COMPARING AUSTRALIA'S BRERETON INQUIRY AND NEW ZEALAND'S BURNHAM INQUIRY: A DISCUSSION

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The following article is an edited transcript of an exchange between the contributors on 28 October 2021, organised by Marnie Lloydd. The purpose of the discussion was to collectively address and

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compare key factors and legal issues arising from the Afghanistan Inquiry Report from the Inspector-General of the Australian Defence Force (commonly referred to as the Brereton Report) and the New Zealand Government Inquiry into Operation Burnham. As well as comparing the technical details, approach, findings and reception of the two inquiries, the discussion focused on Afghan victim participation and perception/reception of the inquiries in Afghanistan. The contributors also considered broader questions, such as what New Zealand or Australia could learn from the other's inquiry, and what has not been tackled or still needs to be done. Rather than necessarily representing an in-depth or conclusive view on any specific issue, the contributors approached this discussion as an opportunity to learn from one another's respective areas of expertise and, more broadly, to identify commonalities, differences and paths for future reflection. Some of the views shared were, however, based on more specific research of the contributors and references to those works are provided at the end of this discussion.

Marnie Lloydd: I am grateful to the contributors for joining me from their respective locations and time zones – Christchurch, Wellington, Auckland, Melbourne, Canberra, Hobart, Armidale, Perth and London – as we pool our collective knowledge to discuss and compare key factors and legal issues arising from New Zealand's Government Inquiry into Operation Burnham and Related Matters (Burnham Inquiry) and the Inspector-General of the Australian Defence Force's Afghanistan Inquiry (Brereton Inquiry) into alleged violations of international humanitarian law (IHL) in Afghanistan by New Zealand and Australian forces.

We will start the discussion by covering the background to the two inquiries and their key findings and recommendations, and then move on to more specific issues arising: government reception and public perception; Afghan perceptions and the views of affected persons; the question of reparations; and command responsibility and International Criminal Court (ICC) complementarity issues arising from the Brereton Inquiry. We will end with thoughts on commonalities, differences and paths for future reflection.

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I INTRODUCTORY MATTERS: THE BACKGROUND, ESTABLISHMENT, CONTENT AND RUNNING OF THE INQUIRIES

Alexandra Fowler: This discussion occurs one year after the Brereton Report was delivered to the Inspector-General of the Australian Defence Force (ADF).[1] As we are all aware, the report detailed credible evidence of a series of alleged war crimes and abusive treatment by the Australian Special Air Service Regiment (SASR) in Afghanistan during the period 2005–2016.

By way of background and context, the SASR started its deployment in Afghanistan in October 2001 as part of Operation Slipper, as Australia's operation in Afghanistan became known. In the beginning, this involved small, targeted assignments alongside the United States of America, for example setting up a United States presence in Kandahar. That first phase of smaller assignments continued until November 2002. Australian Special Forces redeployed in 2005–2006 with Commando regiments, again for targeted operations, although we do not have a lot of detail of that. Things started ramping up much more around 2007 when the Australian Reconstruction Taskforce went into Uruzgan Province. Apparently, a 330-strong Special Operations Task Group (SOTG) was deployed in order to provide security to regular army reconstruction efforts as well as conducting counter-insurgency operations against the Taliban. The SOTG was the "pointy end" of Australia's deployment to Afghanistan, and it comprised SASR and Commando regiments primarily in Uruzgan, with Tarin Kowt as the main base. They were there until 2016 when Operation Slipper wound down.

Many of the allegations in the Brereton Report came from around 2012, but there had been a drip-feed of rumours of alleged misconduct for some years before that. There were early reports of a botched raid in 2009 in which five children had been killed, which was subject to an internal ADF inquiry.[2] Later, there were allegations about the accidental killing of two young boys in an operation involving soldiers under the command of Andrew Hastie, an ex-SAS commander (formerly Australia's Assistant Minister for Defence),[3] and in 2013–2014 about members of his unit's severance of the hands of dead Taliban fighters.[4] An ADF investigation later cleared Hastie of responsibility for

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1 *Inspector-General of the Australian Defence Force Afghanistan Inquiry Report* (Commonwealth of Australia, 2020) [*Afghanistan Inquiry Report*].

2 Brendan Nicholson "Australian troops kill 5 Afghan children" *The Age* (online ed, Melbourne, 14 February 2009).

3 Australian Associated Press "Andrew Hastie says he was cleared over accidental deaths of two Afghan boys" *The Guardian* (online ed, London, 1 September 2015). See also Ellen Whinnett "The untold story of Andrew Hastie's tragic SAS Mission in Afghanistan" *Herald Sun* (online ed, Melbourne, 9 December 2016); and Chris Masters *No Front Line: Australia's special forces at war in Afghanistan* (Allen & Unwin, Crows Nest (NSW), 2017) at 508.

4 Australian Associated Press "Australian soldier allegedly cut off hands of dead Taliban fighters" *The Guardian* (online ed, London, 29 October 2014). See also Masters, above n 3, at 505; and Dan Oakes and

both incidents,[5] but the issue of alleged misconduct by Special Forces soldiers in Afghanistan was by then clearly in the public domain.

In response, in 2015, the Chief of Army and the Special Operations Commander set up an inquiry conducted by a security-cleared Defence consultant, military sociologist Dr Samantha Crompvoets.[6] Crompvoets' brief was to look at the Command's culture and perceptions of its role and capabilities, but her report came to substantiate allegations that Australian soldiers had routinely used unsanctioned and illegal applications of violence during operations in Afghanistan. It also documented poor coordination between the SASR and the Commando's and serious issues with military culture and discipline and with command and control. This internal report was subsequently leaked and it is now available on the Brereton Inquiry's website.[7]

In consequence, in March 2016, the Minister for Defence formally requested the Inspector-General of the ADF to inquire into allegations of serious misconduct by the Special Forces between 2006 and 2016 (this was later extended to 2005–2016). The Inspector-General appointed a New South Wales Supreme Court Justice and Army Reserve Major-General, Paul Brereton, to conduct the inquiry. Brereton was made an Assistant Inspector-General and under then newly minted Inspector-General of the Australian Defence Force Regulation 2016 was given substantial autonomy to go about the investigation.[8] As he did so, further rumours of alleged war crimes were surfacing. In 2017, the Australian Broadcasting Corporation (ABC) published a series of seven reports entitled "The Afghan Files" which were based on alleged leaks of thousands of documents by David McBride, a former army lawyer assigned to the SAS.[9] Allegations about killings of unarmed Afghans by Ben Roberts-

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Sam Clark "'What the f*** are you doing': Chaos over severed hands" (11 July 2017) ABC News <www.abc.net.au>.

5 "Andrew Hastie in clear on second Afghan incident" *The Australian* (Australia, 1 September 2015) at 1; and Masters, above n 3, at 508.

6 Samantha Crompvoets "Bringing the truth to light: My account of the review into Special Operations Command Culture" RapidContext <www.rapidcontext.com.au>, archived at <https://perma.cc/7982-FW32>.

7 Samantha Crompvoets *Special Operations Command (SOCMOD) Culture and Interactions: Insights and reflection* (January 2016).

8 Letter from JM Gaynor (Inspector-General of the Australian Defence Force) to Angus Campbell (Chief of the Defence Force) regarding the transmittal of the IGADF Afghanistan Inquiry Report (10 November 2020) as documented in *Afghanistan Inquiry Report*, above n 1, at 1–2.

9 Dan Oakes and Sam Clark "The Afghan Files: Defence leak exposes deadly secrets of Australia's special forces" (11 July 2017) ABC News <www.abc.net.au>; Binoy Kampmark "The David McBride Case: Whistleblowing, Afghanistan and Australian War Crimes" (3 December 2020) International Policy Digest <intpolicydigest.org>; and "Afghan Files military whistleblower David McBride back before ACT court" (22 August 2019) SBS News <www.sbs.com.au>.

Smith, Australia's most decorated soldier, had started coming through by at least 2018, which attracted considerable attention.[10]

In late October 2020, Brereton delivered his report to the Inspector-General of the ADF, which was then transmitted to the Chief of the Defence Force. The Government released a public version around 10 days later.[11] I will talk more about the findings of the report after Marnie has detailed the background to the New Zealand investigation.

Marnie Lloydd: Thank you Alexandra. That is quite different from the New Zealand situation or at least the allegations that arose. For the New Zealand Defence Force (NZDF), the deployment in Afghanistan was New Zealand's longest. New Zealand was responsible for the Provincial Reconstruction Team in Bamyan Province, and the New Zealand Special Air Service (NZSAS), formed as "Taskforce 81", at least in the period considered by the Operation Burnham Inquiry, were based primarily but not exclusively in Kabul, working with and mentoring the Crisis Response Unit (CRU) of the Afghan Police.[12] As part of their activities, those NZSAS and Afghan CRU forces responded to complex attacks, for example, a complex attack on a hotel in the capital.[13]

What happened in New Zealand was that in 2017, two investigative journalists, Nicky Hager and Jon Stephenson, published the book *Hit & Run: The New Zealand SAS in Afghanistan and the meaning of honour* which made some quite serious allegations against the NZDF.[14] In comparison to the Brereton Inquiry which considered multiple allegations over a number of years, these allegations related primarily to one particular operation called Operation Burnham, hence the name of the subsequent government inquiry. That operation had taken place in Tirgiran Valley (Baghlan Province) in 2010. Another difference is that the allegations against Australian soldiers included allegations of harm being deliberately inflicted upon persons protected under IHL, whereas the New Zealand allegations were primarily about incidental harm during the conduct of hostilities – which might have been *unlawful* incidental harm. That was precisely the question before the Inquiry regarding this

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10 Nick McKenzie and Chris Masters "VC winner Ben Roberts-Smith among subjects of defence investigation" *The Sydney Morning Herald* (online ed, Sydney, 6 July 2018). Roberts-Smith subsequently launched defamation proceedings against *Nine Entertainment* media outlets, which as of 18 February 2022 is still being heard in the Federal Court. A series of media reports since the release of the Brereton Inquiry report have alleged further misconduct, including intimidation of witnesses and attempts to conceal evidence: see for example Nick McKenzie, Chris Masters and Joel Tozer "Buried evidence and threats: How Ben Roberts-Smith tried to cover up his alleged crimes" *The Age* (online ed, Melbourne, 11 April 2021).

11 *Afghanistan Inquiry Report*, above n 1.

12 New Zealand Defence Force *2009/2010 Annual Report* (G55 AR, 2010) at 109.

13 Audrey Young "SAS men wounded in Kabul raid" *The New Zealand Herald* (online ed, Auckland, 30 June 2011).

14 Nicky Hager and Jon Stephenson *Hit & Run: The New Zealand SAS in Afghanistan and the meaning of honour* (Potton & Burton, Nelson, 2017).

particular operation. The Burnham Inquiry also considered a separate allegation related to the treatment of a person in the hands of the NZSAS and about transfers of detainees to other authorities.

The *Hit & Run* book was published in 2017, and in April 2018, the New Zealand Government announced the government inquiry, established under the Inquiries Act 2013. The inquiry was originally expected to take about one year and NZD 2,000,000, but ended up needing two years and, although I do not know the exact budget, the Inquiry had requested a further NZD 5,000,000, so, up to a total of NZD 7,000,000. It was led by Sir Terence Arnold, a judge of the Supreme Court and former New Zealand Solicitor-General, and Sir Geoffrey Palmer, an Honorary Fellow of the Faculty of Law, Te Herenga Waka—Victoria University of Wellington and former Prime Minister of New Zealand. The Burnham Inquiry Report was released in July 2020, approximately three months before Australia's Brereton Report.[15]

II KEY FINDINGS AND RECOMMENDATIONS OF THE INQUIRIES

Alexandra Fowler: The public version of the Brereton Report omitted names of witnesses, specifics of the personnel involved, locations and other operational details, but it detailed a litany of potential war crimes along with damning slips in discipline, oversight and command. It concluded that there was credible evidence that some 39 Afghans had been wilfully and unlawfully killed by 25 ADF soldiers, principally SAS members, in 23 incidents, along with two instances of cruel treatment. The Report specified it was plain that the victims were at the time either *hors de combat* or subdued in some way, that is, they were under the control of Australian forces. These incidents were not hot encounters or an unlawful use of force in the heat of the moment; the victims were within Australia's control and did not pose a threat to any ADF personnel.[16] Shocking as that is, there was in addition a catalogue of slips in military discipline, culture and oversight including the "blooding" or initiation of new soldiers, a practice of cover-ups, sanitising reports to make it look like the laws of engagement had been complied with, and the use of "throw downs" on corpses (that is, planting something on a corpse such as a radio or a pistol to make it look like the deceased was a legitimate target). There had been a growth in a "warrior culture" that had led to elitism and perceptions of impunity. There was also deference to patrol commanders as "demigods", and a lack of willingness to challenge abuses. This behaviour had been allowed to fester in part because of a lack of impartial and effective investigatory mechanisms.[17]

In all, the Brereton Report made 143 recommendations, including that there be referral to the Commonwealth Director of Public Prosecutions of 36 matters arising out of 23 incidents by 19

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15 Terence Arnold and Geoffrey Palmer *Report of the Government Inquiry into Operation Burnham and related matters* (Inquiry into Operation Burnham, July 2020) [*Burnham Inquiry Report*].

16 *Afghanistan Inquiry Report*, above n 1, at ch 1.01, [17].

17 At ch 3.02, [322]–[349]. See also at ch 3.03.

individuals.[18] It concluded that there was a realistic prospect of a criminal investigation obtaining enough information to charge perpetrators with the war crimes of murder and/or counselling, procuring or inciting the war crime of murder, or cruel treatment,[19] in some cases on the basis of command responsibility.[20]

Upon the release of the Brereton Report, the then Prime Minister Scott Morrison and the Chief of the Defence Force both fronted the nation, acknowledged the shocking allegations and committed to taking the Report very seriously.[21] The Inquiry's website carried a translation of the Chief of the Defence Force's apology into Dari and Pashto,[22] and we are told he also telephoned his Afghan counterpart to apologise.[23] The Government also spoke of the possibility of compensation for victims' families.

The Brereton Inquiry was not to the criminal evidence standard, meaning a further process is needed to take things forward for potential prosecution. As a result, the Government announced the establishment of the Office of the Special Investigator (OSI).[24] The OSI is to work with the Australian Federal Police (AFP) to gather enough evidence to the criminal standard to refer persons, if warranted, to the DPP for prosecution under Division 268 of the Commonwealth Criminal Code.[25] The OSI has now been staffed and resourced, and its inter-agency relationships ironed out.[26] The OSI's work, of course, will be lengthy – at least five years. We have not yet heard any update on its progress, although the Head of the OSI has assured the International Criminal Court of the Office's resolve to thoroughly

18 At ch 1.01, [21].

19 At ch 1.01, [15]–[16].

20 At ch 1.01, [25]–[26].

21 See "ADF Chief Angus Campbell offers apology in wake of Afghanistan war crimes report. Read his speech in full" (19 November 2020) ABC News <www.abc.net.au>.

22 See "Afghanistan Inquiry: The Inspector-General of the Australian Defence Force Afghanistan Inquiry" (November 2020) Defence <www.defence.gov.au>.

23 See Department of Defence *Afghanistan Inquiry Reform Plan: Delivering the Defence Response to the IGADF Afghanistan Inquiry* (Australian Government, 30 July 2021) [*Afghanistan Inquiry Reform Plan*].

24 "Order to Establish the Office of the Special Investigator as an Executive Agency" (10 December 2020) *Commonwealth of Australia Gazette* No C2020G01030.

25 Division 268 of the Criminal Code Act 1995 (Cth) covers war crimes, genocide, crimes against humanity and crimes against the administration of justice of the International Criminal Court.

26 Chris Moraitis "Director-General's Opening Statement, Additional Estimates 2021-22" (14 February 2022) Office of the Special Investigator <www.osi.gov.au>.

investigate and if appropriate, prosecute, criminal offences and of a "spirit of cooperative engagement" with the Court.[27]

Alongside the OSI process, the Government announced a wide-ranging examination of the ADF structure, particularly with regard to Special Operations Command. In November 2020, then Minister for Defence Linda Reynolds announced the formation of an independent body, the Afghanistan Inquiry Implementation Oversight Panel, to be led by a former Inspector General of Intelligence and Security, which is to report quarterly to the Minister. The aim of the Oversight Panel is to brief the Minister on governance and cultural reforms in response to the Inquiry's findings and recommendations. These same issues – slips in command and discipline, the warrior culture, and notions of elitism and impunity – had been identified in the Crompvoets Report in 2015, and there was a process already underway within Special Operation Command to address them. The Oversight Panel is also to consider the effectiveness of those reforms.[28] The public was told that the existence of the Oversight Panel would give assurance that the necessary changes were being made, but even so, the Minister promised that she would regularly report to Parliament on its progress. Her successor Peter Dutton, however, was as of June 2022 in receipt of six progress reports from the Panel without making any mention of them in Parliament.[29] A Reform Plan has been published on the Defence website,[30] although there has been criticism about the low-key manner in which that was done.[31] The Reform Plan has two objectives: first, to address what happened, with much of the approach regarding referrals to OSI (criminal conduct), administrative and disciplinary procedures (for negligent, but not criminal conduct), stripping of honours and compensation to be settled by the end of 2021; and second, to put in place command, disciplinary and oversight reforms to prevent a repeat in the future (with

27 Letter from Chris Moraitis (Director-General of the Office of the Special Investigator) to Karim Khan (Prosecutor of the International Criminal Court) regarding the functions of the Office of the Special Investigator (18 June 2021) as attached to Question from Nick McKim (Senator for Tasmania) to Chris Moraitis (Director-General of the Office of the Special Investigator) regarding correspondence to the Office of the Prosecutor of the International Criminal Court (AE22-066, Senate Standing Committee on Legal and Constitutional Affairs, 14 February 2022).

28 Linda Reynolds *Terms of Reference: Afghanistan Inquiry Implementation Oversight Panel* (12 November 2020) at [15].

29 Daniel Hurst "Peter Dutton's department confirms defence minister has six Brereton oversight reports" *The Guardian* (online ed, London, 9 May 2022). The Terms of Reference provided that the Final Report may be tabled in Parliament at the discretion of the Minister: Reynolds, above n 28, at [22].

30 See *Afghanistan Inquiry Reform Plan*, above n 23.

31 Daniel Hurst "'No transparency': Australia accused of 'hiding' following Brereton Report on Afghanistan" *The Guardian* (online ed, London, 26 August 2021); and Andrew Greene "Defence responds to war crimes investigation, promises to deal with all disciplinary matters this year" (3 August 2021) ABC News <www.abc.net.au>.

work to occur over 2021–2025).[32] As of September 2022, Defence claimed that 101 of Brereton's 143 recommendations had been implemented.[33]

So there are two significant processes that have arisen out of the Brereton Inquiry – one being the OSI, and the other the Inquiry Implementation process and Reform Plan within SOC/Defence There has been, however, very little transparency in either process to date.

Marnie Lloydd: Regarding New Zealand, Operation Burnham was an operation against insurgents presumed present in the Baghlan Province villages where the operation took place. The questions concerned an allegation that not only insurgents had been killed during the operation against the insurgents, but that some civilians had also been killed and injured and some civilian property damaged. Ultimately, however, the Inquiry did not identify any IHL violations committed by NZDF in the hostilities during Operation Burnham.

Regarding the allegations related to detention and the transfer of persons to Afghan hands, the Inquiry identified some problems related to New Zealand's detention policy and found a breach of the principle of non-refoulement in one particular case.

One important factor in the *Hit & Run* book, and which became significant for the Inquiry, was an allegation of some kind of cover-up by the NZDF of the civilian casualties caused during this Baghlan Province operation. That was ultimately *not* a finding of the Inquiry. However, it led to related findings and discussion about organisational issues within the NZDF, as well as deeper issues related to governance and democratic oversight of the military. That is, while the Inquiry looked at first glance like a war crimes inquiry, it actually focused to a large degree on these more constitutional issues. In my view, this shows how the Inquiry approached the question of IHL compliance with an appropriately broad vision, focusing not only on conduct on the battlefield, but all relevant government structures and processes supporting deployments.

The Burnham Inquiry made four main recommendations.[34] The first was the appointment of an expert review group that would have some members internal to NZDF, but also some external members. The purpose would be to review the organisational structure and also record-keeping practices and retrieval of information processes of NZDF because they had proven to be part of the problem in terms of information not having been passed appropriately up the chain. This included to the ministerial level, so that there was inaccurate information being reported up and then provided as public statements.

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32 *Afghanistan Inquiry Reform Plan*, above n 23, at 2.

33 See "Defence Response: Afghanistan Inquiry Reform Plan" (September 2022) Defence <www.defence.gov.au>.

34 *Burnham Inquiry Report*, above n 15, at ch 1, [87]–[89].

The second recommendation was that an Inspector-General of Defence should be established, and that to ensure its independence, it should be located outside of the NZDF organisational structure.

The third recommendation was that NZDF should promulgate a Defence Force Order (DFO) setting out how allegations of civilian casualties were to be dealt with, both in theatre and by headquarters in New Zealand. That Order – DFO 35 on Response to Civilian Harm[35] – was issued quite rapidly – it came out at the beginning of 2021 and we will come back to this.

The fourth recommendation was the development of an effective and more appropriate detention policy and procedures for detention, both for when people are captured and held by New Zealand forces, but also detention occurring in a partnering or mentoring situation where forces with which New Zealand forces might be operating detain people, or where New Zealand transfers detainees to another authority (that is, regarding both pre- and post-transfer obligations towards detainees).

James Mehigan: I would like to jump in about the disclosure point. When I got into this, I think the thing that bothered me more than the ins and outs of IHL is the way in which NZDF behaved after the Inquiry began or after the allegations were made public.

There are two aspects to that: the disclosure and the cover-up. The cover-up was found not to have been a formal one, although the threshold for what a cover-up actually *was* seems to have been set quite high – a deliberate, almost *conspiracy* to cover up – and that high-level threshold was not found by the Inquiry. But the Inquiry did find misleading statements by quite senior members of the NZDF. To my mind, NZDF have not been troubled enough about that. The Inquiry named a few senior officers who, as far as I can tell, actively misled their parliamentary overseers.[36] *That*, I think, is exceptionally problematic.

Once the actual allegations were made, one would expect an agency to react like: "Well, we will hand you the keys of the document warehouse. We will let you, the inquirers, come in and look at them." And they did not. They obfuscated and they slowed things down. Implicitly in the report, NZDF said to the Inquiry: "Look, you're not ready. You don't have the security capacity to do this so we're not going to start any of the work necessary for the disclosure." I find that staggering. This is an inquiry in which a former Prime Minister and a Supreme Court judge, who is a former Solicitor-

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35 *Defence Force Order 35: New Zealand Defence Force Response to Civilian Harm* (issued by the Chief of Defence Force, 21 January 2021) [*Defence Force Order 35*]. A first and second annual report pursuant to DFO 35 have since been released, simply stating that no reports of civilian harm related to activities in situations of armed conflict were received in the reporting periods: see New Zealand Defence Force *Annual Report: Defence Force Order 35 – New Zealand Defence Force Response to Civilian Harm For the period 01 July 2020 - 30 June 2021* (October 2021); and New Zealand Defence Force *Annual Report: Defence Force Order 35 – New Zealand Defence Force Response to Civilian Harm For the period 01 July 2021 - 30 June 2022* (October 2022). See also Pete McKenzie "Doing Our Duty? The New Zealand Defence Force, DFO 35 and Ex Gratia Payments" (2024) 22 NZJPIL [forthcoming].

36 *Burnham Inquiry Report*, above n 15, at ch 1, [76].

General, have been tasked with looking at these documents. If there is any document in New Zealand which a former Supreme Court judge and a former Prime Minister cannot look at, then we have a problem with our classification system. It was an impressive piece of restraint on behalf of the Inquiry staff members not to have complained about that more than they did. In the language of an inquiry, it is quite a firm criticism of the Defence Force.

What undermines the Inquiry – and this cuts both ways for the NZDF because they portrayed the finding that no IHL breaches were identified as a win – is that the Inquiry Report has this incredible line stating that the Inquiry cannot be confident that it has received all relevant material.[37] So, the exoneration is based on *most* of the documents, and that is a problem for the NZDF at the end of this, and one that might not be mentioned too often.

It is consistent with a problem in governance in New Zealand, namely, the over-classification of documents. Just as this Inquiry went into its second extension phase, New Zealand's Royal Commission of Inquiry into the Attack on Christchurch Mosques on 15 March 2019 began its process and concluded that there was over-classification of documents across the intelligence services and across governance in New Zealand more generally.[38] So, this issue is not unique to the NZDF. The Burnham Inquiry found, in fact, that 423 documents which were not previously available should be disclosed to the public, not just to the Inquiry.[39] This is indicative of this chronic problem across New Zealand governance of refusing to disclose documents.

I think the NZDF would have been better served if it had been more open, transparent and cooperative. At the heart of this is a sense of honour. The *Hit & Run* book that started all of this is subtitled "The New Zealand SAS in Afghanistan and the Meaning of Honour". Disclosing the necessary documents, to me, seems to be the honourable thing to do, legally speaking. I am surprised they did not do that. If you compare it to the Australian example, the Australian redactions are terrible – it is excruciating to leaf through the pages – but the pretext is that it is to protect these future prosecutions. In theory, we could have a non-redacted version at a later date if the prosecutions are completed. So, the problem of secrecy is different across the two Inquiries.

That, to me, is the bigger problem that the Burnham process has unearthed. Rather than battlefield conduct, the problem identified is this lack of accountability, and the ability to slow down and hinder an accountability process in a way that I do not think any other state agency in New Zealand would be able to do.

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37 At ch 1, [34].

38 William Young and Jacqui Caine *Ko tō tātou kāinga tēnei: Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (26 November 2020) at 521–524 and 739–741.

39 *Burnham Inquiry Report*, above n 15, at ch 1, [38] and n 45.

Thomas Gregory: Regarding the third recommendation that the NZDF should promulgate a DFO setting out how allegations of civilian casualties should be dealt with, DFO 35 was released in late January 2021, but not officially announced until 11 February 2021.[40] This DFO introduces NZDF-wide procedures for handling allegations of civilian harm. This picks up on the context that others have outlined and the crucial difference between the Brereton Report and the Burnham Inquiry. Whereas Brereton found credible evidence of unlawful killings and potential war crimes, the Burnham Inquiry concluded that NZDF personnel acted in accordance with the applicable rules of engagement and IHL. The killings in this case were not considered to be potential war crimes. However, as James and Marnie mentioned, the problem is that the NZDF misrepresented the situation to ministers and in subsequent public statements, and they failed to remedy the situation when the correct information came to light. They continued to deny that civilians were killed when they knew, or should have known, that that information was incorrect. As James mentioned, the Burnham Inquiry was particularly damning of NZDF record-keeping. At one point, it describes a surprising level of ineptitude and disorganisation within NZDF headquarters.[41] We heard reports about people saving crucial documents on personal pen drives and then losing them, important documents being placed in a safe and then forgotten. There were a few tense paragraphs in the report where the authors criticise the NZDF for continually requesting the United States to supply them with the full text of a particular document, even though there was no full text. It was described as a "summary" and the NZDF assumed that it was a summary of a bigger document and kept requesting the same document again and again, expecting a longer version, when they should have known that there was not one.[42]

DFO 35 is really a response to those problems, and it is concerned primarily with responding to incidents of civilian harm rather than avoiding them. The document outlines five guiding principles – independence, impartiality, thoroughness, promptness and transparency – which are meant to govern NZDF investigations into civilian harm. It outlines an eight-step process for looking into allegations which begins with an initial notification report and ends with NZDF archiving the material in a more appropriate repository so that it can be retrieved. It also outlines specific procedures for initiating an investigation, circulating the findings, and making amends to the victims.[43]

Now, there are some positive and interesting points. One of the stipulations in the DFO is that when the NZDF enters into multinational agreements – when it goes into partnerships with other defence forces – there needs to be assurances that there are compatible procedures in place for responding to civilian harm.[44] It will be interesting to see whether this will be a potential deal breaker;

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40 *Defence Force Order 35*, above n 35.

41 *Burnham Inquiry Report*, above n 15, at ch 9, [165].

42 At ch 9, [5]–[7].

43 *Defence Force Order 35*, above n 35, cls 1.03 and 3.03–3.13.

44 Clause 2.02.

if it is a red line that the NZDF will not cross or whether it is something on which they might roll back. There is a potential that the NZDF may refuse to participate in coalitions if suitable procedures are not put in place.

But there are some issues with DFO 35. A significant one is that it is only interested in responding to civilian harm, not avoiding it, so there is no discussion about how the NZDF could adjust tactics, techniques and procedures to minimise civilian casualties before they occur or avoid them entirely.[45]

And the big issue for me is that it is really unclear whether DFO 35 really addresses the concerns outlined in the Burnham Report because many of the procedures that have been put in place hinge on an initial assessment of the credibility of the allegations. One of the problems that the Burnham Inquiry found is what they described as confirmation bias: that officials, when they were reading reports, were seeing what they wanted to see; that commanders were unwilling to contest the information that was provided by the units involved. Similar problems were identified in the Brereton Report with officials reluctant to challenge what was happening "outside the wire". So, I think there is a problem that we might run into the same issues even with these procedures in place.[46]

There are also questions about who will be responsible for collecting and collating this information. Will they have the necessary resources? Will they exist as a dedicated unit or will it be something added to people's existing workloads? I think there is an issue there about whether DFO 35 really addresses the issue that the Burnham Inquiry identifies.

III GOVERNMENT RECEPTION AND PUBLIC PERCEPTION

Azadah Raz Mohammad: One thing that I find interesting and that I welcome, in fact, is the scale of investigation and coverage of the Australian and New Zealand allegations. While more than 40 countries were involved in Afghanistan militarily and there have been investigations of certain incidents in other countries including the United States and Germany, Australia in particular has seen greater media interest and public participation in the debate, including public outcry about the conduct. This is very welcome because there are alleged war crimes committed by many of these forces, and it is a good sign that at least these two countries – Australia and New Zealand – are actively engaging. And we see also that academics, public media and so forth are also discussing this. It is very important that more measures be taken in the future.

Monique Cormier: In Australia, on the whole, the media took the allegations with appropriate seriousness, and I think that is because the Brereton Report recommendations had the support of top military officials and the Government. We had the Prime Minister acknowledging it and various

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45 See also Thomas Gregory and Larry Lewis "Opportunity Missed: New Zealand Defence Force's Order on Civilian Harm in Wartime" (31 March 2021) Just Security <www.justsecurity.org>.

46 See also McKenzie, above n 35; and Conor Donohue "Responding to Instances of Civilian Harm in Coalition Operation" (2024) 22 NZJPIL [forthcoming].

official responses put in place.[47] I guess a lot had to do with the fact that the allegations were very serious. We had a lot of expert commentary explaining these issues as well, which I think helped.[48] What I found particularly interesting with the media reaction this time was contrasting this to the media response in Australia when the Director of Military Prosecutions announced back in 2010 that three SAS soldiers would be charged for civilian deaths occurring in Afghanistan in 2009. Ultimately, those 2009 incidents were deemed to be battlefield accidents and the charges were dismissed, so they are not in the same category as the crimes described in the Brereton Report.[49] But even before details were known in the public arena and still afterwards, the media's reaction to the announcement of these Australian commandos being charged followed the narrative of the soldiers being heroes; that they needed to be defended against the "evil" military justice system.[50] It was absolutely relentless. So, given the "thou shalt not question anything that soldiers ever do" sentiment that was coming from vocal sections of the media and the public in 2010, I was surprised, but pleased, to see that the reaction to the Brereton Report was a lot more sober. Maybe this is because there is less scope to allow such detailed allegations of war crimes to be swept under the rug of nationalism and heroism. We may not have time to go into it today, but I think a lot of what was driving the responses in 2010 was the pervasiveness of the "Anzac myth".[51] In contrast, the seriousness of the Brereton allegations meant that ideology could not paper over the accusations this time.

As for the response of the Australian Government – Alexandra touched on this before – it was largely supportive. I will be interested to see how long that lasts given that this process is going to take a long time. Already, there has been a notable exception: Peter Dutton, Minister for Defence, has been accused of undermining efforts to reform the Special Forces culture in the wake of the Brereton Inquiry. The Chief of the ADF recommended that there should be a removal of unit-wide citation for

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47 Scott Morrison (Prime Minister), Peter Dutton (Minister for Home Affairs) and Linda Reynolds (Minister for Defence) "Joint statement – Statement on IGADF Inquiry" (press release, 12 November 2020).

48 See for example Carrie McDougall "We're facing up to our war crimes blight, unlike our closest allies" *The Sydney Morning Herald* (online ed, Sydney, 19 November 2020); and David Letts "Allegations of murder and 'blooding' in Brereton report now face many obstacles to prosecution" (19 November 2020) The Conversation <www.theconversation.com>.

49 Dan Oakes and Rafael Epstein "Afghan death charges thrown out" *The Sydney Morning Herald* (online ed, Sydney, 21 May 2011).

50 See for example Kathryn Cochrane "Discipline in the field should be left to military command" *The Australian* (Australia, 18 October 2010) at 14; Chris Merritt and Nicola Berkovic "Who should judge our warriors?" *The Australian* (Australia, 30 September 2010) at 13; and Paul Sheehan "Our army is at war over the prosecution of commandos" *The Sydney Morning Herald* (online ed, Sydney, 18 October 2010).

51 Marilyn Lake and others *What's Wrong with Anzac? The Militarisation of Australian History* (UNSW Press, Sydney, 2010).

meritorious service and Dutton has already reversed this.[52] So, there is already some kind of back and forth, I think, among the Government in relation to the recommendations. Overall, I have been fairly pleased with how the media and the public have handled this issue.

Douglas Guilfoyle: The only thing I would add is that following the media coverage that led up to the Inquiry, or in some ways provoked it, the Australian public was much more primed to take this seriously. When you have on the national broadcaster actual helmet camera footage of an unarmed person who poses no threat to the military being executed in a field, it makes it very difficult to argue that crimes have not occurred. It was said at the time that senior military figures reacted to the allegations with complete horror. So, in terms of what Thomas talked about before regarding confirmation bias, and seeing in the evidence what you want to see and discounting things that do not fit your narrative – the narrative of the honour of the military or Australian soldiers being heroes – I think there was a real power to their reactions that absolutely cut through what otherwise could potentially have demonstrated a strong culture of resistance. I do think the critical tipping point in the Australian experience was that footage, and the fact that it was nationally broadcast.

Melanie O'Brien: I agree with everything Monique and Douglas have said, but I also feel that even if there was not resistance, there was still surprise from the media. It was like they could not believe that Australian soldiers would do this. Of course, those of us who work in the field are not surprised because soldiers from any defence force around the world could do this kind of thing. But that element of surprise was still there, or a shock as well – shock that Australian soldiers could do this. Perhaps it was a shock, rather than a disbelief, because of the footage that Douglas has referred to. It was not presented as denialism. It was presented with shock.

Monique Cormier: I think as well that there was partly a narrative of it being a few bad apples even though the Brereton Report specifically said that it was not just a few bad apples.

Alexandra Fowler: I find that aspect particularly troubling. The whole narrative quickly shifted away from the Brereton Report which noted that there were serious systemic issues that needed to be addressed, to the Government, the former and the current Minister for Defence, veterans' groups and others presenting the failings identified in the Report as the acts of those few bad apples. It effectively represents a distancing from what occurred and, I am worried, a lack of ownership that will affect what happens in response to the Inquiry down the track.

Douglas Guilfoyle: This is a systemic feature of international criminal law in general, right? We laud it as a principal accountability mechanism, but ultimately, it very frequently serves to pin the blame on individuals, thereby excusing structures. So, one of the interesting things about comparing the New Zealand and Australian reports is that the Brereton Report does go into a lot more detail about particular incidents and Brereton clearly used the full power of his office, in terms of actually

52 Daniel Hurst "Peter Dutton overrules decision to strip medals from SAS soldiers who served in Afghanistan" *The Guardian* (online ed, London, 19 April 2021).

having statutory access to Defence documents and witnesses, to pursue matters very vigorously. I think a lot of that does come down to the personality in charge of an investigation. However, regarding the appetite for systemic reform, there has definitely been some support from the Chief of the ADF, but, as has already been noted, this is being stymied by the politicians. Still, a function of criminal law is to pin responsibility on individuals, which then implicitly excuses structures.

Melanie O'Brien: I think that was also the situation with having the ADF itself say that they were going to strip the SAS of their medals even if they were not named persons in the Brereton Report. That was a recognition of the systemic issues behind this. However, that was then overturned by Peter Dutton, who found it inappropriate, that is, that we cannot possibly punish the system. That was reported in the media, so, of course, everyone in Australia was seeing this narrative: first of all, we are going to take action; but then the Government overruling this and saying no – "no, it's only a few bad apples, we're not punishing everyone".

Alexandra Fowler: From my perspective, it is also testament to the strength of voices in the veterans' community in strong-arming members of Government towards a more "glorious" perception of Australia's time in Afghanistan, maintaining that hero myth.

Douglas Guilfoyle: I think the veterans issue cuts two ways, though, because we have also seen significant sections of the Australian veterans' community saying that it is a disgrace that the command responsibility allegations are stopping at the patrol commander level and going no higher. It is still the "our brave boys operating outside the wire" kind of myth, but it is being deployed to say: "Why are only these people going to be hung out to dry while no one any higher is put to the test?" One of the journalists actually asked in the press conference at the release of the Brereton Report, how they were meant to believe that no one between the rank of Lieutenant and Lieutenant General knew anything about this. So, while I broadly agree with you, I do think the issue cuts two ways.

The only other point I would make was that the Brereton Report came out in November 2020, and by April 2021, the Assistant Minister for Defence, Andrew Hastie, was going on tour around Defence establishments reminding the ADF that their job is the application of lethal violence in the service of the national interest, and telling them not to get "too woke", which is not exactly a ringing endorsement of the need for, say, cultural or structural reform.[53]

Marnie Lloydd: Regarding government reception and public perception, in New Zealand, although it still remains to be seen, the issuing of DFO 35 with its plan of how allegations of civilian harm are to be handled was clearly direct action to meet one of the recommendations, but work on the other three recommendations has not yet been fully completed and settled.[54]

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53 Andrew Greene "Military reminded core business is to use 'lethal violence' to defend Australia's values and sovereignty" (14 April 2021) ABC News <www.abc.net.au>.

54 After this discussion was held, the Ministry of Defence published its consultation document regarding the establishment of an Independent Inspector-General of Defence (the second recommendation made in the

Thomas Gregory: Yes, I think you are right. As far as I am aware, the Ministry of Defence has work schedules related to specific recommendations that emerged out of the Burnham Inquiry Report,[55] but there has not been much chatter about it. It certainly feels that in relation to some of the more substantial recommendations made in the Burnham Report, there is no sign that anything is imminent.

Marnie Lloydd: Do you also have the sense that there is not substantial civil society pressure or media pressure either? I mean, it has not captured attention as an important public issue?

James Mehigan: I think the NZDF's portrayal of the Inquiry as an exoneration has taken a lot of steam out of the critical aspects of it. That the IHL violations were not found means the rest of the findings are administrative, quite tedious, not headline news. So, while such questions bother lawyers, they may not bother the editors of the news media and potentially civil society groups who have other issues on their minds.

IV AFGHAN PERCEPTIONS AND VICTIM PARTICIPATION

Monique Cormier: I was wondering, Azadah, whether you know how these inquiries and their results were reported in Afghanistan, if at all?

Azadah Raz Mohammad: Yes, I wanted to reflect a little on the nature of the Afghan conflict and how complex it is, and also on how the then Government of Afghanistan – the previous administration that fell in August 2021 – responded; then, also on the Afghanistan Independent Human Rights Commission and how, interestingly enough, the Taliban has recently made a comment about such an investigation.

So, as you are aware, Afghanistan has reached 43 years of conflict now. I believe, in the footage from the ground that you see in the ABC documentary mentioned previously, that an Australian soldier kills a person on film and then there is a comment on that documentary that says that the

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Burnham Inquiry) and a Bill was introduced in October 2022. See "Establishing an Independent Inspector-General of Defence – Cabinet Documents" (16 November 2021) New Zealand Ministry of Defence <www.defence.govt.nz>; and Inspector-General of Defence Bill 2022 (178-2). In November 2021, the Expert Review Group reported to the Minister of Defence with its findings and recommendations considering the NZDF's organisational structure and record-keeping and retrieval processes. The Ministry of Defence is due to provide an implementation progress report in June 2023. See New Zealand Ministry of Defence *Report of the Expert Review Group* (15 November 2021); and New Zealand Ministry of Defence *Annual Report Te Pūrongo-ā-tau 2022* (October 2022) at 38. In December 2022, New Zealand also released its new policy framework for overseas detention. See Ministry of Foreign Affairs and Trade *New Zealand Policy Framework for the humane treatment of detainees in offshore deployments* (6 December 2022).

55 See New Zealand Ministry of Defence *Annual Report Te Pūrongo-ā-tau 2021* (October 2021) at 70–71. For the period after this discussion was held, see also New Zealand Ministry of Defence *Annual Report Te Pūrongo-ā-tau 2022* (October 2022) at 38–40.

soldiers were told that anyone with a beard and turban is allegedly a Taliban fighter.[56] And that shows the extent to which these soldiers were unprepared to go into the battlefield because Afghans in most of the country, especially the south-eastern part, wear a turban and have beards. So, the soldiers were told that actually these people could be an element of the enemy. I know how complex it was for the soldiers, and although this killing was probably wrongful, I understand how complex it must have been for them as well to see someone fitting the description they had been given, and then starting to fire.

I wanted to say also that Afghanistan has not been able to actually investigate such crimes. Afghanistan has been a state party to the Rome Statute since 2003,[57] but they were very passive regarding investigating or even commenting on these crimes. While working with the Government, we had a policy of sometimes being very quiet about some issues because we needed the support of international forces, especially NATO – they were still active until a few months ago – and we had to have them politically with us and with the Government. So, it was very quiet. The Afghan Government had a policy of not following up these cases very closely. Apart from the United States, the other NATO allies, including Australia and New Zealand, did not have any specific agreement with the Government of Afghanistan. But the United States, not being a member of the ICC, had an agreement with Afghanistan very early on that any alleged war crimes being committed in Afghanistan should not be handed over to the ICC or other such platforms, or be tried in Afghanistan. Rather, that they should go back to the United States.[58] There are two very prominent cases that were tried in the United States regarding conduct committed in Afghanistan. For example, one of them was a case in Kandahar where 12 members of one particular family were killed by a United States soldier at night. He raided their home and then they were killed. Later, it was said that that particular soldier was suffering from a medical condition.[59]

Ironically enough, more recently, a Taliban spokesperson said that they very much welcomed any such investigation by the ICC, especially the investigation of the alleged crimes committed by the

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56 Oakes and Clark, above n 9.

57 Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002).

58 Agreement regarding the Status of United States Military and Civilian Personnel of the US Department of Defense Present in Afghanistan in connection with Cooperative Efforts in Response to Terrorism, Humanitarian and Civic Assistance, Military Training and Exercises, and Other Activities, United States–Afghanistan, 42 ILM 1500, 2003 WL 21754316 (exchange of notes 26 September 2002, 12 December 2002 and 28 May 2003, entered into force 28 May 2003); and Agreement between the Government of the Transitional Islamic State of Afghanistan and the Government of the United States of America regarding the surrender of persons to the International Criminal Court, Afghanistan–United States TIAS 03-823 (signed 20 September 2002, entered into force 23 August 2003).

59 Associated Press "US compensation for Afghanistan shooting spree" *The Guardian* (online ed, London, 25 March 2012).

CIA, and they actually called on the ICC to come and investigate these crimes. So, for me, it would be particularly interesting to see now how the new Taliban regime will react to this investigation and whether they will be very passive or perhaps more active on that, because they will likely take it more personally than those who were allies with the international coalition forces while the Taliban were fighting against them. It will be interesting to see how that unfolds.[60]

Unfortunately, Afghanistan does not have laws in place that give powers to actively investigate or to prevent such investigations. For example, if the then administration or current Taliban regime would like to prevent an Australian or New Zealand investigation and say that it actually wants to prosecute the suspects inside Afghanistan, it does not have such provisions in its laws. So, right now, the issue of accountability would very much be left to the Australian and New Zealand authorities.

I will let Kobra comment on the victim group but, very specifically, I wanted to say something in relation to my time working in Afghanistan until May 2018. Afghanistan unfortunately does not have a very organised victim group that allows you to know what the victims think. Afghanistan is a much-divided country, unfortunately, and so we do not have any active victim group in the country. We do have a Transitional Justice Working Group that I used to be part of. That Working Group was successful in terms of submitting evidence and reporting to the ICC while the ICC was investigating the situation in Afghanistan. But in other terms, they were not very organised and having attended their meetings, I am not sure if they were actually representative of the whole of the country.

One last thing is that the acknowledgment at least by Australia that these crimes actually were committed was something that I think is the first step for the victims to start the healing process.

Kobra Moradi: In relation to public knowledge or public opinion in Afghanistan, there were some reports written in Dari/ Farsi by media outlets such as *Etilaatroz*.[61]

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60 See also Kate Clark and Ehsan Qaane "Creating a Hierarchy of Victims? Afghanistan and International Criminal Court Investigations" (2024) 22 NZJPIL [forthcoming].

61 Abuzar Maleknejad "The 'war crime' report of Australian forces in Afghanistan; Nine soldiers committed suicide" (translated from Persian) *Etilaatroz* (online ed, Kabul, 23 November 2020). The article is available at <www.etilaatroz.com/112396/australian-forces-war-crimes-report-in-afghanistan-nine-soldiers-committed-suicide>.

BBC Persian also reported on the Brereton Report.[62] The Afghanistan Independent Human Rights Commission did a media release about the Report in Dari,[63] and there are also some videos available on the Report.[64]

I think that an interesting question would be the whole matter of winning hearts and minds, and the extent to which the way the international troops behaved in places like Uruzgan and Kandahar affected public opinion and tilted it in favour of the Taliban. Within the background of the Ghani Government, as well as the Karzai Government, being seen by some as puppet governments of the West, and the recent ICC decision to focus more on ISIS and Taliban crimes (and deprioritise crimes committed by Afghan and international forces),[65] some Taliban members commented on social media about the international justice system being a tool of the West that is unleashed only for their own benefit, while they go on and commit crimes against other people. We need to question how all of these factors and lack of investigations by the international community then feeds into the Taliban's narrative. If we are telling them, "you have to uphold human rights, have a basic human rights system and respect the laws of war", while Western states have committed crimes in Iraq and Afghanistan and other places which they refuse to investigate and prosecute, then it creates a lot of possible counterarguments for the Taliban. The lack of investigations and prosecution by local and international actors has significantly limited the ability of all victims of war in Afghanistan to access truth and justice and gain healing and closure.

Fiona Nelson: Regarding the participation of Afghan witnesses in the Brereton Inquiry process, we know that the investigators did travel to Kabul in July 2019 and heard evidence there from a number of Afghans.[66] We know that the Inquiry appointed a New Zealand lawyer to help them with

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62 "Request for trial and compensation for 'killing of Afghan civilians by Australian Special Forces'" (translated from Persian) (19 November 2020) BBC Persian <www.bbc.com/persian>. The article is available at <www.bbc.com/persian/afghanistan-54997231>. See also "Australia is investigating the prosecution of its soldiers for 'war crimes' in Afghanistan" (translated from Persian) (12 November 2020) BBC Persian <www.bbc.com/persian>. The article is available at <www.bbc.com/persian/afghanistan-54913865>.

63 Afghanistan Independent Human Rights Commission "The Independent Human Rights Commission of Afghanistan demands the judicial follow-up of the Australian forces accused of war crimes and the protection of the rights of victims" (press release, translated from Persian, 19 November 2020). The press release can be found at <www.aihrc.org.af/home/press-release/9013#>.

64 Sangama Media "War crimes: Australian forces in Afghanistan" (4 December 2020) <www.youtube.com/watch?v=LQZ8Pn9y6dU>; and TOLOnews "War crimes committed by Australian soldiers in Afghanistan" (translated from Persian) (17 November 2020) <www.youtube.com/watch?v=fyxSgXrTgaY>.

65 Karim Khan "Statement of the Prosecutor of the International Criminal Court, Karim AA Khan QC, following the application for an expedited order under article 18(2) seeking authorisation to resume investigations in the Situation in Afghanistan" (press release, 27 September 2021). See also Clark and Qaane, above n 60.

66 *Afghanistan Inquiry Report*, above n 1, ch 1.03 at [49].

that, a member of an international law firm with an office in Kabul.[67] She was engaged to help facilitate this visit. The ADF sourced the interpreters. And the trip was, to a great extent, facilitated by the Australian Department of Foreign Affairs and Trade.[68] This is interesting given that, now, there is no longer an Australian embassy in Afghanistan, and we know from the Brereton Report how useful the Australian Department of Foreign Affairs and Trade had been for their trip there. Another interesting point is that it seems from the Brereton Report that they made the decision to go to Kabul to meet witnesses there after discussions with the Office of the Prosecutor of the ICC; that after talking to the ICC about their best practice of investigations, they decided it was best practice to go to Afghanistan,[69] which, it can also be said, seems obvious.

Looking at publications, as mentioned before, there was the apology to the people of Afghanistan that was translated into Dari and Pashto,[70] and also interesting was that in the report, Brereton emphasised how important that trip to Kabul had been and how significant the evidence obtained there had been.[71] The final Brereton Report stressed repeatedly how Afghan voices had been completely disregarded up to that point and that that is one of the reasons why the initial Australian investigations were so poor, namely, that the Afghan witnesses and Afghan civil society were presumed to be making it up.[72] That is something the Brereton Report criticises quite strongly.

One thing that is notable at this stage, and actually through all stages, is that we see much emphasis on mental health support for ADF veterans affected by this Inquiry. There is no mention whatsoever of whether any support was offered to Afghan witnesses in Kabul at the time or now moving forward.

Looking to where we are now with the OSI investigations, the OSI did get a question about their victim liaison and public outreach when it was giving evidence to the Senate Estimates hearing in March 2021. The response was fairly uninspiring. They said victim and witness liaison will form a part of OSI's approach in line with standard criminal investigation processes.[73] It seems they have not given a great deal of thought to this yet. We know that currently the OSI is focusing not on gathering information from people in Afghanistan, but on gathering other evidence, and that makes sense given

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67 At ch 1.03, [49].

68 At ch 1.03, [49].

69 At ch 1.03, [32].

70 "Defence response: Afghanistan Inquiry Reform Plan" (February 2022) Defence <www.defence.gov.au>.

71 *Afghanistan Inquiry Report*, above n 1, at ch 1.03, [49].

72 At ch 1.01, [42]; at 112 and 359; and ch 3.02, [279] and [295].

73 Question from Jordan Steele-John (Senator for Western Australia) to the Office of the Special Investigator regarding Australian special forces war crimes in Afghanistan – victims liaison unit (AE21-204, Senate Standing Committee on Legal and Constitutional Affairs, 22 March 2021).

the current situation.[74] That is what we heard from Chris Moraitis, the Director-General of the OSI on 25 October 2021 when he gave evidence to the Senate in supplementary estimates hearings.[75] When he was asked whether it was likely that Afghan witnesses would come to Australia to give evidence in future, he said it was hard to envision. He did not say why, and I am not sure why that would be so hard to envision. He did concede that there would be certain advantages to being able to gather evidence in person.

Sooner or later, the OSI will have to engage with Afghan witnesses and victims, and there are a couple of things I think are important here. The first is that investigations of international crimes, even those carried out domestically, bring with them a heightened need for victim outreach and participation. This includes ensuring that victims and witnesses from another country are sufficiently familiar with court processes and what to expect from them. These are things that are difficult for many witnesses anyway and these difficulties are exacerbated where there are cultural and linguistic barriers. The other thing that is important is making plans for victim participation at an early stage, that is, *now* at the latest, I would say. What we can learn from prosecutions of international crimes in other domestic jurisdictions is that early consideration is very important.

Looking at some possibly comparable investigations and prosecutions of international crimes in Germany, the first time that Germany prosecuted crimes under its international criminal code concerned cases in the Democratic Republic of Congo.[76] Now, Germany is quite different in terms of victim participation because it is a civil law system. Victims have a lot more rights in criminal proceedings in the German system. They have the right to be represented at proceedings and can have access to files and documents. In that case, observers found that victims had not been properly informed of their rights at an early enough stage in the proceedings and that this had detrimental effects.[77] It was one of the reasons why victims were not actually represented in those proceedings. The Court also did not order witnesses to be assigned a lawyer until too late, that is, until after the investigatory stage.

In Australia, there is a much more limited menu of rights available to victims and witnesses in the existing system, but I still think it is worthwhile for the OSI and the AFP to start thinking now about

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74 See also Daniel Hurst "Investigation of alleged Australian war crimes could be hindered by fall of Afghan Government" *The Guardian* (online ed, London, 21 August 2021).

75 Senate Legal and Constitutional Affairs Legislation Committee *Estimates: Home Affairs Portfolio* (Official Committee Hansard, 25 October 2021) at 54 and following.

76 *Case of FDLR leaders (Ignace Murwanashyaka and Straton Musoni)* Higher Regional Court of Stuttgart 5 – 3 StE 6/10, 28 September 2015; aff'd Federal Court of Justice of Karlsruhe Case 3 StE 236/17, 20 December 2018.

77 Patrick Kroker *Universal Jurisdiction in Germany? The Congo War Crimes Trial: First Case under the Code of Crimes against International Law (Executive Summary)* (European Center for Constitutional and Human Rights, 8 June 2016) at 25.

how they are going to ensure victim participation and protection. There are existing rights the victims have in accordance with internal guidelines and policies of the AFP, and also of the Commonwealth Director of Public Prosecutions, for example, to be kept up to date with where proceedings are at, to be consulted on decisions about which charges to proceed with and, obviously, at the sentencing stage there are rights around victim impact statements. There is a service – the Witness Assistance Service – which can guide witnesses and offer them support, including support during the potentially traumatic process of giving evidence. That is available to a limited number of people in the Australian system currently – children and victims of sexual assault in some jurisdictions, and also victims of certain international-type crimes like slavery. But it is not clear that it is also available to victims of Rome Statute crimes, so it will be interesting to see how they go forward on that.

Overall, it is important that this element is not an afterthought. There tends to be an instant hesitancy here along the lines of: "Well, sorry, this is an adversarial system. Victims don't have a role in criminal proceedings. It's solely between the state and the perpetrator." I think increasingly in domestic, and especially in international, criminal law, there is an understanding that there can be secondary victimisation if victims are not properly involved in the process.

Thomas Gregory: A quick point about the Burnham Inquiry, simply to flag that, initially, the victims of the alleged conduct were supposed to be involved in the New Zealand process, but they pulled out, expressing frustration, specifically, that they were not given access to the evidence concerning the incident, in particular the gun tape footage that would have shown what was happening. There were certainly some statements in the media at the time that this case was about them, about their loved ones, and they were not being given any access to the relevant material which they could use to help contribute to the case. There was definitely some frustration expressed on the part of the victims in relation to the Burnham Inquiry.[78]

Marnie Lloydd: Following on from what you said, Thomas, I believe the Burnham Report explains that the members of the Burnham Inquiry were planning to go to Afghanistan, if possible, to meet directly with the residents from the affected villages, with the assistance of the same local law firm in Kabul that Fiona mentioned. However, when those persons – known in the New Zealand process as "core participants" in the Inquiry – withdrew from the process as you just mentioned, the Inquiry cancelled the trip. A statement described the withdrawal of the Afghan villagers as disappointing, but not significantly impacting the Inquiry's ability to get to the truth of the

78 *Burnham Inquiry Report*, above n 15, at ch 1, [46]; and "Afghan villagers pull out of Operation Burnham inquiry" (18 June 2019) RNZ <www.rnz.co.nz>.

allegations.[79] I would have thought it valuable anyway to go to Afghanistan, but maybe the affected villagers were no longer willing to provide evidence at all.

James Mehigan: Yes, might it be even *more* necessary to enquire precisely because the Afghan victims and witnesses are no longer participants?

V THE QUESTION OF REPARATIONS

Alexandra Fowler: I wanted to add, not so much regarding victim participation in any potential prosecutions, that I am wondering about how these reparations are supposed to be paid, the ones that have been foreshadowed or announced by the Australian Government?

While Australian forces were deployed, local commanders had a lot of discretion over compensation and *ex gratia* payments. Generally, they used local Afghan leaders as go-betweens in order to liaise; there were very limited direct dealings with the victims themselves. I am wondering, given the recent change of government in Afghanistan, how it could possibly happen now? Do Government representatives go over to Kabul with a suitcase of cash and liaise with local leaders (probably Taliban-affiliated) in order to pass payments through to victim groups, if these can be identified? Some – maybe most – victims would be extremely difficult to find given the passage of time, and I cannot see any way around dealing with Taliban-affiliated figures. So, it seems like that is going to be a much more difficult thing to do now.

Fiona Nelson: The Department of Defence's Afghanistan Inquiry Reform Plan, which was issued in mid-2021, stated that they would decide on a plan for compensation by the end of the year.[80] As we know, the Brereton Report recommended that compensation be arranged immediately, without waiting. Had that been done, say, at the beginning of 2021, then it would have been more straightforward, having military and diplomatic presence there. That delay in acting has definitely made things a lot more complicated.

Alexandra Fowler: It also goes to how this will contribute to the transitional justice process in Afghanistan. Compensation for affected families is so important for a range of reasons. Prosecutions are very important of course, but there is a whole suite of measures which need to go hand-in-hand and, as you say Fiona, that would have been much easier to do if they had acted promptly. Now we are in the situation where it seems it is not going to be an easy thing to do at all, and money will most probably not make it anywhere near the hands of those who deserve it.

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79 Inquiry into Operation Burnham "Inquiry statement on withdrawal of Afghan villagers as core participants" (press release, 18 June 2019). See also *Burnham Inquiry Report*, above n 15, at ch 1, [45]–[47]; and "Afghan villagers pull out of Operation Burnham inquiry", above n 78.

80 Department of Defence, above n 23. Update as of October 2022: That initial deadline was missed by the previous government and Defence has still not finalised its plan to address Brereton's recommendations around compensation.

Douglas Guilfoyle: It is not just that it is going to be difficult. I would have thought that there is no realistic prospect of it happening. If there is no in-country military or diplomatic presence, there is no means of doing it unless the ADF puts up an online application portal, as it were, for people to apply remotely to an Australian fund. I just do not see how it can be properly done. The Department of Defence is probably the best resourced part of the Australian bureaucracy at the moment. But given the general ability of Australian bureaucracy to cope with particularly complex events, when systems at the Commonwealth level have not been particularly inspiring of late, I can imagine things being said about this issue "still being on the agenda": "We haven't given up hope. We want to do it but, at the moment, the conditions aren't right." And that can be said until there is absolutely no basis for a plausible case left to be put forward.

VI SPECIFIC LEGAL ISSUES ARISING: COMMAND RESPONSIBILITY AND ICC COMPLEMENTARITY

Monique Cormier: Regarding specific legal issues that have arisen, prior to this discussion, we had noted the importance – at least from an Australian perspective – of the question of the ICC and complementarity, which connects to command responsibility issues.

Douglas Guilfoyle: Command responsibility is obviously a potentially complex doctrine, but the fundamentals are fairly straightforward: you need the classic elements of a superior–subordinate relationship; a failure to prevent or punish and a guilty mental state; and, under the Rome Statute, an element of causation.[81]

The trickiest aspect of a situation involving conventional state forces under regular military discipline is actually the required mental state, that is, what must a commander have known? We do not have a very clear answer from the ICC on that point. The difficulty we have in Australia is that when we translated the Rome Statute into our domestic criminal law, we actually changed the mental state required. So, actual knowledge is always enough, but the question is, what is enough if you cannot prove actual knowledge? The Rome Statute uses the language of "should have known" and Australian legislation effectively uses a standard of reckless indifference: you were aware that there was a substantial risk that your subordinates would commit crimes and you unjustifiably did nothing in the face of that risk.[82] Melanie O'Brien, our co-author Joanna Kyriakakis and my assessment is that the Australian standard is on its face more difficult to prove.[83]

To boil it right down, the problem with superior responsibility is always proving that a commander knew enough. This can be challenging, even on the strictest version of the test, such as that used by

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81 Rome Statute of the International Criminal Court, above n 57, art 28.

82 Criminal Code Act 1995 (Cth), s 268.115.

83 Douglas Guilfoyle, Joanna Kyriakakis and Melanie O'Brien "Command Responsibility, Australian War Crimes in Afghanistan, and the Brereton Report" (2022) 99 Intl L Stud 220.

the International Criminal Tribunal for the former Yugoslavia (ICTY), which applied a reasonably strict due diligence standard. You must have known enough that you should have conducted further inquiries.

One of the things that comes across from the Brereton Report is that there were fragmented lines of reporting, accountability and inquiry. So, although with the redactions it is a bit difficult to get a handle on it, it seems like new inquiry officers were appointed in relation to almost every complaint. Further, there was a very defensive posture taken by lawyers in the field, whom the Brereton Report slams for effectively forgetting that their first duty was to the Commonwealth of Australia; their duty was not to be a defence brief for the Special Operations Task Group.[84] The net result, I think you could say, is not that the system was deliberately designed to create an environment of plausible deniability, but that it would be hard to consciously design a system that *better* creates plausible deniability; that the institutional culture has evolved in such a way that no one really knows enough about what is going on at any moment at that micro-tactical level. In an odd way, I have come to wonder whether the law of command responsibility incentivises what it is meant to avoid, that is, whether, effectively, it creates an incentive to *not* know enough.

Now, in terms of a counterargument, the minority judgment of Judges Van den Wyngaert and Morrison in the ICC's *Bemba* case took a more sympathetic view that is far more in line with the Brereton findings on command responsibility.[85] This is, that command responsibility is a doctrine that is more intense depending on your actual factual control – not your legal responsibility or your moral responsibility or your theoretical power. Rather, can you *actually* change things in the real world sufficiently promptly to avoid or punish crimes? Their finding, therefore, was that it is a doctrine aimed principally at patrol- or field-level commanders, and that those who are more structurally remote or who serve largely administrative functions are not caught by command responsibility in the same way.[86] This might seem intuitively repugnant but is not necessarily inconsistent with ICTY case law. And, again, underpinning the whole doctrine is the idea that no commander is required to do the impossible and that the doctrine does impose stricter duties on you only according to the extent of your power. So, there are questions about how you measure that. If you make it a factually intensive inquiry, then it tends to push responsibility down to the lowest level. But if you focus on legal, structural or cultural issues of authority, then maybe responsibilities should extend much higher.

Melanie O'Brien: From that we have drawn out a very specific issue of complementarity for the ICC, particularly relating to a couple of things. The first element is the difference in the Australian legislation to which Douglas referred, that is, how the Australian law has required recklessness, so

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84 *Afghanistan Inquiry Report*, above n 1, at 114–115 and 449.

85 *Prosecutor v Bemba (Judgment) (Separate Opinion of Judge Van den Wyngaert and Judge Morrison)* ICC Appeals Chamber ICC-01/05-01/08-3636-Anx2, 8 June 2018.

86 At [33] and following.

there is a very different standard in the law. The other issue is that the Brereton Report recommends responsibility only as high as platoon commander and then says nobody any higher than that need any responsibility.[87]

So, the complementarity issues that arise include that if the OSI decides to follow the Brereton Report line of, first of all, not investigating any commanders above platoon level, that could be seen by the ICC as inaction on the part of Australia since they are not even investigating at that first stage, and trigger complementarity. That is obviously a choice that the OSI will have to make, but they should bear in mind, under the case law that has come out of the ICC, that not investigating could actually be termed inactivity on the part of Australia, enabling the ICC to step in.

Secondly, relating to the law itself, if the OSI investigates and decides it is going to charge command responsibility, but it does not succeed because of that high threshold of recklessness required under the Australian statute, in my analysis, I do not have an answer as to whether it would definitively mean that the ICC could take jurisdiction or not. The problem is that the ICC uses a test of "substantially same conduct". Generally, when the ICC has looked at this test, it has been applied only to substantive law and not to modes of liability. So, there seems to be a missing discussion about modes of liability when it comes to ICC complementarity jurisdiction. I managed to find one ICTY case that talked about it, but it is really the only one.[88] So, it is quite difficult to ascertain which way the ICC would go in terms of modes of liability as opposed to the underlying crime. Basically, the Court has said there has to be overlap; there has to be sameness to the conduct. But they do not define any of these terms, so it is all very broad as well. It is difficult in providing an analysis to come up with a definitive answer one way or the other about which way the Court might go even in terms of whether the conduct is mirrored. As part of that, they also require that it be the same people. So, again, if they are not prosecuting higher-up commanders, then the ICC could step in, in that regard.

The other issue is related to the evidentiary concerns that we have discussed about whether or not Australia could actually get into Afghanistan or have Afghans come to be witnesses in Australia. Very interestingly, that has actually come up in the ICC before in the case of Côte d'Ivoire.[89] Obviously, when you have a situation with a state that is in conflict or post-conflict, undertaking investigations can be extremely challenging, and that is basically what Côte d'Ivoire said. They said: "Look, we are doing the work, it's just really slow and difficult because we're post-conflict and we're trying to re-establish our infrastructure." But the ICC said that is not an excuse. So, the Court claimed jurisdiction because it found that Côte d'Ivoire was not investigating, that is, based on complementarity.

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87 *Afghanistan Inquiry Report*, above n 1, at 31–33.

88 *Prosecutor v Ademi (Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11bis)* ICTY Referral Bench IT-04-78-PT, 14 September 2005.

89 *Prosecutor v Gbagbo (Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo")* ICC Appeals Chamber ICC-02/11-01/12 OA, 27 May 2015, at [120]–[122].

Obviously, we have talked about the fact that Australia no longer has a presence in Afghanistan, and now that the Taliban has taken over, it would be extremely difficult for Australians to get in there. But at the same time, it would be equally difficult for the ICC, so that really could not be an argument from the ICC, because the Taliban is unlikely to welcome the ICC coming in either.

And then, moving one step further, with the new ICC Prosecutor wanting to renew the investigation into Afghanistan, but only with regard to the Taliban and the Islamic State in Khorasan Province group;[90] telling us, essentially, that we can envision that the ICC would have no interest in stepping in regarding the incidents of Australian conduct described in the Brereton Report. If, for example, there were an investigation into the perpetrators on the ground and the platoon leaders, you can imagine the ICC saying: "Well, Australia's done pretty well on this, so we don't really need to step in."

So, our conclusion is that, yes, there are definitely complementarity issues, but it is highly unlikely that the ICC would step in in any capacity, including in this command responsibility area where we think there are significant complementarity triggers.

Douglas Guilfoyle: I would add only one thing to Melanie's excellent analysis. That is, I do think that in terms of positive complementarity, at the very least, the existence of the ICC and the hypothetical, if incredibly remote, possibility that an Australian serviceman or woman might go to The Hague, probably gave a degree of political cover to reluctant forces on the conservative side of politics to say: "Well, we've got to create the OSI because the alternative is too terrible to contemplate even if objectively the risk is very low."

Monique Cormier: Douglas, I was going to say, one of the interesting things I found with the Brereton Report is how it actually mentioned complementarity; that it was really at the forefront of their minds when they were putting the report together. One of the reasons why they decided to go down the civilian, rather than military, prosecution route is for complementarity purposes. Whether or not that was necessary, they were really trying to dot the i's and cross the t's in relation to complementarity.

Douglas Guilfoyle: Yes, and for colleagues not in Australia, ADF criminal law is really quite complicated. There is a mechanism where crimes that could be prosecuted in an Australian state or territory are deemed to be service offences. That is how the prosecution in 2011 of the deaths of five children in Afghanistan was conducted. One of the reasons that prosecution fell apart was the complexity of trying to translate IHL questions into ordinary criminal offences and then prosecuting the case as a negligence-based offence, not an intention-based or direct intention-based defence and so on. I think the lesson from that experience was that it was better to charge people directly under

90 Karim Khan, above n 65.

Division 268 of the Criminal Code,[91] with actual international criminal law offences as translated into Australian law, rather than attempt this jurisdictional two-step that translates "ordinary" offences into service offences.

Fiona Nelson: Also, on complementarity, you can see in the Brereton Report how useful the looming threat of action in The Hague was. Maybe that is something that will continue to be relevant? We spoke earlier about the potential for the appetite for prosecutions and accountability to wane over time and whether or not positive complementarity can continue to have this effect of allowing there to be investigations and prosecutions despite resistance, so, that will be interesting to see.

Alexandra Fowler: I too am pessimistic about any ICC involvement going by the precedent of the ICC's investigation into United Kingdom Special Forces in Iraq. There, the Office of the Prosecutor concluded that although there was a reasonable basis for concluding that war crimes had been committed by the United Kingdom, and that there had been serious deficiencies in the United Kingdom's investigation which had led to no prosecutions at all,[92] the *secrecy* surrounding the process meant that the ICC had too limited information to say that shielding had taken place.[93] Perhaps for similar reasons, the ICC has shown no inclination to date to investigate in the wake of the United Kingdom's failure also to prosecute alleged war crimes by its Special Forces in Afghanistan.

So, I agree with Melanie that even if the OSI does not investigate commanders further up the chain, Australia is very unlikely to be exposed to an ICC process going by the example that the ICC has set with the United Kingdom and given the similar level of secrecy associated with the OSI's work. Moreover, as we have already noted, the Head of the OSI has committed to work constructively with the ICC,[94] which ensures the Court will not take action itself.

Douglas Guilfoyle: Well, yes, we conclude that there is no realistic prospect of the ICC ever stepping in. And, on its performance today, even if it did step in, the odds that it would be capable of convicting anyone would appear very low.

Alexandra Fowler: Yes. There is the gravity aspect as well.[95]

Douglas Guilfoyle: More fundamentally, our point is simply that the symbolic threat of the ICC has been a useful political catalyst and argument, including for Brereton, to say to an otherwise

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91 Criminal Code Act 1995 (Cth).

92 Ministry of Defence "Ministry of Defence response to allegations relating to the conduct of UK forces in Iraq and Afghanistan" (press release, 17 November 2019); and "UK government and military accused of war crimes cover-up" (17 November 2019) BBC News <www.bbc.com>.

93 Fatou Bensouda "Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Iraq/United Kingdom" (media statement, 9 December 2020).

94 Moraitis, above n 26; and Letter from Chris Moraitis, above n 27.

95 Rome Statute of the International Criminal Court, above n 57, arts 17(1)(d) and 53(1)(c).

reluctant political class that "you have to do something, or there is this risk". And, so, I think the use of the ICC in this situation is that, despite its abysmal performance on pretty much every front,[96] it has not yet run out of symbolic capital.

Melanie O'Brien: I think that the command responsibility issue is also important because if we think about one of the key components in the Brereton Report, they are talking about the problem with the system. They are talking about this systemic culture and all of that leads to commanders. It is all in there in the Report. So, it is actually contradictory with the statement that only up to platoon leaders are relevant. To me, the Brereton Report contradicts itself because the whole idea of command responsibility is about the culture, and it is also about the disciplinary culture. It is the commander's responsibility to discipline their subordinates and if there is no discipline, as we know, in criminal law, the greatest deterrence is certainly a punishment. So, if there is no punishment – if the commanders are not disciplining their troops – then they are of course actually creating and contributing to the very culture that is criticised in the Brereton Report.

Douglas Guilfoyle: But this is one of the things where command responsibility is the wrong doctrine to create cultural change, right? Because the moment you say command responsibility is not a strict liability doctrine, its ability to have the kind of institutional catalytic effect that Melanie is describing at a normative level ends. As soon as you move away from strict liability, which all the international courts and tribunals have done, it cannot have that effect because, at the core, the majority of the cases, at least as the ICTY and the ICC have had to deal with them, have arisen out of situations of armed conflict where the troops are *not* under regular armed forces discipline. So, in light of this, the case law says you have responsibility to the extent of your authority, which includes questions like: "Were your orders routinely obeyed?" Command responsibility does not bring with it a duty to have an effective system of discipline that secures automatic compliance. What it does is measure the degree to which, on the ground, you *could* secure automatic compliance. And, again, by taking that atomistic *this offender, this commander* approach, it pushes all of those structural issues out of the frame.

So, while I agree with Melanie at a normative level, at the level of positive law, I do not think the law does that or is designed to do that. The law is, instead, trying to square that circle of not imposing strict liability on every commander for every subordinate crime. But as soon as you step away from that and start trying to say, "well, how do we do this fairly?", your ability to mandate universal standards of discipline through the law evaporates.

VII CONCLUDING REFLECTIONS

Marnie Lloydd: Thank you all. So, it seems to me that both inquiries ended up demonstrating particular organisational problems in both countries' Defence Forces, but through somewhat different

96 See Douglas Guilfoyle "Lacking Conviction: Is the International Criminal Court Broken? An Organisational Failure Analysis" (2019) 20 Melb J Intl L 401.

ways? There is a different feeling to the organisational problems existing within the two Defence Forces; something in the existing structures and cultures in the first place, but then there is something regarding the inquiries themselves or the way that the inquiries have been done that also reflects those differences in some way. I will keep thinking about that.

Meanwhile, I have some final questions for you. First, what do these inquiries serve to do? What do they tell us about how violence is discussed? About violence and how blame is assigned for it? Secondly, what could Australia and New Zealand learn from each other's inquiries or the problems that were illustrated? Quite concretely, do you think the people involved in the Brereton Inquiry in Australia have discussed things with the people involved in the Burnham Inquiry? Have there already been any lessons learned, for example, from either country about the procedures adopted? How could it be done better in the future? And, finally, what has not been addressed in these inquiries? What has been missed out? What is still to be done? What are the important things that still need to be thought about?

Fiona Nelson: On the question of what an inquiry serves to do and normalising – sometimes "exceptionalising" – violence, it is interesting in the Brereton Report in Australia that there was a very deliberate focus on killings that were not in the heat of battle. That presumably has a strategic purpose: you want to deflect criticism of the type we discussed earlier, that you should not second guess our brave soldiers, they have a very difficult job, and so forth. But the result is that other crimes that are indicated in the Brereton Report, such as cruel treatment or potential unlawful killings in the heat of battle because of poor targeting decisions or policies, become relegated to less important crimes. Maybe they were committed in the heat of battle, but they are still violations of IHL. I would be curious if there was any similar scenario in the New Zealand context.

Douglas Guilfoyle: I think the narrow focus of Brereton was legalistic. It is much more difficult to prove a guilty mental state in heat of battle scenarios. But I would agree criminal law risks legitimating what it does not punish.

Thomas Gregory: To piggyback on that, I think one of the things that worries me about both inquiries, is the way in which they work to "exceptionalise" particular acts of violence and then, in doing so, normalise the more mundane, routine practices of violence that we see in war.[97] As Fiona notes, there is already a hierarchy particularly in the Brereton Report between these specific alleged crimes; crimes that may have happened in the heat of battle are somehow presented as potentially being more excusable or understandable. But there is also something to be said about the lawful violence that is inflicted. For me, as a non-lawyer, I am always worried about the way in which these debates get colonised by concerns about IHL and the rules of engagement and that we only focus on that violence that transgresses the law. We do not think about the perfectly lawful destruction that has

97 Jamie M Johnson "Beyond a politics of recrimination: Scandal, ethics and the rehabilitation of violence" (2017) 23 EJIR 703.

rained down on Afghanistan, that has caused tens of thousands of civilian deaths, that has obliterated buildings, that has caused enormous damage and destruction to communities. That is the violence that is often inflicted with the "terrible force of the law" to quote Weizman, not necessarily in violation of it.[98] I am worried we do not talk about, and interrogate, these broader aspects because we are only concerned with those moments of transgression.

Monique Cormier: I absolutely see your point there, Thomas. I suppose I was starting from a more cynical position, so, I have been pleasantly surprised at the Brereton Report. I had assumed that it was going to be another 2010 "commando" situation all over again – the idea that soldiers are allowed to kill, that it is noble, part of warrior culture. I think the very fact that the reaction to the allegations by the Australian media and the public seems to have been more that the conduct was going too far, which, frankly, I did not think that general Australian mindset would be to accept that Australian soldiers could act in that way. So, I was pleased in that sense. I am hoping, perhaps a little bit too optimistically, that this may be a shift away from at least that fully militaristic culture.

James Mehigan: Can I say that both reports open with the defence of the military and noting how difficult their life was in Afghanistan; that it is a terribly difficult war to conduct and so it is very hard to apply IHL. I found that somewhat tricky because if that is your starting premise, it is all well and good, but it ignores a preceding premise, that is, that we decided to go to these places. Consideration of that bigger picture is absent from the two reports – while the Burnham Report may have found no breaches of the *jus in bello*, it had no standing to consider New Zealand and Australia's decision to become involved in such military operations in the first place. It goes neatly to Douglas's earlier point that criminal law is not good at dealing with structural considerations, but only individual agency.

Fiona Nelson: Yes, there is currently a Senate Inquiry in Australia into the whole of Australia's engagement in Afghanistan and that is a forum where those questions, hopefully, will be discussed.[99]

Alexandra Fowler: I would also note about the Brereton Report – and I have no information about how many individuals might be involved – that there is nothing in there about embedded forces, that is, Australians serving with, say, United Kingdom or United States forces. I do not know whether there were any from the Special Forces who fall into that category and whether their conduct has been scrutinised. That would be a very sensitive topic in relation to our allies. Given the American response, and perhaps the British response as well, I wonder whether there will be any thought about that by the OSI? There is also nothing about what happened in Bagram in relation to alleged torture of detainees by American forces in which Australia may also have been involved in some way. These are another couple of gaps which I find quite problematic.

Marnie Lloydd: Yes, the broader question of shared intelligence.

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98 Eyal Weizman "Legislative Attack" (2010) 27 Theory, Cult & Society 11 at 12.

99 "Australia's engagement in Afghanistan" Parliament of Australia <www.aph.gov.au>.

James Mehigan: These same reasons make it easier to have an inquiry, though – smaller deployments have less at stake compared with larger deployments like those of the United States or the United Kingdom.

Marnie Lloydd: To conclude, now that our time is at an end, even if we have only managed to touch on some of these issues, it has been fascinating to take the time to reflect on the two inquiries side by side, learning more about each neighbouring country's experiences, and seeing the differences and the connections. My sincere thanks to all the participants for their time and enthusiasm, and for sharing their expertise and for the important and fruitful food for further thought that has been offered.

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