

Geoffrey Robertson, QC

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[Directional noises] 19. Take one. Action. [0:00:03]

James Unkles: Jeffrey thank you very much for the opportunity of meeting with you to discuss this significant case of the Australian military and legal history. We are as you know making a documentary about the life and times of Breaker Morant and Lieutenant Hancock and Whitten. Three Australians tried by court martial during the Boer war in 1902 just wanted to explore with you your views about some of the issues that have arisen [0:01:00] and that you're familiar with out of the ways those men were treated prior to and during the court martial processes.

Geoffrey Robertson: They were treated monstrously. The case of Morant and Hancock, the two men who were executed, is a disgrace. Certainly by today's standards they were not given any of the human rights that international treaties require men facing the death penalty to be given. But even by the standards of 1902 [0:01:30] they were treated improperly, unlawfully and I can make that good by just listing a few of the errors of their courts martial. They were kept in solitary confinement for three months without any legal access, without even telling the Australian government, their government, that they were in peril. Whilst the prosecution of course got its witnesses in order [0:02:00] but they weren't allowed to approach anyone. They didn't have a lawyer. They got a country solicitor who happened to be serving in the force to defend them at the last moment one day before the trial started. They had no chance, their graves were dug even before. They were convicted at the trial itself the injustice was outrageous, [0:02:30] they weren't allowed to call evidence, they weren't allowed to cross examine, on the vital issue and this was the political aspect of the trial, namely the fact that the higher-ups in the British army all the way up its suggested to Lord Kitchener had given a take no prisoners order. Now killing a prisoner is a monstrous act, its been a war crime for centuries. [0:03:00] and those who kill prisoners, and the evidence is that Morant did certainly deserve punishment. But that punishment has to be mitigated if the order comes from senior command and the evidence does suggest, certainly the evidence that has now come out, suggests that the British army at this point in this place were conducting a shoot to kill prisoners' policy. Now that may seem horrific, [0:03:30] but much later we've seen with historic inquiries in the last year how this kind of illegal policy infected the British army in the 1960s in the war against the Mar-Mar. We've seen how it affected the British army in Iraq, inquiries have shown that prisoners were beaten to death with the knowledge of commanding officers. So given this is over a century before, it is not [0:04:00] surprising or amazing to suggest that this was a British army policy at the time and the circumstances of the behaviour of the judge advocate in this really kangaroo court although I hate using that word, it's something that Australians use odd that their beloved marsupial might be associated with injustice but this certainly was unjust

the summing up gave no time [0:04:30] or space to Morant's defense. And the actual killing of the man, and Hancock who was even less involved, was outrageous. They found them guilty sentenced them to death one evening, 6am the next morning a dawn execution. No opportunity to contact their families, the Australian Government outrageously was not informed. [0:05:00] These were a couple of colonials whom the British establishment decided to sacrifice to cover up the fact that the take no prisoners policy was indeed enforced and had been approved or at least acquiesced by higher ups.

James Unkles: Now I know you've had an opportunity to review the legal opinion of Isaac Isaac's who later became Governor General and Chief Justice of the High Court. [0:05:30] now he represented the interests of George Witton and constructed a marvellous partition to King Edward #7th which eventually led to Witton's release. Now looking at those two documents have you got any insights that you'd like to share about Isaac's work?

Geoffrey Robertson: Isaac Isaac's was a great Australian lawyer and a great later Australian judge and I think his opinion stands up today although it was not for Morant or Hancock, [0:06:00] it was for Whitten the third man, Australian convicted and in the end was spared. So it does I think get to the heart of the matter which was that the trial was unjust. Even though as Isaac says, that I say, the killing of prisoners is an outrageous crime. A war crime. A crime against humanity when conducted as a policy. [0:06:30] It was, none the less, Hancock and Mirant were improperly tried, wrongly convicted and certainly wrongly sentenced. Because all the evidence, I mean these men while they were in solitary confinement were released given guns and asked to help fight against a Boer attack. That should have stood them in good stead, they should not have been executed. [0:07:00] they deserve punishment no doubt for obeying an illegal order, because that is what it was, but they certainly didn't reserve and certainly shouldn't have received the death penalty.

James Unkles: Military law at the time provided for recommendations for mercy and I note that in three of the trials very strong recommendation's for mercy were made to respect of all three officers and those recommendations were only applied with respect to Whitten whose death sentence was revoked to one of life imprisonment. [0:07:30] does that cause you some concern that Lord Kitchener would differentiate having had recommendation's for mercy before then, he would then still single out Morant and Hancock for execution while sentencing Whitten to life imprisonment?

Geoffrey Robertson: Very strong recommendations were made in all cases and of course in only one were they heeded. [0:08:30] I think this shows perhaps the politics that were behind the executions of Morant and Hancock, they needed a couple of sacrificial victims for the British establishment to point the blame. I mean it's an old trick you put a couple of subordinates up and you throw the book at them and refuse any

question of clemency when in fact they were acting either under orders or at least with the approval of their superiors. [0:08:30] and you do that, and we're doing that today, with Abu Ghraib who was convicted of Abu Ghraib a couple of casually brutal officers and the American's didn't look at the higher ups who approved that torture policy. So it's gone on for centuries and we can see the strategy behind it that when something goes very wrong. [0:09:00] When there is a war crime to this extent you charge the underlings and you make sacrificial offerings almost scapegoats of a couple of colonials who didn't matter very much and volunteers anyway. So I think that is part of the unfairness and the squalor of the British conduct of these proceedings. [0:09:30] The other issue that has always troubled the descendants of these men in the push for independent review by the [unintelligible 09:42] today has been the issue surrounding the denial of appeal. These men under military law had first of all the right to run an appeal to their commanding officer and up the chain of command and of course that was impossible because Lord Kitchener made himself unavailable on the day the sentences were announced. [0:10:00] But they also had a right of appeal to partition the King through common law. Now both of those were denied to these men and 18 hours later as you said earlier, 6am or there about next morning, two of them are executed. Does that also cause concern?

Geoffrey Robertson: Part of the unfairness of the trial and I guess the final unfairness was denying any right of appeal these men were convicted in the afternoon [0:10:30] and hung at dawn the next day and that was done deliberately to prevent them from using forms of appeal which existed to prevent the Australian Government even knowing of this. That was an outrageous insult to Australia which was of course federated the year before so it was a deeply offensive behaviour squalled [0:11:00] and really a cover up because there was nothing other than a deal of guilt among the British army at the time. They were making these two colonials a sacrifice, a scapegoat to cover up the fact that they had been implementing an unlawful policy.

James Unkles: You mentioned the secrecy in which the trial, [0:11:30] the arrest and the investigation and the trials were conducted. So effective was the secrecy that the Australian Government, the prime minister indeed, did not become aware until three months after the executions in February 1902. Now what does that suggest to you that secrecy would prevail in such a matter when Lord Kitchener himself had advised the Governor General of Australia that he would inform [0:12:00] the arrest and trial of any colonial troops.

Geoffrey Robertson: It is a vex issue when volunteers as these men were from a different country as it were sign up to fight for a country other than their own. That country's military force is entitled to discipline those men, it is entitled to put them on trial if they commit breaches of the law of war. [0:12:30] There is no doubt that these men did commit that breach, they were implicated in the killing of German officers and in one case a missionary. These were barbaric acts and nothing that is said on behalf of

Morant or Hancock should justify those acts. They were rightly put on trial. But they were wrongly tried. Unfairly tried, their Government was given no inkling that they were on trial [0:13:00] or even that they were about to be executed. They weren't told till 3 months after, and the defences which could have been run which could have led to a much lighter sentence, in fact it would have ensured that they did not face execution were simply not heard. They were not allowed to them, so the trial was unfair and the cover up included covering it up from [0:13:30] even the Australian Government. It is probably an indication partly of the somewhat contemptuous attitude to the colonial Government as if it was still colonial. And it is also I think indicative to cover up the real fact that shoot to kill orders were approved by the British army of the time in that place. [0:14:00]

James Unkles: Now you mentioned earlier on in during one of the court marshal's, these three men were given arms to beat off an attack mounted by the Boer's and this was during one of the runnings of one of the courts martial. And extraordinarily once the attack had been beaten off, the court martial resumed and the men re-entered trial. Now your understanding of military law at the time, [0:14:30] would be I assume, that they should have been given at least significant credit for not trying to escape, not use the firearms against the jailers and even help in beating off the Boer attack. What is your view of that situation?

Geoffrey Robertson: A lot of Morant's supporters now that he should have been acquitted because during the trial he was given arms to help beat off an attack by the Boer's. [0:15:00] I don't credit that defence either now or then. I think if you are under attack obviously every man is necessary and including prisoners and so you arm loyal prisoners, it doesn't excuse whatever crime they were said to have committed. What it does, or should have done, is provide a mitigation and you don't execute men who you have pressed into your own service. [0:15:30] so it should have had that effect but I don't think, as a defence, condonation runs. Either in law or indeed in morality. If a man is guilty of a war crime, he should face that crime and if he is convicted then it only counts toward sentence.

James Unkles: Now Isaac's himself in his own legal opinion and in the petition he sent to the King [0:16:00] made much mention of the principal of condonation to Whitten's credit and it appears to have perhaps worked.

Geoffrey Robertson: Yes well I agree with Isaac Isaac's that condonation was relevant to commute the sentence of death to a sentence of life imprisonment. But I don't agree that condonation wipes out the original crime. The crime was a heinous one [0:16:30] killing a prisoner is perhaps the worst of war crimes and every soldier knows it. The defence that Morant put up, namely that he had been instructed by his Captain who was in fact killed and disfigured, that no prisoner should be taken. If true and there is some evidence now supporting it, should have counted for a lighter [0:17:00] sentence, but of course there can be no sentence heavier than death. So it

should have saved his life and he should have been given the opportunity to investigate it and present witnesses to prove it.

James Unkles: And indeed that was one of the aspects that was mentioned in the recommendation's for mercy the extreme provocation that Morant appears to have been under at the murder and torture of his superior officer and friend Captain Hunt [0:17:30] and it just appears that that hasn't been applied by Lord Kitchener when signing off the death warrants for Hancock and Morant but then applied it with respect to George Witten.

Geoffrey Robertson: Morant had one good line of defence its called provocation. It lowers murder to manslaughter in Britain today [0:18:00] but he was under extreme stress, his closest friend in a way and also his commanding officer had been killed and his body disfigured and that was so he said what provoked him into taking an unlawful action. Now that's not a defence but it does, if accepted, serve to mitigate the punishment. IT certainly would have prevented him being executed. [0:18:30] and it was that defence that he was never given an opportunity to pursue. He was never given an opportunity to call witnesses, to prove what the effect it had been on him. So that's just another example of the unfairness that attended the trial.

James Unkles: Bringing the case into the present since 2009, there has been a partition to the Queen which has been rejected. [0:19:00] The partition run by Isaac Isaac's in 1903 certainly helped in Witten's release but it didn't get Witten a pardon. The partition that was put to the Queen in 2009 has been rejected on the advice of her ministers of her Government. It has been rerun to the current defence secretary, Philip Hammond, who also agreed with the decision made by his predecessor Dr. Liam Fox. [0:19:30] The Australian Government, the attorney general, Nicola Roxon, has decided that there will be no support or recommendation from the Australian Government about asking the British Government to put this matter under examine by an independent inquiry. Do you have any comments to make about why the British Government would be reticent to put this to an independent investigation? [0:20:00]

Geoffrey Robertson: Let's face it there has been a lot of miscarriages of justice particularly in Military Court Marshal's. George Clemenceau once said "Military justice is to justice, as military music is to music". It's not very good. And its failed on numerous occasions and one can see any Government reluctant to spend the money to go down a very long historical path. [0:20:30] But I think the best reason for doing so is what we've recently discovered under freedom of information legislation about the behaviour of the British army. Very recently in Iraq killing prisoners, back in the Nar-Mar(? - 20:53) times there are survivors, relatives of normal(?) people who were executed, tortured [0:21:00] wrongly killed as prisoners by the British army in the 60's. I think there is a whole history here of why the British army has been guilty, outside of the two world wars not that that was a justification either of shooting to kill

prisoners that is a war crime and it has been for centuries. [0:21:30] And it may be that behind the scenes in the Morant and Hancock case we will find the seeds of this undesirable stain, this horrific stain in British military history which is otherwise a very great history and so I think for that reason it does justify an enquiry.

James Unkles: Is there some compromise here that can be worked on to, in your experience, [0:22:00] to suggest to the British government that perhaps an enquiry could be done in such a way that would achieve a sense of justice for both the descendants of these men but also the descendants of the Boer's who were shot, taken prisoner and shot, at a time in during the Boer war when the British military prosecuted in a very violent manner the Boer population to try and end the war. Lord Kitchener brought in, [0:22:30] very draconian and I suppose modern day counter insurgency methods, scorched earth policy and concentration camps to isolate the Boer's. But then there is evidence that he also took the unprecedented step of ordering shooting the Boer's found wearing British RP for example, is there not some process that could be appealing to the British Government to have some [0:23:00] limited inquiry, to limit the costs, but also to examine the sorts of issues that you've discussed today.

Geoffrey Robertson: An inquiry is an inquiry and who knows it can't be prejudged. Set up an inquiry and it may find that Hancock and Morant were guilty without any excuse it may find that this is all camouflage that they were really brutal men in a brutal war who behaved abominably [0:23:30] and deserved at least the full sentence. Now of course it would not be execution but they certainly deserved conviction. On the other hand it could show that they were acting pursuant to a policy that was fairly general, adopted or accepted by senior officers and I think that would of course be interesting because it may show how this [0:24:00] strain of illegality emerged in the British army. It may of course served some further purpose in South Africa. It may bring into focus what is seen now by many historians as a really unjustified Colonial war. But all those things are interesting but you can't expect that an inquiry if it were set up [0:24:30] would exonerate Hancock or Morant on any view, they deserve condemnation but they certainly don't deserve I would have thought, the death penalty.

James Unkles: Finally Geoffrey, are there some lessons to be learnt from such an inquiry if one was to be set up on this manner?

Third Speaker: Jim can we just stop there we're running out of -

Geoffrey Robertson: I think we've done everything, I'll just give you the same

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