Douglas Guilfoyle, Joanna Kyriakakis & Melanie O’Brien

Command Responsibility, Australian War Crimes in Afghanistan, and the Brereton Report

The Brereton Report into allegations against members of Australian special forces in Afghanistan revealed shocking evidence of potential war crimes, including the execution of those hors de combat. It also suggested that command responsibility effectively stopped at the patrol commander level and officers higher in the chain of command bore only moral responsibility for what happened on their watch. These findings highlight both complex questions about who knew what when, but also the divergence of the Australian Criminal Code from the definition of superior responsibility found in the Rome Statute of International Criminal Court (ICC). The latter requires a commander ‘should have known’ of subordinates’ crimes; Australian law requires reckless indifference. With the establishment of the Office of the Special Investigator to investigate and initiate prosecutions in Australian courts, the question of whether any officers should face prosecution will become acute. Questions which will arise include the extent to which Australian courts can follow the case law of the ICC in fleshing out the concept of command responsibility, and whether (if it does not or cannot) this has implications for complementarity. Could the ICC prosecute Australian SAS officers if Australian courts find themselves unable to? The Brereton Report also provides an interesting case study in the differing visions of who the doctrine of command responsibility is meant to bind and what it is intended to achieve; and of the role of ‘positive complementarity’ and the extent to which the ICC’s existence may have incentivised Australia’s inquiry and steps towards prosecution.

Douglas Guilfoyle is an Associate Professor at UNSW Canberra, School of Humanities and Social Sciences.

Joanna Kyriakakis is a Senior Lecturer at Monash University’s Faculty of Law.

Melanie O’Brien is a Senior Lecturer at the University of Western Australia.