when the clemency files arrived together in Canberra. Due to the election, Federal Cabinet was not meeting, so Hasluck and Menzies made the decision to overrule the judge's recommendations for execution and

[119] Graham Hardy, "Murder trial of Aro of Rupamanda: Graham Hardy", *PNG Alumni Association Library*, https://www.pngaa.net/Library/Aro.htm, Accessed 12-3-18.
[120] Hardy, "Murder Trial of Aro of Rupamanda".

commute both sentences to 15 years hard labour.[121] That these men escaped the escalating severity of the clemency process indicates the limits of Slim's influence on punishment that had culminated in Aro's execution. These two cases suggest the limit lay where there was determined opposition from Cleland and also when there was the suggestion of misconduct in the chain of causation of the crimes. Hasluck and the Prime Minister seem to have overruled any commentary the Governor-General may have made to the contrary, as the warrant was signed.

Cleland's extensive exposition in this capital case review file was seemingly pushing back after losing the argument over Aro. Cleland asserted a view quite strongly that the men should not be hanged on the basis that similar wife killing cases had received sentences of between four and fifteen years in prison. He cited a range of similar cases in which the murderers' sentences were commuted. Further, he saw little that was unusually severe or cruel about these cases that might differentiate them from other cases.[122] For example, he argued that unlike Aro, each man had killed one person. Indeed, this was a much more extensive and well-researched submission than the Administrator habitually made under his own pen. His argument centred on sentencing consistency in both cases, which was in marked contrast to his expressed uncertainty in discussing Aro's case. Certainly, Hasluck and Menzies took Cleland's advice, not the Chief Justice's, so evidently it impressed them.

In addition, Cleland pointed out that Bok was from a very primitive area, a type of argument that had long been reason enough to commute sentences. Mann had discussed the case with the Luluai and then had tried to argue that Bok's actions were contrary to local custom and therefore the question of primitiveness was beside the point, as the man would have died under local notions of justice, writing: "The pattern of customs is clear enough and refutes and suggestion that the natives regarded the killing of a wife as a justifiable act."[123] Cleland rejected that line of argument around the crime and focused closely on a primitiveness regarding incomprehension of punishment, arguing that Bok "is really a primitive native with no real contact of any appreciable extent with the administration and its laws."[124] Despite the luluais' reported attitude, Cleland argued it might either suggest that there would be a limited acceptance for the execution of one of their own by foreigners, or following the fear raised throughout the period, that the Luluai actually saw execution as a vendetta. And thus

[121] Allen Brown, Secretary Prime Minister's Department, to the Secretary, Department of Territories, 4 Nov 1958, Cabinet *Submission No. 1442, Territory of Papua and New Guinea- sentence of death on natives Warira and Bok- No decision*, NAA: A4926, 1442.
[122] D.M. Cleland to the Secretary, Department of Territories, The Queen –v- Bok, 9 Sept 1958; D.M. Cleland to the Secretary, Department of Territories, The Queen –v- Warira, 9 Sept 1958, Cabinet *Submission No. 1442, Territory of Papua and New Guinea- sentence of death on natives Warira and Bok- No decision*.
[123] Alan Mann, letter, Alan Mann, C.J. to His Honour the Administrator, The Queen –v- Bok of Munjiga, 26 Aug 1958, Cabinet *Submission No. 1442, Territory of Papua and New Guinea- sentence of death on natives Warira and Bok- No decision*.
[124] Cleland to the Secretary (Bok), 9 Sept 1958; Cleland to the Secretary (Warira), 9 Sept. 1958.

the execution would bring disorder to the barely controlled region. Hasluck pushed the idea that in this particular situation an execution would be misunderstood and be an endorsement of violence and disorder.

In the case of Warira, who had been working for Australians and thus was well immersed in Australian PNG, Cleland acknowledged that a lack of sophistication was not a consideration.[125] Yet despite that, Cleland presented the precedents for imprisonments for this kind of killing, and also repeated the generally accepted notion that Nuiginians, and Nuiginian communities, did not really understand Western executions. In reply, Hasluck, despite agreeing with Slim that harsher punishments for actions "repugnant to humanity" needed to be enacted, agreed with Cleland's recommendations for mercy.[126] In Aro's case, there had been dispute about the local understanding of executions, yet Aro had hanged. However in this case Cleland gave certain rather than qualified advice, which indicates his influence over the Hasluck when such questions were raised.

Perhaps the most telling reason for clemency is consistent with the reasoning in the Telefomin case, it is that in each of these cases there was evidence of Administration misconduct and mistakes. In Bok's case, the Kiap had forced the victim, Bok's wife, to return to her husband in spite of local custom and good sense, both of which would have let them part. Mann reflected that this mistake thrust the two into an unnecessarily charged situation.[127] In Warira's case, the murder was in revenge for the wife's adultery with a Nuiginian Constable who broke the requirements of conduct under which he worked as well as Native Affairs ordinances in carrying out an adulterous affair.[128] In both cases, these errors contributed to the chain of causation that led to the murders. Considering that in the light of the scandals described in this chapter, it seems Hasluck took the safer option of not adding execution to a suggestion of injustice. And indeed Slim was either unable or unwilling to argue for execution under the shadow of that misconduct, or suspicions that the evidence was unsound.

The limits of severity is particularly marked in that even in the case of his own appointee, Mann, Hasluck, was unsure enough of the quality of PNG policing and judicial processes to confirm a sentence of death in case the judge had misjudged the evidence, or not accounted for official misconduct when he pronounced rather than recorded a sentence of death.

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[125] Cleland to the Secretary (Warira), 9 Sept 1958.
[126] On repugnance- Christmas Island- Administration of Justice, *Attorney-General's Department Correspondence Files*, NAA: A432, 1961/2023, 1172557; Application of Law and Justice to Home Island Malays- Cocos (Keeling) Islands, *Department of Territories Correspondence Files*, NAA: A518, BZ800/1/9.
[127] Mann to the Administrator (Bok), 26 Aug 1958.
[128] Native Regulation Ordinance, 1908-1930- Native Regulations 1939, (Papua), Section 84, Laws of the Territory of Papua 1888-1945, PACLII, http://www.paclii.org/pg/legis/papua_annotated/nro19081930nr1939446/ And Cabinet *Submission No. 1442, Territory of Papua and New Guinea- sentence of death on natives Warira and Bok- No decision*.

Indeed, the limits were also indicated in the rejection of advice from the Solicitor-General's office in July 1958. The Department of Territories received advice that the Governor-General Sitting as Executive Council could in fact uphold a record sentence of death and have the offender executed. The file indicates the advice was endorsed by the Solicitor-General and conveyed orally and entered in the Opinion Book Index.[129] Given that the Governor-General did not confirm any recorded sentences despite his expressed preference for doing so, the advice was either not conveyed, not acted upon, or rejected by Territories. Further, given that the advice contradicts the advice given to the Governor-General by the same Solicitor-General, Kenneth Bailey, in 1956, that advice could not have been conveyed to Slim who remained Governor-General for another year. With Hasluck insisting on clemency for Warira and Bok, and despite his apparent sympathy with Slim's punishment goals, it seems that Hasluck was in fact unwilling to over-ride the considered decisions of the judges of the Supreme Court in recording sentences of death, however much he might entertain suspicions of their conduct and leniency; an unwillingness that placed a substantial limit on the possible severity of the PNG Supreme Court and its Executive oversight.

Finally, and speculatively, perhaps executing Nuiginians whose conduct might be the result of official mistakes in the midst of a federal election was not the sort of issue to which the Liberal and Country Party wanted to draw attention. Perhaps five executions in three years strained the qualities of mercy. Hasluck, with all his focus on public diplomacy celebrating Australia's role in PNG, was conscious of projecting an image to Australia and the world, and two executions so soon after Aro, was perhaps not the image he wanted, particularly during a federal election period.

**Conclusion**

The hand of Sir William Slim can be seen clearly in the execution of Aro of Rupamanda. After the legal difficulties of 1957 and what he felt was a mounting law and order problem, he advocated deterrence of crime through the judicious and pointed use of the death penalty. He wished an example to be made as soon as possible. Aro's case fell squarely within this determination to change policy direction. Aro, like Usamando, satisfied the standards of neither world. He was a rubbish man and a man who attempted to bend the law to suit his own needs, yet had not embraced the opportunities offered by colonialism, and neither man was what was wanted by the policies of advancement.

[129] The Assistant Secretary Advisings, Attorney-General's Department, *Criminal Code Amendment Ordinance 1907 (Papua) Section 2 - Criminal Code Amendment Ordinance 1923-1939 (New Guinea) Section 8 - whether 'recorded' sentence of death can be enforced*, Attorney-General's Department, NAA: A432, 1958/3143.

Indeed, the decision to execute Aro, a double homicide, would not have been exceptional in any of the jurisdictions in which capital punishment had been retained. In fact, the contrast between habitual clemency and the smiting of the truly wicked presented a legitimate face for Australian justice and colonial practice in the *Canberra Times.*

Legal scandals had seemingly shaken the resolve of Cleland and indeed his wife Dame Rachel Cleland reported 1957 to be a low point in morale for the Administration. Cleland responded to this tension with uncertainty. Bignold responded to scandal and also to Slim's campaign for severity with unusual harshness in his sentencing of Aro. Cleland's was rather unwilling to hang Aro, but equivocal. Thus, the Executive Council had more opportunity than usual to have an impact on the clemency deliberations and agreed with Bignold, rather than Cleland.

As the *Canberra Times* reported, this was a rare instance of capital punishment, but also a situation in which the diverse audiences to the execution found it acceptable to hang Aro. With the Wabag Luluais seemingly in support, any fears of losing control of the area that Cleland had raised were set aside.

Yet that determination for greater severity also had limits and with more dubious cases, such as Warira and Bok, Hasluck was unwilling to execute still more Nuiginians and expose Australia to accusations of brutality and incompetence. Reinforcing that impression, he was unwilling to accept the advice that would have given Slim free rein to confirm recorded sentences of death, indicating the limits of his demands for greater severity in punishment.

# Chapter 7 The End of Mandatory Sentencing

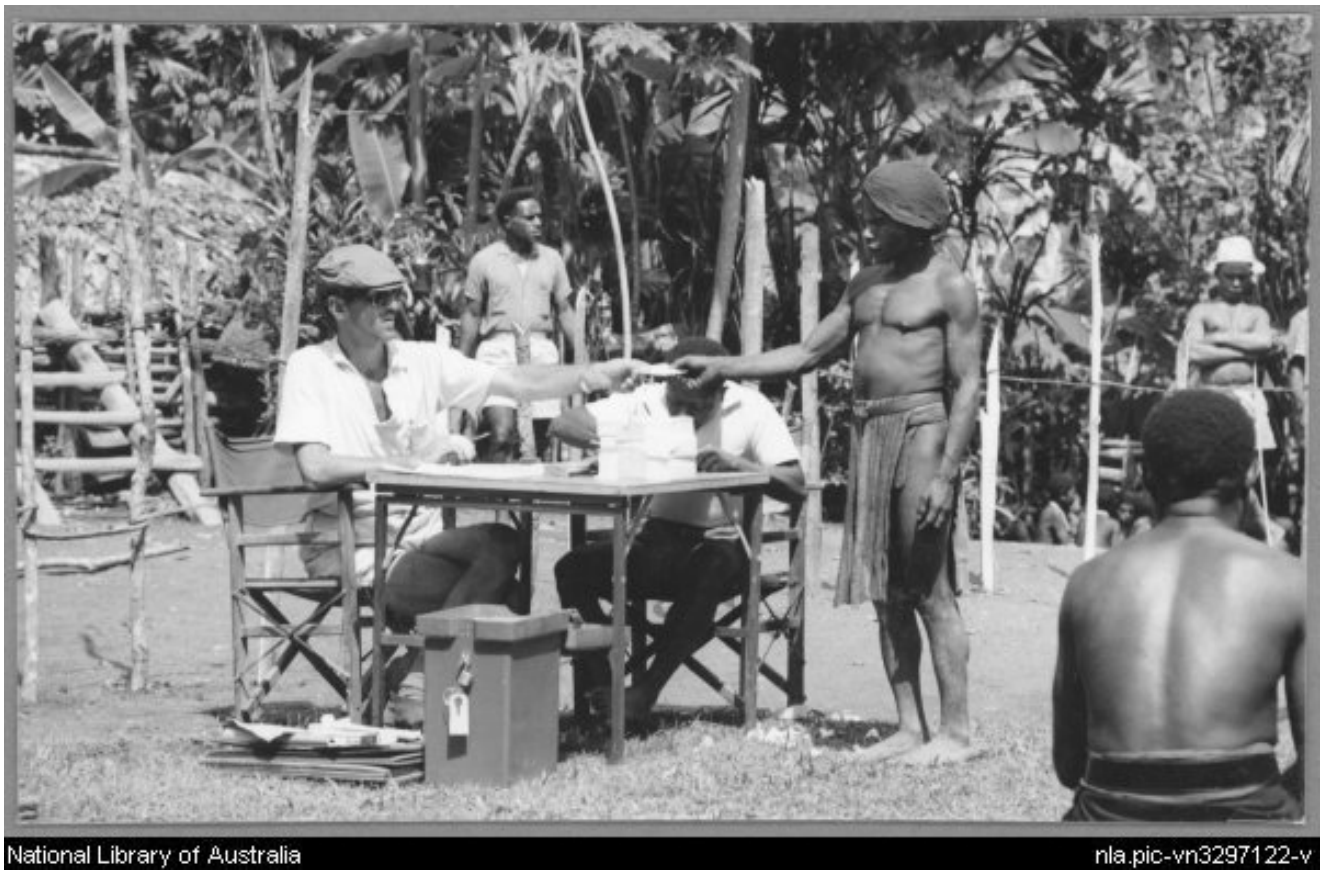


Figure 7-1 "Frederick Carter, Papua New Guinean casting his vote, New Guinea Elections", 1964[1]

In 1965 the PNG House of Assembly, with the approval of the Commonwealth Cabinet, legislated to end the mandatory sentence of death for a finding of wilful murder. It was proposed that the Governor-General would still retain the royal prerogative, but PNG judges could choose what sentences to impose on murderers, rather than being mandated to hand down a sentence of death. The result of that change was that, while capital punishment was not abolished, judges handed down no more sentences of death. This chapter explains why the mandatory regime was ended and why the new punishment regime took the form that it did.

In June 1960, after a visit to the UK, Prime Minister Menzies announced that Australia would go along with Harold McMillan's 'Winds of Change': Australia would move much more quickly

[1] "Frederick Carter, Papua New Guinean casting his vote, New Guinea Elections", 1964, National Library of Australia, nla.pic-vn3297122

towards independence for PNG.[2] As Nelson, Sinclair, Groves, Waiko and Denoon have noted, Menzies' announcement surprised the expatriate and colonialist interests in the territory and Australia, and after that there was an acceleration of devolution of many powers to the territory, yet there was also resistance to that plan and disputes over the pace of that plan.[3] The rationale for the Commonwealth policy on managing capital punishment in PNG was caught up in an accelerated transition to independence.

While some expatriates had thought it would take a century or so, or there would even be statehood within Australia, Nelson noted that: "Criticism by the UN had strengthened the hand of those officials who believed changes must come more quickly."[4] Indeed, Downs placed PNG in 1960 in a global context of decolonisation; he pointed out that, between 1945 and 1960, fifteen African colonies had become nations by the time Menzies' changed his policy on PNG's status by stating:

> At one time it was thought better to move slowly towards independence,
> the school of thought now is that it is better to go sooner than later.[5]

It is from Menzies statement in 1960 that a more rapid schedule towards independence and the devolution of authority was developed and this movement to devolution percolated into all areas of the Administration including clemency and capital punishment, yet not at a speed that the statement might suggest, and as Waters has shown, independence was still seen as a distant goal by many in the Australian and PNG administrations.[6]

As an example of that ambiguity, in 1964, the PNG House of Assembly legislated to end the mandatory sentence of death for wilful murder, but retained the royal prerogative for the Governor-General. Ending mandatory sentencing reduced the entanglement of the Federal Cabinet in the administration of justice in PNG, while still retaining ultimate control should it be needed. This legislation also introduced a new class of mitigation based on indigenous cultural impulses for indigenous offenders. A judge who determined that a Nuiginian had murdered due to ignorance of

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[2] "Favours Early Independence", *Canberra Times*, 21 June 1960, p.1; Ian Downs, *The Australian Trusteeship; Papua New Guinea, 1945-1975,* AGPS, Canberra, 1980, p. 215-6*;* Christopher Waters, "Against the Tide'; Australian Government Attitudes to Decolonisation in the South Pacific, 1962–1972", *The Journal of Pacific History,* vol. 48, no. 2, 2013, pp. 194-208.

[3] Paul Hasluck, *A Time for Building*; *Australian Administration in Papua and New Guinea, 1951-1963*, Melbourne University Press, Carlton, 1976*,* p. 215*;* Hank Nelson, *Taim Bilong Masta; The Australian Involvement with Papua New Guinea,* ABC books, Sydney, 1982, p. 209; "Territory as 7th state "impractical", *South Pacific Post*, 2 May 1966, p.1. John Dademo Waiko, *A Short History of Papua New Guinea, Second Edition, Oxford University Press, Melbourne, 2013,* p. 136; Murray Groves, "The Reign of Mr. Hasluck", *Nation*, 5 May 1962, pp. 7-9 cited in Ian Downs, *The Australian Trusteeship*, p. 217; Donald Denoon, *A Trial Separation; Australia and the Decolonisation of Papua and New Guinea*, Pandanus Books, Canberra, 2005, Ch 1; James Sinclair, *Middle Kingdom; A Colonial History of the Highlands of Papua and New Guinea*, Crawford House Publishing, Adelaide, 2016, p. 310; Waters, "Against the Tide'.

[4] Nelson, *Taim Bilong Masta*, p. 209-214; Cleland, *Pathways to Independence,* p. 252; Nelson, *Papua New Guinea*, p. 127.

[5] Downs, *The Australian Trusteeship,* pp. 215-216.

[6] Waters, "Against the Tide", p. 170.

Australian law, fear of sorcery, cultural obligations, or other notions pertaining to the local culture and notions of justice, could hand down a sentence of imprisonment rather than death.[7] This provision was similar to the powers Supreme Court judges held in mainland jurisdictions that retained the death penalty, but the cultural mitigation sections were distinctive. From this point, in principle, Canberra, with an eye to international criticisms, could point to a meaningful devolution of power, but still retained the royal prerogative over any death sentences, and as such prevent any potential unjust executions that might also embarrass the Commonwealth. However, once entrusted with this power, PNG Supreme Court Judges never again sentenced an offender to death making the royal prerogative moot. Thus no more clemency appeals were forwarded to Canberra. To some extent, this move reflected the general movement away from capital punishment in Australian jurisdictions, but it is also important to note also the distinct dimension of cultural sensitivity. [8]

The Department of Territories in its submission on the legislation argued this change would make sentencing more immediate, more culturally aware, and more transparent, rather than protracted, mysterious and suspicious to local people. Territories hoped this certainty and clarity would deter crime, and indeed, fear of crime and deterrence was one reason why the legislative change retained the death penalty.

As well as an accelerating path to autonomy, a major reason for this legislation coming in that form, and at that particular time, was that in 1963 the Ministry of Territories changed hands from Hasluck to Charles Barnes, a Country Party House of Representatives Member. A novice minister, Barnes was less capable of encompassing the vast detail of the portfolio with insight, was less "articulate", and was less interested in political and legal issues than Hasluck, and subsequently much more inclined to allow his Secretary to take the lead. On top of that lack of capability and interest, according to Healy and Downs, Barnes was uncertain about the desirability of the devolution of power in PNG, but nevertheless felt the same pressure for decolonisation that Menzies and the Administration felt. [9] Nelson and Denoon add another dimension when they argued that Barnes was much more interested in PNGs economic development, particularly mining, and indeed Nelson and

[7] Territory of Papua and New Guinea, "No. 69 of 1965, An Ordinance to Amend the Criminal Code (Queensland Adopted) in its Application to the Territory of New Guinea, Assented to 7th December 1965", *Papua and New Guinea- Wilful Murder- Death Sentence*, NAA: A432, 1964/2543, 1184765.

[8] Mark Finnane, *Punishment in Australian Society,* OUP, Melbourne, 1997; Barry Jones, (ed) *The Penalty is Death; Capital Punishment in the Twentieth Century*, Sun Books, Melbourne. 1968; Jo Lennan and George Williams, "The Death Penalty in Australian Law*" Sydney Law Review*, vol. 34, no. 4, 2012, pp. 659-94. http://www.austlii.edu.au/au/journals/UN.S.W.LRS/2013/12.html

[9] Allan M Healy, "Monocultural Administration in a Multicultural Environment: the Australians in Papua New Guinea", p. 223. Ian Downs, *The Australian Trusteeship*, Ch. 10, and p. 378; John Langmore, "A Powerful, Formative Experience: 1963-1972", in Ceridwen Spark et al (eds.) *Australians in Papua New Guinea, 1960-1975*, Pacific Studies Series, UQ ePress, St Lucia 2014, p.122; Denoon, *A Trial Separation,* pp. 40-45

Denoon noted his lukewarm attitude to the independence process, and that Barnes stated in 1967 that "the territory would not achieve independence for many years, if at all".[10] Nevertheless, he did supervise some movements towards greater autonomy and independence.

Most particularly revealing of the lack of interest in legal matters, in 1964 Barnes and Attorney-General Billy Snedden made a submission to Cabinet for a change to the law on mandatory sentencing in PNG that would devolve power away from the Commonwealth and the Minister for Territories. That submission will be the central source for assessing the reasoning behind the policy formation process in this chapter, as it summarised the views of the Commonwealth and PNG agencies on the justice and colonial policy issues that lead to the change in the law.

Creating pressure on Australian colonial policy and the question of PNG independence, were those Nuiginians who had benefited from an Australian or missionary education and were engaged in the political process.[11] They were beginning to take jobs in the public service and schools, run local councils, and speak up in the House of Assembly. I will present evidence to show that this emerging group of people spoke strongly in favour of using capital punishment, which created additional pressure on Australian policy makers.

Accordingly, in this chapter, I will ask why the Commonwealth and Legislative Assembly changed the legislation. In answer I will argue that the devolution of power to Supreme Court judges suited the program of devolution demanded by the world decolonisation movement. Further, the new minister wanted to focus on economic rather than socio-legal issues, with which he felt more comfortable, and was satisfied that he could not add anything to Hasluck's policies on law and justice.[12] The Minister of Territories also believed that the deterrent effect of faster sentencing from the judges would help with lowering crime rates, and expatriates and Nuiginians supported that view. Ultimately, however, the legislation was acceptable to Canberra because, while devolving power, it did maintain the Governor-General as the ultimate arbiter of life and death to allow the Commonwealth the ability to prevent executions that might embarrass the Commonwealth.

**Canberra and Port Moresby's Awareness of Outside Scrutiny and their Mutual Suspicions**

The early 1960s saw the Australian government accelerate devolution of political and legal power to PNG in response to international scrutiny, its own mistrust of expatriates colonialism and the new Nuiginian elite's preference for capital punishment.

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[10] Denoon, *A Trial Separation,* p. 40; Hank Nelson, *Papua New Guinea,* p. 110.
[11] Waiko, *A Short History of Papua New Guinea*, pp. 135-7; Nelson, *Papua New Guinea*, pp. 124-6.
[12] Charles Edward Barnes interviewed by Pat Shaw, Parliament's Bicentenary Oral History Project, 19 Nov 1983. NLA TRC 4900/13.

The first half of the 1960s saw steady and regular criticism of Australia's role in PNG from the USSR, and India and proponents of decolonisation in the UNTC and the *CT* and *SPP* wrote articles, relaying those criticisms.[13] Indeed, a Soviet motion demanding immediate independence for NG of July 7 1961 at the UNTC was defeated by only one vote.[14] While in 1964, apparently aware of criticisms, the new Nuiginian dominated House of Assembly in PNG passed a motion telling the UN to 'stop meddling.'[15] The process of the Dutch leaving West Papua and the dubious process of the Indonesian re-colonisation, in particular, drew attention to the ongoing colonisation in Papua and New Guinea.[16] Australia found itself vulnerable to repeated attacks targeting the slow pace of devolution, development and of the path to independence.

As such, while the Menzies government responded to the pressure to decolonise more rapidly and devolved power in the legislation on capital punishment, the Commonwealth Government maintained ultimate power over life and death. This indicated that Cabinet was still anxious that there could be poor judicial decisions due to the racially fraught situation inherent to a colony, and that the Department of Territories maintained its perception of an Administration and judiciary that was inclined to racism and paternalism; that the Executive saw capital punishment as a necessary last resort; and, that Barnes was equivocal as to the desirability of devolving power.[17]

Indeed, Australian colonialism in PNG in the 1960s was conducted in the context of outside scrutiny. As Hudson concluded, "It seems that at this point Australia finally decided that less was to be gained from defying the Assembly than in going some way towards meeting its demands or at least appearing to."[18] Indeed through the 1950s and 1960s, one of Hasluck's responses to this scrutiny was public diplomacy. Hasluck and his Department's public diplomacy publications highlighted the successful economic and social development that accompanied Australian colonialism.[19] For

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[13] "Commission Likely On New Guinea Policy", *Canberra Times*, 15 Aug 1960, p. 2; "Australia Proud of Papua Record", *Canberra Times*, 19 Oct 1960, p. 6; "Calwell Criticises New Guinea Policy", *Canberra Times*, Monday 29 January 1962, p. 3; "Self-Rule Possible For Papua 'in decade'", *Canberra Times*, 30 May 1962, p. 3; "U.N. Endorses Papua Policy", *Canberra Times*, 28 June 1963, p. 9; "Discrimination Swept Away in New Guinea", *Canberra Times*, 14 December 1962, p. 3; "Papua-N.G. visits by Russians Advocated", *Canberra Times*, 25 July 1964, p. 3; "Russia renews blistering attack on Australia", *Canberra Times*,14 Nov 1964, p. 6; "Discussion 'not over' in Papua", *Canberra Times*, 4 Sept 1964, p. 6. "New guinea Prisoners", *Tribune*, Sydney, 21 October 1964, p. 4; Also see W.J. Hudson, *Australia and The Colonial Question at the United Nations*, East-West Centre-University of Sydney Press, Honolulu/ Sydney, 1970, pp. 175-176.

[14] 'Target for New Guinea Plans Soon", *Canberra Times*, 14 July 1961, p. 4.

[15] "Papua-N.G. tells U.N. to stop 'meddling'", *Canberra Times*, 3 Sept 1964, p. 8.

[16] "Dutch New Guinea Trusteeship", *Canberra Times*, 27 February 1961, p. 3; Letters to the Editor, *Canberra Times*, 12 January 1962, p. 2. Waters, "The Last of the Imperial Dream for the Southwest Pacific."

[17] Cabinet approved the recommendations in Cabinet decision 1156 of 25 August 1965.[17] Subsequently an amendment to the law was made: the *Criminal Code Amendment (New Guinea) Ordinance 1965*.[17]

[18] Hudson, *Australia and The Colonial Question at the United Nations*, pp. 175-176.

[19] Hasluck, *A Time for Building*, p. 284-5. Also, see for example: Jane Landman, "Visualising the subject of development; 1950s Government Film Making in the Territories of Papua and New Guinea", *The Journal of Pacific History*, vol. 45, no. 1, 2010, pp. 71-88.

example, *A Series of Pictures in "Papua and New Guinea", an information folder prepared and published by the Department of Territories*, was a photographic essay to be distributed in New York and to those interested in PNG policy, in which the department portrayed a prospering and developing new nation emerging from trusteeship.[20] The page from the photo essay below is an example. It shows a prosperous, Westernised Nuiginian engaged in voting, thus demonstrating the successful approach to advancement Australia was taking in PNG.


The polling booth for the Central Highlands at Goroka on 18th March, 1961. At six central points throughout the Territory of Papua and New Guinea hundreds of voting representatives listened for four days to policy speeches by the 108 candidates standing for election to the Legislative Council. Voting representatives at each centre were instructed in the ballot system and each representative in turn completed a ballot paper and placed it in the ballot box. The successful candidate at Goroka was Kondom Agaundo, who took his seat in the Legislative Council on 10th April, 1961, with five other elected native members: John Guise (Eastern Papua), Simoi Paradi (Western Papua), Somu Sigob (New Guinea Coastal), Nicholas Brokam (New Guinea Islands) and Vin Tobaining (New Britain). There are also six elected non-native members.

[No. 20 of 30 pictures—July, 1961.

"No. 20 of 30 Pictures-July", *A Series of Pictures in "Papua and New Guinea", an information folder prepared and published by the Department of Territories*, Department of Territories, Australian Government Printer, Canberra, 1961.

Australians were also a critical audience to Australian policies in PNG and often shared concerns with the international audience that Australians were treating Nuiginians badly. The Australian Communists and the newspaper the *Tribune* had regular critical articles on the Australia in PNG.[21] This was a small and politically insignificant group, yet even its criticisms could bite internationally.

[20] *A Series of Pictures in "Papua and New Guinea", an information folder prepared and published by the Department of Territories*, Department of Territories, Australian Government Printer, Canberra, 1961.
[21] See for example, "New Manoeuvre on New Guinea", *Tribune*, 31 Oct 1962, p. 11; "New Guinea Prisoners", *Tribune*, 21 Oct 1964, p. 4.

An example of how the scrutiny and criticism from a group within Australia could become an international incident that required defence and considerable diplomatic effort was when and the Victorian Trades Hall Council (VTHC) and the Kilsyth, Victoria and Sydney, NSW, branches of the Communist Party sent a petition to the UN Secretary General and Minister Hasluck on 8 May 1961 protesting about colonial courts sentencing to death some Nuiginians from Tariga, Papua.[22] On 8 June 1961, these petitions were forwarded by the Secretary-General's office to the members of the Trusteeship Council. Some were already opposed to the continued Australian control of PNG, and colonialism by Western powers in general, such as India and the USSR. Other members were generally suspicious of colonialism, but less overtly critical of Australia, such as Paraguay and Bolivia. Subsequently, the petition became an agenda item for the next meeting of the Trusteeship Council. Australian officials then coordinated a response amongst its own departments and its allies, such as the UK and USA.[23] It is a marker of the vulnerability of Australia's role in PNG to suspicion that such a small gesture of protest was taken up by international diplomats.

The VTHC and the Communists expressed concern about the punishment regime in PNG in an attempt to pressure Australia to minimise or prevent the punishment of the Tariga men, and more generally to hasten the Australian departure from PNG. The petitioners wrote that their concerns arose from press reports written in April 1961 in the major Sydney newspaper the *Daily Telegraph*, the widely read Melbourne *Herald*, as well as the much less prevalent and influential *The Tribune*, the journal of the Communist Party of Australia.[24] The petition called for the differentiation of punishment between Westernised and Non-westernised Nuiginians, so that Nuiginians were not condemned under a system they did not understand nor had consented to.

The petitioners demonstrated they were unaware of the established mitigating factor of 'lack of sophistication', a reason which spared almost all offenders. Ironically, this call for differentiation was a rejection of the liberal approach being taken under Hasluck to make Nuiginian law more colour-blind and universal and was more aligned with the old colonial view of justice. However, both the VTHC and the Communists and Hasluck's Administration shared the same general idea that

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[22] *Petition to United Nations from Kilsyth Communist Party and Others, Re: sentence of Death Passed on PNG Natives*, NAA: A452, 1961/4256, 3500477.

[23] *Petition to United Nations from Kilsyth Communist Party and Others, Re: sentence of Death Passed on PNG Natives*. Members of the UNTC for this meeting in 1961 were Australian, Belgium, Bolivia, Burma, China, France, India, New Zealand, Paraguay, USSR, UAE, UK and USA. *Index to the Proceedings of the Trusteeship Council; Eleventh Special Session 10 April 1961 Twenty-seventh Session 1 June to 19 July 1961*, United Nations Headquarters Library Bibliographical Series No. T.22, United Nations, New York, 1961, https://library.un.org/sites/library.un.org/files/itp/t27_0.pdf

[24] *Petition to United Nations from Kilsyth Communist Party and Others, Re: sentence of Death Passed on PNG Natives*. "Nurse writes on NG Agony", *Tribune*, 26 April 1961, "Trades Hall to Hasluck Letter with clipping, 4 May 1961", *Petition to United Nations from Kilsyth Communist Party and Others, Re: sentence of Death Passed on PNG Natives*.

ultimately, punishments for Non-westernised Nuiginians needed to be considered in the light of indigenous beliefs and practices. There was just a difference over at what point in the process that should happen, with PNG's existing system giving that power to the Governor-General in Executive Council, but the petitioners wanting the judges to make that calculation at the point of sentencing. Also, the process of petitioning the Council shows both positions were aware of the impact of international scrutiny on Australian policy. The petitioners were hoping to use international pressure to change Australian policy.

Soviet officials raised the Kilsyth/VTHC petition in a UNTC meeting on 15 June 1961 to criticise Australian colonialism. Dudley McCarthy was the Australian representative at the UNTC, and had previously been a Patrol Officer and PNG official.[25] He accused the Soviets of being vexatious:

> Mr. Uberemko [the USSR representative] has also referred to reports of recent sentences in a certain area, which incidentally is a part of Papua. This reference is clearly tactical only, for he should know as well as I do myself – and I believe he does- that there is merely a legal form involved here; that in the whole post-war period in the territory, only two such sentences have been carried out. In this particular case, I am now able to report that in accordance with the standard procedure, the sentences have been reviewed and have now been commuted to terms of imprisonment of some three years in each case.[26]

McCarthy's accusation of being "tactical only" indicates that he saw this as one move in an ongoing campaign to undermine the Australian presence in the territories. It indicates that officials in both External Affairs and Territories were aware of the opposition to Trusteeship and colonialism in PNG, and that they were responding to it. Therefore, it further indicates that the direct responses to the petition and wider policy making should be considered in the context of that international awareness.

Australia decided not to persuade its allies to vote to refuse to hear the matter, which it could have managed, as the murders in Tariga happened in Papua, not in NG, and therefore the Council had limited standing in the matter. However, the UN's jurisdiction over non-trust colonial possessions of UN members was a matter of debate and newly independent countries did not usually accept that argument.[27] In the "spirit of openness", it was felt that removing the petition from the agenda would

[25] John Farquharson, 'McCarthy, Dudley (1911–1987)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/mccarthy-dudley-15053/text26251, published first in hardcopy 2012, accessed online 7 Feb 2015.
[26] 15 June 1961 "Extract from Concluding Statement by Special Representative Mr. McCarthy at Twenty Seventh Session of Trusteeship Council" (handwritten note) *Petition to United Nations from Kilsyth Communist Party and Others, Re: sentence of Death Passed on PNG Natives*.
[27] Hudson, *Australia and the Colonial Question at the United Nations*, pp. 62-63.

draw attention to the matter unnecessarily when the issue did not require hiding.[28] Indeed, the Department of External affairs felt that openness when so blameless was best. [29] Subsequently, the Department of Territories was asked to prepare a report for Australian diplomats for the discussions of the Council. The task of preparing the report was delegated to Cleland's administration.

Cleland set this task to Wally Watkins, who had been heavily involved in developing a political and policy response to the Telefomin killings and reporting on the legal issues arising from Usamando's murders. Watkins was an old colonial and enmeshed in the culture of the PNG Administration and legal system.

Watkins emphasised that Judge Bignold followed established jurisprudence when the judge considered the murder typical of pay back killings and that: "their primitive condition and lack of contact with [Australian authorities]" and that justice in such cases was best achieved through clemency.[30] To substantiate the success of this system, he cited the very low levels of recidivism under the Australian system.[31] He cited Justice Gore's argument that a prisoner who had been granted clemency would return to their community after their imprisonment and take their knowledge of Western culture and law back with them to educate and westernise their community. As such, the Law Office argued that it was in Australia's interest to imprison rather than execute, because it would better extend Westernization, the rule of law, and ultimately Australian authority. Watkins provided a case study on the Telefomin killers was written to develop the themes raised in his report.[32]

Watkins wrote about the Telefomin killers during the eighth year of their ten-year sentences. [33] They had actually built Boram Prison, and in the process some had become experienced and qualified brick makers and bricklayers. Watkins pointed out that they all had learned pidgin, had vastly improved their knowledge of modern agriculture, and had become familiar with Australian ways.[34]

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[28] To the Secretary, Department of External Affairs, Canberra ACT, Trusteeship Council Twenty-eighth Session from Australian Mission to the UN, Permanent representative, 12 June 1962; Department of Law, PNG, U. N. Petition 8/16 and 8/17, Tari Murders, *Petition to United Nations from Kilsyth Communist Party and Others*, p. 1. In *Petition to United Nations from Kilsyth Communist Party and Others.*

[29] Department of Law, PNG, To The Secretary, Department of Territories, with draft 'UN Petitions 8/16 and 8/17; Tari Murders [Stamped Received 19 September 1961], *Petition to United Nations from Kilsyth Communist Party and Others, Re: sentence of Death Passed on PNG Natives*.

[30] Department of Law, PNG, U. N. Petition 8/16 and 8/17, Tari Murders, *Petition to United Nations from Kilsyth Communist Party and Others*, pp. 1-2.

[31] Department of Law, PNG, U. N. Petition 8/16 and 8/17, Tari Murders, p 4.

[32] D.M. Cleland to Secretary Department of Territories, re: Petitions Concerning New Guinea, Murders in the Southern Highlands of Papua, 16th March, 1962, *Petition to United Nations from Kilsyth Communist Party and Others, Re: sentence of Death Passed on PNG Natives*.

[33] W. Watkins to the Secretary, Department of Territories, Reply to memorandum 28th February, 1962, *Petition to United Nations from Kilsyth Communist Party and Others, Re: sentence of Death Passed on PNG Natives*.

[34] Except for two who died of old age

And while a few of the Telefomin killers had cooperated only minimally, all had worked in the gardens and supplied their own food. Significantly, none had committed any disciplinary offences whilst in prison. Indeed, three wished to be employed by the Department of Public Works on their release and already had been involved in training prisoners in other prisons in brick making and bricklaying. However, most wished to return to the Telefomin region.[35] Implicit in this recitation of their fine disciplinary record was that they had become accustomed to and accepted Australian authority and rules—they had been advanced on "the march". Watkins argued that such acculturation was what guided PNG sentencing policy and that it was the hoped for outcome of imprisoning the 'primitive': they would be trained to understand and be in awe of Australian coercive power, as well as gaining knowledge and skills. This case study was relayed to New York to be presented as a measure of the success of Australia's system of sentencing and punishment because they believed it showed how Australian developmental colonialism was working.

Hasluck also replied officially to the UN representatives and to the Kilsyth Communist Party and the Victorian Trades Hall Council that had initiated the petitions.[36] First, Hasluck explained the general principles of the sentencing process and how clemency was used to redress the particular situations of Nuiginians and ensure justice was done. He further noted the relatively lenient sentence of three years handed down to the Tariga men and that prison in PNG was quite successful at education and rehabilitation and he gave the example of the successful education of the Telefomin killers.[37] According to Hasluck's representation, Australia was in keeping with the UN's advancement goals for such places as PNG. Hasluck reiterated the justification of the clemency process: that it was successful; that it was rehabilitative; that it was educational to the prisoners and the community; and, perhaps most of all, that it was consistent and just.

So why make those changes to sentencing law in 1964?

Ann Stoler and Frederick Cooper, and Martin Wiener argued that after the Second World War colonialism attempted to become something more acceptable to a world sickened by Nazi and Japanese imperialism, and as such, that new types of imperialism were replacing the old. Similar to that Michael Barnett also noted that the end of the war was a disjunction in thinking about, and practice of, colonialism, and after the war colonialists used socio-economic and political

[35] Watkins to Secretary, 28 Feb 1962.
[36] Observations of the Administering Authority on Petitions t/PET 8/16 and 17; C.R. Lambert, letter, C.R. Lambert, Secretary Department of Territories to The secretary, the Department of external Affairs, re: Trusteeship Council: 28 the Session, Petitions t/PET8/16 and 17, 6 June 1962, *Petition to United Nations from Kilsyth Communist Party and Others, Re: sentence of Death Passed on PNG Natives*.
[37] Observations of the Administering Authority on Petitions t/PET 8/16 and 17; Lambert to the secretary, 6 June 1962.

development as a moral justification for continued possession.[38] Those analyses are coherent with Australian colonialism as well. A politically active expatriate in 1960s PNG, and historian of the trusteeship, Ian Downs wrote:

> In 1962, the Australian Trusteeship was exposed by the ebb of the colonial tide. There was danger in seeming to be an anachronism in an age of colonial rejection. International support during trusteeship confrontations required Australia to have policies which her friends could support without embarrassment.[39]

While the system of mandatory sentencing and clemency was defended, it is evident that Australian officials saw its deficiencies in 1961 when Watkins acknowledged to the Administrator that the sentencing systems would not make sense to anyone outside the system.[40] Nevertheless, due to events like the VCTU/Communist Party petition, Australia was conscious of that scrutiny and the particular formulation of the 1964 legislation to end mandatory sentencing becomes more comprehensible as both the language of colonial engagement and colonial policy were forming under the pressure of such criticism.

**"To abandon our responsibilities would be an almost criminal act": Trusteeship Council Visiting Missions, the Foot Report and the Pressure to Hasten Independence**

PNG officials' awareness of the pressure of external judgement was also created by the regular visits of Trusteeship Council visiting missions. A Visiting Mission was usually made up of diplomats from members of the Trusteeship Council. In 1962, the UNTC mission was led by the UK's Sir Hugh Foot. He was an eminent British diplomat and formerly Colonial Secretary of Jamaica, 1945 to 1947, Chief Secretary for Nigeria, 1947 to 1950, Captain-General and Governor-in-Chief of Jamaica from 1951 to 1957, Governor and Commander-in-Chief of Cyprus, and when he wrote the report, he was British Ambassador and Advisor for the UK Mission to the United Nations.[41] As such he had been closely engaged both in colonisation and the UK's moves towards decolonisation. According to Rachel Cleland, Sir Hugh Foot told Donald Cleland that he was there to put Australian "into a gallop" in working towards independence.[42] Foot's and the Council's criticism of the pace of change

[38] Frederick Cooper and Ann L. Stoler, "Introduction", in Frederick Cooper and Ann L. Stoler (eds.) "Tensions of Empire: Colonial Control and Visions of Rule", *American Ethnologist*, vol. 16, no. 4, 1989, pp. 609-621; Martin Wiener, *An Empire on Trial; Race Murder and Justice Under British Rule, 1870-1935,* Cambridge University Press, New York, 2009, pp. 232-3; Michael Barnett, *Empire of Humanity: A History of Humanitarianism*, Cornell University Press, Ithaca, 2011, table one.
[39] Downs, *The Australian Trusteeship*, p. 240.
[40] Watkins to Secretary, 28 Feb 1962.
[41] Peter B. Flint, **"**Lord Caradon, Britain's Delegate To U.N. in 1960's, Is Dead at 82" 7-9-1990, *New York Times*, https://www.nytimes.com/1990/09/07/obituaries/lord-caradon-britain-s-delegate-to-un-in-1960-s-is-dead-at-82.html
[42] Cleland, *Pathways to Independence*, pp. 253-3. Clive Moore, *New Guinea; Crossing Boundaries and History*, University of Hawaii Press, Honolulu, 2003, p. 197.

was in this report, according to Denoon, "unusually effective"[43]. Australia was being pushed to devolve power faster. Yet Denoon also notes that Hasluck told his department that he did not think scheduling independence independent of facts on the ground was desirable, but that appropriate "eye-wash from time to time" should be supplied to satisfy the UN's perceptions, and Denoon cites the first World Bank study of PNG as an example of that.[44] In that vein, some of Foot's recommendations touched on policies already in train, for example opening the University of PNG. Despite Hasluck's resistance, Foot was the UK's representative on the Trusteeship Council and Australia depended on the support of its Western allies such as the UK to stave off the demands of newly independent and Eastern Bloc states that PNG's independence be imminent.[45] As such, when even the UK with its own colonial issues to defend spoke in favour of 'galloping', Australia had to acknowledge that and increase its haste to retain that support. Therefore, some policies should be regarded as 'eye-wash' and others as genuine devolution.

Significantly, striking at the heart of Australian rhetoric around its place in PNG, the United Nation's *Declaration on the Granting of Independence to Colonial Countries and Peoples* of December, 1960 stated that:

> 3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.[46]

Yet the unpreparedness of PNG for independence was a primary justification for Australia's continued presence in PNG with both Hasluck and Menzies having spoken publically on how much the Nuiginians needed Australian assistance and they would do so for some years.[47] For example, Menzies told the General Assembly in response to Soviet complaints:

> Nobody who knows anything about these territories and their indigenous people could doubt for a moment that for us in Australia to abandon our responsibilities would be an almost criminal act.[48]

Cleland like most expatriates had imagined independence taking up the next fifty or one hundred years, but they were starting to learn otherwise.

Even with the implementation of policies to spread democratic institutions, such as; increasing the number of local shire councils to replace direct administration by Port Moresby during Hasluck's

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[43] Denoon*, A Trial Separation*, p. 30.
[44] Denoon*, A Trial Separation*.
[45] Hudson, *Australia and the Colonial Question at the United Nations*, pp. 4-8.
[46] United Nations General Assembly, *Declaration on the Granting of Independence to Colonial Countries and Peoples Dec, 1960* General Assembly resolution 1514 (XV) of 14 Dec 1960. http://www.un.org/en/decolonization/declaration.shtml
[47] "No Hurry to Quit N.G., says Minister", *Canberra Times,* 24 Aug 1960, p. 1; "'To Abandon N.G. Would Be Criminal'", *Canberra Times,* 6 Oct 1960, p. 1; Waters, "Against the Tide'.
[48] "'To Abandon N.G. Would Be Criminal'", *Canberra Times,* 6 Oct 1960, p. 1.

tenure; increasing the number of directly elected Nuiginians in the PNG Legislative Council in 1961; and, the acceleration of educational achievement with planning for a university to support such increased responsibility, UN officials still imposed pressure on Australian officials to move even more quickly towards autonomy.[49] For example, Foot noted that:

> Taken as whole we feel that the effort made by Australia since its last war has been impressive in its range and most admirable in its drive. Its success makes it possible to be confident that further rapid advance is now possible…They [Nuiginians] must be given every opportunity to play full part.[50]

Australia was being pushed both by the world community, friends and enemies, and by the Left within Australia to speed up moves towards autonomy. Compounding that external influence, this report was also influential because Foot attempted to harness existing policy proposals, such as the establishment of the University of PNG, and thus was useful in supporting Territories' bid for the money needed to accelerate development projects.[51] This pressure towards independence was extending into all areas of the administration, and policy makers in law and punishment also felt that pressure to devolve power.

[49] Waiko, *A Short History of Papua New Guinea,* p. 136; Nelson, *Papua New Guinea,* p. 127; Moore, *New Guinea*, p. 197.
[50] Hugh Foot et al, *Report of the United Nations Visiting Mission to the Trust Territories of Nauru and New Guinea, 1962: Report on New Guinea*, United Nations Trusteeship Council, New York, 1962.
[51] Cleland, *Pathways to Independence*, pp. 264-5

Figure 7-2 “Detainees working on the Corrective Institution farm at Bomana near Port Moresby. The farm is fully mechanised and detainees operate and maintain all the equipment”[52]

**New Leadership and the Shift in Colonial Policy**

New leadership in 1963 led to changes in policies. Menzies made Charles ‘Ceb’ Barnes the new Minister for Territories in 1963. Barnes’ shift to an economic emphasis in his policy development meant the new Minister had little interest in maintaining a close oversight over legal issues, and partially explains the decision to end mandatory sentencing. Scholars in PNG history have also clearly established that under Barnes, the pressure to devolve power to PNG in preparation for independence competed with a new technocratic bureaucratic culture in Territories that favoured centralisation on Canberra matching his equivocal attitude towards PNG’s eventual independence.[53] Similarly, Denoon wrote: “An elected house implied devolution, but Canberra’s control tightened, partly through better communications but largely because of changes in personnel”, that is Barnes and his staff.[54] As such, the form of the policies that emerged from that tension reveals aspects of both the stated intention to devolve and develop PNG institutions, yet that was counteracted by the technical and bureaucratic capacity for officials in Canberra to provide those institutions with directions.

Barnes stated that Hasluck had done such “tremendous” work on the social and political side that he felt he could only contribute his expertise in economic and commercial development and that for independence to occur: “we had to build the material side. Otherwise, you couldn’t be independent if you had to have handouts from everyone about the place.” And he thought that level of self-sufficiency was a long way off.[55] Nevertheless, Downs argues that in 1960 Australia had abandoned the belief that it would be a trustee indefinitely, or as Waters has shown, that there would some extended supervision of a Melanesian Federation.[56] Furthering this agenda to devolve power on legal issues, Barnes himself was less autocratic and controlling than Hasluck.[57]

In contrast to Barnes, the new Departmental Secretary George Warwick Smith was interested in centralising decision making in Canberra and controlling any decisions for which the Minister was

[52] John Tanner, “Detainees working on the Corrective Institution farm at Bomana near Port Moresby. The farm is fully mechanised and detainees operate and maintain all the equipment, 1 photographic negative: b&w, acetate. 1958.” NAA: A1200, L27452, 7572946.
[53] Healy, “Monocultural administration in a multicultural environment: the Australians in Papua New Guinea”, p. 223.
[54] Denoon, *A Trial Separation, p. 40.*
[55] Charles Edward Barnes interviewed by Pat Shaw in the Parliament's Bicentenary Oral History Project, 19 Nov 1984, NLA TRC 4900/13, Session 4, 10:43
[56] Downs, *The Australian Trusteeship*, p. 273. Waters, “The Last of the Australian Imperial Dreams for the South West Pacific”, pp. 183-184.
[57] Cleland, *Pathways to Independence*, p. 311. Denoon, *A Trial Separation*, pp. 40-43.

responsible.[58] Warwick Smith was a career bureaucrat beginning in the Queensland Department of Education, he then moved to the Commonwealth Department of Commerce. He rose to be a Deputy Secretary at the Department of Trade and then moved to be deputy to Cecil Lambert the Secretary of the Department of Territories and became Secretary of Territories when Lambert retired in 1964. His eulogist Farquharson noted that he was remembered as autocratic and uncompromising in his duties and that "by seeking to have all decisions run by his desk, alienated people rather than got them on side".[59] Downs argued that despite the stated intention to devolve, Warwick Smith actually insisted on more communication and oversight from Canberra.[60] Policy attempts to balance this centralised and technocratic approach and the pressure to devolve politically are also evident in the form the reworking of the clemency process, as power was supposed to be devolved, yet the ultimate power was retained in Canberra where the Territories' officials could use their expertise to control the fates of the condemned. Yet the judges subverted that by not employing the death penalty.

Previously, Hasluck had refused a request for an end to mandatory sentencing after a review in 1957 as he argued that the checks and balances of the situation were desirable. In contrast, Barnes agreed with the judges that the system of Executive review for all wilful murder findings was too slow and confusing to local people.[61] The 1964 submission also proposed a PNG appellate court, before the High Court of Australia, and sentencing policy, to make the courts more separate from Australian courts for independence.

Focusing on the question of sentencing reform, Barnes took the advice of the judges and advocated for an end to mandatory sentencing, and in conjunction with the Commonwealth Attorney-General Billy Snedden, submitted a proposal to the Cabinet that the government members of the PNG House of Assembly should pass legislation to end the mandatory sentence of death for wilful murder. In their submission to Cabinet recommending change, the Ministers acknowledged that the judges had requested more autonomy over sentencing before: "Over an extended period the Chief Justice and the judges have put forward proposals for changes." Judges complained that they had less authority than other Australian Supreme Court judges and that the practice of recording and pronouncing

[58] Denoon, *A Trial Separation,* pp. 40-45. Downs, *The Australian Trusteeship,* Ch. 10.
[59] John Farquharson "Warwick Smith, George Henry (1916–1999)" *Obituaries Australia*, National Centre of Biography, Australian National University, Accessed 29 June 2019, http://oa.anu.edu.au/obituary/warwick-smith-george-henry-1003
[60] Downs, *The Australian Trusteeship*, p. 274-5.
[61] Attorney-General's Department, *Territory of Papua and New guinea: Sentencing of Native Offenders Convicted of Wilful Murder: Pronounced or recorded Sentence of Death*, NAA: A432/1956/3371.

sentences followed by clemency was confusing to all concerned.[62] Barnes and Warwick Smith welcomed the proposal to devolve some power on legal matters to the judges.

Indeed, Hasluck's appointment, Chief Justice Alan Mann had apparently come around to the thinking of the local Supreme Court he had been sent to change. He made the proposals that the B4 judges had previously made and Hasluck had rejected. Rather, by 1964, he had come around to the B4 view that the people on the ground were the best placed to make judgements about justice and colonial policy. These new sentencing laws were perhaps only a short distance from Hasluck's views on respecting judicial decisions to record sentences of death, but as he had rejected them, they were not what he had in mind when he appointed Mann to promote a bench more in keeping with Australian norms and supervised by the Executive.

The justice issue, compounded by the awareness of outside scrutiny, resulted in the maintenance of Vice-Regal oversight in the legislation to end mandatory sentencing. Judges still might sentence offenders to death, but the Governor-General would still review the sentence under advice from the Commonwealth Executive Council.[63] With the *Canberra Times* writing about colonial injustices and missteps on a regular basis, Australian officials were certainly aware of the need for care and due attention to international scrutiny, there was interest in the struggles of other colonial powers to devolve power in underdeveloped places, such as Guiana and Kenya.[64] Territories officials such as Lambert and Warwick Smith were thus aware of the problems a rogue judge ordering a racially charged execution could bring Australian foreign policy.[65] Thus while officials were swayed by arguments to devolve power to judges, they did not want to lose oversight entirely, so they would not be beset by the scandals evident in other colonies they read about in their local paper. Indeed, such concerns had been significant in the reasoning around clemency decisions in the case studies in this thesis.

Thus the form of the legislation to end mandatory sentencing was mired in a space between devolution, centralisation, and the desire to avoid international embarrassment. This reform left the problem of sentencing individuals according to individual circumstances to the judges, while providing a humanitarian and diplomatic safe guard.

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[62] B.M. Snedden and C.E. Barnes, Confidential for Cabinet Submission- Papua and New Guinea ACT; Administration of Justice, Submission NO. 971, 9 August 1965*, Papua and New Guinea- Wilful Murder- Death Sentence*, NAA: A432, 1964/2543, 1184765, p. 1.
[63] Snedden and Barnes, Confidential for Cabinet Submission, 9 August 1965*,* p. 1.
[64] "Self-rule turns Sour for British Guiana", *Canberra Times*, 24 July 1963, p. 32; "Kenya 'too hot' for Governor", *Canberra Times*, 20 Nov 1962, p. 15; "Crowds Cheer Mau Mau Chiefs", *Canberra Times*, 18 Dec 1963, p. 17.
[65] See for example, "Soekarno Demands End of All Colonialism, Indonesians Show Might in Take-over", *Canberra Times*, 2 May 1963, p. 1.

Stepping into this space, Barnes and Snedden set out their primary rationale for the proposed amendments to the administration of justice, which was that the proposed changes devolved power:

> 2. Underlying the recommendation in this submission is the belief that the judicial system of the Territory should be appropriate to the emerging status of the Territory, and should therefore as far as practicable be self-contained and separate from the judicial system of the Commonwealth and be regulated by the Territory ordinances rather than by Commonwealth Acts.[66]

Prior to 1960s, debates within and around capital case reviews were about putting the best face on colonialism, rather than ending it. In hanging Usamando and Aro, part of the consideration was that the colonial authorities to continue following the precedent for hanging, so that they could punish Nuiginian who might murder white officials in the future. There was a desire for the colonialism to operate with equitable justice, but implicit to the idea of precedent to protect whites was that colonial justice was going to keep operating for some time. However, as this legislative change suggests, as the 1960s progressed legal institutions were preparing for independence.

Hasluck was actively considering the autonomy of the PNG courts from the colonial administration prior to Barnes' succession. He had ordered an inquiry into PNG justice the result of which was The Derham Report of 1960, conducted by Professor David P Derham, Professor of Jurisprudence at the University of Melbourne. Derham made significant and, Downs argues, highly influential recommendations towards building the justice system the Commonwealth intended for PNG's independence to come. Derham shared some of Hasluck's concerns about the ad hoc and fundamentally racist kiap courts, the lowest level of courts for dealing with customary disputes, family law issues, and petty crimes.[67] Kiaps were provided with training in the native ordinances to run what was officially called Courts for Native Affairs, and they had a broad remit for ordering resolutions, compensation and generally doing what seemed to them to be necessary to solve the problem in line with the ordinances, customs and ideas of the local people. This was generally done without the formalities of laws of evidence, formal procedure, or depositions. These courts were at the heart of old colonial legal practice of colonial officials using their expertise and judgement to do what they thought best. Derham's report gave Hasluck the support he needed to begin to convert the Native Courts into something more comparable to Australian local courts to be run, eventually, by Nuiginian magistrates. Downs heavily criticised the substance and implementation of this policy as imposing a system that did not meet Melanesian notions of justice, nor in the order or pace Derham

[66] Snedden and Barnes, Confidential for Cabinet Submission, 9 August 1965, p. 1.
[67] Downs, *The Australian Trusteeship*, pp. 147-151.

intended.[68] However, Hasluck's notion was that a system that depended on the fiat of colonial officials was unsustainable into the future, unlike the rule of law:

> Our present task, in following this tradition [fair and impartial courts], is to build an implicit acceptance of the rule of law in Papua New Guinea on foundations that will outlast political change.[69]

The collision of the old colonial and the liberal notions of the law resulted in liberal notions being the basis of a local court system. But Barnes ended up being the responsible Minister when some of these policy proposals had to be delivered. Thus the future was on the mind of those charged with law reform in PNG in the early 1960s. Accordingly, Barnes and Snedden's proposals built on some parts of Derham's report, as Derham recommended an Appellate Division of the Supreme Court to be based in Port Moresby as a step before the High Court of Australia, to further build the independence to the PNG courts and this was included in the suite of legislation that ended mandatory sentencing in 1965.[70]

Internal pressures reinforced the external pressures of decolonisation. Ian Downs notes the pressure Arthur Calwell and his Labor party placed on Barnes by ending the largely bipartisan approach to PNG and openly criticizing the slow pace of government policy on PNG. The Labor Party, increasingly enmeshed in the anti-colonial movement of the left as well as their notion of what the war time alliance meant, wanted more to be done for PNG sooner, to better prepared for independence in the nearer future.[71] Downs argued the change in Labor policy posed significant new pressures on the Liberal government and hastened the movement towards setting a date for independence, "sooner than later".[72]

As well as concerns about building institutions for independence and maintaining control, the end to mandatory sentencing also arose out of suggestions that clemency reviews in Canberra undermined the authority of PNG courts in the eyes of Nuiginians. This was a view supported by Nuiginians, as House of Assembly members debating the reform expressed the view that this disrespect was elevating crime rates. Thus the ministers advocated for, and House of Assembly members supported, an end to mandatory sentencing and Vice-regal review to deter crime, as judges, members, and Barnes and Snedden argued, punishment would be immediate and derived from the court rather than distant Canberra.

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[68] Downs, *The Australian Trusteeship*, pp. 147-155.
[69] Paul Hasluck, Speech, *Parliamentary Debates (Hansard), House of Representatives,* Commonwealth of Australia, vol. 33, 24 Oct 1961, pp. 2347-50, cited in Downs, *The Australian Trusteeship*, pp. 147-155.
[70] Downs, *The Australian Trusteeship*, p. 151
[71] For Calwell's criticisms and other Labor criticisms see: "Criticism of Menzies' Views On N.G.", *The Canberra Times,* 22 June 1960, p. 1; "More Effort to Bring New Guinea to Early Self-Rule Urged", *Canberra Times,* 27 June 1960, p. 3; "Calwell Warns on Premature N.G. Self-Rule", *Canberra Times*, 1 July 1960, p. 1.
[72] Downs, *The Australian Trusteeship*, p. 214; "Favours Early Independence", *Canberra Times*, 21 June 1960, p.1.

Snedden and Barnes repeated the concerns about improving law and order that the judges had expressed in both the 1957 and 1964 reviews, that the authority of the court was undermined by every wilful murder case going to Canberra.[73] While Hasluck, with his mistrust of the courts, had insisted on Vice-regal review, Barnes was satisfied with the quality of the courts. Thus Barnes was more concerned with the apparent reputational damage the judges and Nuiginian politicians reported.

> This procedure is damaging to the status of the court because the judge must explain that the real sentence is not a matter for him although he has heard the whole case. Equally important is that all the interested parties who are present do not hear the real sentence and much impact is lost especially when the latter rumours circulate that the convicted person has not been punished at all or has been given a lighter sentence than is the fact. The situation is not really comparable with that in a sophisticated country which has had prolonged experience of these matters, and which has the advantage of a wide press coverage and a literate community. [74]

The PNG judges argued that an immediate sentence was needed to ensure that the wicked were seen to be punished completely and promptly. Barnes and Snedden posed this concern in PNG against the danger that the people of this "unsophisticated country" might return to vendetta, an on-going concern to judges and Administration in every case study of this thesis, to ensure that they felt justice had been done. Bringing law and order and ending vendetta was what Australians cited as the particular success of Australian colonialism and they were not willing to endanger it.[75] This concern was noted in the clemency discussions in every case study of this thesis and continued to be a preoccupation of judges as they debated ways to make sentences pedagogical, as Zorn and Ottley observed, to change Nuiginians into the kind of advanced person Australia intended to create.[76]

The problem of immediacy and deterrence in the clemency process was evidently of wide concern because officials in Canberra, official members and Nuiginian elected members of the PNG House of Assembly also spoke about authority and deterrence when supporting the reforms to sentencing.[77] Watkins, the Chief Law Officer and official Government Member, in reading the bill in Port Moresby to abolish mandatory sentencing the second time noted that:

> Honourable Members will appreciate that the practice of recording sentence of death has certain undesirable features. For one thing neither the accused not

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[73] Capital punishment [Territory of Papua and New Guinea,] 1957-58, *Department of Territories Correspondence Files for Paul Hasluck*, NAA: M331, 8, 511120. Snedden and Barnes, Confidential for Cabinet Submission, 9 August 1965.
[74] Snedden and Barnes, Confidential for Cabinet Submission, 9 August 1965.
[75] Hasluck, *A Time for Building,* p. 84.
[76] Bruce L. Ottley, and Jean G. Zorn, "Criminal Law in Papua New Guinea: Code, Custom and the Courts in Conflict", *The American Journal of Comparative Law*, vol. 31, no. 2, 1983, pp. 251-300.
[77] Official members were appointed by the Administration to the House of Assembly, where as other members were popularly elected. This was intended to incrementally introduce parliamentary democracy in line with the evolution of democracy in colonial Australia; Territory of Papua and New Guinea, *House of Assembly Debates, Seventh Meeting of the First Session, 23 November to 29 November, 1965*, vol. 1, no. 7, Papua and New Guinea House of Assembly, 1965, pp. 1158-1162.

> those present at the trial hear the final punishment awarded. For another, it detracts somewhat from the status of the court that the judge does not carry the proceedings to a conclusion by pronouncing sentence, but has to explain that the matter of punishment be referred to another authority.[78]

As an Official Member, appointed to the legislature by Cleland, Watkins was the mouthpiece of the Administration in proposing this legislation to the House of Assembly, thus revealing the concerns of the Minister and Territorial governments. The appearance and impact of justice was a theme raised during clemency deliberations analysed earlier in this thesis. However, while a good deal of concern in Canberra was with its appearance as much as its conduct, and indeed a court system must always be concerned with appearance if it is to work effectively, people in PNG were concerned with the actual conduct of justice,

Nuiginian politicians spoke out in support of Watkins in the second reading debate. They spoke for more stringency indicating their own concerns but perhaps also speaking to a concerned constituency. They wanted the legislation to give judges more control. Pita Lus, (MHA Dreikikir), from East Sepik, and who would go on to have a very successful political career in PNG politics, reflected the views of other Nuiginian members in the Second reading debate when he asserted that:

> I support the bill, but I reiterate that the penalties should be more severe in order that the people will be afraid of the law and thus not commit so many murders.[79]

Indeed, as debate progressed the speaker had to call the house to order for speaking too critically of judges and what Pita Lus and other members asserted were their lenient punishments.[80] The second reading debate's criticism of the judges also indicates that the concern that the courts were losing authority had reached into the emerging elite of Nuiginian society. Thus part of the move to end mandatory sentencing was about making punishment more immediate to deter crime and restore the reputation of the Supreme Court of PNG.

The awareness that crime, particularly violent crime, was on the rise was a significant cause for the legislative change from mandatory sentencing. Judges, Commonwealth Ministers, Government Members and Nuiginian members felt pressure from all sections of the community to exercise more visible and immediate justice as a solution to the rise in crime. According to the statistics reported to the UN Trusteeship Council and the Australian Parliament, violent crimes had been trending gradually upward since the beginning of the 1960s.[81] Indeed Denoon suggests that rising crime was

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[78] *House of Assembly Debates*, pp. 1158-9.
[79] *House of Assembly Debates*, p. 1160.
[80] *House of Assembly Debates*; On Sir Pita Lus, see David Wall, "Knights of the Realm in PNG", *Stories by David Wall*, https://deberigny.wordpress.com/category/sir-pita-lus/ (Former Administration Official); Donald Denoon, *A Trial Separation, p. 48.*
[81] The Parliament of Australia, *Territory of Papua; Annual Report*, Commonwealth Printer, Canberra. Statistics compiled from annual reports from 1949/50 to 1964/65. Note the shifting of reporting categories.

also the result of increasing urbanisation, with its associated social dislocations.[82] At the very least then, rising rates indicated Australian justice was encompassing more offences as more people were brought under actual, rather than nominal, Australian control.

It was in this context that Nuiginians members expressed concern that, in ending mandatory sentencing, more severe punishments would deter people from committing crimes.[83] These arguments and criticisms came from Nuiginian members who were not known for being particularly critical of the government prior to 1964.[84] It is then indicative of the concern in the community about public safety and violence.[85] Indeed, Greenwell observed that Nuiginians continued to believe, despite the use of clemency by Australian courts, that to achieve deterence and retribution, murderers should die. Greenwell argued that Nuiginians generally believed that death would restore social harmony, which was the aim of Nuiginain conflict resolution systems that preceded and existed alongside Australian law.[86] Thus the legislation to end mandatory sentencing, in part, should be seen as their solution to those concerns and a recognition that the existing system was no longer entirely satisfactory to the groups engaged with the processes of capital punishment.

Barnes also made direct reference addressing an increase in crime with this reform in PNG in 1963-65. Barnes and Snedden evidently addressed prior discussions in Cabinet about abolishing capital punishment in PNG when Barnes argued against the notion in his submission on ending mandatory sentencing, due to expatriate anxiety at high crime levels and the Nuiginian tendency to prefer capital punishment for offenders:

> In the present temper of the public opinion of the Territories it would not be practicable to deal with this situation by abolition of the Death Penalty.[87]

As shown in the previous case studies, most interests in the PNG justice believed in the deterrent effect of punishment, particularly capital punishment, and there was evidently pressure to produce a more detterent effect from punishment to meet the rise in crime.

Indeed, Barnes, in an oral history interview about his time in government, saw himself as having been very strict on law and order in reponse to rising crime in PNG. And he felt he pursued that policy in the face of opposition from Australian academics whom he felt criticised him for that strictness.[88] Thus the legislative change to end mandatory sentencing also, in part, should be seen as

[82] Denoon, *A Trial Separation,* p. 45.
[83] Wally Watkins, 2nd Reading Speech, *PNG House of Assembly Debates*, 3 June 1965, pp. 1158-1162.
[84] Waiko, *A Short History of Papua and New Guinea,* p. 136; Nelson *Papua New Guinea,* pp. 124-6.
[85] Waiko, *A Short History of Papua and New Guinea,* p. 137; Denoon, *A Trial Separation*, pp. 35-36.
[86] Greenwell, *The Introduction of Western Law to Papua and New Guinea*, pp.11-14.
[87] Snedden and Barnes, Confidential for Cabinet Submission.
[88] Barnes NLA interview, Session 4, 12:18.

Barnes and the Nuiginian legislators atempting to increase law and order with deterence, including the possibility of capital punishment.

**The Trend Against the use of the Death Penalty in Australia and PNG**

While the form of the 1964 legislation aimed to provide a solution to that tension between community expectations and judicial decisions, in fact, the judges defied expectations and no one was condemned to death again.[89] How can this be explained? The PNG Law Reform Commission attributed it to judges always finding extenuating circumstances to imprison rather than sentence offenders to death.[90] Another explanation is that the capacity to actually hand down death sentences and carry them out was limited by the shift in wider sentencing norms against the death penalty in PNG since 1954. The established nature of this practice of accommodating cultural clash and legal uncertainty through clemency between 1957 and 1964 was apparent in the process and the arguments around clemency, as well as the clear precedent that judges noted in their decisions.

There was a pervasive belief in PNG that followed the Murray System and Justice Ralph Gore's sentencing doctrine: that Nuiginians were mostly incapable of understanding Australian law and the intention of capital punishment as it was understood in Australia and like jurisdictions and in 1959 Gore was still arguing that the Criminal code "needed softening when applied to a primitive people ethically opposite".[91] Up to 1957, Capital punishment was reserved for only the more extraordinary crimes committed by westernised people such as Usamando and Aro. However, even this threshold seemed to be abandoned by the 1960s for a more universal acceptance of Nuiginians incapacity to understand western law and punishment. The following analysis of *R. v Endei, 1964* provides a useful insight into the extent of the presumption of clemency in the 1960s, particularly because of its similarity to Aro of Rupamanda's case that resulted in execution, while Endei's sentence was commuted.[92] Justice Ollerenshaw heard *R v. Endei, 1964*. Ollerenshaw had been a barrister in NSW since 1929, and then had practiced in Rabaul, as well as serving as a Member of the NG Legislative Council from 1937. He served in the Army during the Second World War. He acted briefly as a PNG judge in 1954 to relieve a build-up in cases, but was appointed from the NSW bar to be a PNG judge permanently by Hasluck on 12 September 1961.[93] He retired in 1970 to Buderim, Queensland.[94] In his obituary in 1972, Chief Justice Minogue was quoted as noting his fine service and particularly the

[89] Law Reform Commission of Papua New Guinea, "Punishment for Wilful Murder", *Occasional Paper 1*, PNG Law Reform Commission, 1 July 1976.
[90] Law Reform Commission of Papua New Guinea, "Punishment for Wilful Murder".
[91] Untitled Legal History of PNG,(draft), p. 2, Box 1, Folder 8, *Gore, R. T. and Quinlivan, Paul J. Papers 1930-1964*, National Library of Australia.
[92] See Chapter six.
[93] "Judge's Post in Territory", *Canberra Times*, 12 Sept 1961, p. 8.
[94] "Judge Dies", *Post-Courier* (Port Moresby), 20 Sept 1972, p. 9.

importance of his judgements in relation to interpreting the defences of accident and provocation.[95] With this endorsement of his reasoning on provocation, the case of Endei takes on greater significance as Ollerenshaw discussed the relevance of provocation in determining punishment for Endei.

In this case, Endei, a 41 year old with some familiarity with the administration, a measure of Westernisation and therefore culpability, committed a double murder during which he killed his step-daughter and her friend: "not induced by any traditional fear or belief: [it was] The crime of a man who gave way to a viciousness".[96] That is, there were no traditional provocations to excuse his behaviour. Thus Justice Ollerenshaw's commentary on the appropriate sentence for Endei highlights the shift to the presumption of clemency that had developed in PNG sentencing practice, as despite this ringing condemnation of the accused and a complete absence of those mitigating factors of local custom, such as honour, duty, or shame, at the heart of the Gore Doctrine, Justice Ollerenshaw determined that it was best to record sentence in order to protect the authority of the court.

His first argument was the usual reason that Nuiginians, neither the offender nor his community, could understand the death sentence and in particular the distinction between pronounced and recorded sentences.[97] He further refined this point when he asserted that pronouncing sentence and then it not being carried out would confuse the community and reduce confidence in the court.[98] Ollerenshaw's belief that the mandatory sentencing and commutation process was undermining his authority in the eyes of the Nuiginian communities was one that judges highlighted in their campaign to end mandatory sentencing.[99]

Additionally, Ollerenshaw noted to the Administrator, in his recommendation for clemency prepared for the Governor-General that he had been lobbied by local officials and local people about the case, so aghast were they at Endei's violation of both traditional and modern mores. Thus it was precisely because Nuiginian locals and expatriate officials had argued to Ollerenshaw that Endei should hang that Ollerenshaw decided he could not order it: "A judge should not even appear to be influenced by particular local pressures"[100] He was concerned that the lobbying would appear to have been

[95] "Praise for Dead Judge", *Post-Courier*, 21 Sept 1972, p. 13.
[96] Ollerenshaw, letter, Justice Ollerenshaw to the Administrator, Re: The Queen v Endei, 25 May 1964, p.5 in *Commutation of death sentence on Papua and New Guinea native – Endei*, NAA: A452, 1964/3503, 3541991.
[97] Ollerenshaw to the Administrator, 25 May1964, pp. 1-2.
[98] Ollerenshaw to the Administrator, pp. 1-4.
[99] Snedden and Barnes, Confidential for Cabinet Submission.
[100] Ollerenshaw to the Administrator, p. 5.

successful and thus discredit the independence of the court.[101] He wanted to be seen as solely responsible for the sentence to build confidence in his authority.[102]

Further, the judge questioned why it should be Endei who paid the price for earlier leniency and the current concern about law and order.[103] This argument made it apparent that he thought the trend of clemency was so established that the act of hanging anyone to change that trend would be unjust "scapegoating". Ollerenshaw made it clear to Cleland and the Minister in his submission to the clemency review that he thought that "scapegoating" Endei was unfair, rather than a just outcome to a particular legal case.[104] This suggests that Ollerenshaw was recording sentences because he thought that a hanging was no longer supportable by the weight of sentencing precedents. He also believed that the practice of commutation was so entrenched that even if he pronounced the sentence, even with this particularly vicious crime, it would be commuted. Ollerenshaw was pointing out that sentencing standards had reached a point from which it was difficult to return. The significance of this case is also that it indicates, with the weight of precedents and sentencing norms, the judges did not think capital punishment could any longer be perceived as a just, either in the practice of the law, or the cultural purposes it was to serve. His arguments highlighted a shift by 1964 in the threshold for pronouncing sentence, and in seeing a death sentence carried out.

This trend towards clemency existed to the extent that after ending mandatory sentencing, my survey of clemency files shows that no one was sentenced to death, let alone executed before independence. The PNG Reform Commission also noted that no one was sentenced to death between 1964 and 1976.[105] Indeed capital punishment for murder was abolished by an independent PNG, even though it was reinstated in 1991.[106]

**"Prima Facie, the sentence required by law should be death as now"; The Problems of Mitigation and Legislated Defences in Implanting Western Law within Nuiginian Cultures**

In 1964, the use of clemency to deal with cultural and evidentiary uncertainty, shown in cases such as the Telefomin killers and Sunambus of Puto, were no longer satisfactory to Nuiginians. Further, Ollerenshaw's commentary on Endei's sentencing shows that the judges were also unhappy with reserving questions of cultural mitigation to the clemency process. They wanted a new solution. Thus

[101] Ollerenshaw to the Administrator, pp. 4-5.
[102] Ollerenshaw to the Administrator, p. 5.
[103] Ollerenshaw to the Administrator, pp. 4-5.
[104] Ollerenshaw to the Administrator.
[105] Law Reform Commission of Papua New Guinea, "Punishment for Wilful Murder", *Occasional Paper 1*, PNG Law Reform Commission, 1 July 1976; And my own survey of files.
[106] Papua New Guinea, *Criminal Code Act 1974*, Sections 37, 81, 82, 299, Papua New Guinea, https://www.unodc.org/tldb/pdf/Papua_New_Guinea_Criminal_Code_Act_1974.pdf, Accessed 17-12-16. Capital punishment was reintroduced due to concerns about crime in 1991.

the legislation to end mandatory sentencing also extended partial defences to a murder charge to include mitigations drawn from Nuiginian cultural expectations.

Barnes and Snedden argued in their submission to Cabinet that Judges needed guidelines for interpreting violent crime to include what motivated Nuiginians, and as such, to develop laws suitable to the culture of the coming new nation. Thus the 1964 submission proposed to allow judges to consider the cultural motivations of Nuiginian offenders as mitigating their culpability in a murder trial. Indeed judges long had found that Nuiginian offenders were driven by impulses not encompassed by the elements of mitigation in Australian law. However, such matters were discussed in capital case reviews, or considered in the decision to record rather than pronounce sentence.[107] Barnes and Snedden concurred with the advice of the PNG bench to change those practices to build a more culturally independent Nuiginian legal system, rather than fixing the PNG system to Australian norms, as Hasluck had intended.

The provisions of the legislation to end mandatory sentencing also indicated an interest in meaningful devolution and decolonisation of the notion of justice. In the previous case studies, judges often recommended clemency on the basis of the particular cultural circumstances of offenders and subsequently Australian bureaucrats and then politicians spent much time in trying to understand the chain of causation in a murder case, such as the shame and pride inherent to the motivations of Ako-Ove and the men of Telefomin. Indeed, in most cases across the period, judges plainly would not have handed down a sentence of death were it not mandatory, but politicians in Canberra were left to puzzle out why and if that was just.

However, Barnes and Snedden, unlike Hasluck, were interested in altering the Australian notion of justice to allow judges rather than politicians to match Nuiginian notions of provocation and duty to the outcomes of capital cases. Rather than trying to explain the culture of offenders to the less expert Governor-General in Council, the Ministers thought it more efficient and just for the judges to make the decision to imprison the offender, which they plainly wanted to make when they recorded a sentence. The recommendation to Cabinet argued that:

> 13. After much thought and after consultation by the Attorney-General with the judges, we recommend that the trial Judge should have, in each case, the responsibility of deciding whether in all circumstances, imprisonment (for a term then and there decided by the judge) should be substituted for the death penalty. The criterion in deciding between death and imprisonment should be in the presence or absence of extenuating circumstances. Prima Facie, the sentence required by law should be death

[107] Snedden and Barnes, Confidential for Cabinet Submission.

> as now. If the judge finds that there are extenuating circumstances, he should be required by law to impose a term of imprisonment.[108]

The Ministers also recognised the difficulties of writing specific legislation for the array of cultural impulses within the hundreds of PNG cultures in recommending to the Cabinet that the exact extenuating circumstances not be iterated in the legislation, but be left to the discretion of the court. If the intention had been to maintain Australian norms, this aspect of the recommendations would not have been included.[109] It was not necessary to the process of ending capital punishment, as a purely Australian approach to mitigation could have been maintained. The significance of not doing so indicates an interest in meaningful devolution and decolonisation. It directed judges to return to the Murray System's dictum of "thinking black", which Hasluck had resisted.[110] This policy direction under Barnes modified Hasluck's attempts to inculcate advanced Australian norms of punishment and justice and reform Nuiginian understandings of just punishment.

Further, this discretionary power reversed the direction of Hasluck's mistrust of PNG judges. The wording of the recommendations to Cabinet, and the very similar terms in the second reading debate, gave great credence to the local knowledge of judges and lawyers in PNG.[111] It provided wide powers to interpret Nuiginian customs in terms of Australian legal practices to judges that previously had been suspected of paternalism and discrimination. Barnes and Snedden recommended that:

> 14. Extenuating circumstances would not be defined, but that Judges would, in considering whether there are extenuating circumstances in a case, have regard to matters that presently lead the judge to record, rather than pronounce the death sentence. [Document's underlining] These include the shortness of the period of exposure to Administration influence, the strength of a native custom that has motivated the crime and the incapacity of the group of which the prisoner formed part to comprehend the gravity of the offence under our system of law.[112]

The modification under Barnes was a synthesis of the 'B4' Old Colonialism's faith in PNG courts and discretion for officials, and the progressives who wished more emphasis on Nuiginian beliefs in the law.[113] Under the new legislation, judges were expected to give weight to the cultural expectations of people that previously could only be considered in post-sentencing, and political, clemency processes.

This change came less than ten years after Hasluck's rejected Administration proposals for local courts which would have given some recognition to indigenous practices, yet under Barnes, Australia

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[108] Snedden and Barnes, Confidential for Cabinet Submission.
[109] *House of Assembly Debates,* 3 Nov 1968*,* pp. 1158-1162.
[110] Gore, *Justice Versus Sorcery*, p. 28; Francis West, *Hubert Murray; The Australian Pro-Consul,* Oxford University Press, Melbourne, 1968, p. 211.
[111] *House of Assembly Debates.*
[112] Snedden and Barnes, Confidential for Cabinet Submission.
[113] On progressives' desire for more customary law see Healy "Monocultural Administration in a Multicultural Environment", pp. 221-2.

sought to meet the expectations of a world focused on decolonisation and humanitarian development by the wealthy 'First World Countries'. As Emily Baughan and Bronwen Everill suggest, "Humanitarian work was also revealed to be a site of active experimentation in the empire…and the relationship between the coloniser, the colonised and the imperial state were negotiated through the language of humanitarian reform."[114] Australia was engaged in justifying its colonialism as a humanitarian project, for example when Menzies and Hasluck claimed that leaving too soon would be a disaster for Nuiginians. Michael Barnett similarly argued that humanitarians engaged in post war development of former colonies became more sensitive to infantilising language, processes and implications that the recipients were backward.[115] Including indigenous thoughts about justice in punishment is consistent with Australia's claims to humanitarian colonialism, as self-determination, independence, and sovereignty emerged as key concepts in development.[116] As such, these sentencing measures that gave recognition to indigenous practices and beliefs and fit with the tendency towards respect and self-determination. Thus the rationale for ending mandatory sentencing and reconsidering mitigation were steps towards independence consistent with the arc of change in post-war colonialism towards more emphasis on autonomy and respect for non-western cultural practices.

While legislative change was intent on acknowledging customary impulses as mitigation, it was also indicative of the Nuiginian preference for capital punishment. Indeed it is plain in Barnes' submission to Cabinet that Commonwealth Cabinet intended the death penalty to remain in use: "Prima Facie, the sentence required by law should be death as now."[117] Further the legislation passed the House of Assembly in the midst of arguments mounted by Nuiginians that offenders should be more severely punished, if necessary by death.[118] This preference of Nuiginians for capital punishment was given recognition in the question of just deserts for offenders, in contrast to the more abolitionist mainland. Nuiginian conceptualisation of what was just and right was being given more weight.

Yet, despite the clear arguments of Nuiginians for more capital punishment, Australians and Australian judges decided clemency was more appropriate. The PNG Law Reform commission argued that Australian judges in the 1960s guided by the doctrine of the unsophisticated perpetrator established by Justice Gore decades before, made essentially colonialist and racist decisions in

[114] Emily Baughan and Bronwen Everill, "Empire and Humanitarianism; A Preface", *The Journal of Imperial and Commonwealth History*, vol. 40, no. 5, December 2012, p. 727.
[115] Michael Barnett, *Empire of Humanity; A History of Humanitarianism,* Cornell University Press, Ithaca, 2011, p. 105
[116] Barnett, *Empire of Humanity*, p. 130.
[117] Snedden and Barnes, Confidential for Cabinet Submission.
[118] *House of Assembly Debates*, 3 Nov 1968.

preserving life.[119] Australian judges were also troubled by questions of justice relating to understanding culture, sentencing norms and precedents, international and local status and reputation, and the on-going problems of evidence.

Judges were under pressure to implement a modern Western legal system while also being sensitive to the movement in world humanitarianism and developmental colonialism that indigenous culture and rights be respected, which was implicit in their recommending and using the consideration of indigenous species of provocation. Giving judges space to consider local cultural imperatives went some way to respecting Nuiginian culture while also allowing the legal system to function in a way that met evolving international standards that increasingly valued the views of colonised people. It allowed for uncertainty as well as encouraging efficiency. It was hoped that the certainty in punishment, which would follow from judges being able to encompass cultural motivations immediately rather than waiting for Canberra, would also build respect for the judiciary. However, the intention that capital punishment would be employed regularly as a part of building that respect was not successful. It had been too long between hangings in a legal system moving away from execution.

**Conclusion**

In 1964, the new, expanded Legislative Assembly replaced the House of Assembly, the first cohort of UNPG graduated, and there were widespread protests following the wage decision that paid Nuiginians less than Australians for the same work. Nuiginians were starting to feel their power. However, that independence was still subject to the boundaries set by Canberra as they continued to justify their presence by the development they brought to the territories. Yet parts of the community were in dispute over the pace of change, for example, the 29 April 1966 *South Pacific Post* editorial warned against hurrying independence. Yet, there were hopes amongst some expatriates that independence might never happen, as Cleland had to come out on 2 May 1966 to publicly state that PNG would never become a state of Australia.[120] Canberra and the world community insisted that power had to be gradually devolved to the territories. And institutions, such as the courts, in ending mandatory sentencing, began to reflect that change.

The death penalty was never used again after the end to mandatory sentencing, despite opportunities to do so and the intentions of the politicians that passed the legislation that it would be. The new legislation, which made decisions immediate, was also designed to reflect that anxiety. Yet, the

[119] Law Reform Commission of Papua New Guinea, "Punishment for Wilful Murder".
[120] "Canberra Begs the Issue- Editorial", *South Pacific Post*, 29 April 1966; "Territory a 7th State Impractical", *South Pacific Post*, 2 May 1966, p. 1

courts resisted public pressure, expatriate and Nuiginian, to execute murderers. They brought about a de facto end to the death penalty; and indeed, that worried expatriates.[121]

As such, mandatory sentencing was brought to an end with judges and colonial officials asking questions similar to those expressed during deliberations over clemency throughout this thesis. How would the world see Vice-Regal review in PNG? How would the local community react to death sentences? How would expatriates react? How could justice be done in these unique circumstances? However, in 1965 under Barnes, and under international pressure to devolve power, new solutions were needed. The solutions of the earlier chapters—the standard practice of recording sentence and enacting clemency, or pronouncing sentence and deferring the decision— no longer sufficed. Responsibility for answering those questions posed by the colonial project was devolved to the local level rather than gathered into the hands of Canberra, as under Hasluck in 1954. Nuiginians, judges, the Administration, and Barnes' ministry decided that solutions to these questions had to be addressed in PNG within structures and using concepts that would eventually allow Nuiginians to attempt to solve these problems for themselves.

[121] "The Drum", *South Pacific Post*, 5 Jan 1966, p. 1.

# Conclusion

Through the studies of detailed and highly personalised capital case reviews examined in this thesis, the lives of illiterate and ordinary Nuiginians have entered into the historical record. Each case has revealed debates about Australia's place in the territories as guide and guardian, occasioned by the extremity of the crimes and penalties under discussion, the violence of which challenged colonial authority and also drew attention to the failures of Australia's colonialism to transform the legal culture of Nuiginians to an Australian rule of law. These capital case reviews provided an opportunity for Australian officials to seek a balance between self-interest and altruism. Each showed how that trusteeship was exercised on the bodies of offenders and in the experiences of their communities.

The analysis of these case files has allowed for more than a recording of who was hanged or was not. It has highlighted the rationales under which decisions were made about Nuiginians, culture, justice, and the role of the shifting notions underpinning Australian colonialism in making decision about punishment. It has also uncovered the effects of engagement with multiple audiences, from official to expatriate, metropolitan, and international communities.

This analysis has demonstrated that, in 1954, judges and bureaucrats in PNG attempted to solve the ambiguities of evidence and the cultural complexities of implementing Australian law in an extremely diverse colonial setting by judges and PNG officials making discretionary judgements to bring peace and confidence through engineering clemency and relative leniency with limited oversight from Canberra. The exercise of mercy was calculated in terms that would serve Australia's need to maintain the legitimacy of its colonial presence by projecting an image of benevolence to appease critics inside and outside of PNG. Ostensibly, also through mercy, colonialists hoped to advance Nuiginians slowly towards a more peaceful approach to disputes, and build confidence in the benignity of Australian control among Nuiginian communities. The case studies show that these issues were debated at the several levels to determine the fate of the accused in a process that was solidified by 1954.

By the later 1950s, as the Minister Paul Hasluck became more familiar with his role, and gave his own emphases to it, he found the reliance on judicial discretion and leniency was racist and colonialist, based as it was on presumptions of Nuiginian incapacity, and not easily sold to a critical world audience. Most of all, Hasluck determined that the legitimacy of Australia's role in PNG, and the viability of its colonial project, required the inculcation of a consistent, Western rule of law that could assist in Australia guiding the transformation of PNG communities into an "advanced society".

Hasluck moved against discretionary practices to alter the judicial culture to be more Australian by appointing an 'outsider' Chief Justice and ensured more oversight in Canberra to ameliorate his reservations about PNG justice. Hasluck's changes rendered the Governor-General and Executive Council, in particular Sir William Slim, much more significant to the process than previous Governor-Generals. His pre-war beliefs and perspectives on colonialism introduced a new level and set of parameters into the equation of determining justice and punishment. Yet this analysis of Hasluck's changes was tempered by evidence showing also that judges and officials negotiated the new parameters to achieve the outcomes they felt best, and that despite the preference of the Governor-General for executions, it actually only resulted in some longer sentences, but not more executions. Hasluck's brand of liberalism held that colonialism was only acceptable if it was equalitarian, altruistic and temporary, was in contrast to the pre- war paternalistic notions that Australians would decide what was best to advance and protect Nuiginians under the Murray system.

By the early 1960s, as international scrutiny grew and with it demands for more substantial moves towards independence, another stage of reform returned to dependence on judicial discretion with less oversight from Canberra. The continuing difficulties of evidence and process, a general move away from capital punishment in Australian jurisdictions, and a change in minister, further indicated the extent to which the exercise of this most extreme form of judicial power was fundamentally shaped by political considerations. Yet in doing so, the judiciary in PNG brought about an unintended, de facto end to the use of capital punishment for reasons that were as much legal as political.

This thesis has explored why Australian judges in PNG, and officials at several levels, utilised clemency so much more often than executions in controlling and communicating with Nuiginians. Decisions that took into account the changes in the international, national and local implications for colonial authority following the Second World War. With such high rates of commutation compared to those shown, for example, in Hynd's studies of British colonies in Africa. The analysis of the case files in this thesis provides a perspective on a distinctive technique of Australian colonialism in PNG, and also of the tensions, debates and transitions that occurred in the use of that technique.

This was not just a history of governance and politics. The analysis in this thesis has revealed something of the lives of ordinary people and their relationship to the colonial state. Their concerns with preserving law and order and preventing vendetta, their attempts to navigate the imposed legal system: and their attempts to find justice, can be excavated from the testimonies, precis of testimony, and accounts of missionaries, bureaucrats and lawyers collected to make decisions about the fate of the accused. In this detailed, but often selective and incomplete record we can see the lives of people

who experienced Australian justice and how they engaged with an attempt to 'advance' them through the criminal justice system. This thesis also showed that officials were well aware of the Nuiginian preference for responding to violent crime with capital punishment, yet Australian did not see that method as meeting their goals, so the Australian judiciary and Executive used executions only twice after the war.

Through the lens of capital case reviews, we can see though the pandanas curtain to the hopes, successes and failures, and self-beliefs of Australia's colonial officials and expatriate workers, and how such beliefs changed over time. These capital case review files provide evidence to construct a narrative of the intersecting ideologies of our colonialism at its most profound, in questions of life and death, and questions of gender, race, justice and civilisation.

Sean Dorney wrote in his book *The Embarrassed Colonialist* of the dearth of contemporary scholarship on the history of Australia's role in PNG. He argued that:

> We need to acknowledge our colonial past as a starting point for deeper engagement with PNG today. And once and for all Australia needs to shed its embarrassment and embrace its relations with its nearest neighbour.[122]

This thesis offers another step in that direction. It provides an understanding of Australian colonialism that perhaps is not as 'embarrassing' as it might have been had Australian officials made different decisions and judgements. Further, the rich archive from which this thesis is derived invites further study. It provides excellent opportunities to give much more attention to the lived experiences, relationships, and assumptions that shaped Nuiginians and Australians in their engagements with colonialism in the 1950s and 1960s.

[122] Sean Dorney, *The Embarrassed Colonialist,* Lowy Institute Papers- Penguin Special, Sydney, 2016, Kindle Edition 4%, final paragraph of introduction.

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