Australia/Afghanistan, Inquiry into the Conduct of Australian Defence Forces

This case discusses a report into the alleged violations of International Humanitarian Law (IHL) and war crimes committed by a special forces unit of the Australian Defence Force (ADF) in Afghanistan between 2005 and 2016. The report found 'credible evidence' of unlawful killings and mistreatment of persons hors de combat and referred a number of these incidents to the Australian Federal Police for criminal investigation. More broadly, this case allows for a discussion why IHL is violated and how this can be avoided and an exploration of the content of the obligation to investigate under IHL and raises specific questions in relation to the role of legal advisors and the applicable legal paradigm during hostilities.

Acknowledgments

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A. INSPECTOR-GENERAL OF THE AUSTRALIAN DEFENCE FORCE AFGHANISTAN, INQUIRY REPORT

[Source: Inspector-General of the Australian Defence Force Afghanistan Inquiry Report, November 2020, available at: https://afghanistaninquiry.defence.gov.au/sites/default/files/2020-11/IGADF-Afghanistan-Inquiry-Public-Release-Version.pdf; footnotes omitted]

Chapter 1.01

Introduction and Executive Summary

1. The Chief of the Defence Force has, […] directed the Inspector General of the Australian Defence Force ('the Inspector General ADF') to inquire into a matter concerning the Defence Force, namely whether there is any substance to rumours of criminal or unlawful conduct by or concerning Australian Defence Force Special Operations Task Group (SOTG) deployments in Afghanistan during the period 2005 to 2016.

[…]

4. The Inspector-General […] is an independent statutory office holder with powers similar to those of a Royal Commission. The Inspector-General […] appointed an Army Reserve Major-General, who is also a serving judge of the Supreme Court of New South Wales, to conduct an independent inquiry.

[…]

6. The short and sad answer to [the] question [asked by the Chief of the Defence Force] is that there is substance to those rumours. Because of the nature of this Inquiry, which is not a criminal trial, it cannot and does not find guilt in any individual case. In conformity with legal principle, the practices of commissions of inquiry, and the Inquiry Directions, its findings in any individual case are limited to whether there is 'credible information' of breaches of Law of Armed Conflict ('war crimes')

[…]

What the inquiry has found

12. The Law of Armed Conflict and International Humanitarian Law prohibit as war crimes the murder and cruel treatment of non-combatants and persons who are hors-de-combat (that is, out of-the fight because they have been seriously wounded, or have surrendered or been captured and are prisoners or 'persons under control'), in a non-international armed conflict, which the war in Afghanistan was. Those binding international law obligations are implemented in Australian criminal law and they applied to all Australian Defence Force members on Operation SLIPPER. Australian Defence Force members were and are extensively trained on this subject, and the Inquiry did not encounter a single witness who claimed to be under any misunderstanding as to what was prohibited. Uniformly, everyone understood that it was impermissible to use lethal force against a prisoner (or 'person under control'), or against a non-combatant.

[…]

14. In 28 incidents the subject of detailed examination (and a further 11 which were discontinued), the Inquiry has found that rumours, allegations or suspicions of a breach of Law of Armed Conflict are not substantiated.

15. However, the Inquiry has found that there is credible information of 23 incidents in which one or more non-combatants or persons hors-de-combat were unlawfully killed by or at the direction of members of the Special Operations Task Group in circumstances which, if accepted by a jury, would be the war crime of murder, and a further two incidents in which a non-combatant or person hors de-combat was mistreated in circumstances which, if so accepted, would be the war crime of cruel treatment. Some of these incidents involved a single victim, and some multiple victims.

16. These incidents involved:

a. a total of 39 individuals killed, and a further two cruelly treated; and

b. a total of 25 current or former Australian Defence Force personnel who were perpetrators, either as principals or accessories, some of them on a single occasion and a few on multiple occasions.

17. None of these are incidents of disputable decisions made under pressure in the heat of battle. The cases in which it has been found that there is credible information of a war crime are ones in which it was or should have been plain that the person killed was a non-combatant, or hors de combat. While a few of these are cases of Afghan local nationals encountered during an operation who were on no reasonable view participating in hostilities, the vast majority are cases where the persons were killed when hors-de-combat because they had been captured and were persons under control, and as such were protected under international law, breach of which was a crime.

18. The Inquiry also found that there is credible information that some members of the Special Operations Task Group carried ‘throwdowns’ – foreign weapons or equipment, typically though not invariably easily concealable such as pistols, small hand held radios (‘ICOMs’), weapon magazines and grenades – to be placed with the bodies of ‘enemy killed in action’ for the purposes of site exploitation photography, in order to portray that the person killed had been carrying the weapon or other military equipment when engaged and was a legitimate target. This practice probably originated for the less egregious though still dishonest purpose of avoiding scrutiny where a person who was legitimately engaged turned out not to be armed. But it evolved to be used for the purpose of concealing deliberate unlawful killings.

19. In […] different Special Operations Task Group rotations, the Inquiry has found that there is credible information that junior soldiers were required by their patrol commanders to shoot a prisoner, in order to achieve the soldier’s first kill, in a practice that was known as ‘blooding’. This would happen after the target compound had been secured, and local nationals had been secured as ‘persons under control’. Typically, the patrol commander would take a person under control and the junior member, who would then be directed to kill the person under control. ‘Throwdowns’ would be placed with the body, and a ‘cover story’ was created for the purposes of operational reporting and to deflect scrutiny. This was reinforced with a code of silence.

[…]

21. […] the Inquiry has recommended that the Chief of the Defence Force refer 36 matters to the Australian Federal Police for criminal investigation. Those matters relate to 23 incidents and involve a total of 19 individuals.

[…]

Individual, command and collective responsibility

25. While it would have been much easier to report that it was poor command and leadership that was primarily to blame for the events disclosed in this Report, that would be a gross distortion. While, as will appear, commanders at troop, squadron and Special Operations Task Group level must bear some responsibility for the events that happened 'on their watch', the criminal behaviour of a few was commenced, committed, continued and concealed at the patrol commander level, that is, at corporal or sergeant level.

26. But for a small number of patrol commanders, and their protégées, it would not have been thought of, it would not have begun, it would not have continued, and it would have been discovered. It is overwhelmingly at that level that responsibility resides. Their motivation cannot be known with certainty, but it appears to include elements of an intention to 'clear' the battlefield of people believed to be insurgents, regardless of Law of Armed Conflict; to 'blood' new members of the patrol and troop; and to outscore other patrols in the number of enemy killed in action achieved; superimposed on the personal psyche of the relevant patrol commander.

27. Subordinates complied for a number of reasons. First, to a junior Special Air Service Regiment trooper, the patrol commander is a 'demigod', and one who can make or break the career of a trooper, who is trained to obey and to implement their superior commander's intent. Secondly, to such a trooper, who has invested a great deal in gaining entry into Special Air Service Regiment, the prospect of being characterised as a 'lemon' and not doing what was expected of them was a terrible one, which could jeopardise everything for which they had worked. Thirdly, they were in a foreign environment, far from the influence of the norms of ordinary Australian society, where the incident could be compartmentalised as something that happened outside the wire to stay outside the wire. In that context, some individuals who would have believed themselves incapable of such behaviour were influenced to commit egregious crimes. It is clear to the Inquiry that at least some of them have regretted it, and have been struggling with the concomitant moral injury, ever since.

28. The Inquiry has found no evidence that there was knowledge of, or reckless indifference to, the commission of war crimes, on the part of commanders at troop/platoon, squadron/company or Task Group Headquarters level, let alone at higher levels such as Commander Joint Task Force 633, Joint Operations Command, or Australian Defence Headquarters. Nor is the Inquiry of the view that there was any failure at

any of those levels to take reasonable and practical steps that would have prevented or detected the commission of war crimes. It is easy now, with the benefit of retrospectivity, to identify steps that could have been taken and things that could have been done. However, in judging the reasonableness of conduct at the time, it needs to be borne in mind that few would have imagined some of our elite soldiers would engage in the conduct that has been described; for that reason there would not have been a significant index of suspicion, rather the first natural response would have been disbelief. Secondly, the detailed superintendence and control of subordinates is inconsistent with the theory of mission command espoused by the Australian Army, whereby subordinates are empowered and entrusted to implement, in their own way, their superior commander's intent. That is all the more so in a Special Forces context where high levels of responsibility and independence are entrusted at relatively low levels, in particular to patrol commanders.

29. Moreover, an accumulation of practices, all of them apparently adopted for sound reasons and none inherently sinister, combined to ensure that troop commanders were not well-positioned – structurally or geographically – to discover anything that the patrol commanders did not want them to know. Information was closely held, within individual patrols. Even within a patrol, not every member would necessarily know of events. For sound tactical reasons, troop commanders were usually located remotely from the target compound, in an overwatch position, and did not have visibility of events on the objective.

30. By late 2012 to 2013 there was, at troop, and possibly up to squadron level, suspicion if not knowledge that throwdowns were carried, but for the purpose of avoiding questions being asked about apparently lawful engagements when it turned out that the person killed was not armed, as distinct from facilitating or concealing deliberate unlawful killings. While dishonest and discreditable, it was understood as a defensive mechanism to avoid questions being asked, rather than an aid for covering up war crimes. The more sinister use of throwdowns to conceal deliberate unlawful killings was not known to commanders.

31. However, the absence of knowledge or even suspicion that war crimes were being committed by some of their subordinates does not relieve commanders of all responsibility, as distinct from criminal responsibility, for the crimes of their subordinates. Commanders indirectly contributed to the criminal behaviour, in a number of ways, but in particular by accepting deviations from professional standards in respect of behaviour, by sanitising or embellishing reporting to avoid attracting questions, and by not challenging or interrogating accounts given by those on the ground.

32. Moreover, Special Operations Task Group troop, squadron and task group Commanders must bear moral command responsibility and accountability for what happened under their command and control. Command responsibility is both a legal and a moral concept. In the narrow sense, command responsibility is a legal doctrine by which commanders may be held legally responsible for the misdeeds of their subordinates. But the concept has a much wider scope. At its core is responsibility for the effects and outcomes delivered by the unit or formation under command. Commanders are both recognised and accountable for what happens 'on their watch', regardless of their personal knowledge, contribution or fault.

33. Commanders set the conditions in which their units may flourish or wither, including the culture which promotes, permits or prohibits certain behaviours. It is clear that there must have been within Special Operations Task Group a culture that at least permitted the behaviours described in this Report. However, that culture was not created or enabled in Special Operations Task Group, let alone by any individual Special Operations Task Group Commanding Officer. Because Special Operations Task Group was a task group drawn from multiple troop contributing units and multiple rotations, each Special Operations Task Group Commanding Officer acquired a mix of personnel with which he had typically had little prior influence or exposure. There was little opportunity for the Commanding Officer of any Special Operations Task Group rotation to create a Special Operations Task Group culture.

34. The position with the individual Force Elements was otherwise: each of the Special Air Service Regiment squadrons, and each of the 2nd Commando Regiment Company Groups, rotated in succession through Special Operations Task Group, many times. It was in their parent units and subunits that the cultures and attitudes that enabled misconduct were bred, and it is with the commanders of the domestic units who enabled that, rather than with the Special Operations Task Group commanders, that greater responsibility rests.

35. The evidence does not reveal a consistent pattern of misbehaviour in 2nd Commando Regiment or any of its sub-units, as it does in at least two Special Air Service Regiment squadrons. It cannot be excluded that that may be attributable to the Inquiry having less success in breaching the code of silence in 2nd Commando Regiment than in Special Air Service Regiment, but on the available evidence the Inquiry would attribute it to the closer resemblance of 2nd Commando Regiment to a conventional unit - in particular that its officers were not sidelined and disempowered, but very much remained in practical command of operations.

36. The position of the Special Air Service Regiment troop commanders calls for some sympathy. Their position was a difficult one. Invariably, they were on their first Special Operations Task Group deployment. They were in an environment in which the non-commissioned officers had achieved ascendancy, just as they had from their role as gatekeepers to Special Air Service Regiment selection, and their extended role when new officers were ‘under training’ and thus regularly subordinate to them. They were not well-mentored, but were rather left to swim or sink. Those who did try to wrestle back some control were ostracised, and often did not receive the support of superior officers. In that context, given the arduous selection process and how hard it is to get there in the first place, it is to an extent understandable that some might not be prepared to risk that position at the time to try to stop what was seen as an organisationally routine practice such as throwdowns.

37. A substantial indirect responsibility falls upon those in Special Air Service Regiment who embraced or fostered the ‘warrior culture’ and the clique of non-commissioned officers who propagated it. Special Forces operators should pride themselves on being model professional soldiers, not on being ‘warrior heroes.’ […] That responsibility is to some extent shared by those who, in misconceived loyalty to their Regiment, or their

mates, have not been prepared to ‘call out’ criminal conduct or, even to this day, decline to accept that it occurred in the face of incontrovertible evidence, or seek to offer obscure and unconvincing justifications and mitigations for it

38. That responsibility and accountability does not extend to higher headquarters […] because they did not have a sufficient degree of command and control to attract the principle of command responsibility, and within the constraints on their authority acted appropriately when relevant information and allegations came to their attention to ascertain the facts. First, Joint Task Force 633 was not positioned, organisationally or geographically, to influence and control Special Operations Task Group operations: its ‘national command’ function did not include operational command. […] Without operational command, Joint Task Force 633 did not have the degree of command and control over Special Operations Task Group on which the principle of command responsibility depends. Secondly, commanders and headquarters at Joint Task Force 633, Joint Operations Command and Australian Defence Force Headquarters appear to have responded appropriately and diligently when relevant information and allegations came to their attention, and to have made persistent and genuine endeavours to find the facts through quick assessments, following up with further queries, and inquiry officer inquiries. Their attempts were often frustrated by outright deceit by those who knew the truth, and, not infrequently, misguided resistance to inquiries and investigations by their superiors.

[…]

40. All that said, it was at the patrol commander level that the criminal behaviour was conceived, committed, continued, and concealed, and overwhelmingly at that level that responsibility resides.

41. The events discovered by this Inquiry occurred within the Australian Defence Force, by members of the Australian Defence Force, under the command of the Australian Defence Force. To the extent that the protracted and repeated deployment of the relatively small pool of Special Forces personnel to Afghanistan was a contributing factor - and it should be recognised that the vast majority of Special Forces personnel did repeatedly deploy to Afghanistan without resorting to war crimes - it was not a risk to which any government, of any persuasion, was ever alerted. Ministers were briefed that the task was manageable. The responsibility lies in the Australian Defence Force, not with the government of the day.

Inquiries and oversight

42. The Australian Defence Force had in place a system of operational reporting and investigatory mechanisms including quick assessments, Australian Defence Force Investigative Service investigations, and inquiry officer inquiries, designed to provide command oversight and respond to allegations of unlawful conduct. However, these systems failed to detect breaches of Law of Armed Conflict that were identified during the course of the Inquiry. The failure of oversight mechanisms was contributed to by an accumulation of factors.

43. First, commanders trusted their subordinates: including to make responsible and difficult good faith

decisions under rules of engagement; and to report accurately. Such trust is an important and inherent feature of command. However, an aura was attached to the operators who went ‘outside-the-wire’, and whose lives were in jeopardy. There was a perception - encouraged by them and accepted by others - that it was not for those ‘inside-the-wire’ to question the accounts and explanations provided by those operators. This was reinforced by a culture of secrecy and compartmentalisation in which information was kept and controlled within patrols, and outsiders did not pry into the affairs of other patrols. These matters combined to create a profound reticence to question, let alone challenge, any account given by an operator who was ‘on the ground.’ As a result, accounts provided by operators were taken at face value, and what might at least in retrospect be considered suspicious circumstances were not scrutinised. Even if suspicions were aroused in some, they were not only in no position to dispute reported facts, but there was a reticence to do so, as it was seen as disloyal to doubt the front line operators who were risking their lives.

44. Secondly, commanders were protective of their subordinates, including in respect of investigations and inquiries. Again, that is an inherent responsibility of command. However, the desire to protect subordinates from what was seen as over-enthusiastic scrutiny fuelled a ‘war against higher command’, in which reporting was manipulated so that incidents would not attract the interest or scrutiny of higher command. The staff officers did not know that they were concealing unlawful conduct, but they did proactively take steps to portray events in a way which would minimise the likelihood of attracting appropriate command scrutiny. This became so routine that operational reporting had a ‘boilerplate’ flavour, and was routinely embellished, and sometimes outright fabricated, although the authors of the reports did not necessarily know that to be so, because they were provided with false input. This extended to alternative reporting lines, such as intelligence reporting, which was carefully controlled. It also generated resistance to lawfully authorised investigations and inquiries.

45. Thirdly, there was a presumption, not founded in evidence, to discount local national complaints as insurgent propaganda or motivated by a desire for compensation. This presumption was inconsistent with the counter-insurgency effort, and resulted in a predisposition on the part of quick assessment officers to disbelieve complaints.

46. Fourthly, the liberal interpretation of when a ‘squirter’ (a local national observed to run from a compound of interest) could be taken to be ‘directly participating in hostilities’, coupled with an understanding of how to describe an engagement to satisfy reporting expectations, combined to contribute to the creation of a sense of impunity among operators.

47. Fifthly, consciously or unconsciously, quick assessment officers generally approached their task as being to collect evidence to refute a complaint, rather than to present a fair and balanced assessment of the evidence. They did not necessarily seek to question or independently confirm what they were told; and/or consider and weigh conflicting evidence, both external and internal, against what they were told and accepted on trust.

48. Sixthly, inquiry officers did not have the requisite index of suspicion, and lacked some of the forensic skills and experience to conduct a complex inquiry into what were, essentially, allegations of murder. Nonetheless, allowance needs to be made for the difficulty of the task when faced with witnesses who are motivated not to disclose the truth, whether by self-interest or by misplaced loyalty. This Inquiry does not doubt that, even with its much heightened index of suspicion, and an approach in which accounts have been robustly tested by forensic examination, it has not always elicited the truth, and that there are matters about which it has been successfully kept in the dark, if not deceived. However, inquiry officers would have had greater prospects of success if more suspicious, and better trained or experienced in investigatory and forensic techniques.

49. Seventhly, as a result, operational reporting, and the outcomes of quick assessments and inquiry officer inquiries, were accorded a level of confidence by higher command, which they did not in fact deserve.

50. Many of those themes are founded in attitudes which are, in themselves, commendable: loyalty to the organisation, trust in subordinates, protection of subordinates, and maintenance of operational security. However, they have fostered less desirable features, namely avoidance of scrutiny, and thus accountability. It is critically important that it be understood that not all of these themes are, in themselves, bad or sinister. There are good reasons for many of them. Their importance and benefits should not be overlooked when addressing the problem to which they have contributed.

51. Operation summaries and other reports frequently did not truly and accurately report the facts of engagements, even where they were innocent and lawful, but were routinely embellished, often using ‘boilerplate’ language, in order proactively to demonstrate apparent compliance with rules of engagement, and to minimise the risk of attracting the interest of higher headquarters. This had upstream and downstream effects: upstream, higher headquarters received a misleading impression of operations, and downstream, operators and patrol commanders knew how to describe an incident in order to satisfy the perceived reporting requirements. This may be a manifestation of a wider propensity to be inclined to report what superior commanders are believed to want to hear. Integrity in reporting is fundamental for sound command decisions and operational oversight. The wider manifestation needs to be addressed in leadership training and ethical training, from the start of a military career and continuing throughout it. Its narrower application needs to be addressed through impressing accountability for integrity in reporting on operations and intelligence staff through duty statements and standing orders.

52. Legal officers contributed to the embellishment of operational reporting, so that it plainly demonstrated apparent compliance with rules of engagement. It is not suggested that this was done with an intention to mislead, as distinct from the expression in legal terms of what the legal officer understood to have happened, or more typically, indirectly, by explaining what needed to be stated in a report to demonstrate rules of engagement compliance.

53. The mandatory use of body-cameras by police in many parts of Australia has proved successful in confirming lawful actions, rebutting false complaints, and exposing misconduct, and is now widely accepted. Privately-owned helmet cameras were enthusiastically used in Afghanistan by some Special Operations Task Group members, which has albeit unintentionally resulted in the exposure of at least one apparent war crime. Use of official helmet cameras by Special Forces operators, perhaps more than any other single measure, would be a powerful assurance of the lawful and appropriate use of force on operations, as well as providing other benefits in terms of information collection, and mitigating the security risk associated with unofficial imagery.

[…]

Witness welfare support

60. It was and is the duty of the Inquiry to inquire into the matters in its terms of reference, without fear or favour, affection or ill-will, so as to uncover the truth. That necessarily required the rigorous and comprehensive collection, evaluation and testing of all available evidence, which sometimes meant that robust examination of witnesses could not be avoided.

[…]

Use and derivative use immunities

63. Every witness who gave evidence to the Inquiry has the protections and immunities afforded by the Defence Act, s 124(2CA), and the Inspector-General of the Australian Defence Force Regulation, s 31 (prohibition against taking reprisals), s 32 (self-incrimination) and s 33 (protection from liability in civil proceedings). Those protections and immunities include use and derivative use immunity: […] any information given or document or thing produced by the witness, and giving the information or producing the document or thing, and any information document or thing obtained as a direct or indirect consequence of giving the information or producing the document or thing, are not admissible in evidence against the individual in any civil or criminal proceedings in any federal court or court of a State or Territory, or proceedings before a Service Tribunal, other than proceedings by way of a prosecution for giving false testimony.

64. The immunities operate in any relevant court or Service Tribunal in which proceedings may be brought, and regulate the admissibility of certain evidence in those proceedings. They do not directly constrain the Inquiry […] However, there is potential for criminal proceedings to be compromised if immunised evidence informs a prosecution. That is one reason why it is inappropriate for the evidence that has been obtained by the Inquiry to be published at this stage.

65. It is important to observe that the immunities preclude only the admission in evidence in court proceedings of information given to the Inquiry by a witness (and anything obtained as a direct or indirect

consequence) against that witness. They do not preclude the admission in evidence in court proceedings of information given to the Inquiry by a witness (and anything obtained as a direct or indirect consequence) against any other person – including another person who was also an Inquiry witness.

[…]

67. Secondly, without those immunities, it is unlikely that the culture of silence would have been breached, and that the conduct described in this Report would have been exposed, at least to the extent to which it has.

What the Inquiry has recommended, and why

68. As already mentioned, the Inquiry has recommended that the Chief of the Defence Force refer 36 matters to the Australian Federal Police for criminal investigation. Those matters relate to 23 incidents and involve a total of 19 individuals.

69. In considering whether to recommend referral of a matter for criminal investigation, the Inquiry has adopted as a threshold test the following question: Is there is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge an identifiable individual with a criminal offence. The Inquiry has also had some regard to the ultimate prospects of a conviction.

70. Because of the immunities, explained above, to which witnesses who give evidence to the Inquiry are entitled, which preclude the use of a person's evidence to the Inquiry, or anything discovered as a result, in proceedings against that person, there are some individuals who have been involved in misconduct who will not be amenable to prosecution. That is the necessary consequence of their having made protected disclosures to the Inquiry, without which the conduct described in this Report would not have been uncovered. Decisions therefore have to be made about which individuals should, and which should not or cannot be prosecuted. Ultimately, those are decisions for prosecuting authorities. However, the Inquiry's recommendations have taken this issue into account. Essentially, this involves prioritising a hierarchy of criminal responsibility, in order that those who bear greatest responsibility should be referred for criminal investigation, and potentially prosecution, in priority to those bearing less responsibility.

71. The Inquiry's approach is that those who have incited, directed, or procured their subordinates to commit war crimes should be referred for criminal investigation, in priority to their subordinates who may have 'pulled the trigger.' This is because in a uniformed, disciplined, armed force those in positions of authority bear special responsibilities, given their rank or command function, because their subordinates would not have become involved

but for their instigation of it; and because what happened was entirely under their control, with their subordinates doing what they were directed to do.

72. Additional factors include the objective gravity of the incident (for example, if there are multiple victims);

whether the conduct appears to have been premeditated, wanton or gratuitous; and whether the individual concerned is implicated in multiple incidents, particularly if those other incidents may provide tendency evidence.

[…]

75. The Inquiry has recommended that consideration be given to administrative action for some serving Australian Defence Force members, where there is credible information of misconduct which either does not meet the threshold for referral for criminal investigation, or is insufficiently grave for referral, but should have some consequence for the member. The administrative action process would require further procedural fairness.

76. Where there is credible information that an identified or identifiable Afghan national has been unlawfully killed, the Inquiry has recommended that Australia should now compensate the family of that person, without awaiting for establishment of criminal liability. This will be an important step in rehabilitating Australia's international reputation, in particular with Afghanistan, and it is simply the right thing to do.

[…]

79. The Inquiry has made numerous recommendations to address strategic, operational, structural, training and cultural factors that appear to have contributed, although generally indirectly, to the incidents and issues referred to in this Report.

Conclusion - why this matters

80. History teaches that the failure to comprehensively deal with allegations and indicators of breaches of Law of Armed Conflict as they begin to emerge and circulate is corrosive - it gives spurious allegations life, and serious allegations a degree of impunity. The consequences of not addressing such allegations as and when they eventually arise are measured in decades […] By conducting this Inquiry, the Australian Defence Force has taken ownership of its own problem, as the rumours began to emerge.

81. Australia subscribes to, and holds itself out as adhering to, the Law of Armed Conflict, and International Humanitarian Law. When our enemies fail to so adhere, we hold them to account by such standards. In order to maintain our moral integrity and authority as a nation, which in turn gives us international credibility, strategic influence, and sustains our operational and tactical combat power, we must apply at least the same standards to our own military personnel. Moral authority is an element of combat power. If we do not hold ourselves, on the battlefield, to at least to the standards we expect of our adversaries, we deprive ourselves of that moral authority, and that element of our combat power. Painful as it may be for those involved, by conducting this Inquiry, and following the evidence wherever it went, Australia has sought to maintain our moral integrity and authority as a nation by investigating breaches of laws which apply to us and our enemies

alike. It also ensures that the only courts current or former Australian Defence Force members may face are those established by the laws of Australia.

82. While the Inquiry is reporting now as it is satisfied under s 28F(1)(a) of the Inspector-General Australian Defence Force Regulation that ‘all information relevant to the inquiry that is practicable to obtain has

uncover everything that fell within its terms of reference. The Inquiry also does not doubt that, like some of the contemporaneous inquiries and investigations conducted during the Afghanistan era, there are probably cases in which it has been deceived. Reports, rumours and allegations of war crimes in Afghanistan will continue to emerge, following the release of the Inquiry’s findings, and potentially for many years. Partly for that reason, the Inquiry has made recommendations for the establishment of processes to receive and assess such reports, using the Inquiry’s evidence and experience. Amongst other things, it is important that people who have been traumatised by their exposure to such incidents have the opportunity to speak in a confidential setting about them. One of the more satisfying aspects of the Inquiry is that some witnesses have found that opportunity cathartic.

83. All but two of those who have worked on this Inquiry are, in one capacity or another, serving members of the Australian Defence Force, and every one of us is proud to be so. We embarked on this Inquiry with the hope that we would be able to report that the rumours of war crimes were without substance. None of us desired the outcome to which we have come. We are all diminished by it.

Chapter 1.10
Applicable Law of Armed Conflict

[…]

1. This Inquiry is not about what some might call breaches of discipline, such as misuse of alcohol, or inappropriate personal relationships. Its subject matter is rumours, suspicions and allegations of what are commonly known as ‘war crimes’, and in particular the killing or mistreatment of non- combatants, or persons hors de combat (‘out of the fight’, and thus entitled to protection from attack), in contravention of the law of armed conflict.

[…]

2. The relevant Law of Armed Conflict (LOAC) for Australia is principally to be found in Division 268 of the Commonwealth Criminal Code Act 1995 (the Criminal Code), through which Australia, as a party to the Rome Statute of the International Criminal Court 1998 (Rome Statute) which established the International Criminal Court (ICC), implemented that instrument in domestic legislation. Division 268 was incorporated into the Criminal Code through Schedule 1 of the International Criminal Court (Consequential Amendments) Act 2002. These amendments commenced on 26 September 2002, and accordingly were applicable throughout the period of relevance to the Inquiry.

3. The purpose of this amendment to the Criminal Code was to give effect to Australia's obligations under the Rome Statute,6 which Australia ratified on 07 January 2002 […]

[…]

Afghanistan – a non-international armed conflict

8. […] the Government of Australia deployed military forces to Afghanistan in support of North Atlantic Treaty Organisation (NATO)-led military operations in the global struggle against violent extremism, and in order to enhance international peace and security, since 2001. The period of relevance for this inquiry covers Operation SLIPPER, from 2005 to 2014.

9. The stated legal basis for Australia's presence in Afghanistan, in support of NATO-led military operations in the global struggle against violent extremism, and in order to enhance international peace and security, has changed over time. The United States (US) treated the events of 11 September 2001 as an armed attack upon it, which it said justified the invocation of both the inherent right of self- defence enshrined in Article 51 of the Charter of the United Nations and, for the first time, Article IV of the Australia, New Zealand, United States Security (ANZUS) Treaty.

10. The legal bases for Operation SLIPPER were the invitation to NATO by the Government of the Islamic Republic of Afghanistan (GIRoA) and the series of United Nations (UN) Security Council Resolutions which provide a UN Charter Chapter VII mandate for the NATO-led security mission in Afghanistan, in particular Resolution 1386 in December 2001. The NATO force, raised pursuant to Resolution 1386, was the International Security Assistance Force (ISAF). Initially, its main purpose was to train the Afghan National Security Forces (ANSF) and assist Afghanistan in rebuilding key government institutions, while engaged in operations against the Taliban, al Qaeda and factional warlords. In October 2003, the UN Security Council adopted Resolution 1510, which authorised the expansion of the ISAF mission throughout Afghanistan.

11. The Government of Australia rightly considered the conflict in Afghanistan to be an armed conflict not of an international character; that is, a conflict between the sovereign Afghan Government on the one hand and insurgents, foreign fighters and remnants or supporters of the former Taliban regime on the other. Thus, Common Article 3 of the Geneva Conventions applies as a matter of legal obligation. In addition, certain provisions of the Geneva Conventions are applicable as a matter of customary international law.

[…]

26. Secondly, and of great significance, there is a Division 268-specific extension of criminal responsibility, generally known in LOAC as 'command responsibility':

268.115 Responsibility of commanders and other superiors

(1) The criminal responsibility imposed by this section is in addition to other grounds of criminal responsibility under the law in force in Australia for acts or omissions that are offences under this Division.

(2) A military commander or person effectively acting as a military commander is criminally responsible for offences under this Division committed by forces under his or her effective command and control, or effective authority and control, as the case may be, as a result of his or her failure to exercise control properly over those forces, where:

(a) the military commander or person either knew or, owing to the circumstances at the time, was reckless as to whether the forces were committing or about to commit such offences; and

(b) the military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

[…]

33. In 1977, the doctrine of command responsibility was recognised in the Additional Protocol No 1 to the Geneva Conventions. Article 86(2) provides:

The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from … responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time,

that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

34. Article 87 requires commanders to ‘prevent and, where necessary, to supress and to report to competent authorities’ any violations of the Conventions and of Additional Protocol 1.

[…]

The International Criminal Court – the principle of complementarity

43. The whole of the period under consideration by the Inquiry falls within the jurisdiction of the ICC. In the light of the decision of the Prosecutor of the ICC to open an investigation in respect of Afghanistan, it is important to observe that, under the principle of complementarity, the ICC lacks jurisdiction and the Australian Attorney-General is not to surrender, for example, a member of the ADF to the ICC’s jurisdiction, until Australia has had the full opportunity to investigate or prosecute any alleged crimes. [..]

44. Australian civilian courts have jurisdiction under Division 268 of the Criminal Code in respect of prosecutions for war crimes that are serious violations of article 3 common to the Geneva Conventions committed in the course of an armed conflict that is not an international armed conflict, or other serious violations of the laws and customs applicable in such conflicts that amount to war crimes. As discussed below, at least in theory, such proceedings could also be brought as 'Territory offences' under the Defence Force Discipline Act 1982 (DFDA). There is no legal impediment to Australian courts or military tribunals hearing such cases if they are to be brought.

45. Pursuant to Article 17 of the Rome Statute, the ICC will only exercise its jurisdiction if a State fails to genuinely investigate and prosecute a situation in which crimes against international humanitarian law have been committed.

[…]

52. There remains some debate as to the way in which contested complementarity; that is, situations where the national jurisdiction claims an effective process is on foot or has been completed, but where the ICC may not agree with this assessment, will be dealt with by both national courts and the ICC. The ICC Prosecutor is entitled to make their own assessment as to the adequacy of any national process cited as an admissibility bar to ICC jurisdiction […]

53. One significant consequence of this Inquiry is that, notwithstanding the decision of the ICC to open an investigation into Afghanistan, SOTG conduct is unlikely become a matter for investigation or prosecution before the ICC. This is because Australia is committed, and has demonstrated through this Inquiry, its commitment to inquire into, investigate, and if appropriate prosecute any allegations that may be amenable to ICC jurisdiction (in the absence of appropriate responses by Australia). Therefore, under the principle of complementarity, so long as Australia can satisfy the ICC Office of the Prosecutor that it is making the requisite inquiries and taking appropriate consequential action, the jurisdiction of the ICC is not enlivened.

54. The DFDA applies to Defence members outside Australia. There is no doubt the DFDA applies to conduct in the context of a NIAC [Non-international Armed Conflict] in Afghanistan

56. However, there are potential difficulties with that course.

[…]

57. […] Jann Kleffner, writing in 2003, described why any policy of charging war crimes as a Service offence could be problematic:

[The] ‘ordinary crimes approach’ raises the question whether the ICC Statute accepts prosecution for offences classified as ‘ordinary’ rather than as the specific international crimes within the ICC jurisdiction, in order to consider a national jurisdiction to satisfy the complementarity requirements...

[…]

61. [..] The Inquiry has recommended that any criminal investigation and prosecution of a war crime should be undertaken by the Australian Federal Police and CDPP, with a view to prosecution in the civilian criminal courts, rather than as Service offences or in Service tribunals.

Chapter 1.11
The Applicable Rules of Engagement

[…]

Key Australian Defence Force Rules of Engagement Principles

6. **Self-Defence**. The primary general legal principle applicable to the ROE under which the ADF [..] operated in Afghanistan is that self- defence was available as a justification for use of force, including lethal force. That is, in any situation within the area of operations, the legal justification of ‘self-defence’ or defence of others (including of mission-essential equipment) was available as a defence to any charge of unlawful killing or infliction of serious harm.

7. However, an understanding of how the legal defence of self-defence operates in a legal battlespace within which LOAC also applies, is complex. In essence, there were two justifications for use of lethal force available to ADF members in Afghanistan. The first was self-defence. This justification is found in Australian domestic law that applies to ADF members extra-territorially. This justification centres around a complex part-subjective and part-objective legal test that is chiefly concerned with evidence and indicia of the fear of imminent death or really serious injury to self or another, which is reasonably apprehended by the user of force, and the reasonableness and necessity of the force they used in response in that particular situation.

8. There is ongoing debate as to whether and how the justification of self-defence is available when dealing with enemy forces in operations, when LOAC says attack rules and targeting are the relevant legal paradigm governing use of force against the adversary […]. This is a difficult and contentious area of law and has led to confusion as to which legal criteria/assessment paradigm is or should be used in analysing an incident of use of force against the enemy. Some recent assessments have concluded that amongst United States combat forces, 80 per cent or more uses of force in combat operations were described as incidents of self-defence rather than as LOAC- permissible lethal targeting of enemy forces.

9. The Inquiry has identified that in numerous SOTG operational summaries, Quick Assessments and Inquiry Officer Inquiry (IOI) reports, the justificatory narrative set out has employed or recorded both analytical

paradigms. Whether this assists command execute its oversight responsibility is an important matter, but is beyond the scope of this Inquiry.

10. **LOAC**. The second legal justification for use of lethal force available to the ADF in Afghanistan was LOAC. This is the second general principle which underpins ROE: LOAC is available as a justificatory scheme for use of force only under certain circumstances. This justificatory scheme is sourced in the first instance from international law, and it is applicable to Australia because Australia has ratified or recognised that this law binds Australia and its agents, including the ADF.

11. That said, however, LOAC is also operationalised for the ADF through Australian domestic law (such as Division 268 of the Criminal Code Act 1995 (Cth)) and – as subsidiary instruments - ADF orders and instructions (such as ROE and Targeting Directives [TD]). The distinction between LOAC enshrined in legislation, and orders set out in the form of ROE and TDs, is one as to source of authority; it is not as to legal content, for ROE and TDs cannot exceed or go beyond what is permitted by law.

12. On this point, it is important to recall that sometimes ROE and TDs limit ADF actions and authorisations to a smaller subset of conduct – that is, they require the ADF to apply limits on use of force, for example, that are more stringent than the law requires. This may be done for operational or strategic ('policy') reasons. For example, whilst it may be permissible under LOAC to attack a particular religious building as a military objective in a given situation because it is being used as a base of operations by the adversary, ROE and TDs may restrain the ADF from attacking that particular type of target for other reasons (such as achieving a broader strategic outcome by not antagonising the local population by destroying their place of worship). Thus a breach of an ROE rule that limited conduct more tightly than the law required (but where the conduct was still within the permissible bounds of LOAC) is not a breach of LOAC; it is only a breach of orders.

13. It is vital to recognise, however, that LOAC is available as a justification for such use of lethal force (and indeed other less-than-lethal uses of force such as capture, search and seizure, and so on)

14. In the case of Afghanistan, there was an armed conflict occurring (a non-international armed conflict) and Australia was a party to that armed conflict – that is, a combatant in that armed conflict with an identified enemy Australia (and others) was fighting against. Therefore, LOAC applied to ADF conduct as a matter of both international and Australian law.

15. However, LOAC applies to conduct within its scope, and this means that other conduct by ADF personnel in Afghanistan was governed not by LOAC, but rather by the self-defence rules noted above, which also applied in Afghanistan. The significance of this legal complexity can be illustrated by an example.

16. In Afghanistan, the Taliban's military forces were one of the ADF's designated enemy forces. This means that when an ADF member was on patrol, for example, and came across people who were targetable with lethal force because they were members of the enemy fighting force – Taliban fighters – they could be

targeted on that basis. There was no need to resort to the legal justification of self-defence to justify killing that enemy fighter, because the applicable legal regime in relation to that situation was LOAC, and LOAC permits the ADF to seek out and kill such enemy forces.

17. However, on a different day, an ADF FE may have been deployed to assist ANSF to apprehend a 'drug baron' who was not a member of the Taliban, but simply a criminal. The reason for apprehending that individual or for carrying out an operation to shut down that drug baron's facilities may still have been linked to the armed conflict – for example, the drug trade was in general financing Taliban operations. However the drug baron in question had no links to the Taliban or to the hostilities against the ADF. In this situation, the applicable elements of ADF ROE would not be those based in LOAC, because although the general context of the operation was an armed conflict, the person against whom the operation was directed was not an enemy fighter. In this case, that person – although clearly a criminal – is for LOAC purposes a 'civilian' who cannot be made the target of attack.

18. This means that the use of force rules applicable in this counter-drug baron operation would be those that relate to policing activities (not armed conflict), and the applicable law in relation to use of lethal force against the drug baron (if that became necessary) would be self-defence (not the LOAC authorisation to attack and kill enemy fighters as of right). This would mean that the ADF FE engaged on this apprehension operation would not be entitled to kill the drug baron on sight in accordance with LOAC, because that drug baron is not a person who can be targeted under LOAC. However, if in the process of attempting to apprehend the drug baron, that drug baron engaged the ADF FE, then an ADF member who reasonably believed that they had to use lethal force to stop that drug baron killing someone could do so; however, the justificatory scheme/legal regime against which that ADF member's conduct would need to be assessed would be the law of self-defence.

[…]

21. In relation to LOAC rules. LOAC set outs general limitations on the use of lethal force in relation to the 'enemy,' […] such lethal force may only be used:

1. (1) against persons who take an active or direct part in hostilities (DPH); and

2. (2) against targetable members of organised armed groups (OAG).

22. LOAC further describes these two categories of targetable person against whom lethal force could be used in accordance with LOAC because they were enemy fighters. It acknowledges that there is no need to await the commission of a hostile act or demonstration of hostile intent before the ADF may apply lethal force to accomplish the mission against these two categories of people. These two categories of people were the designated hostile or enemy forces who could be attacked with lethal force because of their status and/or

conduct. Because they were targetable in accordance with LOAC, there was no necessity for the indicia of self-defence to be present when using lethal force against these categories of people.

23. LOAC sets out separate tests for assessing the targetability of people in each of these two categories (DPH and OAG). Whilst there are some similarities, the tests differ as to content given that the indicia, emphasis, and consequences of each categorisation differ.

24. This distinction as to indicia and targetability criteria was necessary because under LOAC, the liability to targeting of each type of enemy fighter (DPH on one hand, OAG on the other) differs. In short, civilians who are assessed as DPH are considered 'ad hoc' enemy whose connection or otherwise to an organised military force is unknown or merely suspected. Consequently, their liability to targeting is only within the 'bubble' of time bound by the lead up to their attack on ADF and friendly forces, during that attack, and for a period of time after that attack. Once the DPH has concluded, however, that person once again re-gains the protections that attend their underlying status as 'civilians' – including the protection from being made the target of an attack. By contrast, people who are considered under the OAG criteria are 'full-time' enemy OAG members. Consequently, they are targetable at all times unless and until they clearly dissociate themselves from the OAG and cease hostilities (or are out of the fight due to injuries, surrender, capture, or similar reasons […].

Key indicia regarding the identification of enemy forces who were liable to lethal targeting in accordance with LOAC

25. Set A indicia for DPH. This test essentially focusses upon observable conduct aimed at causing harm to ADF, friendly forces, and local civilians. Conduct in this category could include, for example, attacking ADF FE with weapons, laying an improvised explosive device (IED), manoeuvring into an attacking or ambush position, manoeuvring to access a weapons cache, or departing from a position after an attack or after laying an IED.

26. Set B indicia for DPH. This test covers DPH that was indicated by intelligence and other sources. For example, this test could apply when intelligence indicated that an individual was planning an attack or operation against the ADF, friendly forces, or civilians, and this attack or operation was intended to cause harm to those targeted.

27. Targeting members of an OAG. The LOAC requirements for satisfaction of the OAG test are generally as follows:

(1) Identify those OAGs that are taking part in the hostilities against the ADF and friendly forces. There are a range of factors and indicia that can be used to assist in this identification process.

(2) Identify whether the proposed target is a member of one of those identified enemy OAGs. Again, there are a range of factors and indicia that can be used to ascertain the required connection between the

individual proposed to be targeted, and the enemy OAG.

(3) Confirm whether or not the identified OAG member proposed to be targeted is fulfilling a ‘targetable role’ in that enemy OAG – that is, undertaking a role in that enemy OAG that LOAC defines as a role, or conduct, that makes an individual targetable with lethal force. For example, planning, commanding, or taking part in OAG military operations are targetable roles. Being an OAG political spokesperson or propagandist who never takes part in planning or conducting or facilitating military operations may not be a targetable role.

Application of the ADF ROE by SOTG

[…]

40. While the evidence before the Inquiry indicates that SOTG members were well-versed in the applicable ROE, there appears to have been a wide variation in how they were understood to apply to different factual scenarios.

41. Numerous witnesses were asked generic questions about the circumstances in which they could lawfully engage:

1. A spotter;

2. A squirter, defined as someone running from a compound of interest;

3. A person under confinement; and

4. A badly wounded insurgent who was hors de combat.

[…]

45. In respect of ‘spotters’, some witnesses said that a ‘spotter’ could only be engaged if the person was seen holding a communication device, there was certain intelligence that confirmed the person was reporting on coalition forces and that they were facilitating the

manoeuvre of hostile elements. Other witnesses said that it was enough that the person was holding a communication device and they were suspected of being hostile by, for example, ignoring calls to stop running. […] there were many engagements […] where the […] photographs show the body of the killed local national with no more than a communication device […] witnesses have admitted that such two- way radios (known as an ‘ICOM’ from the manufacturer of an Individual Communication device) were planted on the bodies (known as ‘throwdowns’) in order to falsely portray that the engagement was of a spotter and therefore within ROE.

46. In respect of engaging ‘squirters’ (Afghan males running from a compound of interest) again there was wide variety in what elements were needed before the ROE permitted opening fire. Some witnesses said the person running could only be engaged if they were armed, some witnesses said there needed to be an assessment that the person was likely running to a cached weapon, others said there needed to be an assessment that the person was ‘moving to a position of tactical advantage’ or ‘moving tactically’ (but often the witness could not explain what this meant in practical terms), while other witnesses seemed to indicate that it was enough that a person was seen sprinting from a compound on an occasion where there was reliable intelligence of the presence of an Objective.

[…]

Chapter 3.01
Strategic, Operational, Organisational and Cultural Factors

88. […] The Inquiry recommends that in future, so far as practicable, Australia should retain operational command over its deployed forces, including Special Forces, rather than assigning them under command to other entities.

The Inquiry recommends that Special Forces should not be treated as the default ‘force of first choice’ for expeditionary deployments, except for irregular and unconventional operations. While in conventional operations Special Forces will sometimes appropriately provide, or significantly contribute to, early rotations, the ‘handing off’ of responsibility to conventional forces, and the drawdown of Special Forces, should be a prime consideration.

The Inquiry recommends that a professional review of appropriate dwell times between operational deployments be undertaken; that pending that review the 12-month policy be adhered to; and that the authority for waivers be escalated to a higher level.

The Inquiry recommends that every member of SOCOMD should receive education on the causes of war crimes. This education to be delivered by SOCOMD soldiers themselves and reviewed by appropriate external (ie, non-SOCOMD) reviewers who can act as critical friends.

The Inquiry recommends that members of the SOCMD community should be recorded talking candidly, and on the record, about the ethical drift that took place over a period of time, how hard it was to resist the prevailing organisational culture, and the missed opportunities that could and should have been taken to address the failure that many appeared to recognise at the time but felt powerless to change.

The Inquiry recommends that basic and continuation training should reinforce that not only is a member not required to obey an obviously unlawful order, but it is the member’s personal responsibility and legal duty to refuse to do so; and

The Inquiry recommends that both selection and continuation training should include practical ethical decision-making scenarios in which trainees are confronted in a realistic and high pressure setting with the requirement to make decisions in the context of incidents of the kind described in Part 2.

The Inquiry recommends that the training of officers and non-commissioned officers emphasise that absolute integrity in operational and other reporting is both an ethical obligation and is fundamental for sound command decisions and operational oversight.

The Inquiry recommends that the structure of SASR Troops include a second officer, of the rank of Lieutenant, as Executive Officer; and a troop/platoon sergeant, with the rank of Staff Sergeant, Colour Sergeant or equivalent. Consideration should be given to whether a similar approach should be adopted in the Commando Regiments.

The Inquiry recommends that it should be clearly promulgated and understood across SOCOMD that the acknowledged need for secrecy in respect of operational matters does not extend to criminal conduct, which there is an obligation to notify and report.

The Inquiry recommends that members have access to an alternative (to their chain of command) reporting line to facilitate confidential reporting of concerns that they are reluctant to raise through the chain of command.

The Inquiry recommends that the careers ofthose serving members who have assisted in the exposure of misconduct, or are known to have acted with propriety and probity, be seen to prosper, and that they be promoted at the earliest opportunity […].

Chapter 3.02
Inquiries and oversight

[…]

Legal Officers

284. A Legal Officer deployed within the Force Command Element (FCE) of all SOTG rotations. The duties of SOTG legal officers do not appear to have been reduced to writing. The SOTG Legal Officer during […] defined his role as ‘providing legal advice to the Commanding Officer and Task Group as required on operational legal matters’ including:

a. interpretation and application of the LOAC;

b. interpretation and application of relevant Australian and ISAF policy documents, such as ROE, targeting and tactical directives, detention policies, standard operating procedures and other relevant

documents;

c. kinetic targeting and non-kinetic targeting, including information operations;

d. detention operations, including representing the CO on detention review boards and engaging with the local Afghan National Directorate of Security prosecutor in relation to the handover of detainees to Afghan authorities for prosecution;

e. supporting the SOTG rule of law cell, including legal input to training activities conducted with partner forces and local law enforcement authorities, and attending ISAF rule of law meetings;

f. reviewing operational reporting before it was sent to either Australian or ISAF higher headquarters to ensure that precise terminology was being used correctly. For example some terms used in both Australian and ISAF ROE had different meanings in each document and as SOTG had to report up both Australian and ISAF channels, ensuring correct terminology was being used in reporting, to reflect which ROE was being referred to.

285. Although this may be an accurate statement of the role of the SOTG Legal Officer […] there appear to have been some variations between Rotations. For instance, whereas said part of his role in […] was 'review(ing) operational reporting before it was sent to either Australian or /SAF higher headquarters ... in ensuring correct terminology was being used in reporting, to reflect which ROE was being referred to' […] who deployed as SOTG Legal Officer in […], said that was not part of his role. Another difference is that [REDACTED]'s role as SOTG Legal Officer included the conduct of a number of QAs, while [REDACTED] said this was not part of his role (although he reviewed QAs from a legal perspective).

286. However, it is clear, from all the legal officers interviewed by the Inquiry, that SOTG legal officers had a role in advising CO SOTG on interpretation and application of LOAC in respect of civilian complaints about SOTG operations, including complaints of unlawful killing.

287. It is also clear that […] SOTG legal officers played a role in reviewing or shaping operational reporting before it was submitted to higher headquarters […] referred to 'review(ing) operational reporting before it was sent to either Australian or ISAF higher headquarters […]

288. […] However, it is clear from his role in the incident QA that he was involved in shaping reporting better to demonstrate compliance with ROE. This is not sinister: although he does not recall it, he was probably doing what lawyers conventionally do, putting the witness's words into terms that legally express what he understood the witness to have said.

Identifying the client: Special Operations Task Group or the Commonwealth?

289. How a lawyer acts is necessarily influenced by his or her perception of who is the client: to whom

professional legal duties are owed […] the Inquiry explored this question with a number of them. That is, was the legal officer acting for the CO, or the members of SOTG, or was the legal officer's duty to serve the interests of the Commonwealth of Australia, even if that conflicted with the interests of SOTG or its members?

290. Three of the legal officers interviewed by the Inquiry said that they considered their 'client' to be the Commonwealth of Australia. This is undoubtedly correct. However, there is an overall impression that many SOTG legal officers did not closely turn their mind to this issue during their deployment, and it may not have been perfectly clear that their duty was to the Commonwealth, even if it conflicted with the interests of SOTG.

291. [REDACTED] who served as the SOTG legal officer in, felt that, with hindsight, deployed legal officers (in the early 2010s) did not have a clear understanding of what their roles, responsibilities, and expectations were. Moreover, his view was that legal officers were 'not overly well prepared' for deployments and should have had a better understanding of information requirements and the tactical situation. He said that not only was he not given a mission or duty statement, he did not receive any briefs from HQJOC or other command but did have 'a couple of briefs' at SOCOMD Headquarters over one or two days.

Handling civilian casualty complaints: defensive or impartial?

292. The identification of the true client is relevant to the related question of the proper approach of a legal officer to the management of civilian complaints of wrongdoing against the very unit in which the legal officer is serving. If the civilian population makes a complaint against SOTG or its members, should the legal officer be defending the interests of SOTG, or treating the complaint impartially?

293. This question was also explored with SOTG legal officers interviewed by the Inquiry and the consensus was that the legal officer's duty was to deal with civilian complaints impartially. However, like the issue of identifying the 'client', the impression formed by the Inquiry is that this was never articulated, nor fully appreciated, at the time. For instance, while [REDACTED] agreed that, when he was reviewing operational reporting where there had been a civilian complaint, his role was to be impartial, adding, 'it wasn't my role to find a way to explain away a civilian complaint or any complaint'. Nonetheless, on a number of occasions […] he wrote or endorsed reports which said civilian complaints, since shown to have substance, were 'absurd'. […]

294. That civilian complaints should have been treated and managed impartially would appear uncontroversial and logically follows from acceptance that the legal officer's client is not the unit in which they are embedded, but the Commonwealth of Australia. Multiple Commanders of ISAF emphasised that the ISAF mission became a counter-insurgency mission, where the will of Afghan people needed to be won over, and a key to doing this was to keep civilian casualties to a minimum. […]

Conclusions and recommendations

342. […] Standing orders for operations should state that commanders and staff are accountable to ensure that there is absolute integrity in operational reporting.

343. […] Members should have access to an alternative safe reporting line, separate from their chain of command, to report or discuss concerns about suspected unlawful behaviour. Specialist legal, intelligence, medical, chaplaincy and other technical chains can provide one avenue for this. Whistle-blower protections to shield and support personnel who raise suspicions, including regarding potential breaches of the LOAC, should be reinforced and promulgated.

[…]

345. […] An independent tri-service multi-disciplinary specialist operations inquiry cell be established, for the conduct of administrative inquiries into operational incidents. The cell should comprise personnel with a mix of expertise drawn from arms corps (to provide the requisite understanding of the battlespace and operations), lawyers (to provide the requisite forensic skills), investigators, and intelligence professionals, and be available as an independent resource for command in any military operation. Such a cell could reside in the Office of the Inspector-General of the ADF (IGADF), where it would have available the powers of compulsion available under the IGADF Regulation 2016 (with the associated protections).

346. […] It should be clearly promulgated and understood across Special Operations Command (SOCOMD) that while a member is not under any legal obligation to submit to questioning by ADFIS [The Australian Defence Force Investigative Service], there is no impediment to agreeing to being questioned, and in particular that no obligation of secrecy prevents disclosure to or discussion with ADFIS of any criminal conduct. This

recommendation supports the Inquiry's broader recommendation that it should be clearly promulgated and understood across SOCOMD that the acknowledged need for secrecy in respect of operational matters does not extend to criminal conduct, which there is an obligation to notify and report.

347. […] The wearing and use of an appropriate helmet camera or body camera by Special Forces operators on operations should be mandated.

348. […] Australia should retain operational command over its deployed Special Forces, so far as practicable in a coalition context, and minimise delegation of operational command to other nations or organisations.

349. […] Duty statements for deployed legal officers should clearly articulate that ultimately their client is, and their professional duties are owed to, the Commonwealth, as distinct from the deployed force, its members or Commanding Officer; that that requires that they treat and deal with civilian complaints impartially, rather than as if acting in defence of the deployed force; and that there is no place for embellishment in connection with

operational reporting.

Command and collective responsibility

98. […] The Inquiry recommends that the award of the Meritorious Unit Citation to SOTG (Task Force 66) be revoked. […] The Inquiry recommends that the award of decorations to those in command positions at troop, squadron and task group level during SOTG Rotations […] be reviewed. […] The Inquiry recommends that the award of decorations to those in command positions in SASR during the period 2008 to 2012 be reviewed.

Discussion

I. Classification of the Situation and Applicable Law

1. *(Chapter 1.10., paras 8-11)* How would you classify the situation in Afghanistan at the time of the alleged incidents? Which specific body of law is applicable to that situation? (GC I-IV Art. 3; AP II Art. 1)

2. *(Chapter 3.02., para. 348)* Does Australia's involvement in Afghanistan influence the classification of the situation? What rules of IHL apply to Australia in Afghanistan? Does a lack of operational control change which rules are applicable? Would Australian forces, fighting under the command of another State party to the conflict, be bound by different rules?

3. Does the classification of the situation matter for determining whether IHL was violated in the present case? Why?

II. Conduct of Special Operations Task Group (SOTG)

4. *(Chapter 1.01., paras 15-19)* What rules of IHL does the conduct described in the Report violate? Does it matter that none of the incidents reported took place in the 'heat of battle'? Does it matter if the acts alleged were committed against fighters or civilians? (GC I-IV Common Art. 3; CIHL Rules 47, 87, 89, 90, 129, 131)

5. What does IHL have to say about the practice of 'throwdowns'? Do you agree with the Report's assessment that this practice is 'less egregious' than other conduct mentioned in the Report? Would planting a weapon or communication device on a civilian for the purposes of justifying a killing violate IHL?

III. Obligation to investigate

6. *(Chapter 1.01., para. 1)* Do States have an obligation to investigate rumours of war crimes? To investigate all violations of IHL? Where is this obligation contained? Does it exist for NIACs? If not, does it exist under Customary International Humanitarian Law (CIHL)? What other arguments could be made that the obligation

exists also in NIACs? What authority does the Report invoke as the legal basis for this obligation? What were the reasons behind this? (GC I-IV Common Art. 1, 3; GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146; CIHL Rule 158); Preamble of Rome Statute; see also ICRC/Geneva Academy, *Guidelines on investigating violations of IHL: Law, policy and good practice*, 2019)

7. What is the difference between grave breaches and war crimes? Do all war crimes amount to grave breaches? Does this distinction matter for prosecution of the individuals involved? (GC I, Art. 50; GC II, Art. 51; GC III, Art. 130; GC IV, Art. 147; CIHL Rule 156, 157, 158)

8. *(Chapter 1.01., paras 22-24, 80)* Is the obligation to investigate engaged only where 'credible information' exists? Or when rumours begin to emerge? How do you determine the reliability of information without first investigating? Does the identity of the alleged perpetrator need to be known? What does the Report suggest?

9. *(Chapter 1.01., para. 81)* What are the benefits for States who comply with their obligations under IHL? Do you agree that moral authority is an element of combat power?

IV. Content of obligation to investigate

10. *(Chapter 1.01., para. 4)* Does IHL provide any guidance on the content of the obligation to investigate? Should the investigation be independent and impartial? In your opinion, in the present case, was the investigation conducted with sufficient guarantees of impartiality and independence? Was it effective and conducted promptly? What would be your reasoning under IHRL?

11. *(Chapter 1.01., para. 21)* What is your opinion of the Report's recommendation to pursue criminal convictions for war crimes? Is this sufficient to discharge the State's obligation under IHL? Or is it discharged only upon a conviction for war crimes? Is this an obligation of means or an obligation of result? (GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146; CIHL Rule 158)

12. In your opinion, do the measures undertaken by the investigation go beyond their international law obligations? Could it act as a benchmark for compliance with obligations regarding war crimes? Would this realistic for States without similar investigative resources? Does IHL make any allowance for States with more limited investigative capacity? (ICRC *Commentary to GC III*, 5162-5164)

13. *(Chapter 1.01., paras 63-67)* Does the granting of immunities to witnesses violate IHL? How does the Report justify their use? In your opinion, is a fair balance struck between the need to break the culture of secrecy and prevent impunity? Could the requirement to take measures necessary for the suppression of all acts contrary to the Conventions encompass resort to immunities?

V. Command responsibility

14.

a. What is the scope of the obligation on commanders to prevent, repress or report war crimes? Is this obligation applicable in NIACs? (P I, Art. 86, 87; CIHL Rule 153)
b. *(Chapter 1.01., paras 28 and 31)* To be criminally responsible, must a commander know or be recklessly indifferent to the commission of war crimes?

15. *(Chapter 1.01., paras 28-53)*

a. Do you consider the finding of the Report that no one above the level of patrol commander bore any legal responsibility, to be problematic? Are the commission of war crimes in armed conflicts unforeseeable?
b. Is it sufficient under the doctrine of command responsibility, that officers were aware of the practice of 'throwdowns', even though they did not comprehend the 'sinister' reasons underlying such practice? Are commanders obliged to take complaints from alleged insurgents seriously?
c. What is the Australian theory of command? What are the advantages of such a theory? Does the Australian theory of command, nevertheless, operate in such a way as to shield commanders from responsibility for actions of their subordinates? Do you consider a decentralised theory of command appropriate in the context of extraterritorial operations? Would a theory of strict instructions and control over subordinates increase compliance with IHL? Can subordinates be trusted to implement, in their own way, their superior commander's intent?

VI. Legal officers

16. *(Chapter 3.02., paras 284-294)* Is there an obligation under IHL to consult legal officers? What is the role of legal officers for armed forces? Should legal officers always remain impartial? Does it matter who their client is? To what extent are they expected to defend the actions of their unit? (P I, Art. 82; CIHL Rule 141)

17. *(Chapter 1.01., para. 44)* What is meant by the term 'boilerplate' language? May a legal adviser review a report to ensure that the reported conduct appears to conform with IHL? Does use of precise legal terminology amount to 'embellishment'?

18. Do you consider the recommendations of the Report as sufficient to address the inherent difficulties with legal reporting of incidents occurring during armed conflicts? In particular, the recommendation for mandatory use of helmet or body cameras?

VII. Applicable legal paradigm

19. *(Chapter 1.11., paras 6-10)* What is the relationship between self-defence and the targeting rules of IHL? Does a soldier need the justification of self-defence for having killed anyone in an armed conflict, with a nexus with that conflict, or does a use of force in self-defence necessarily comply with IHL? May a use of force not justified by self-defence nevertheless comply with IHL?

20. Is the status of the target decisive of the applicable legal paradigm? If the target is a civilian, does always IHRL apply except if the target is directly participating in hostilities? Is it possible to "directly participate in hostilities" if there are no hostilities occurring elsewhere? (P I Arts 48, 51(3); CIHL Rule 6, 7)

21. *(Chapter 1.11., paras 21-27)*

a. Does a civilian who directly participate in hostilities violate IHL? Do all civilians who directly participate in hostilities against State forces become members of an armed group? Does the Report subscribe to the notion of continuous combat function? (P I Art. 51(3); CIHL, Rule 6; Interpretive Guidance on Direct Participation in Hostilities)
b. Does planning an attack constitute direct participation in hostilities? (P II, Art. 13 (3); CIHL, Rule 6; Interpretive Guidance on Direct Participation in Hostilities, pp. 65-67)

22. *(Chapter 1.11., paras 16-18)* Do you agree with the Report's assessment of the applicable legal paradigm in the examples provided? Would your answer change if the drug baron was the armed group's main financial source? If he directly supplied weapons? If he made bombs used by the armed group? What if the 'drug baron' was present in the vicinity during an armed group attack but did not engage in hostilities? To what extent is the applicable legal paradigm dependant on control over the territory and ability to plan operations? (Interpretive Guidance on Direct Participation in Hostilities)

23. *(Chapter 1.11., paras 40-46)* What is your assessment of the reasons justifying use of lethal force against 'spotters' and 'squirters'? When do they directly participate in hostilities? Would anyone carrying a mobile phone be considered a spotter and therefore a legitimate target? Does running to a cached weapon presuppose the knowledge of the location of said weapon? What is considered 'moving to a tactical position'? Could a civilian running for cover from gunfire be interpreted as such?

24. *(Chapter 1.11., para. 16)* Do you agree with the Report's submission that IHL permits the ADF to seek out and kill enemy forces? Does IHL authorise the killing of legitimate targets or regulate the conduct of attacks against legitimate targets? Would the former exclude the applicability of a law enforcement paradigm in all operations with a nexus to the conflict?

VIII. Training

25. *(Chapter 3.01., para. 88)* Is it appropriate or inappropriate that the IHL training is delivered by SOCOMD soldiers themselves or should this rather be the task of legal advisors?

IX. Respect of IHL

26. *(Chapter 1.01., paras 17, 19 and 26-53 and Chapter 3.01., para. 88)* What does this case teach us about the reasons why humanitarian law is violated and about measures to prevent such violations? (GC I-IV Common Art. 1; See ICRC, *Commentary to GC I*, paras 121, 145, 150, 154, 164, 181)