

# Prosecution of Alleged War Crimes: Need for Afghan Voices in Australian Judicial Process

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*The release of the Inspector-General of the Australian Defence Force's report on the Afghanistan Inquiry (the Brereton Report) into alleged war crimes committed by Australian SAS soldiers has prompted outrage and shock. Questions are being asked in Australia and around the world: what happened? How did it happen? And who bears responsibility?*

It has provoked debates about how this could have happened in one of Australia's elite fighting units and the extent to which it was due to a type of warrior culture in this institution; one more akin to "First Person Shooter" than the "[ANZAC tradition](#)" on which Australia typically prides itself. There is debate about what the Brereton findings mean in terms of the efficacy of the chain of command in the Australian armed forces in the light of the failure of senior officers to recognise what was going on and to respond to it. And there are, of course, debates about how these revelations effect the reputation of the Australian military and of Australia more broadly as a state that respects the laws of war, and the rules-based international order more broadly. Many commentators have been at pains to cast the perpetrators as outlaws, and to insist that these actions should not be taken as representative of others who have served in the Australian armed forces.

Finally, there has been extensive debate about what is to be done in the wake of these revelations. There is widespread consensus that those accused of the crimes should be prosecuted. The Australian Prime Minister has indicated that a special investigator will be appointed to prosecute allegations of Australian war crimes in Afghanistan. [The Office of the Special Investigator](#) will

"address the criminal matters made in the Inspector General's report and investigate those allegations, gather evidence and, whether appropriate, refer briefs to the Commonwealth Director of Public Prosecutions for consideration."

## Whose voices?

There are many voices and perspectives being expressed in the discussion of these alleged events and a plethora of issues being canvassed. All are important. These are critical debates that need to be out in the open for both the Australian and the world's public. But there is one set of voices that is conspicuously absent: the voices of Afghan people.

An important component of the [reporting done by the ABC](#) (Australian Broadcasting Company) investigative team, which helped break this story to the Australian public,

included travelling to Afghanistan to speak to the families who had survived some of these attacks and lost loved ones. But more generally one has to hunt in the maelstrom of commentary to find the perspectives of those who have suffered grievously from these events.

The debate focuses instead on the Australian actors and the consequences of these events for and in Australia. When the Afghan people are referred to, it is largely as victims. The paucity of recognition of the agency of those who have been subjected to failures of humanitarian protection, including the protection of international humanitarian law, is not unusual. It is often external actors, such as international institutions, international NGOs or outside government, who are seen as the protectors whilst affected communities are often portrayed simply as passive victims. This can serve to disempower affected populations.

Nevertheless, the field of prosecutions is an evolving arena in which there are important developments that warrant support and further analysis.

### **Providing an interface for the Afghan witnesses, victims and survivors**

Attention must be given to those suspected of core international crimes, as well Australia's legal obligation to investigate and prosecute those suspected in its armed forces. Yet, a third voice is also critical: how do we ensure that Afghan witnesses, victims and survivors are also heard and their views reflected in the investigative and prosecution processes? And how do we ensure they have the capacity to sufficiently interface with Australia's legal system? The Brereton report noted that any future legal process will include reparations and engage with the victims. Yet, more could be done.

There is an opportunity to draw upon the legal processes and procedures of other states and legal systems to ensure Afghan witnesses, victims and survivors are not only sufficiently engaged, but have the capacity to actively participate. Germany has one of the broadest universal jurisdictions in the world, and has also engaged actively in the investigation and prosecutions of core international crimes, including crimes suspected of its citizens. In this respect, there are many lessons learned that the Office of the Special Investigator and the Commonwealth Director of Public Prosecutions (in the event of referrals) could draw upon from the German experience of criminal accountability for core international crimes. Moreover, the processes outlined below could be coordinated between the Office of the Special Investigator and the Commonwealth Director of Public Prosecutions to ensure Afghan witnesses, victims and survivors have the opportunity to play an active role in the investigation and prosecution of those suspected of international crimes.

#### **1. Support 'criminal accountability communities'**

First and foremost, the Office of the Special Investigator and the Commonwealth Director of Public Prosecutions could work with groups that are genuinely representing the Afghan witnesses, victims and survivors. While it is not necessary for witnesses, victims and survivors of core international crimes to agree on all matters of justice, it does help if there is a coordinated and cooperative 'criminal accountability community'[1] which works alongside the witnesses, victims and survivors of these crimes to ensure accountability.

While Australia has an independent legal system, core international crimes have a tendency to be sidelined by the political priorities of the State in question. As [Geoffrey Robertson recently noted](#), the UK and the US are excellent relevant examples. Cooperative 'criminal

accountability communities' are 'private' non state actors (led by witnesses, victims and survivors of core crimes) and state legal 'officials' that work together to ensure accountability for those most responsible for heinous international crimes. They are also supported by State government actors in that they do not intervene in the judicial process, nor seek to limit the application of international criminal law to the domestic jurisdiction.

A positive recent example is the work of the Office of the Federal Public Prosecutor General in Germany with the justice group Yazda when Daesh members – two German women and a foreign national – suspected of killing a Yazidi child in Syria, were arrested. It was the interaction with witnesses, victims and survivors, who were supported by a cooperative community of [criminal accountability practitioners](#), which established the facts and the basis for the case against the Daesh suspects.

## **2. Accessory prosecutors or civil parties to the criminal prosecution**

Moreover, in the German court system, victims can apply to act as '[private accessory prosecutors](#)', alongside the public prosecutor. Similarly, in many other civil legal systems, such as [in Spain](#) and [Senegal](#) (including in the Extraordinary African Chamber) victims can request to participate as civil parties in a criminal prosecution.

In the Australian context, this would provide victims and survivors with the means to actively engage and participate in the trial. It would serve to provide greater confidence and transparency in the prosecution process. Again, while Australia is ordinarily known for its judicial independence, it has traditionally struggled with independence from government interference when it relates to prosecution of core international crimes according to universal jurisdiction, including prosecuting those suspected in the Australian armed forces. The fact that [Australian journalists were arrested](#) for attempting to expose allegations of war crimes in the Australian armed forces is testament to this lacklustre record.

Another example, is when **Aung San Suu Kyi** arrived in Australia in 2018, five lawyers filed a private application in the Melbourne magistrate court in Australia against her for crimes against humanity. She was in Australia in her capacity as Foreign Minister and de facto leader of Myanmar. The Australian attorney general, Christian Porter, granted her immunity, which had the effect of [blocking any further judicial action](#) within Australia. The Office of the Special Investigator and the Commonwealth Director of Public Prosecutions could lead the way in providing victims and survivors with greater authority, as a counterbalance to the political concerns that have previously overshadowed allegations of core international crimes.

## **3. Ensure adequate translation that is made publicly available**

Lastly, providing language translation services is key. In an ongoing German criminal prosecution in the Higher Regional Court of Koblenz against Anwar R., a Syrian senior government leader suspected of significant international crimes, including torture, [the court has decided](#), where possible, to provide Arabic interpretation services. This will ensure that witnesses, victims and survivors of core crimes are adequately able to participate in the trial and also that official records are provided in German and Arabic. Similarly, The Office of the Special Investigator and the Commonwealth Director of Public Prosecutions could ensure that witnesses, victims and survivors of core international crimes are empowered to participate through audio and written translation. This will also ensure that information about the case is accessible not only to victims and survivors, but more broadly across

Afghanistan.

## Conclusion

The uncovering of alleged Australian war crimes in Afghanistan demonstrates the importance of Australia's independent media, insider witnesses and whistle-blowers, and civil society action in inhibiting the whitewashing of war crimes and avoidance of accountability.

Yet, adding some or all of the above processes to the newly established Office of the Special Investigator and the way the Commonwealth Director of Public Prosecutions may engage with possible referrals allows Australians to view Afghan witnesses, victims and survivors as more than passive and anonymous actors in an enduring war that no longer has any concrete or tangible objectives from a Canberra perspective. Rather, it provides an opportunity to see the human side of Afghan people, which was not displayed towards them when the alleged crimes were committed. It allows us to see them as actors with agency. Like most Australians, Afghan witnesses, victims and survivors of core international crimes would prefer to seek justice for those suspected of crimes through an independent, impartial criminal court.

### Notes:

[1] Melinda Rankin. forthcoming. De facto International Prosecutors in a Global Era: With My Own Eyes. Cambridge: Cambridge University Press.

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