

## REVIEW ESSAY

### HONG KONG'S WAR CRIMES TRIALS

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#### I INTRODUCTION

Over the years, international criminal law ('ICL') literature has consistently and generously lavished attention on the post-World War II trial of the major war criminals at Nuremberg.<sup>1</sup> But a recent, and welcome, trend in the scholarship has given greater consideration to the trials of other categories of Axis perpetrators as well as older and more obscure ICL antecedents.<sup>2</sup> In fact, whether by design or not, over the past few years Oxford University Press has been publishing a series of titles devoted to these cases, including Neil Boister and Robert Cryer's *The Tokyo International Military Tribunal: A Reappraisal*,<sup>3</sup> Kevin Jon Heller's *The Nuremberg Military Tribunals and the Origins of International Criminal*

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<sup>1</sup> See, eg, Peter Calvocoressi, *Nuremberg: The Facts, the Law and the Consequences* (Chatto and Windus, 1947); Whitney R Harris, *Tyranny on Trial: The Trial of the Major German War Criminals at the End of World War II at Nuremberg, Germany, 1945–1946* (Southern Methodist University Press, revised ed, 1954); George Ginsburgs and V N Kudriavtsev (eds), *The Nuremberg Trial and International Law* (Martinus Nijhoff, 1990); David A Blumenthal and Timothy L H McCormack (eds), *The Legacy Of Nuremberg: Civilising Influence or Institutionalised Vengeance?* (Martinus Nijhoff, 2008). Kevin Jon Heller notes that '[s]cholars have produced literally dozens of books and hundreds of articles about the IMT trial': Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford University Press, 2011) 2.

<sup>2</sup> See, eg, Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford University Press, 2008); Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (Harvard University Asia Center, 2009); Heller, *Nuremberg Military Tribunals*, above n 1; Kevin Jon Heller and Gerry Simpson (eds), *The Hidden Histories of War Crimes Trials* (Oxford University Press, 2013).

<sup>3</sup> Boister and Cryer, above n 2 (exploring the International Military Tribunal for the Far East).

*Law*,<sup>4</sup> and Heller and Gerry Simpson's *The Hidden Histories of War Crimes Trials*.<sup>5</sup> Now the latest entry on this list — *Hong Kong's War Crimes Trials*<sup>6</sup> — examines Britain's military tribunal cases against Japanese WWII perpetrators that took place in its south China coast colony from 1946 through 1948. Edited by Professor Suzannah Linton, *Hong Kong's War Crimes Trials* makes an outstanding contribution to this new wave of scholarship.

The book is a collection of pieces by different authors regarding various aspects of the trials and serves as a logical follow-up to Professor Linton's 2012 *Melbourne Journal of International Law* article 'Rediscovering the War Crimes Trials in Hong Kong, 1946–48'.<sup>7</sup> The article itself was inspired by Professor Linton's work in establishing the Hong Kong War Crimes Trials Collection ('HKWCT Collection'), a digitised archive of the proceedings.<sup>8</sup> So the archive inspired the article and now the article has inspired this book.

Professor Linton places these scholarly essays in their proper perspective in an introductory chapter with helpful preliminary information regarding the trials.<sup>9</sup> Held in Hong Kong from 28 March 1946 to 20 December 1948, they were conducted by four British military tribunals and concerned war crimes committed in the British colony of Hong Kong (including Kowloon and the New Territories), as well as in Formosa (Taiwan), China (Waichow and Shanghai), Japan and on the high seas.<sup>10</sup> Of the 10 000 Japanese captured in Hong Kong after the surrender, 239 were held as suspected war criminals. From those, after further vetting, 123 individuals were prosecuted as part of 46 separate trials. Of the 108 convicted, 21 were executed and there were 14 acquittals.<sup>11</sup>

Consistent with the practice of British military trials at that time, the Hong Kong courts issued verdicts without reasoned decisions.<sup>12</sup> So each chapter in the book is the fruit of its author poring over the case files and gleaning insights from the opening and closing statements, transcripts, exhibits and various other

<sup>4</sup> Heller, *Nuremberg Military Tribunals*, above n 1, 9–25 (analysing the legal precedent established by the American zonal trials at Nuremberg pursuant to *Control Council Law No 10*).

<sup>5</sup> Heller and Simpson, *Hidden Histories*, above n 2 (looking at a wide range of cases, including the trial of Peter von Hagenbach, the 19<sup>th</sup> century Franco-Siamese mixed court, as well as tribunals from different eras in diverse places such as Ethiopia, Finland and Turkey).

<sup>6</sup> Suzannah Linton (ed), *Hong Kong's War Crimes Trials* (Oxford University Press, 2013).

<sup>7</sup> Suzannah Linton, 'Rediscovering the War Crimes Trials in Hong Kong, 1946–48' (2012) 13 *Melbourne Journal of International Law* 284 (the article's self-described purpose is to provide 'a window into the rediscovered Hong Kong war crimes trials and the key issues in international law that they raised' and thereby serve as a 'taster' of what is emerging from the research that is currently in progress: at 284).

<sup>8</sup> Suzannah Linton and Hong Kong University Libraries, *Hong Kong's War Crimes Trials Collection: HKU Libraries Digital Initiatives* <<http://hkwtc.lib.hku.hk>> (forming part of a project funded by the Hong Kong Special Administrative Region government's Research Grants Council, '[t]he Collection's website provides details of, and access to, the case files of 46 trials involving 123 persons who were tried in Hong Kong for war crimes committed during the Second World War').

<sup>9</sup> Suzannah Linton, 'Introduction' in Suzannah Linton (ed), *Hong Kong's War Crimes Trials* (Oxford University Press, 2013) 1, 1–5.

<sup>10</sup> Ibid 1.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

submissions as well as reviews of the proceedings by ‘Judge Advocates’ located in Singapore.<sup>13</sup>

## II TRIAL PROCEDURE

What were the origins and governing law for these relatively early post-WWII trials, many of which concluded before the judgment delivered by the International Military Tribunal at Nuremberg? Professor Alexander Zahar’s contribution, ‘Trial Procedure at the British Military Courts, Hong Kong, 1946–48’, the book’s first substantive chapter, answers these questions.<sup>14</sup> In post-WWII Far East Asia, British war crimes investigations were organised in Singapore, where the Headquarters of Allied Land Forces in South East Asia (‘ALFSEA’) created and oversaw inter-Allied investigating teams for work in the field.<sup>15</sup> The direct source of law for all British trials in the aftermath of WWII, including in Hong Kong, was the *Royal Warrant* of 18 June 1945, which had annexed to it the *Regulations for the Trials of War Criminals* (‘*Royal Warrant Regulations*’).<sup>16</sup> The *Royal Warrant* authorised the British Army to exercise jurisdiction over captured enemy personnel suspected of violations of the ‘laws and usages of war’, which were memorialised and explicated in the British *Manual of Military Law* (‘*Manual Military Law 1929 (as amended)*’).<sup>17</sup> The *Manual*, in turn, derived many of its norms from key contemporary international law instruments, including the 1907 *Hague Convention (IV) respecting the Laws and Customs of War on Land* and its annexed *Regulations concerning the Laws and Customs of War on Land* (collectively, ‘*Hague Convention IV and Its Annexed Regulations*’)<sup>18</sup> and the 1929 *Geneva Convention relative to the Treatment of Prisoners of War* (‘*1929 POW Convention*’).<sup>19</sup> The British also relied on customary international law to fill in interpretative gaps and, failing that, turned to UK domestic criminal law principles. Professor Zahar observes that the ‘sources of procedural and substantive law for the British military courts were therefore multiple, indistinct, and, one may presume, difficult to make sense of in their combined effect’.<sup>20</sup>

To operationalise this regime, and pursuant to the *Royal Warrant Regulations*, the ALFSEA Commander-in-Chief appointed the Commander of Land Forces,

<sup>13</sup> Ibid 1–2.

<sup>14</sup> Alexander Zahar, ‘Trial Procedure at the British Military Courts, Hong Kong, 1946–1948’ in Suzannah Linton (ed), *Hong Kong’s War Crimes Trials* (Oxford University Press, 2013) 13. To put the Hong Kong trials into further chronological and historical perspective, nearly all of the Hong Kong trials had concluded by the time the International Military Tribunal for the Far East handed down its judgment in November 1948: at 13.

<sup>15</sup> Ibid 15, 34–5.

<sup>16</sup> Ibid 14–15.

<sup>17</sup> Ibid. See *Manual of Military Law* (His Majesty’s Stationery Office, 7<sup>th</sup> ed, 1929) (‘*Manual of Military Law 1929*’).

<sup>18</sup> *Hague Convention (IV) respecting the Laws and Customs of War on Land*, opened for signature 18 October 1907 (entered into force 26 January 1910) annex (‘*Regulations respecting the Laws and Customs of War on Land*’) (collectively, ‘*Hague Convention IV and Its Annexed Regulations*’).

<sup>19</sup> Zahar, above n 14, 15. See *Geneva Convention relative to the Treatment of Prisoners of War, with Annex*, opened for signature 27 July 1929, 118 LNTS 343 (entered into force 19 June 1931) (‘*1929 POW Convention*’).

<sup>20</sup> Zahar, above n 14, 16.

Hong Kong to convene war crimes courts and to review and confirm court sentences.<sup>21</sup> For each panel, a designated Convening Officer would in turn select a Lieutenant Colonel to serve as Presiding Officer, supported by one Major and one Captain.<sup>22</sup> Although a clear exception to actual practice, the Presiding Officer could be appointed even if not trained as a lawyer.<sup>23</sup> Similarly, although prosecutors were supposed to be ‘legally qualified’, some lacked formal legal education or practice experience.<sup>24</sup> The accused had the right to counsel and could choose a Japanese attorney, a British Defending Officer, other non-Japanese civilian lawyers or self-representation.<sup>25</sup> In many cases, notwithstanding patent conflicts of interests, attorneys often represented multiple parties.<sup>26</sup> Pre-trial motions, including for jurisdictional challenges, were extremely limited.<sup>27</sup>

Consistent with this informal regime, the *Royal Warrant Regulations* called for an expedited and simplified adversarial procedure with relaxed rules of evidence (including use of affidavits rather than live witness testimony).<sup>28</sup> In principle, defendants were able to call any witness they ‘reasonably desired’ in support of their cases. But, in practice, given time pressures, distant witnesses were often not allowed to testify (even if the defendant were willing to cover the cost of transportation).<sup>29</sup>

There was no right to appeal but defendants could submit a petition against the finding or sentence that would be transferred to an ALFSEA Judge Advocate, who would prepare an ‘advisory report’ for the Confirming Officer (the same person as the Convening Officer).<sup>30</sup> Certainly, the absence of a judicial opinion with reasoning made it difficult for the accused to identify grounds for objection and the petitions usually had no impact on the final outcome. On rare occasions, however, the Judge Advocate would point out certain problems with the trial findings and the Confirming Officer would make adjustments (such as converting a death sentence into a prison term).<sup>31</sup>

Professor Zahar suggests that these due process deficits, relative to normal courts martial, were overlooked in the interest of promoting speed and efficiency in bringing Japanese war criminals to justice. But he does not excuse them. He faults the Hong Kong trials for being under-resourced, relatively hasty, and a form of hypocritical ‘victor’s justice’ in light of widespread Allied misdeeds, including the indiscriminate firebombing of German cities, the Russian murder

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<sup>21</sup> Ibid 23.

<sup>22</sup> Ibid 24–5.

<sup>23</sup> Ibid 26.

<sup>24</sup> Ibid 32–3.

<sup>25</sup> Ibid 46. The civilian lawyer would have to be nominated by the British Military Authorities and the accused would have to cover the cost of this kind of representation.

<sup>26</sup> Ibid 47–8.

<sup>27</sup> Ibid 22–3, 28.

<sup>28</sup> Ibid 41–2.

<sup>29</sup> Ibid 40.

<sup>30</sup> Ibid 60–1.

<sup>31</sup> Ibid 63–4.

and rape rampage during the victorious push into the Third Reich, and the American use of nuclear weapons against Hiroshima and Nagasaki.<sup>32</sup>

Moreover, he points out that British racist attitudes toward the Japanese further mar the trials' legacy. He notes, for example, the statement of the Presiding Judge in pronouncing the death sentence in one case: 'The Court has taken into consideration the fact that you belong to a black race from which little or no decency is expected, but by no conceivable standard of conduct is there any excuse for what you did.'<sup>33</sup> Zahar also complains that the 22 convicted who were sentenced to death received truly disproportionate punishment. In light of Cold War politics, similar to what happened after the subsequent Nuremberg trials,<sup>34</sup> the remaining defendants, including those sentenced to life in prison, were all released prior to serving out their sentences and none of them were incarcerated for more than 10 years.<sup>35</sup>

All in all, Professor Zahar's chapter succeeds admirably in providing an overview of the trials, the law and procedure that governed them and an assessment of their substantive and procedural strengths and weaknesses. The table is then set for the other authors to tackle more substantive law issues from the Hong Kong trials, such as the core offenses, modes of criminal responsibility and defences.

### III THE PRISONER OF WAR CAMP TRIALS

What follows is a two-chapter sequence related to the only core crime charged in connection with the Hong Kong proceedings — war crimes. It begins with Professor Yuma Totani examining a single variant of those charges — those focusing on abuses committed at prisoner of war camps. The chapter opens somewhat curiously with an American judge reading the July 1949 verdict in the Philippine military commission trial of Japanese Lieutenant General Shigenori Kuroda, who was found guilty of war crimes for the unlawful treatment of prisoners of war and civilian internees consistent with a 'general pattern in all the camps' in the Philippines.<sup>36</sup> This included inadequate rations, overcrowded and

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<sup>32</sup> Arguably, for the same reasons, the Nuremberg and Tokyo trials are tainted with the same type of 'victor's justice' hypocrisy. See Vijay M Padmanabhan, 'Norm Internalization through Trials for Violations of International Law: Four Conditions for Success and Their Application to Trials of Detainees at Guantanamo Bay' (2009) 31 *University of Pennsylvania Journal of International Law* 427, 442–3. Professor Zahar notes that:

The post-World War II tribunals at Nuremberg and Tokyo were victor's justice in the truest sense of the term: they were conceived of and conducted by the victorious Allies ... while alleged Allied war crimes — including Stalin's massacres, the British and US firebombing of Dresden, and the US decision to use the atomic bomb at Hiroshima and Nagasaki — were not investigated.

Despite mentioning the Nuremberg and Tokyo trials when relevant elsewhere, Professor Zahar spares them from criticism in this context.

<sup>33</sup> Zahar, above n 14, 67.

<sup>34</sup> See John Shattuck, 'The Legacy of Nuremberg: Confronting Genocide and Terrorism through the Rule of Law' (2006) 10 *Gonzaga Journal of International Law* 6, 8 ('By the time of the Korean War, the American High Commissioner in Germany, John J McCloy, had commuted or reduced the sentences of sixty-four of the seventy-four highest-level convicted Nazi war criminals').

<sup>35</sup> Zahar, above n 14, 68–9.

<sup>36</sup> Yuma Totani, 'The Prisoner of War Camp Trials' in Suzannah Linton (ed), *Hong Kong's War Crimes Trials* (Oxford University Press, 2013) 71, 71.

unhygienic quarters, withholding of medical supplies, neglect of the gravely sick, frequent beatings and other physical abuses, unlawful use of Prisoner of War ('POW') labour under trying and dangerous conditions and many illnesses, injuries and deaths resulting from the mistreatment.<sup>37</sup> Professor Totani points out that the American verdict 'had special resonance with the findings made earlier at the British war crimes trials in Hong Kong'.<sup>38</sup> She then examines five of the Hong Kong trials — of Japanese commandants and their subordinates, as well as a civilian mining company executive, at camps in Hong Kong and Taiwan — in an effort to parse culpability for the aforementioned depredations among camp guards, officers, civilian managers and the central government of Japan.<sup>39</sup>

The chapter does a fine job of summarising the trials and giving them historical perspective. The one Hong Kong camp case, whose lead defendant was Colonel Isao Tokunaga, was notable for the predominance of Canadian victims, an implied theory of command responsibility and an exploration of the potential liability of Tokunaga's superiors, all the way up to the War Ministry in Tokyo.<sup>40</sup> The Taiwan cases, in addition to the general features noted above, featured POWs labouring for various Japanese business concerns, including the Japan Mining Company.<sup>41</sup> Professor Totani explores the brutal treatment of the POWs so enslaved as well as the involvement of company officials, primarily Japan Mining Company executive Mitsugu Toda, who was found guilty.<sup>42</sup> She also explores the Japanese abuse of high-ranking Allied officers in the Taiwanese prison camps.<sup>43</sup> In direct violation of the laws of war, British colonels and generals were routinely forced to perform such demeaning tasks as pulling weeds and drawing water for the baths of Japanese guards.<sup>44</sup>

Professor Totani is an historian and her chapter provides an excellent historical account of these trials and helps situate them in the larger context of Japanese POW crimes throughout the Pacific — for example, explaining wartime Japan's labour shortage, its institutional animus toward 'white' POWs (those from Europe and North America), the important role of mid-level actors in the Army, the relationship between the corporate and military segments of Japan and the harsh treatment of senior officers in the camps.<sup>45</sup> Given the doctrinal focus of this tome, though, her analysis of the *Toda* case might have benefited from some consideration of the Nuremberg jurisprudence regarding liability of

<sup>37</sup> Ibid 72.

<sup>38</sup> Ibid 71. The beginning of the chapter is somewhat confusing, as the British camp trials in Hong Kong took place before the referenced American Philippines trial. Perhaps it would have been clearer to have started with the Hong Kong trials and then described the American trial at the end of the chapter, as a kind of postscript.

<sup>39</sup> Ibid 73.

<sup>40</sup> Ibid 74–81.

<sup>41</sup> Ibid 82.

<sup>42</sup> Ibid 90–2.

<sup>43</sup> Ibid 85–7.

<sup>44</sup> Ibid 85.

<sup>45</sup> Professor Totani might have explored in greater detail the inherent contempt in then prevailing Japanese military culture toward Prisoners of War ('POWs'). See Edward Frederick Langley Russell, *The Knights of Bushido: A History of Japanese War Crimes During World War II* (Skyhorse, 2008) ('The youth of Japan had been brought up ... to consider ... that it was ignominious to surrender to the enemy [and this] undoubtedly led to the Japanese soldier having a feeling of utter contempt for those who surrendered to the Japanese forces': at 55).

corporate officials. Similarly, reference to the command responsibility doctrine, given important precedents in that area by the time of the Taiwan camp trials, including *In re Yamashita*, could have been helpful.<sup>46</sup> Still, given the central role of POW camps in the perpetration of Japanese atrocities during the war, this outstanding historical exposition serves as a linchpin for the entire volume.

#### IV WAR CRIMES

Professor Totani's chapter is followed by another superb contribution dealing with war crimes more generally. Professor Suzannah Linton begins her 'War Crimes' chapter by elucidating the *Royal Warrant*'s key subject matter jurisdiction phrase — violations of the 'laws and usages of war'.<sup>47</sup> She places these into four discrete categories: (1) war crimes against POWs; (2) war crimes against persons hors de combat, including surrendering or newly surrendered personnel and sick and wounded personnel; (3) war crimes against medical personnel; and (4) war crimes against civilians.<sup>48</sup> Then she sets out the sources of law used to adjudicate the cases. Consistent with Professor Zahar's analysis, she explains how the Hong Kong trials were regulated by a mixed regime of international and domestic law largely incorporated into the *Manual of Military Law 1929 (as amended)*.<sup>49</sup>

What is truly fascinating about this section, however, is Professor Linton's consideration of which laws were found to be binding on Japan. Although Japan was a party to the 1906 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field*<sup>50</sup> and the 1907 *Hague Convention IV and Its Annexed Regulations*, it did not sign the 1929 *POW Convention*. Still, it appears the British military courts in Hong Kong applied the 1929 *POW Convention* to the Japanese as a matter of customary international

<sup>46</sup> *In re Yamashita*, 327 US 1 (1946). See also Linton, 'Rediscovering', above n 7 ('The decisions in these Hong Kong cases came in the wake of the US Supreme Court *In re Yamashita* ... judgment upholding the conviction of the Japanese General on the basis of command responsibility': at 318).

<sup>47</sup> Suzannah Linton, 'War Crimes' in Suzannah Linton (ed), *Hong Kong's War Crimes Trials* (Oxford University Press, 2013) 95, 96.

<sup>48</sup> *Ibid* 97 (noting that there were no cases involving the means and methods of warfare, such as use of prohibited weapons).

<sup>49</sup> *Ibid* 100–2. Based on this, the British considered the main offences constituting war crimes to be: (1) shooting and killing without justification; (2) shooting and killing on the false pretence that the prisoner was escaping; (3) assault with violence causing death and other forms of murder or manslaughter; (4) shooting, wounding with bayonet, torture and unjustified violence; (5) other forms of ill-treatment causing the infliction of grievous bodily harm; (6) theft of money and goods; (7) unjustified imprisonment; (8) insufficient food, water and clothing; (9) lack of medical attention; (10) bad treatment in hospitals; (11) employment on work having direct connection with the operation of the war or on unhealthy or dangerous work; (12) detaining Allied personnel in an area exposed to the fire of the fighting zone; (13) making use of POWs or civilians as a screen and such cases as attacks on hospitals or hospital ships and on merchant ships without making provision for survivors; and (14) interrogation by 'third degree' or other forcible methods: at 102.

<sup>50</sup> *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field*, opened for signature 6 July 1906 (entered into force 9 August 1907) (ultimately superseded by the 1929 convention of the same title: opened for signature 27 July 1929, 118 LNTS 303 (entered into force 19 June 1931)).

law, much as the International Military Tribunal for the Far East would do in subsequent proceedings.<sup>51</sup>

Having laid out the doctrinal framework, Professor Linton briefly considers the two categories of war crimes against persons hors de combat and medical personnel. As these were limited exclusively to the actual invasion of Hong Kong, and trials centred on them were largely factual in nature (not raising complex war crimes issues), the balance of the chapter concentrates on war crimes against civilians in occupied territory. Within this rubric, the analysis further subdivides into forced displacement cases, torture/ill-treatment cases and homicide cases.

With respect to the displacement cases, Linton examines the trials of two *Kempeitai* commanders who were charged with war crimes related to the forced relocation of approximately one million people from Hong Kong to occupied China.<sup>52</sup> Given resource shortages in Hong Kong, was this coerced removal of civilians a legitimate administrative act carried out for the greater good of the Hongkongers or a war crime, given its brutal implementation and net negative impact on human life? Professor Linton indicates it was the latter and points to the guilty verdicts in the two cases. Her analysis is enriched through consideration of arts 43 and 46 of the 1907 *Hague Regulations*, the Martens Clause, the Nuremberg *Control Council Law No 10*<sup>53</sup> trials of Krupp and High Command as well as comparisons with contemporaneous analogous trials in China (Sakai and Isogai and Singapore (the *Andaman Islands* case)).<sup>54</sup>

The torture/ill-treatment and homicide cases she attributes primarily to the standardised, widespread and systematic nature of *Kempeitai* abuse of civilians. Linton observes that, with two exceptions, British authorities did not charge ‘torture’ as a war crime. When they did, the term ‘torture’ was limited to practices associated with coercive interrogation.<sup>55</sup> This included water torture, beatings, burnings, electrocution and dog attacks on persons suspected in resistance activities, black marketeering or espionage.<sup>56</sup> Linton observes that there was no explanation of the conceptual distinctions between torture and other forms of maltreatment, but it might have been interesting to consider how this squares with modern formulations of ‘torture’ as a war crime or as a crime

<sup>51</sup> Linton, ‘War Crimes’, above n 47, 104–5.

<sup>52</sup> Ibid 107–18. The *Kempeitai*, the police of the Imperial Japanese Army that also served as a counterespionage agency, ‘operated with extreme ruthlessness in [territories occupied by Japan during the war] gaining a brutal reputation similar to that of the Gestapo in Germany’: H Keith Melton, *The Ultimate Spy Book* (Dorling Kindersley, 1996) 40.

<sup>53</sup> ‘Control Council Law No 10: Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity’ (1946) 3 *Official Gazette of the Control Council for Germany* 50.

<sup>54</sup> Linton, ‘War Crimes’, above n 47, 117–18.

<sup>55</sup> Ibid 118.

<sup>56</sup> Ibid 119.

against humanity.<sup>57</sup> In one case, the prosecutor claimed that *Kempeitai* atrocities against civilians could ‘be classed as crimes against humanity’.<sup>58</sup> One wonders whether the British considered adding this as a potential charge for *Royal Warrant* prosecutions but the book does not take up this avenue of inquiry, perhaps because nothing illuminating was to be found in the files.

There is an area of war crimes involving torture/ill-treatment of civilians that gets short shrift in the British prosecution strategy. As Professor Linton points out, the Japanese raped civilian women during the invasion. And several rapes were included in the case brought against Lieutenant General Takeo Ito, although he was acquitted on these counts because of difficulties in proving the chain of command.<sup>59</sup> Did Hong Kong’s new overlords continue to use rape as a tool of persecution and repression during the occupation? The historical record suggests they did. According to historian Charles Roland:

To provide a context for what happened at St Stephen’s [where nurses were raped during the invasion], it must be kept in mind that at least 10 000 girls and women in Hong Kong were raped in the month following the Japanese victory. The number may have been much higher, but modesty led to a reluctance to disclose at least the less violent and bloody instances and probably kept many victims from identifying themselves or reporting their ill treatment to authorities. The estimate of at least 10 000 was put forward by a Chinese physician who was in active practice in Hong Kong during 1941 and 1942.<sup>60</sup>

At the end of her chapter, Professor Linton does lament not finding documentation that would shed light on the dearth of British sexual violence prosecutions arising from Kowloon and Victoria conquest atrocities committed by the Japanese.<sup>61</sup> Charles Roland suggests that rape may not have been reported

<sup>57</sup> For example, a clear difference between torture as a war crime and as a crime against humanity under the *Rome Statute of the International Criminal Court* (*Rome Statute*) relates to the requirement of purpose. With respect to the former, pursuant to art 8 of the *Rome Statute*, the perpetrator must be acting for such purpose as obtaining information, a confession, intimidation or some other tangible benefit for the perpetrator. Regarding the latter, under art 7, no specific purpose need be demonstrated. See *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) arts 7, 8; Machteld Boot, *Genocide, Crimes against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Intersentia, 2002) 587.

<sup>58</sup> Linton, ‘War Crimes’, above n 47, 122.

<sup>59</sup> Ibid ([War crimes against medical personnel were committed] at St Stephen’s College, including the rape and murder of several nurses’: at 99; ‘Prosecutions for sexual violence, consistent with the practice of the time, were peripheral, although the rape of a number of nurses at St Stephen’s College, the Jockey Club, and local civilians at Blue Pool Road, were included in one of the Hong Kong island invasion cases’: at 133). See also Hanson W Baldwin, *The Crucial Years: 1939–1941: The World at War* (Harper & Row, 1976) 410 (“The nurses [at St Stephen’s] were gang-raped in a welter of blood and seven were bayoneted to death”).

<sup>60</sup> Charles G Roland, *Long Night’s Journey into Day: Prisoners of War in Hong Kong and Japan, 1941–1945* (Wilfrid Laurier University Press, 2001) 40. See also Suzannah Linton, ‘Appendix, Major Murray Ormsby: War Crimes Judge and Prosecutor 1919–2012’ in Suzannah Linton (ed), *Hong Kong’s War Crimes Trials* (Oxford University Press, 2013) 227. In interviewing Major Murray Ormsby, a former judge and prosecutor at the Hong Kong tribunals, Professor Linton asks ‘Okay, so you don’t know anything about how it was that they got involved in looking at a case. There are some gaps. The sexual violence, for example, you mentioned the nurses, but there was a lot more that went on in Hong Kong that wasn’t prosecuted’; Ormsby replies: ‘Sure, as you say’.

<sup>61</sup> Linton, ‘War Crimes’, above n 47, 133.

(or was severely under-reported) ‘[g]iven the inbred reticence and modesty of women from many eastern cultures’.<sup>62</sup>

The last category of war crimes cases covered here involves civilian homicides, wherein a common issue during the trials was causation. Many civilians died soon after being released by the *Kempeitai* from diseases such as tuberculosis or cancer that had been brought about or aggravated by the ill-treatment during captivity. Were the *Kempeitai* in the dock legally responsible for those deaths? Professor Linton explains that ‘[c]ausation was, correctly, determined on a case-by-case basis’.<sup>63</sup> She also explains how the British courts navigated the thorny issue of civilians killed in the course of anti-guerrilla activities. Defence counsel in the *Lantau Island* trial,<sup>64</sup> she notes, cited sources such as Lassa Oppenheim and the 1907 *Hague Convention* for the proposition that the Japanese, as the occupying power in Hong Kong, were allowed to take offensive measures against the civilians who had taken up arms against them. Moreover, noting their reliance on Birkenhead’s *International Law*<sup>65</sup> and the United States ‘Lieber Code’,<sup>66</sup> she outlines their argument that guerrillas could be summarily executed.<sup>67</sup> Although the court convicted most of the defendants in that case, Linton reasonably infers that, in sentencing most of them rather lightly, the court apparently found that the Japanese were entitled to defend themselves against attack but not to execute prisoners, including innocent villagers, without trial.<sup>68</sup> Once again, a Hong Kong war crimes court managed to strike a delicate balance between acknowledging the realities of war and the higher principles that help render it more humane. Capturing that balance and explaining the legal intricacies that underlay it is one of the chief strengths of this comprehensive but economically written chapter.

## V JOINT CRIMINAL ENTERPRISE

The book’s next two contributions deal, respectively, with modes of criminal responsibility and the plea of superior orders. Professor Nina Jørgensen handles the former by tackling the issue of whether a Hong Kong tribunal charge of ‘being concerned in crime’ represented a nascent version of joint criminal enterprise liability (‘JCE’). She begins her chapter by acknowledging the controversy surrounding JCE, which she colourfully characterises as the ‘chilli pepper’ of modes of liability.<sup>69</sup> Introduced by a 1999 International Criminal Tribunal for the Former Yugoslavia (‘ICTY’) Appeals Chamber decision in

<sup>62</sup> Roland, above n 60, 40.

<sup>63</sup> Linton, ‘War Crimes’, above n 47, 126.

<sup>64</sup> *Trial of Lt Kishi Yasuo and Fourteen Others* (HKWCT Collection, Case No WO235/993) <<http://hkwtc.lib.hku.hk/exhibits/show/hkwctc/documents/item/58>>.

<sup>65</sup> Frederick Edwin Smith and James Wylie, *International Law* (JM Dent & Sons, 4<sup>th</sup> revised ed, 1911).

<sup>66</sup> Francis Lieber, *Instructions for the Government of Armies of the United States in the Field* (Washington Government Printing Office, 1898).

<sup>67</sup> Linton, ‘War Crimes’, above n 47, 129–30.

<sup>68</sup> *Ibid* 132–3.

<sup>69</sup> Nina H B Jørgensen, ‘On Being “Concerned” in a Crime: Embryonic Joint Criminal Enterprise?’ in Suzannah Linton (ed), *Hong Kong’s War Crimes Trials* (Oxford University Press, 2013) 137, 137.

*Prosecutor v Tadić*<sup>70</sup> as a creature of customary international law and partially repudiated 11 years later by a Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia ('ECCC') in the *Case of Ieng Thirith, Ieng Sary and Khieu Samphan ('Ieng Sary')*,<sup>71</sup> the future of JCE is cloudy and one has to appreciate Jørgensen's scouring of the Hong Kong trials for new insights into JCE's legacy and possibly its place in posterity.

In the process, she does a terrific job of elucidating its doctrinal underpinnings. JCE permits principal liability, as opposed to accomplice liability, to attach to actors with even peripheral physical participation in group crimes.<sup>72</sup> It has three categories. Category I involves the defendants' sharing the same intent in acting pursuant to a common design. Category II, a variant of Category I applied to 'concentration camp' cases, involves active participation in the enforcement of a system of repression with knowledge of the system and intent to further the common design of ill-treating the prisoners.<sup>73</sup> Category III, also assuming a common design, is the most controversial as it entails a perpetrator committing an act outside the common design that is nevertheless imputed to all members of the group because it was a 'natural and foreseeable' consequence of effecting the common design.<sup>74</sup> It was this last category that was rejected by the ECCC Pre-Trial Chamber in *Ieng Sary*.<sup>75</sup>

So can 'being concerned in a crime' be deemed a progenitor of JCE liability? To find out, Jørgensen traces the roots of the former, going all the way back to its early common law antecedents.<sup>76</sup> Then she examines its treatment in the Hong Kong cases.<sup>77</sup> Her analysis reveals that 'being concerned in a crime' is a hydra-headed liability placeholder encompassing versions of command responsibility, traditional complicity and standard principal liability.<sup>78</sup> Although elements of JCE appear in the Hong Kong cases, such as shades of Category II in the Tokunaga POW camp case,<sup>79</sup> in the end Professor Jørgensen concludes that 'concerned in' was used primarily 'to indicate that the accused was implicated in crimes for which he was not necessarily exclusively liable' and not a joint venture.<sup>80</sup>

<sup>70</sup> *Prosecutor v Tadić (Appeal Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) [195]–[226].

<sup>71</sup> *Case of Ieng Thirith, Ieng Sary and Khieu Samphan (Appeal Judgment)* (Extraordinary Chambers in the Courts of Cambodia, Pre-Trial Chamber, Case No 002/19-09-2007-EC CC-OCIJ (PTC38), 20 May 2010) [77].

<sup>72</sup> Elizabeth J Rushing et al, 'Updates From the International Criminal Courts' (2007) 14 *Human Rights Brief* 55 ('[A]iding and abetting is a form of *accomplice liability*, whereas participation in a joint criminal enterprise is a type of *direct commission* of a crime with other persons': at 56 (emphasis in original)).

<sup>73</sup> Ian M Ralby, 'Joint Criminal Enterprise Liability in the Iraqi High Tribunal' (2010) 28 *Boston University International Law Journal* 281, 297–8.

<sup>74</sup> *Ibid* 299.

<sup>75</sup> Michael P Scharf, 'Seizing the "Grotian Moment": Accelerated Formation of Customary International Law in Times of Fundamental Change' (2010) 43 *Cornell International Law Journal* 439, 440 n 2.

<sup>76</sup> Jørgensen, above n 69, 142–4.

<sup>77</sup> *Ibid* 146–57.

<sup>78</sup> *Ibid* 156.

<sup>79</sup> *Ibid* 152. See *Trial of Colonel Tokunaga Isao and Four Others* (HKWCT Collection, Case No WO235/1012) <<http://hkwtct.lib.hku.hk/exhibits/show/hkwctc/documents/item/61>>.

<sup>80</sup> Jørgensen, above n 69, 156.

She arrives at this conclusion notwithstanding the applicability of reg 8(ii) of the *Royal Warrant Regulations*, which provided that in cases of concerted action by a group, evidence of guilt as to one member could be treated as *prima facie* evidence of guilt of the other group members and such evidence would permit a joint trial of the group members.<sup>81</sup> This was arguably a precursor of arts 9 and 10 of the *Charter of the International Military Tribunal* ('Nuremberg Charter'),<sup>82</sup> which dealt with responsibility for membership in a criminal organisation.<sup>83</sup> Professor Jørgensen finds, however, that '[reg] 8(ii) was relevant primarily for the purpose of assessing evidence and not as a provision relating to substantive law'.<sup>84</sup>

Similarly, she opines that 'concerned in' is not a predecessor of JCE's prime competitor as a joint criminality doctrine, 'co-perpetration', which has been embraced by the International Criminal Court ('ICC').<sup>85</sup> In any event, with respect to JCE's most controversial manifestation, Category III, Jørgensen concludes that the Hong Kong cases are essentially neutral.<sup>86</sup> But she suggests that their neutrality might lend subtle sanction to the ECCC's take on Category III.<sup>87</sup> Whether that insight is ultimately validated or not, Professor Jørgensen's chapter makes an important contribution to the historical understanding of group criminality doctrine in ICL.

## VI THE PLEA OF SUPERIOR ORDERS

The next chapter is Professor Bing Bing Jia's and it is titled 'The Plea of Superior Orders in the Hong Kong Trials'.<sup>88</sup> Professor Jia's contribution is significant in that he surveys the wide panorama of the superior orders legal landscape — both chronologically and in terms of domestic and international jurisdictions — and then situates the plea within the Hong Kong cases. His analysis also helpfully bifurcates the traditional functions of the superior orders plea in terms of, on one hand, serving as a potential defence for liability and, on the other, serving as a mitigating factor for sentencing.<sup>89</sup>

Early on, he shows that he is sympathetic to the plea, observing:

In the extreme conditions of a total war, with many countries involved to varying degrees in violation of the law and customs of war, could international law still expect a soldier, being a member of a gigantic machine of armed forces — often numbering millions at the height of a world war — to retain his own judgment as

<sup>81</sup> Ibid 145.

<sup>82</sup> *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 82 UNTS 279 (signed and entered into force 8 August 1945) annex ('Charter of the International Military Tribunal').

<sup>83</sup> Jørgensen, above n 69, 145. Consistent with this, *Control Council Law No 10* provided in its art 2(2) that criminal liability could be incurred based on a connection with plans or enterprises involving the commission of a crime or membership in an organisation connected to such a crime: at 145.

<sup>84</sup> Jørgensen, above n 69, 161.

<sup>85</sup> Ibid 163–4.

<sup>86</sup> Ibid 167.

<sup>87</sup> Ibid.

<sup>88</sup> Bing Bing Jia, 'The Plea of Superior Orders in the Hong Kong Trials' in Suzannah Linton (ed), *Hong Kong's War Crimes Trials* (Oxford University Press, 2013) 169.

<sup>89</sup> Ibid.

to the legality or otherwise of an order that commanded him to kill [POWs] or civilian detainees, or other orders of lesser hue of unlawfulness?<sup>90</sup>

But he acknowledges that the plea's development over time 'has by no means been a smooth process'.<sup>91</sup> He then identifies the change in the British stance regarding the defence from the first part of the 20<sup>th</sup> century, when the UK absolved soldiers for crimes committed pursuant to superior command, until well into WWII — 1944 to be exact — when it rejected the excuse.<sup>92</sup> Jia points out how divided British authorities were about the change.<sup>93</sup> And he astutely notes that, despite having a *Charter* that explicitly rejected the superior orders defence,<sup>94</sup> the International Military Tribunal at Nuremberg may have subtly and implicitly endorsed it in the following passage of its Nuremberg judgment ('IMT Nuremberg Judgment'): 'That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense ... though ... [t]he true test ... is not the existence of the order, but whether moral choice was in fact possible'.<sup>95</sup>

Professor Jia then writes that, despite post-WWII British and international rejection of the superior orders plea on the surface (as evidenced by international instruments and military manuals), in practice certain military tribunals implicitly acknowledged the International Military Tribunal's above-cited 'moral choice' dictum and accepted the plea as a defence 'when the recipient believed in the order's lawfulness'.<sup>96</sup> It is in that context that he begins his analysis of superior orders in the Hong Kong cases. And he divides this analysis into five case categories: (1) the plea as a defence without the element of duress; (2) the plea containing an element of duress; (3) the plea raised in conjunction with other factors; (4) the plea raised by civilian officials; and (5) the plea as a mitigating factor.<sup>97</sup>

Based on these categories, Professor Jia then dissects the individual cases. His analysis of the individual cases, however, reveals a blurring of the categories. In essence, categories (2) and (3) end up looking like category (1) — all three categories involve cases where, quite simply, the accused claimed they were acting under orders. The category (2) cases, designated as implicating duress, seem to involve the accused stating explicitly at trial that, if they had disobeyed the order, they would have ultimately been punished (which is clearly implied in the 'non-duress' cases, even if not stated explicitly). However, according to well established principles of ICL, as announced in the *Control Council Law No 10 Einsatzgruppen* decision<sup>98</sup> and consistently affirmed elsewhere, a defendant may invoke duress only if he has been faced with an 'imminent, real, and inevitable'

<sup>90</sup> Ibid 170.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid 173–4.

<sup>93</sup> Ibid 174–6.

<sup>94</sup> *Charter of the International Military Tribunal* art 8.

<sup>95</sup> *International Military Tribunal (Nuremberg) Judgment and Sentences*, reproduced in 'Judicial Decisions' (1947) 41 *American Journal of International Law* 172, 221 ('IMT Nuremberg Judgment').

<sup>96</sup> Jia, above n 88, 179.

<sup>97</sup> Ibid 181–95.

<sup>98</sup> *United States of America v Ohlendorf* (United States Military Tribunal, Nuremberg, Case No 9, 10 April 1948).

threat to his life.<sup>99</sup> This means ‘threatened injuries that will follow nearly instantly if the coerced actor fails to obey’.<sup>100</sup> The cases cited by Professor Jia — where the defendants cite only general concerns about future punishment not specified — do not appear to satisfy the imminence or death-threat requirements.

Category (3), the plea in conjunction with other factors, seems to involve multiple defendant cases (but with individual defendants asserting the plea) — no substantive conceptual or factual difference appears to distinguish these cases from those in the first two categories. In fact, in every case in each of the five ‘categories’, the accused were all found guilty and several were sentenced to death (or substantial prison sentences). Some received lighter sentences but given the absence of reasoned decisions, one can only speculate as to whether the superior orders plea had a mitigating effect. Even in the one case discussed under category (5), ‘the plea as a mitigating factor’, the defendants were accused only of ill-treatment of civilians but were nonetheless sentenced to 15 years’ imprisonment.<sup>101</sup>

Professor Jia concedes that

the weight of the existing international law concerning superior orders ... was rather overwhelming, so that there was little trace of a successfully raised defence ... [and] [t]he trials discussed so far might have provided further evidence to the trend of denying the plea the status of a defence.<sup>102</sup>

Still, he alludes to the dictum in the *IMT Nuremberg Judgment* regarding ‘moral choice’ and then art 33 of the *Rome Statute of the International Criminal Court* (*Rome Statute*) (allowing superior orders as a defence to war crimes if the order was not ‘manifestly unlawful’) to suggest that the defence may again be crystallising as a norm of customary international law.<sup>103</sup>

Although Professor Jia’s analysis of the superior orders plea in the Hong Kong cases offers useful insight into the development of the plea until that time, his assigning it new customary international law status goes perhaps too far. The weight of recent and current scholarly analysis lies heavily in the other direction. In the first place, rejection of the superior orders defence is well rooted — going all the way back to history’s first ever ICL trial, the 1474 prosecution of Peter von Hagenbach.<sup>104</sup> Moreover, despite a Westphalian-flavoured caesura in the intervening years, the post-WWII trials of Axis perpetrators, as well as the ICTY and the International Criminal Tribunal for Rwanda, embraced the Hagenbach

<sup>99</sup> See, eg, Heller, *The Nuremberg Military Tribunals*, above n 1, 395; *R v Finta* [1994] 1 SCR 701, 837; Sarah J Heim, ‘The Applicability of the Duress Defense to the Killing of Innocent Persons by Civilians’ (2013) 46 *Cornell International Law Journal* 165, 167–8.

<sup>100</sup> Heim, above n 99, 168, quoting Joshua Dressler, ‘Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits’ (1989) 62 *California Law Review* 1331, 1340.

<sup>101</sup> Jia, above n 88, 194–5.

<sup>102</sup> Ibid 195.

<sup>103</sup> Ibid 195–6.

<sup>104</sup> Gregory S Gordon, ‘The Trial of Peter von Hagenbach: Reconciling History, Historiography and International Criminal Law’ in Heller and Simpson (eds), *The Hidden Histories of War Crimes Trials* (Oxford University Press, 2013) (‘[The 1474 Hagenbach trial] is the first recorded case in history to reject the defence of superior orders’: at 13).

precedent and invested it with customary status. According to Professor Antonio Cassese:

As international instruments (in particular Statutes of the ad hoc International Tribunals, as well as *Control Council Law No 10*) and national and international case law clearly show, a customary rule has evolved in international law whereby an international crime by a subordinate may not be excused by the plea that he acted upon superior orders.<sup>105</sup>

Others similarly conclude that '[art] 33 of the *Rome Statute* has departed from customary international law without any well-grounded reasons'.<sup>106</sup>

Professor Yoram Dinstein suggests that 'superior orders' is not so much a complete defence in its own right but rather a common factual component of the duress and mistake of law defences asserted in the war crimes context.<sup>107</sup> If a commander threatens a subordinate with imminent death unless an order is carried out, then the defence is duress (of course, duress in this context might not entail a 'superior' order as the source of coercion could be a peer, subordinate or civilian). The 'moral choice' dictum in the *IMT Nuremberg Judgment*, Dinstein explains, represented the Tribunal merely pointing out that superior orders was factually relevant to the defence of duress.<sup>108</sup> For many, therefore, '[t]he assertion that [the 'moral choice'] is in conformity with the law of all nations is patently false'.<sup>109</sup>

On the other hand, in the absence of coercion, if the order is not 'manifestly unlawful', a subordinate carrying it out could assert the defence of mistake of law. Professor Dinstein summarises it as follows: '[Superior orders] is a factual element which may be taken into account — in conjunction with other circumstances — within the compass of an admissible defence based on lack of *mens rea* (specifically, duress or mistake)'.<sup>110</sup>

Still, the 'moral choice' dictum in the *IMT Nuremberg Judgment*, as well as art 33 of the *Rome Statute*, has inspired other scholars to perceive a different narrative, one much more akin to Bing Bing Jia's. For example, Professor Gary Solis opines that '[d]espite Nuremberg, the defense of superior orders lives. It is true that no military case is found in US jurisprudence within the past sixty years in which the defense has been successful, but it cannot be said that the defense is dead'.<sup>111</sup> Although the defence was not successful in the Hong Kong trials either,

<sup>105</sup> Antonio Cassese, *International Criminal Law* (Oxford University Press, 1<sup>st</sup> ed, 2003) 231–2.

<sup>106</sup> Paola Gaeta, 'The Defence of Superior Orders: *The Statute of the International Criminal Court* versus Customary International Law' (1999) 10 *European Journal of International Law* 172, 172.

<sup>107</sup> Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press, 2<sup>nd</sup> ed, 2010) 289.

<sup>108</sup> Ibid 288.

<sup>109</sup> Robert Cryer, 'The Boundaries of Liability in International Criminal Law, or "Selectivity by Stealth"' (2001) 6 *Journal of Conflict and Security Law* 3, 12.

<sup>110</sup> Dinstein, above n 107, 289.

<sup>111</sup> Gary D Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press, 2010) 355. See also Mark J Osiel, *Obeying Orders: Atrocity, Military Discipline and the Law of War* (Transaction Publishers, 1999) 97 ('The superior orders defense remains very much alive wherever the criminality of the defendant's conduct cannot convincingly be categorized as immediately obvious').

Professor Jia's thought-provoking account of the plea could inspire other jurists to help resuscitate superior orders as a viable defence in its own right.

## VII ROGER CLARK'S THOUGHTS

The book's final scholarly contribution comes from eminent ICL guru Roger Clark. His chapter, 'Concluding Thoughts', examines the Hong Kong trials from a modern perspective.<sup>112</sup> He divides his analysis into five discrete categories:

- (1) 'War Crimes in a Narrow Sense' — noting that genocide and crimes against humanity were not within the tribunals' remit and 'war crimes' were both broad — 'violations of the laws and usages of war' — and narrow as they were crystallised into a list of 14 offences — reminiscent of the *Rome Statute*'s itemisation in art 8;<sup>113</sup>
- (2) 'Finding the Applicable Law' — observing that in deciding cases according to the 'laws and usages of war', a nominally international standard, the Hong Kong tribunals relied heavily, given the paucity of precedent and lack of library resources, on British sources, including the British War Office's *Manual of Military Law 1929*, *Archbold's Pleading, Evidence & Practice in Criminal Cases*<sup>114</sup> and William Best on evidence<sup>115</sup> — with Professor Clark adding that the type of 'paint by numbers' breakdown approach to war crimes offered by the *Manual of Military Law 1929* factored into the negotiations on the creation of the ICC and led to the adoption of art 9 of the *Rome Statute*, which mandates development of 'Elements of Crimes' to assist in interpreting the substantive offences set out in arts 6, 7 and 8;<sup>116</sup>
- (3) 'The Proceedings Were of a Summary Nature' — comparing the Hong Kong inquests with the Nuremberg and Tokyo trials and finding that the former were summary and inexpensive proceedings that resulted in judgments without reasoned decisions — different from modern cases, whose judgments are often discursive and replete with references to national and international precedents;<sup>117</sup>
- (4) 'Modes of Participation' — pointing out that the *Nuremberg Charter*'s reference to 'common plan' and 'conspiracy' are antecedents of what was to become JCE liability and none of this was discussed in the Hong Kong proceedings, notwithstanding reg 8(ii) of the *Royal Warrant Regulations*, which allowed the tribunals to charge groups of defendants jointly, and apply evidentiary presumptions, when there was proof of them having acted in concert

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<sup>112</sup> Roger S Clark, 'Concluding Thoughts' in Suzannah Linton (ed), *Hong Kong's War Crimes Trials* (Oxford University Press, 2013) 199.

<sup>113</sup> Ibid 199–202.

<sup>114</sup> John Jervis et al, *Archbold's Pleading, Evidence & Practice in Criminal Cases* (Sweet & Maxwell, 26<sup>th</sup> revised ed, 1922).

<sup>115</sup> W M Best and Sidney L Phipson, *The Principles of the Laws of Evidence: With Elementary Rules for Conducting the Examination and Cross-Examination of Witnesses* (Sweet & Maxwell, 12<sup>th</sup> revised ed, 1922).

<sup>116</sup> Clark, above n 112, 202–4.

<sup>117</sup> Ibid 204–5.

- (consistent with Jørgensen, Clark finds this was more of an evidentiary/procedural mechanism than a substantive liability principle);<sup>118</sup> and
- (5) ‘Sentencing’ — noting that the *Royal Warrant*, like the *Rome Statute*, provided little guidance in terms of sentencing — defendants could be sentenced to death (inconsistent with modern international tribunals), victims could get restitution for property crimes but could not participate in the proceedings (as permitted at the ICC) — and superior orders were treated as a mitigating factor.<sup>119</sup>

Professor Clark’s analysis is invaluable as it contextualises the Hong Kong trials both in terms of the birth of ICL (Nuremberg and Tokyo) as well as in terms of its most recent iteration, the ICC. His insights as a framer and principal negotiator of the *Rome Statute* help seamlessly connect the British ALFSEA judicial enterprise in Hong Kong with ICL’s larger and more modern normative trajectory.

### VIII MAJOR MURRAY ORMSBY

Finally, the book ends with a rather unexpected gem. It seems that in May 2011, while doing her research for this book, Professor Linton fortuitously learnt that a former Hong Kong tribunal judge and prosecutor, Major Murray Ormsby, was still alive and quite spry.<sup>120</sup> So in July and August 2011 she interviewed him over two sessions (one in person, one by telephone)<sup>121</sup> and the edited transcripts of those interviews close the tome. Amazingly, Major Ormsby had no formal education in the law, but learnt on the job.<sup>122</sup> And he had ample opportunity to educate himself — he ‘took part in 27 of the 46 trials held in the colony’.<sup>123</sup>

The interview transcripts furnish rich details that take the reader back to the trials and bring them alive. Ormsby discusses how, while in Burma at war’s end, he was recruited to serve ALFSEA’s prosecution of Japanese war criminals, first stationed in Singapore (where he sat in on Singapore’s war crimes proceedings, absorbed the trial process and advised Japanese counsel on rudimentary points of procedure) and then in Hong Kong.<sup>124</sup> In fact, he was there at the very beginning of the Hong Kong trials, presiding over the 15-defendant Lantau Island case<sup>125</sup> in the Hong Kong Supreme Court (the first and biggest trial of them all).<sup>126</sup> From there, Ormsby’s panel sat in more modest digs but adjudicated a wide range of cases that included defendants from all ranks of the Japanese military. He provides frank assessments of the proceedings, such as opining that Japanese

<sup>118</sup> Ibid 205–8.

<sup>119</sup> Ibid 208–13.

<sup>120</sup> Linton, ‘Appendix’, above n 60, 215.

<sup>121</sup> Ibid 216.

<sup>122</sup> ‘Obituaries: Major Murray Ormsby’, *The Telegraph* (online), 26 March 2013 <<http://www.telegraph.co.uk/news/obituaries/9955533/Major-Murray-Ormsby.html>>.

<sup>123</sup> Ibid.

<sup>124</sup> Linton, ‘Appendix’, above n 60, 216–17.

<sup>125</sup> *Trial of Lt Kishi Yasuo and Fourteen Others* (HKWCT Collection, Case No WO235/993) <<http://hkwtc.lib.hku.hk/exhibits/show/hkwctc/documents/item/58>>. Although there were 15 defendants in the Lantau Island case, Ormsby states — in his interview with Linton — that there were only 12: Linton, ‘Appendix’, above n 60, 218.

<sup>126</sup> Ibid 218, 220.

defence attorneys were ‘too polite’ in going along with the flow of trials, not sufficiently trained in English trial technique and ultimately provided ineffective assistance.<sup>127</sup>

In addition to describing the mechanics of adjudicating the cases, Ormsby recounts colourful anecdotes, such as the difficulties Indian stenographers had in ‘traipsing through the rice fields’ when the court visited a crime scene and the way the judges dutifully saluted, stopped proceedings and broke for lunch every day at noon when they heard the boom of the midday gun. When proceedings for the day would adjourn at 4 pm, the judges would often go swimming in Repulse Bay and discuss cases.<sup>128</sup>

And the scholarly analysis of the trials in preceding chapters is infused with drama when, for example, Major Ormsby explains that female survivors of the St Stephen’s atrocity were interviewed in chambers to protect their privacy and were merely asked “do you understand what rape is?” and [they would respond] “yes”, we didn’t go into any details about it.<sup>129</sup> Similarly, he recounts how, in the Lisbon Maru case,<sup>130</sup> he could not vote for the guilt of a Japanese defendant who allegedly caused English sailors to drown when he refused them quarter by yelling in English ‘batten the hatches’ (with a Canadian accent because this defendant had spent time in Canada before the war) based merely on voice identification supported by nothing more.<sup>131</sup> He noted that, in his heart of hearts, he thought the defendant was ‘guilty as hell’ but felt the prosecution had not met its steep burden of proof.<sup>132</sup> ‘I saved his life’, Ormsby dramatically concludes.<sup>133</sup>

After a year on the bench, a prosecutor position opened up and Major Ormsby got the job.<sup>134</sup> From that perspective, he is able to explain the way the cases were prepared, his strategy in trying them and his reliance on the *Manual of Military Law 1929*, referred to as the ‘Red Book’.<sup>135</sup> He offers interesting perspectives on such issues as superior orders (wondering ‘how could these Japanese know what an illegal order was? ... To them it all came down from His Highness [the Emperor]’)<sup>136</sup> and command responsibility (noting that, if the chain of command could be established, a general could be found guilty of his subordinates’ misdeeds even if he had no actual knowledge of them).<sup>137</sup> And he recounts his successful prosecution of Japanese defendants for the killing of Fred Hockley, a 22-year-old Seafire pilot, who was shot down in Tokyo Bay, captured and tragically murdered on the last day of the war. The case was investigated by an American in Japan, who sat with Ormsby during the trial and, from Ormsby’s perspective, was far too generous with trial strategy suggestions.<sup>138</sup> Touchingly,

<sup>127</sup> Ibid 221.

<sup>128</sup> Ibid 220.

<sup>129</sup> Ibid.

<sup>130</sup> *Trial of Kyoda Shigeru* (HKWCT Collection, Case No WO235/1114) <<http://hkwtc.lib.hku.hk/exhibits/show/hkwctc/documents/item/84>>.

<sup>131</sup> Linton, ‘Appendix’, above n 60, 225.

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid 227.

<sup>135</sup> Ibid 243–4.

<sup>136</sup> Ibid 230–1.

<sup>137</sup> Ibid 231. This appears to be an inaccurate statement of the law as it was applied at that time.

<sup>138</sup> Ibid 237–9.

for decades after the trial, Ormsby placed an annual ‘In Memoriam’ advertisement in *The Daily Telegraph* for Hockley so the young man would not be forgotten.<sup>139</sup> One hopes that, owing to this vivid and informative account of his service, Major Murray Ormsby will not be forgotten either.

## IX CONCLUSION

*Hong Kong’s War Crimes Trials* does an exemplary job of elucidating the history, context and law related to Britain’s 1946–48 prosecutions of suspected Japanese war criminals in its south China coast colony. The structure and content of the book lend themselves to a well-organised and comprehensive analysis of the proceedings. Nevertheless, in this regard, a couple of observations are in order. First, it might have made more sense to place Professor Linton’s chapter on ‘War Crimes’ before Professor Totani’s on ‘The Prisoner of War Camp Trials’. Totani’s chapter, written by an historian, gives the reader an initial exposure to the topic of substantive war crimes but it is only a subcategory of war crimes and does not impart information about the legal framework that would promote a better understanding of the POW camp trials. Linton’s piece provides a legal and analytical framework for war crimes in general as well as an overview of the subject. Both logically and substantively, inserting it before Totani’s would have been preferable.<sup>140</sup>

Second, there is one major lacuna in the topics covered — command responsibility. Professor Linton herself laments in the ‘Introduction’ that ‘[u]nfortunately, we were not able to include the chapter on Command Responsibility’.<sup>141</sup> Whatever the reasons for the omission, however, it is in no ways fatal. That is because the subject is otherwise covered, albeit in a more fragmented way, in other chapters. The contributions of Professors Linton (‘War Crimes’) and Jørgensen (‘On Being Concerned in a Crime’), in particular, address command responsibility in the course of discussions on the scope of liability for the substantive crimes (Linton) and modes of liability in multi-defendant cases (Jørgensen). So, in the end, the gap is essentially filled.<sup>142</sup> As jurists have begun to probe dusty annals for insights on atrocity proceedings that did not take place in Nuremberg or Tokyo, *Hong Kong’s War Crimes Trials* makes a timely and important contribution to ICL literature. In fact, one hopes that it will serve as a springboard for future works examining post-WWII trials in other parts of Asia. Indeed, the Hong Kong trials themselves fall within a much larger group of some 330 war crimes trials that British military authorities carried out in formerly Japanese-occupied British colonies in Southeast Asia, including Singapore.<sup>143</sup> And those trials were ‘part of an even larger pan-Pacific Allied war crimes programme’, involving more than 2240 trials of some 5700

<sup>139</sup> Ibid 239.

<sup>140</sup> On the other hand, perhaps the editors concluded the simpler piece should go first, as it would be more accessible for the non-legal audience and lead the way toward the more complex discussion in Linton’s chapter.

<sup>141</sup> Linton, ‘Introduction’, above n 9, 7.

<sup>142</sup> It should also be noted that the subject of command responsibility is addressed in Professor Linton’s *Melbourne Journal of International Law* article. See Linton, ‘Rediscovering’, above n 7, 316–41.

<sup>143</sup> Totani, ‘Prisoner of War Camp Trials’, above n 36, 93.

suspected war criminals.<sup>144</sup> The great bulk of those records have not been explored.<sup>145</sup> We should not be surprised then if a new cohort of ICL historians, inspired by the superior scholarship and doctrinal insights of *Hong Kong's War Crimes Trials*, soon sets sail in those unchartered archival waters.

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<sup>144</sup> Ibid.

<sup>145</sup> Ibid.

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