War crimes and the sanctity of the rule of law: The trial of Lieutenants Morant, Handcock and Witton

By James Unkles

"It does no good to act without the fullest inquiry and strictly on legal lines. A hasty judgment creates a martyr and unless military law is strictly followed, a sense of injustice having been done is the result" [i]

"*They were treated monstrously. Certainly by today's standards they were not given any of the human rights that international treaties require men facing the death penalty be given. But even by the standards of 1902 they were treated improperly, unlawfully'.* [ii]

Australians have genuine regard and respect for their defence forces and such allegations are confronting. However, an equal injustice and affront to Australia's values enshrined in our democratic institutions and judicial independence is an abrogation of due legal process for political and other agendas.

Leo D'Angelo Fisher's insightful article on alleged ADF war crimes and its reflection on the failure of leadership in the ADF presents [iii] an opportunity to balance the assessment of allegations war crimes with the significance of the preservation and promotion of the rule of rule in ensuring those accused are given the presumption of innocence, proof beyond reasonable doubt and treated in accordance with common and statutory law. Nothing less is unacceptable in a civilised society.

Leo D'Angelo Fisher rightly draws comment on the trial of Lieutenants Harry Breaker Morant, Peter Hancock and George Witton, three Australian volunteers arrested, trial and sentence for alleged war crimes during the Anglo Boer War of 1902.

This controversial aspect of Australian military and legal history is also significant as it illustrates that the prosecution of alleged war crimes then and now can be polluted by another injustice, trial and sentencing not in strict accordance with the law and due process.

Breaker Morant

Because there has never been any doubt that Morant, Handcock and Witten were involved in the shooting of prisoners, accusations they admitted to, the debate has focused entirely on the question of whether orders to that effect were given. No-one has objectively looked at the legality of the trial proceedings and whether the rule of law and trial procedures of the law of 1902 were scrumptiously adhered to or ignored to achieve a political inspired outcome.

The Anglo Boer War

The war between the British and two Dutch South African republics (the Anglo Boer War) began on 11 October 1899 and lasted until 31 May 1902 when a peace treaty was signed. The bitter conflict that raged across the South African veldt was a war between the Boer population on one side and the might of the British Empire, keen to secure for itself the wealth of colonialism, gold and a strategic geographic location on the African continent.

Britain was determined to win the war, but failed to produce a decisive victory against a formidable insurgency. Finally, in order to settle the conflict, the commander in chief of the British Army Lord Kitchener instigated brutal strategies to break Boer resistance and to fight an effective opponent. He introduced a scorched earth policy of burning farms and crops, confiscated and destroyed livestock and imprisoned non-combatants, women and children in concentration camps to remove them from the field, thus preventing logistic support and psychological comfort to Boer fighters. These policies were designed to strip the Boers of their resources and to break their will.

Excesses in war and the brutal treatment of prisoners are synonymous with the history of human conflict and this war was no exception. Incidents of brutality, including summary executions, occurred on both sides of the conflict. Military Commander, Lord Kitchener was desperate to end a war that had become politically and economically unpopular in Britain and he turned to Australian volunteers to fight a guerilla war, men who could ride and shoot like the Boers, and live off the land.

The Bushveldt Carbineers was a unit that played the Boers at their own game and was very successful in combat. However, it was the use of summary executions to extract reprisals against Boers that resulted in an incident that still reverberates to this day – the arrest, trial and sentencing of three Australian volunteers, Lieutenants Morant, Handcock and Witton for shooting 12 Boer prisoners.

The three Army volunteers claimed they had acted in good faith in following the orders of their British superiors, in particular Lord Kitchener. Morant and Handcock were executed on 27 February 1902 and Witton's death sentence was commuted to life imprisonment. Witton was released in 1904 following a determined campaign for his freedom led by the Australian government, British MPs including Winston Churchill, and his lawyer Isaac Isaacs KC, MP (who eventually became Governor-General and Chief Justice of the High Court). A feature of the campaign was a petition authored by Isaacs and signed by 80,000 Australians.

Critics of the accused say they were lawfully convicted of serious war crimes and deserved the sentences they received. However, the descendants of these men and others insist that Morant, Handcock and Witton were scapegoats for the crimes of their British superiors while their British counterparts were not prosecuted for similar offences. It is also alleged that Lord Kitchener conspired to deny the men fair trials according to the laws of 1902 and deliberately kept the proceedings from the Australian government to avoid any interference in the trial and sentencing processes. While the men admitted to shooting Boer prisoners, they had a right to be tried strictly in accordance with the laws of 1902, and to exercise their right of appeal.

In 2009, I commenced a review of the trials and sentences of these men and completed a detailed analysis. I uncovered new evidence of orders to take no prisoners, the use of the customary law of reprisal to extract revenge against Boer fighters and serious procedural errors made in the investigation, court martial and sentencing of the accused.

Of particular concern was the denial of the accused's right of appeal to the British Crown, the conflict of interest of Lord Kitchener in issuing orders to take no prisoners, while being implicated as a potential defence witness and confirming the sentences of death against the accused. Evidence also suggests that he misled senior Crown officers and the Secretary of State for War, William St John Brodrick by failing to detail recommendations for mercy made by the trying officers and failing to provide the Crown with a complete set of the trial transcripts as required by law. Lord Kitchener also acted oppressively by absenting himself once he had confirmed the death sentences, thereby denying the men an appeal to the Crown.

I also focused on the writings of the Australian solicitor from Tenterfeld, Major James Francis Thomas, who inadvertently found himself the centre of this controversy when he was asked to defend the accused. Major Thomas was given only one day to prepare the defence of the accused of serious charges tried over a period of about one month. While the prosecution had three months to prepare its cases and unlimited resources to assist in their preparation, Major Thomas had no such assistance, had to act as both solicitor and counsel, and was refused an adjournment so he could better prepare a proper defence.

He was also denied the use of the telegraph to seek assistance from the Australian government. The proceedings were conducted in utmost secrecy and Lord Kitchener prohibited any contact between the accused and their lawyer with their relatives and the Australian government. Major Thomas protested the innocence of his clients and following the execution of Morant and Handcock, waged a campaign in Australia for an inquiry into the cases. Major Thomas' writings have provided me with significant detail of how he and his clients were treated by the British military and why he thought his clients had been singled out for prosecution in deference to British soldiers. He also complained that Lord Kitchener had deliberately absented himself to deny him an opportunity to lodge an appeal in the few hours before the execution of his clients.

Another source of evidence has come from a book published by Witton in 1907. The book, *Scapegoats of the Empire, The true story of Breaker Morant's Bushveldt Carbineers*, provides a firsthand account of the circumstances of the shootings and the trials that followed.[i] I have used extracts of the transcripts of the trials quoted in the book to assist with the case for judicial review. These men were not tried in accordance with military law and procedure of 1902 and suffered great injustice as a result. The convictions were unsafe and the sentences illegal as appeal was denied and due process seriously compromised.

There were flaws in the arrest, investigation, trial and sentencing of the accused. The following issues were identified:

1. **Denial of natural justice - Investigation.** On or about 22 October 1901, Morant, Handcock and Witton were arrested and placed in solitary confinement over allegations of shooting Boer prisoners. A court of Inquiry commenced on 16 October 1901. The accused were denied details of the investigation, no opportunity to seek legal advice, cross examine those who gave evidence at the investigation or conduct their own inquiries and arrange defence witnesses. The denial of legal advice continued until the evening before their trials commenced on 16 January 1902. The lack of time to consult legal counsel was a gross injustice noting the seriousness of the charges.

2. **Denial of fairness to prepare defence cases for trial.** The prosecution had three months to prepare cases against the accused before trials commenced in January 1902. This was in stark contrast to Morant, Handcock and Witton who were denied the right to consult legal counsel until 15 January 1902. One day's preparation before trial to seek legal advice on serious allegations and complex legal issues with defence counsel Major James Thomas with whom they had no previous contact. Their confinement and limited time to prepare a defence included locating and interviewing witnesses. This prevented them from mounting a defence to charges of murder. The denial of fairness was a serious breach of military law and procedure in accordance with the Manual of Military Law 1899.

3. **Condonation.** The application of condonation should have caused pardons to be granted to the accused at the time of the trials or after their convictions but before sentences had been carried out. Condonation arose from the call to service during a Boer attack on Pietersburg on 23 January 1902 and again on 31 January 1902. Condonation should also have been recognised as a plea inbar due to the offences being condoned or pardoned by a competent military authority.

4. **Trial Errors by Judge Advocate.** The members of the courts martial were not properly directed to a competent standard by the judge advocate on issues including:

    - The lawful excuse of obedience to superior orders, evidence of provocation, evidence of the accused's limited military service;
    - The status of the accused as volunteers and their limited education and ignorance of military law;
    - The significance of mitigating circumstances and character evidence; and
    - Several failures in trial procedures directions on matters including, sufficient time and resources to prepare a defence to serious charges of murder and to ensure the accused were not unfairly restricted in their rights to a fair trial.

5. **Review of convictions and sentences.** Lord Kitchener, the confirming authority of convictions and sentences failed to, amongst other things:

    - To inform the accused of the verdicts and sentences within a reasonable time so they could seek legal counsel on their rights of review through the military redress of wrongs procedure or petition to the King;
    - To ensure that he was available in Pretoria after he had confirmed the sentences and convictions on 25 February 1902 to hear pleas for mercy by the accused and their counsel;
    - To ensure the accused were permitted to contact their relatives and / or representatives of the Australian Government to seek clemency on their behalf (This failure was particularly cruel and unjustified); and
    - To ensure the accused were not prejudiced in their defence or suffered injustice during the investigation and trial proceedings.

In addition to the above failures, Lord Kitchener arranged or countenanced the posting of Lieutenant Colonel Hall, the area commander for Spelonken from South Africa to India thereby preventing him from giving evidence at the investigation and trials on issues such as orders to shoot prisoners. This action caused extreme prejudice to the accused's defence of obedience to superior orders.

6. **Unsafe verdicts.** In all the circumstances, the convictions and sentences were unsafe. Posthumous pardons are needed to address the substantial errors, injustices and quash the convictions.

The evidence has since been considered by three Australian attorneys-general, Robert McClelland, Nicola Roxon and Mark Dreyfus. In 2011, Mr McClelland announced that these men were not tried according to law. However, his decision to make his concerns known to the British government was not In a significant step towards judicial review, I put the evidence before the Victorian Supreme Court on 20 July 2013. Although it carried no judicial standing, the moot hearing was conducted professionally by senior counsel who acted for the Crown and the accused. The case was heard by senior barristers Andrew Kirkham, RFD, QC and Gary Hevey.

They found unequivocally that the men had not had proper trials and had suffered a substantial and fatal miscarriage of justice. Those interested can view the hearing on ine at www.breakermorant.com.

Mr Robertson's opinion was also supported by former Chief Justice of the NSW Supreme Court, Sir Laurence Street, and former deputy prime minister, Tim Fischer. They agreed that the case represents a gross miscarriage of justice and is deserving of independent inquiry.
Calls for review have also come from other judicial officers, including Dr Howard Zelling (dec), former Chief Justice of South Australia, Charles Francis QC (dec), David Denton SC, Judge Sandy Street SC and MPs Alex Hawke,MP, Greg Hunt, Tony Smith MP and the MPs who were members of the House of Representatives Petitions Committee. Their calls for judicial review cannot be ignored.

Respecting Australian Values

Matters of justice confront Government, none more important than Australia's defining principle of being a fair and equitable country, its values embracing democratic principles. Foremost is Australia's tradition of trial according to due process to ensure that those appearing before the courts are presumed to be innocent, and entitled to a fair and unbiased hearing in accordance with statute and common law.

For 118 years, the issue of whether Lieutenants Morant, Handcock and Witton, were tried according to British law and treated fairly when convicted and sentenced for shooting Boer prisoners has been one of Australia's most enduring controversies. Many will not be aware that since 2009, a *dogged war* of a legal nature has been waged by me in an effort to persuade the British or Australian Governments to comprehensively review the case.

The execution of Morant and Handcock on the 27th of February 1902 and the sentencing of Witton to life imprisonment continues to ignite passionate debate in Britain, South Africa and amongst their Australian descendants.

The brutality of an episode in British military history between 1899 and 1902 is one that many, particularly in London, would rather forget. In the midst of the Boer war, the trial of these three volunteers highlighted reprehensible tactics ordered by British officers, including reprisal through summary execution as a means of prosecuting the war.

It has been argued convincingly with persuasive evidence that the Australians shot 12 Boers while acting under the orders of senior British regular Army Officers, including the Commander In Chief, Lord Kitchener. Putting that aside, the legitimacy of the process used to try these men was illegal and improper and was done to hide the criminal culpability of British Officers. Put simply, the accused were not afforded the rights of a person facing serious criminal charges enshrined in military law and procedure of 1902.

Perhaps the opinion of Australian Government Minister, Greg Hunt, MP will ensure the injustice is addressed:

'*Well my view is that any Australian government at any time should seek final resolution, and if we are elected then I will continue to work within the parliament to see that outcome. Well I think the concern is that two Australians were executed in a summary fashion without justice. Now none of this excuses what was clearly a heinous act in relation to the prisoners under care, but it is time, in my judgment, for a proper independent inquiry. That may not change the decision of the court, it may reverse the decision, or it may say that there were mitigating circumstances that these were actions taken under orders. But there was no justice, there was a summary execution after a sham trial and there deserves to be a full trial.*

This will not ever excuse their actions, but similarly it is clear that the actions of the colonial administration of those who were running the Boer conflict were equally reprehensible. And if there is a stain on the historic record we need to address it'. [v]
Mr Hunt's assessment is supported by noted jurist, Sir Laurence Street, AC, KCMG, KStJ, QC, former Chief Justice NSWs (dec):

'*I think the British government should intervene and appoint an enquiry, the outcome of which I'm sure would be that the conviction should not be allowed to stand and would quash the convictions'. This is an appalling affront to any general notions of justice, and an appalling injustice to the remaining living man. This was an exercise of the administration of criminal justice which sadly miscarried. No judge with any ownership of the criminal justice system in his jurisdiction, or her jurisdiction, could tolerate a... something of this sort going unremedied. This is crying out for judicial intervention.'* [vi]

The House of Representatives

These opinions were reflected in an historic motion that was drafted by me and moved by Scott Buchholz MP in the House of Representatives on 12 February 2018. The motion concluded that the men were not tried according to law and expressed sympathy and regret to the descendants. The motion was compelling and reflected Mr Buchholz's commitment to see justice done:

'Lieutenants Morant and Handcock were the first and last Australians executed for war crimes, on 27 February 1902. The process used to try these men was fundamentally flawed. They were not afforded the rights of an accused person facing serious criminal charges enshrined in military law in 1902. Today, I recognise the cruel and unjust consequences and express my deepest sympathy to the descendants'

Conclusion

As Australia enters the landscape of assessing and trying alleged war crimes by Australian SAS soldiers, Leo D'Angelo Fisher's review is an opportunity to remind us that the outrage of perceived war crimes can be equally outraged by the abuse in human rights in the arrest, detention trial and sentencing of offenders. This applied in 1902 and in the present and must remain the focus in the conduct of military justice.

Anything less is a failure of leadership.

I remain committed to having this matter judicially examined and justice delivered posthumously so that Major Thomas' work can be completed and the descendants of these men can rest knowing that the injustice done has been addressed and this case of Australian military and legal history resolved. Corrupted trial process makes martyrs and this case is an example.

The passing of time and the fact that Morant, Handcock and Witton are deceased does not diminish errors in the administration of justice. Injustices in times of war are inexcusable and it takes vigilance to right wrongs, to honour those unfairly treated and to demonstrate respect for the rule of law. This matter involves injustice and how we respond is a test of our values and treatment of these Australian veterans. Their descendants and those who respect the rule of law await justice and that must be put above all other considerations.

The words of Tim Fischer, AC, former Deputy PM (dec) aptly addresses the injustice:

'*Because two great wrongs were done to both Breaker Morant and Peter Handcock – absolute wrongs – and also a wrong towards George Witton. And this goes to the moral values and fabric of a nation. We know these wrongs were done, do we do nothing about it, or do we in fact seek to at least... we can't reinstate life, correct the formal record by one method or another here or in Great Britain.'* [vii]

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www.breakermorant.com

Ready, Aim, Fire: Major James Francis—The Fourth Victim In the Execution of Harry "Breaker' Morant by James Unkles | Sid Harta Publishers

James' book can be sourced online at Booktopia or email jamesunkles@hotmail.com

Footnotes:

i. Lord Kitchener cable sent to Secretary of State on 6 April 1902 aptly summarises the case for review in the Breaker Morant controversy

ii. Geoffrey Robertson QC, International Jurist and Human Rights advocate, interview with James Unkles, 2013

iii. Leo D'Angelo Fisher, *War-crime allegations are confronting but they may lead to welcome reforms,* Australian Veteran News, 7 June 2020

iv. Witton, George, *Scapegoats of the Empire*, Angus and Robertson, 1982

v. Greg Hunt, interview with James Unkles, 2013

vi. Sir Laurence Street AC, KCMG, KStJ, QC, interview with James Unkles, 2013

vii. Tim Fischer AC, extract from an interview with James Unkles, 2013