LAUNCH OF "LAW REPORTS OF THE AUSTRALIAN WAR CRIMES TRIALS 1945-1951: VOLUME I: REPORTS OF THE TRIALS: MOROTAI, WEWAK, LABUAN AND DARWIN"

The Hon Justice Robert Beech-Jones*

Major General, Your Excellencies, Mr Anderson, the few of you who brought us this wonderful Volume and the many who owe so much to that few for giving us all the opportunity to read it.

If a trial takes place in a forest and there is no record of it, was justice truly served? Well, thanks to the labours of the people who brought us this magnificent work we do not need to ponder such questions any longer.

To elaborate, I will attempt to give a brief but incomplete context to the trials described in the Volume we are launching tonight before I try to explain why lawyers and judges get so excited over law reports and make some other brief observations. The full context to these trials is provided in the companion work of the editors and one of their colleagues, *Australia's War Crimes Trials 1945-51*.[1]

On 1 November 1943, President Roosevelt, Prime Minister Churchill and Marshal Stalin issued the Moscow Declaration on Atrocities ("the Moscow Declaration"). The Moscow Declaration identified two categories of perpetrator who would be judged and punished if any armistice were reached. These categories were later reflected in the Nuremburg Charter[2] to which, amongst other countries, Australia, New Zealand and the Netherlands became States parties.[3]

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* Justice of the High Court of Australia. This is a revised version of the comments made on the launch of McCormack and Morris (eds), *Law Reports of the Australian War Crimes Trials 1945-1951: Volume 1: Reports of the Trials: Morotai, Wewak, Labuan and Darwin* (2024) at the Australian War Memorial on 11 September 2025.

1 Fitzpatrick, McCormack and Morris (eds), *Australia's War Crimes Trials 1945-1951* (2016).

2 *Charter of the International Military Tribunal* – Annex to the *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, opened for signature 8 August 1945.

3 Australia on 5 October 1945; New Zealand on 19 November 1945 and the Netherlands on 15 September 1945.

One category of perpetrator was described in the Moscow Declaration as "major criminals", being those whose offences had no particular geographic location. They were the leading Nazis tried by the International Military Tribunal at Nuremberg[4] and the high ranking civilian and military Japanese officials tried by the International Military Tribunal for the Far East.[5]

The other category of perpetrator included those who were often wrongly described as minor war criminals;[6] they carried out atrocities that could be ascribed to a particular location. According to the Moscow Declaration, they were generally to be tried according to the laws of the liberated countries where their deeds took place. In fact, in the case of atrocities committed against Australian military forces, and certain classes of civilians,[7] they were to be tried by Australian military courts.

Australian military courts conducted approximately 300 of these trials in which over 900 former members of the Japanese armed forces were defendants. The trials were conducted in Darwin and seven other overseas locations in the region from late 1945 to 1951.[8] The Volume of the law reports of these trials launched tonight concerns 46 of the earliest of those trials. They took place at Morotai,[9] Wewak,[10] Labuan[11] and Darwin.

The mode of trial was by military courts constituted by a panel of military officers. These "courts" were given authority by the *War Crimes Act 1945* (Cth) to try persons charged with war crimes[12] and to impose the death sentence, life imprisonment or imprisonment for a lesser term.[13] War crimes included "violation[s] of the laws and usages of war" as well as specific offences set out in a statutory instrument, which

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4 November 1945 to October 1946.

5 April 1946 to November 1948.

6 See McCormack and Morris, "The Australian War Crime Trials, 1945-51" in Fitzpatrick, McCormack and Morris (eds) (n 1) at 1.

7 *War Crimes Act 1945* (Cth), s 12.

8 The other locations were Morotai, Wewak, Labuan, Rabaul, Singapore, Hong Kong and Manus Island.

9 Indonesia.

10 Papua New Guinea.

11 Malaysia.

12 *War Crimes Act*, s 5(1)(a).

13 *War Crimes Act*, s 11.

included crimes against peace.[14] These "courts" had jurisdiction to try an offence committed anywhere during any war in which Australia had been engaged since 2 September 1939[15] provided the victim of the crime was at one time an Australia resident or a British subject or a subject of an allied power.[16] These trials generally used the rules applicable to courts martial.[17] The accused had a right to counsel.[18] The trials had the assistance of a Judge-Advocate,[19] who advised on substantive and procedural law as well as usually summarising the facts for the panel. A Judge-Advocate was required to act impartially.[20]

Prior to the publication of this Volume, the only proper reporting of these trials was in the *Law Reports of Trials of War Criminals* published between 1947 and 1949 by the United Nations War Crimes Commission.[21] That Commission received the records of 256 of the Australian trials but only 5[22] were selected for reporting in the 15 volumes of reports published by that Commission and most of those trial reports were very brief.[23]

The launch of this Volume of the law reports of the Australian war crimes trials after the Second World War is a giant step in correcting that under-reporting.

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14 *War Crimes Act*, s 3 (definition of "war crime"). See also United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (1948), vol 5 at 94-95.

15 *War Crimes Act,* s 3.

16 *War Crimes Act*, s 12.

17 *War Crimes Act*, s 10.

18 *Regulations for the Trials of War Criminals 1945* (Cth), reg 10.

19 *Regulations for the Trials of War Criminals*, reg 6.

20 Paes, "The Australian Military Courts under the *War Crimes Act 1945* — Structure and Approach" in Fitzpatrick, McCormack and Morris (eds) (n 1) at 103; United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (1948), vol 5 at 99.

21 The *Law Reports of Trials of War Criminals*, reported by the United Nations War Crimes Commission, contained 15 volumes and was published between 1947-1949.

22 United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (1949), vol 4 at xvi.

23 United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (1948), vol 5 at 25 ("Case No 26"), at 32 ("Case No 27"), at 37 ("Case No 28"); United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (1949), vol 11 at 56 ("Case No 60") and at 62 ("Case No 65").

Similar to a jury trial and like the general approach in the United States Military Commission trials and the British Military trials after the Second World War,[24] the Australian military courts did not produce reasons for their decisions. This makes the process of meaningfully reporting on the trials that much more difficult. The evidence and the addresses, including the summing up of the Judge-Advocate and events after any conviction, have to be accurately but succinctly summarised so that the principles for which the case stands and which were applied can be identified. Narelle Morris has done this task with great skill adding supplementary notes in each case on particular issues that arose in the trial. The reporting of each group of trials at a particular location is prefaced by a detailed historical discussion from Georgina Fitzpatrick that brings the trials and their location to life.

And so, as every law student screams out in frustration, why do we have law reports?

Our common law tradition cannot exist without such reports. Ours is a system of precedent; that is, of principles that emerge from particular factual contexts that are examined, tested and then refined to different levels of abstraction. According to Justice Windeyer, law reporting is "essential for the continuance of the rule of law" and without such reporting "the law would become stagnant and cease to be a living stream".[25] In his foreword to volume 15 of the *Law Reports of Trials of War Criminals*, Lord Wright described law reports for war crimes as "giv[ing] legal life and substantial definition to what might otherwise be regarded as a mere collection of moral generalisations."[26]

Those observations apply just as much to justice administered in the extreme circumstances described in this Volume as they do to the everyday work of civilian courts and perhaps more so. The principles that emerge from this Volume have contemporary application to the conduct of our armed forces. The decisions confirm, contrary to what others might think, that the standards of conduct being enforced are

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24 United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (1949) vol 15, at x.

25 *Incorporated Council of Law Reporting (Queensland) v Federal Commissioner of Taxation* (1971) 125 CLR 659 at 668.

26 United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (1949) vol 15, at viii-ix.

long established. At the very least, the standards we applied to the armed forces of our former enemies are standards we must apply to our own.

The law reports, of which this Volume is one part, have an international significance as well. The structure of this Volume and the manner in which cases are reported in it are consistent with that adopted in the *Law Reports of Trials of War Criminals*. Along with similar works, they form a corpus of case law of international criminal law. That body of law is not just applied by common law countries but is also applied by courts and tribunals of countries that adopt the civil law tradition of codifying law and which do not generally rely on precedent. Reports such as these are one means of allowing different legal systems to engage in dialogue with each other. This Volume forms part of an international common law of war and peace.

And, of course, law reports like this have a raw historical significance; they literally bear witness. When you come to read Narelle Morris' case reports with Georgina Fitzpatrick's discussion of the circumstances surrounding the trials, the human tragedy and drama of the events depicted in the trials and the trials themselves will come to the forefront of your mind.

Can I just make a couple of additional brief observations?

As a member of a State Supreme Court for over a decade, I had something to do with crime and punishment. You only have to listen to the air waves in our major cities to know that when serious crimes are involved the thirst for vengeance is strong. How strong must the desire for vengeance have been at the end of the Second World War and especially amongst our military?

I am not so naive as to believe that the whole atmosphere of a trial can be discerned from a law report. Even so, the impression I gathered from this Volume was of a system that, whilst not perfect by our current standards, was striving to be fair and principled, and to display restraint in difficult circumstances.[27] Yes, the death penalty was

[27] See Morris and McCormack, "Were the Australian Trials Fair" in Fitzpatrick, McCormack and Morris (eds) (n 1) at 781.

administered to about 10% of the accused who faced trial[28] but the death penalty was deployed in our domestic courts then and the majority of other comparable countries, and the crimes tried in these military courts were very grave. About a third of the accused in the trials were acquitted.[29] The terms of imprisonment imposed generally properly reflected the convicted offenders' roles in the relevant offences and their personal circumstances. There was a system of post-trial review by a reviewing officer and by a Judge-Advocate-General.[30] Excuse the pun but these were not "kangaroo courts" and they were not victor's justice either.

Being the law nerd that I am I found myself pondering a particular ruling in a trial of two Japanese soldiers convicted of shooting prisoners of war that was heard on Morotai.[31]

Counsel for the accused objected to the jurisdiction of the Court to hear the case on two bases. The first was that the legislative power of the Commonwealth that was exercised to pass the *War Crimes Act* did not extend to events and circumstances outside of Australia. The Court rejected that argument. The Judge-Advocate argued that the external affairs power in s 51(xxix) of the *Constitution* supported legislation having extraterritorial effect. That argument predates by some 40 years the High Court of Australia's holding to that very effect, ironically in another war crimes case, namely *Polyukhovich v The Commonwealth*.[32]

The other argument is something to ponder. Counsel for the accused objected that the Court was exercising the judicial power of the Commonwealth but was not constituted as a court under the *Judiciary Act 1903* (Cth) or, to put it properly, constituted in conformity with Ch III of the *Constitution*.[33] This argument was also rejected. The Judge-Advocate argued that the High Court had previously determined that courts

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28 Fitzpatrick, McCormack and Morris, "Preliminary Material" in Fitzpatrick, McCormack and Morris (eds) (n 1) at xiii.

29 Fitzpatrick, McCormack and Morris, "Preliminary Material" in Fitzpatrick, McCormack and Morris (eds) (n 1) at x-xv.

30 *Regulations for the Trials of War Criminals*, regs 17-19.

31 The President of the Court for that trial was a Brigadier Woodward who fought at both the 1st and 2nd battles of El Alamein and later became Governor of New South Wales.

32 (1991) 172 CLR 501 at 529, 603, 633-635, 652-656, 695-697, 713-715.

33 McCormack and Morris (eds), *Law Reports of the Australian War Crimes Trials 1945-1951: Volume 1: Reports of the Trials: Morotai, Wewak, Labuan and Darwin* (2024) at 140.

martial did not exercise the judicial power of the Commonwealth.[34] It is the case that the High Court has repeatedly held that, as the maintenance of military discipline of the armed forces is essential to the nation's defence, a system of military justice that serves that end does not involve an exercise of the judicial power of the Commonwealth and need not be constituted in the form of courts that conform with Ch III of the *Constitution*.[35] However, that line of authority has its limits.[36] While there might be some other justification available, the trial of enemy combatants for war crimes after hostilities cease does not appear to be for the purpose of maintaining the discipline of Australia's armed forces. Anyway, Australian law now recognises that the function of trying these cases is for Ch III courts[37] and the International Criminal Court[38] ("the ICC") of which something should now be said.

This Volume records an aspect of Australia's role in the enforcement of international criminal law of which we can be proud. One of my predecessors, Sir William Webb, took a leave of absence from the High Court when General Douglas Macarthur appointed him to be President of the International Military Tribunal for the Far East that I referred to earlier. He was not the only judge of an apex court who answered the call. Lord Wright did so[39] and Justice Robert Jackson took a leave of absence from the Supreme Court of the United States to become the Chief Prosecutor at the International Military Tribunal trials in Nuremburg.[40]

The United States has now imposed sanctions on six judges of the ICC and three prosecutors, including its Chief Prosecutor.[41] Amongst other punishments, those

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34 Citing *R v Bevan* (1942) 66 CLR 452.

35 See *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 574-574; *Re Aird; Ex parte Alpert* (2004) 220 CLR 308; *Private R v Cowen* (2020) 271 CLR 316. See also *R v Cox; Ex parte Smith* (1945) 71 CLR 1 at 23.

36 See *Lane v Morrison* (2009) 239 CLR 230.

37 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501.

38 See *Internation Criminal Court Act 2002* (Cth); *International Criminal Court (Consequential Amendments) Act 2002* (Cth).

39 Lord Wright accepted a position as Chairperson of the United Nations War Crimes Commission, which aided the prosecution of war crimes committed during the Second World War.

40 See, eg, Feldman, *Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices* (2010) at 275.

41 *Executive Order 14203: Imposing Sanctions on the International Criminal Court*, 90(28) Fed Reg 9369 at 9373 (12 February 2025); US Department of State, "Imposing Sanctions in Response to the ICC's Illegitimate Actions Targeting the United States and Israel" (Press Release, 5 June 2025); US Department of State, "Imposing Further Sanctions in Response to the ICC's Ongoing Threat to Americans and Israelis" (Press Release, 20 August 2025).

sanctions make it a crime for any US citizen or company to provide them with any good or service, including food or medicine.[42] The sanctioned judges are experienced and well-qualified lawyers[43] working on an international tribunal just like Sir William Webb and just like Justice Robert Jackson.

Under the *Criminal Code* (Cth)*,* no Australian citizen, no matter who they are and where they work, can involve themselves in or urge the imposition of sanctions on ICC officials, including its judges.[44] ICC judges and prosecutors are performing the same duty as the military officers whose service is documented in this Volume. Sanctioning ICC judges and prosecutors is contrary to our values, is contrary to our law and is a betrayal of the legacy documented in this Volume.

I have already referred to the role of Narelle Morris and Georgina Fitzpatrick in the preparation of the book. They deserve our thanks. As my associates and the Court staff can tell you, perhaps in colourful terms, proofreading and editing are testing and laborious but essential. Julia Flint has done a wonderful job of proofreading the manuscript. I will otherwise leave it to you to read the acknowledgments section but not without thanking Professor Tim McCormack who one way or another has devoted much of his life to this topic for which we should all be grateful.

It is a great honour to launch Volume 1 of the *Law Reports of the Australian War Crimes Trials 1945-1951* and I now do so.

Thank you for listening.

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42 *Executive Order 14203: Imposing Sanctions on the International Criminal Court*, ss 1-4, 90(28) Fed Reg 9369 at 9370-9371 (12 February 2025); 50 USC § 1702(2)(b); Galbraith, "U.S. Sanctions on the International Criminal Court: The Details and The Pattern", Verfassungsblog (Web Page, 7 June 2025) <https://verfassungsblog.de/u-s-sanctions-on-the-international-criminal-court/>.

43 See Justice Beech-Jones, "Sanctioning Judges: Australian Domestic Law and the International Criminal Court" (Speech, Sir Frank Kitto Lecture, 21 August 2025) at fn 126.

44 *Criminal Code* (Cth), s 268.111(1)-(2). See also *Criminal Code*, ss 11.4, 15.3.