AUSTRALIA'S WAR CRIMES TRIALS 1945-51[1]

REVIEWED BY FRED L. BORCH III*

This important book deserves to reach a wide audience in our Corps for at least three reasons. First, the legal and policy issues faced by Australian judge advocates in prosecuting war crimes at specially created military courts between 1945 and 1951 are very similar to the issues faced by American military lawyers today when deciding what war-related crimes may be prosecuted at military commissions and what procedures should be used at these trials. Second, the expertly written chapters on command responsibility and obedience to superior orders in *Australia's War Crimes Trials 1945-51* provide useful insights into two areas of the law that continue to vex American military lawyers. Finally, the book is the first comprehensive study of Australia's 300 war crimes trials. Consequently, it is worth reading simply for its unique contribution to legal history.

Between 1945 and 1951, the Australians prosecuted 952 individuals, most of whom were Japanese nationals, at 300 war crimes trials held in eight different geographic locations. These proceedings occurred at special military courts created by the Australian War Crimes Act of 1945. The court panels deciding guilt, and an appropriate sentence if an accused was found guilty, consisted of a minimum of three officers. None of the

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[1] GEORGINA FITZPATRICK, TIM MCCORMACK, AND NARRELLE MORRIS, AUSTRALIA'S WAR CRIMES TRIALS 1945-1951 (2016).

panel members were required to have any legal training, much less required to be a licensed attorney. A war crimes court panel might have a legally qualified judge advocate assigned to it, to provide legal advice and counsel to the officer members, but the War Crimes Act did not require that the panel receive such legal assistance.[2]

At trial, the prosecutor was usually an Australian attorney (solicitor or barrister) who was a member of the Australian Army Legal Corps (AALC).[3] The defense counsel sometimes were AALC officers but most often were Japanese lawyers, who were at a considerable disadvantage because they were not educated in Anglo-Australian criminal law and procedure and, even if they spoke some English, often worked through interpreters. This language barrier also affected the accused, who rarely could understand English (much less speak the language) and consequently likewise were dependent on interpreters to understand the nature of the proceedings against them. As for the evidence at trial, there was some live testimony (subject to cross examination), but much of the evidence consisted of sworn statements from witnesses or admissions or confessions from the accused.[4] In this regard, the use of sworn affidavits was the norm in all war crimes proceedings conducted by the Allies in the Pacific, if for no other reason than it was not feasible to hold the victim-witnesses for weeks, if not months, before trial proceedings commenced. This was because almost all of these witnesses were men who had been prisoners of war (POW), had been in very poor health at the time of their release from Japanese POW camps, and thus had been quickly repatriated to their homes in 1945.

Australia's War Crimes Trials consists of three parts. Part I consists of essays that explain why Australia established special military courts to prosecute the mostly Japanese combatants who had violated the laws and usages of war. This section also includes essays about various legal issues in the trials, including jurisdiction, command responsibility, obedience to superior orders and related defenses, and the imposition of death sentences.[5] Part II examines war crimes trials by geographic location of the tribunals, and consequently there are eight chapters in this section—

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[2] *Id*. at 810-15.

[3] While the United States has a unified bar, Australia—like the United Kingdom—has a bifurcated bar, with solicitors engaged in the practice of law except for court appearances, which are handled exclusively by barristers.

[4] FITZPATRICK, MCCORMACK, & MORRIS, *supra* note 1, at 800-01.

[5] *Id*. at 5-372.

one for each court location.[6] Part III is devoted to post-trial issues, including a discussion of the repatriation of convicted Japanese war criminals in Australian custody back to Tokyo to serve the remainder of their sentences and a wrap-up essay by the authors evaluating the fairness of Australia's war crimes proceedings.[7] There also are four appendices, nine maps, and more than fifty photographs, many of which are of Japanese accused. All add value to the book by providing a context for understanding the trial proceedings.

Judge advocates will be especially interested in how the Australian military legal authorities handled command responsibility in trials involving Japanese commanders. Where the evidence was that a Japanese commander had *ordered* his subordinates to violate the laws of war, liability was clear. Consequently, when Rear Admiral Okada Tametsugu was tried at Rabul for ordering the execution of five Australian POWs, the court found him guilty given that he had a "guilty mind" and the unlawful killings were the result of his "voluntary act."[8]

On the issue of criminal liability for war crimes committed by subordinates, however, Australian judge advocates recognized that the law was unsettled at the time. Ultimately, the Australians adopted the view that actual knowledge was not required for command responsibility for war crimes committed by subordinates when the accused "was so willfully and culpably negligent in his duties that he did not care whether or not any offense was committed in his command."[9] In this regard, the Australians very much looked to the American military commission results in *In re Yamashita* [10]as "authoritative precedent," with the essential elements for command responsibility being the commander's mens rea and his breach of command duties using a due diligence standard.[11] Due diligence was interpreted to mean that a "commander must use due diligence to foresee the possibility of crimes being committed within his command, or to take

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[6] *Id*. at 373-688.
[7] *Id*. at 689-809.
[8] *Id*. at 61.
[9] *Id*. at 151.
[10] In re Yamashita, 327 U.S. 1 (1946). For more on the Yamashita case, *see* GARY D. SOLIS, THE LAW OF ARMED CONFLICT 442-47 (2d ed. 2016). *See also*, PHILIP R. PICCIGALLO, THE JAPANESE ON TRIAL 49-62 (1979); YUMA TOTANI, JUSTICE IN ASIA AND THE PACIFIC REGION 1945-1952 at 21-40 (2015); ALLAN A. RYAN, YAMASHITA'S GHOST: WAR CRIMES, MACARTHUR'S JUSTICE, AND COMMAND RESPONSIBILITY (2012). Note that *Yamashita's* "must have known" standard is today expressed as a "should have known" test for command responsibility.
[11] FITZPATRICK, MCCORMACK, & MORRIS, *supra* note 1, at 172-73.

such action as within his power, having regard to all the circumstances, to prevent those crimes being committed."[12] Using this test, General Adachi Hatazō was convicted for the ill-treatment of Indian, Australian, and American prisoners of war by his subordinates (including mutilation and cannibalism) because the "volume and character of the crimes committed in his command area" was so significant that Adachi "could not have been otherwise than aware" and "should have had knowledge of the crimes."[13]

Judge advocates and others familiar with military commissions will also be interested in how the Australians dealt with the admissibility of evidence. At the American war crimes trials held in Europe and the Pacific, any evidence having probative value to a reasonable person was admissible, and this is the same standard for admissibility at the ongoing military trials at Guantanamo Bay.[14] The Australians adopted the same basic standard for admissibility in Section 9(1) of their War Crimes Act. This provision stated that:

> At any hearing before a military court the court may take into consideration any oral statement or any document appearing on the face of it to be authentic, provided the statement or document appears to the court to be of assistance in proving or disproving the charge, notwithstanding that the statement or document would not be admissible in evidence before a field general court martial.

While some commentators[15] have criticized this evidentiary standard—chiefly because the accused were denied the ability to confront their accusers through cross-examination—the fact is that there was nothing inherently unreliable about any of the statements, even though most of them corroborated each other. Additionally, in virtually every case tried by the Australians, the identity of the accused was not in question, and the accused usually claimed superior orders as a defense. Therefore, it was reasonable to use these sworn statements as evidence. In

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[12] *Id*. at 154.

[13] *Id.* at 149. General Adachi committed suicide (hanged himself) after being convicted of war crimes. *Id*. at 556.

[14] MANUAL FOR MILITARY COMMISSIONS, UNITED STATES, 2010. Military Commission Rule of Evidence 402: "All evidence having probative value to a reasonable person is admissible . . . evidence that does not have probative value to a reasonable person is not admissible." *Id.*

[15] FITZPATRICK, MCCORMACK, & MORRIS, *supra* note 1, at 198.

any event, given the shortages of aircraft for transportation of personnel in the immediate aftermath of the war, and the generally poor health of ex-prisoners of war, it was simply not feasible to transport these men to testify at the eight locations where the Australian trials were held. After all, some of these men were Dutch citizens and had returned to the Netherlands; some were Americans and had been repatriated to the United States. That said, there were some exceptions: victims did appear as witnesses in trials involving the so-called Sandakan-Ranau death marches across Borneo. One of the six survivors—Warrant Officer William Sticpewich—appeared at three trials at Labuan. He and two other survivors—Private Keith Botterill and Corporal William Moxham—testified in person at the Rabul trial of Captain Yamamoto Shoichi and ten others in May 1946.[16] Other examples include the appearance of a Dutch prisoner of war, Staff Sergeant Fredrik Waaldijk, at the only trial held in Ambon. He was available to give testimony under oath because he had remained on Ambon after his liberation from a Japanese POW camp—because he was married to a local Indonesian woman and Ambon was now his home.[17] But these were rare exceptions and the use of sworn affidavits was the rule in the proceedings.

The 300 war crimes trial proceedings examined in Part II are discussed by location rather than by subject matter. As a matter of policy, the Australians selected locations for their criminal trials based on the proximity of the location to the war crimes committed.[18] This makes perfect sense, but since similar offenses were prosecuted in more than one location, it might have been better to structure this section of the book by offense subject matter rather than location. In any event, the reader looking for information about unlawful killings of prisoners of war or mistreatment of civilians will not find it in one section or chapter. For example, the chapter detailing the twenty-five trials conducted at Morotai, one of the Molucca Islands that were part of the Netherlands East Indies in 1945, contains details on the execution of downed and captured Australian airmen. But so too does the chapter on the twenty-three Australian-run trials conducted in Singapore, many of which involved ill-treatment of prisoners of war working on the Burma-Thailand Railway.[19] Likewise, the section on the sixteen trials held on Labaun also contains

[16] FITZPATRICK, MCCORMACK, & MORRIS, *supra* note 1, at 443-46.
[17] *Id*. at 386.
[18] Trials were held at Morotai, Wewak, Labuan, Darwin, Rabaul, Singapore, Hong Kong, and Manus Island. FITZPATRICK, MCCORMACK, & MORRIS, *supra* note 1, at xxxix.
[19] FITZPATRICK, MCCORMACK, & MORRIS, *supra* note 1, at 576-581.

information on POW killings, in this case Formosan camp guards who were prosecuted for the massacre of thirty-three POWs.[20]

The only exception to the text's discussion of crime by location is that *Australia's War Crimes Trials 1945-1951* does have stand-alone essays on crimes committed by the Japanese against captured airmen and cannibalism. It was not unusual for the Japanese to decapitate captured Allied airmen in ritual beheading ceremonies and, while this was bad enough, claims that the Japanese had eaten portions of Australian and Allied captives caused a tremendous uproar when reported in the Australian press in World War II. The gruesome and controversial nature of this crime no doubt explains why the editors included an essay on it, including the story of a captured fighter pilot who was decapitated, his flesh cut into pieces, and who was then fried and served to about 150 Japanese army personnel.[21] There also is a special essay on crimes against Asians in command responsibility trials and one on the use of the death penalty.

Were the war crimes trials conducted by Australia fair? Was justice done? The last essay in the volume answers this question in the affirmative (the trials "generally" were "fair and just"),[22] and this reviewer agrees. This was not 'victor's justice.' On the contrary, the Australians carefully weighed the evidence and did not hesitate to find the accused not guilty. Witness the Australian acquittal rate of 29.31%—higher than any other Allied war crimes trials, which had an overall acquittal rate of 18.9%. Yet another indication of fairness and justice is the fact that 20% of the sentences imposed by the trial courts were reduced or commuted on review, including some death sentences, which were reduced to terms of confinement.[23]

A final note: those who continue to insist that the Australian war crimes trials were unfair and unjust because they had evidentiary standards and procedures that differed from civilian criminal courts simply do not understand the history or the purpose of war crimes courts. These tribunals of extraordinarily narrow subject-matter jurisdiction exist precisely because civilian criminal proceedings are ill-equipped to deal with war crimes and those accused charged with war crimes. Additionally, the

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[20] *Id.* at 429-70, 804.
[21] *Id.* at 313.
[22] *Id*. at 795.
[23] *Id*. at 794-95.

nature of the battlefield and combat—witnesses to crimes are killed, wounded, or simply vanish, and forensic evidence is hard to come by or non-existent—means that rules of evidence and procedure that work in civilian criminal courts are ill-suited for war crimes courts. Consequently, the issue is not whether rules of evidence and procedure used by Australian authorities after World War II were the same as in Australian civilian courts, but whether the war crimes courts provided full and fair trials for the accused. The text shows that the Australians were sincere in their efforts in trying war criminals for horrific offenses, and their efforts were grounded in moral integrity.

Australia's War Crimes Trials 1945-1951 is unique as the only book in print that examines Australia's war crimes prosecution in a comprehensive and systematic manner. While there have been recent books devoted to trials of Class B and Class C war criminals,[24] they are few in number: *Hong Kong's War Crimes Trials* and *Military Trials of War Criminals in the Netherlands East Indies*.[25] But these two books only cover Hong Kong and the Netherlands East Indies, which means that there is—as yet—no *comprehensive* study about war crimes prosecutions conducted by the French in Indo-China, the United States in the Philippines and Guam, the Soviets in Russia, or the Chinese (Communist and Nationalist) in China.[26]

Australia's War Crimes Trials 1945-1951 is first-rate scholarship that deserves to be widely read. But that will not happen because the book is prohibitively expensive; a popular online bookseller lists it for $370 (the discount price from $390 retail). While it is true that the book runs more than 800 pages (plus appendices, endnotes and indices), and is a wealth of

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[24] Class A war criminals were tried at Nuremburg and Tokyo for crimes against peace ("planning, preparation, initiation or waging a war of aggression"). Class B war criminals were prosecuted for conventional war crimes, like the unlawful killing of POWs. SOLIS, *supra* note 10, at 103-04. Class C war criminals were those individuals charged with crimes against humanity. *Id.* These B-C war criminals were prosecuted by each Allied authority at special war crimes courts. *Id.* In the Pacific Theater, the Americans, British, Chinese, Dutch, French, Filipinos, and Russians all convened special tribunals at which these Class B-C accused—chiefly Japanese nationals—were prosecuted. *Id.*

[25] SUZANNAH LINTON, HONG KONG'S WAR CRIMES TRIALS (2013); FRED L. BORCH, MILITARY TRIALS OF WAR CRIMINALS IN THE NETHERLANDS EAST INDIES (2017).

[26] A few books in print, however, provide some details on these trials of B and C war criminals, including: BARAK KUSHNER, MEN TO DEVILS, DEVILS TO MEN: JAPANESE WAR CRIMES AND CHINESE JUSTICE (2015); YUMA TOTANI, JUSTICE IN ASIA AND THE PACIFIC REGION 1945-1952 (2015)

information to be found nowhere else, its price means that it is beyond the means of almost all individuals and most libraries.