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ARTICLE 15 COMMUNICATION TO THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT REGARDING THE COMMAND RESPONSIBILITY OF AUSTRALIAN MILITARY HIGHER COMMANDERS FOR ALLEGED WAR CRIMES BY AUSTRALIAN FORCES IN AFGHANISTAN

I. INTRODUCTION

1. Global Security Group Pty Ltd and Cardinal Legal, Australia-based multidisciplinary organisations with an emphasis on the use of mechanisms of international law to effect strategic change domestically and internationally, and signatories (cumulatively "Communication Senders"), file with the Office of the Prosecutor ("OTP") of the International Criminal Court ("ICC"), as *amicus curiae*, this communication under Article 15 of the Rome Statute of the International Criminal Court ("Communication").

2. This Communication relates to the command responsibility of Australian Defence Force ("ADF") higher commanders in respect of war crimes within the jurisdiction of the ICC, allegedly committed by Australian forces in Afghanistan during the period 2009 to 2013. The Communication Senders submit that, based on the information set out herein, the proper investigation of higher commanders has been actively and systematically avoided by Australian military and civil authorities notwithstanding, it is submitted, a reasonable basis to believe that the mode of liability provided under Article 28 can be established.

3. This Communication is filed by the Communication Senders with a view to combating impunity for international crimes at the highest echelons of the ADF and to holding to account those bearing the greatest responsibility for the crimes in the light of the gravity of the acts allegedly committed.

4. In addition to demonstrating that the statutory threshold is met, i.e., that there is a reasonable basis to proceed with an investigation,[1] the Communication Senders submit that: (a) the case is within the jurisdiction of the Court and such determination is without prejudice to subsequent determinations by the Court in this

[1] *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 15(3), art 53(1)(a) ('*Rome Statute*'); Office of the Prosecutor, International Criminal Court, *Paper on some policy issues before the Office of the Prosecutor* (Policy Paper, September 2003) Annex, [I.A] ('Policy Paper Annex'); Office of the Prosecutor, International Criminal Court, *Policy Paper on Preliminary Examinations* (Policy Paper, November 2013) 2 ('Preliminary Examinations Policy Paper').

regard;[2] (b) is admissible, including on complementarity grounds;[3] (c) is of sufficient gravity to justify further action by the Court[4] in its determination to 'put an end to impunity … and thus to contribute to the prevention of [war crimes]';[5] and (d) an investigation will thus serve the interests of justice.[6]

5. In support of this Communication, the Communication Senders have relied, *inter alia*, upon, transcripts of evidence before Australian Parliamentary Committee hearings, publicly available statements and reports, commentary on publicly available reports, a contemporary doctoral thesis on point, and ADF command and leadership doctrine. The relevant excerpts of this material are attached hereto as Annexes and form part of this Communication.

6. The principal authors of this Communication, drawing on their respective military and diplomatic backgrounds as augmented by their academic and professional practice, adopt wholeheartedly the statement of Nybondas that:

> Authors of legal writings who have a military background urge an understanding of the position of the military commander and of the circumstances in which they operate by the civilian jurists who act as prosecutors or judges in cases where international humanitarian law is applied.[7]

7. The Communication Senders, in totality, bring decades of experience in military operational environments, in command appointments, in conflict settings, and in academic circles in which the operational circumstances of military commanders were merely a daily fact of life for the Communication Senders.

II. CONTEXTUAL BACKGROUND

8. Australia was involved in combat operations in Afghanistan, on its operation designated Operation SLIPPER, from 2001 to 2014. Operation SLIPPER, the Australian contribution to the NATO International Security Assistance Force, ended on 31 December 2014. An initial ADF commitment concluded in December 2002 with the withdrawal of the Special Air Service Task Group. An Australian Special Forces Task Group ("SFTG") re-deployed to Afghanistan in August/September 2005. The SFTG was withdrawn from Afghanistan in September 2006. A Special Operations Task Group ("SOTG") deployed to Afghanistan in April 2007 and SOTG force elements remained in Afghanistan for the duration of Operation SLIPPER and until 2016 as part of the subsequent Operation HIGHROAD.

9. An internal ADF administrative inquiry was appointed on 12 May 2016 by the Inspector-General of the Australian Defence Force ("IGADF") to inquire into rumours that war crimes had been committed by members of the SOTG in Afghanistan during the period 2006 to 2016 (subsequently expanded to 2005 to 2016). The IGADF Afghanistan Inquiry ("Brereton Inquiry") is discussed in greater detail throughout this Communication.

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[2] *Rome Statute* (n 1) art 15(4), art 53(1)(a).
[3] Ibid art 17(1), art 53(1)(b); Policy Paper Annex (n 1) [I.C(b)].
[4] Ibid art 17(1)(d), art 53(1)(c); Policy Paper Annex (n 1) [I.C(c)].
[5] *Rome Statute* (n 1) Preamble.
[6] *Rome Statute* (n 1) art 53(1)(c); Policy Paper Annex (n 1) [I.C(c)].
[7] Maria Nybondas-Maarschalkerweerd, 'The command responsibility doctrine in international criminal law and its applicability to civilian superiors' (PhD Thesis, University of Amsterdam, 2009) 243.

10. The Report of the Brereton Inquiry ("Brereton Report") was presented to the IGADF on 29 October 2020 for provision to the Chief of the Australian Defence Force ("CDF") in conformity with the applicable IGADF Regulation. The findings of the Brereton Inquiry on command responsibility, as stated in the Brereton Report, are problematic from a legal perspective and in terms of the analysis and application of ADF command doctrine and structures generally and specifically in the context of special operations in Afghanistan.

11. The flawed findings and recommendations on command responsibility are discussed in greater detail, below, in assisting to ground this Communication and are analysed in forensic detail in the doctoral thesis on point at Annex A to this Communication.

A. *Rumours of war crimes*

12. The Brereton Report states that, '[a]fter Operation SLIPPER concluded in 2014, a number of issues emerged in Special Operations Command, including rumours that war crimes had been committed by some members of the Special Operations Task Group in Afghanistan'.[8]

1. *"The leadership knew. EVERYONE KNEW"*

13. Evidence from multiple sources independent of the Brereton Inquiry, including witness testimony before a civil defamation trial, the plaintiff in which was a former member of the SOTG, indicates that such 'issues' and rumours emerged and were well known in special operations and command circles alike long before the conclusion of Operation SLIPPER in 2014.[9] Investigative media reporting on the rumours has provided statements of former SOTG members, including:

> "The leadership knew. This went beyond the patrols. This was known up the chain".
>
> [S]ome say the senior leadership of special forces knew for years about many allegations of unlawful behaviour … a former SAS patrol commander who witnessed the killing of two Afghans, shootings he said clearly breached the Rules of Engagement. The incident was reported all the way up the special forces chain of command but dismissed … The former patrol commander says he was told by a senior officer that "the regiment is bigger than an individual and the integrity of the regiment must come first … he informed me the regiment will handle this internally".
>
> The former SAS patrol commander had one message … about alleged war crimes. "EVERYONE KNEW".[10]

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[8] Inspector-General of the Australian Defence Force, *Afghanistan Inquiry Report* (Final Report, November 2020) chap 1.01, [2] ('Brereton Report').

[9] *Roberts-Smith v Fairfax Media Publications Pty Limited (No 41)* [2023] FCA 555 (evidence of Captain (Ret'd) Andrew Hastie MP).

[10] Mark Willacy, 'The inquiry into Australian soldiers in Afghanistan is finally over. The reckoning is about to begin', *ABC News* (online, 19 Nov 2020) <www.abc.net.au/news/2020-11-18/igadf-inquiry-into-special-forces-in-afghanistan-is-over/12816626>.

> [Another] former soldier said he understood why young officers had not spoken up about Roberts—Smith's activities in Afghanistan and that it was "the lowest levels" within the regiment who had "brought this up" [with senior officers].
>
> "You're a young officer … you're not going to speak up," he says. "That's the end of your career."
>
> He believes some more senior military figures were aware of the allegations circulating against the man who became a celebrity soldier, but they did not act. "People above knew," he alleges. "And no one did anything."[11]

14. The question, of course, remains as to why a well-resourced and extensive inquiry, headed by a Major General, would conclude with such certainty that the issues and rumours didn't emerge until after December 2014 when journalists obtained information, and a civil case so readily obtained evidentiary testimony, that the rumours emerged earlier and were known to officers up the chain of command. The Communication Senders respectfully submit this is a line of inquiry which should properly be pursued by the ICC.

2. *Non-accountability & 'marking their own homework'*

15. The refusal of the ADF higher commanders to be held accountable to the Australian people through the Australian Parliament for their role as commanders of the subject forces lends weight to this submission as to the need for an ICC investigation into the command responsibility of the ADF higher command. The following exchange between a member of the Australian Senate's Foreign Affairs, Defence and Trade Legislation Committee and the CDF, General Angus Campbell AM DSC,[12] exemplifies this avoidance of accountability:

> **Senator LAMBIE**: But you were also in charge. You were in command and control of the Joint Task Force 633. From 2011 to 2012, you were the commander.
>
> **Gen. Campbell**: To be precise, from 14 January 2011 until and including 17 January 2012.
>
> **Senator LAMBIE**: When some of the alleged crimes were happening.
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> **Gen. Campbell**: Senator, that is a presumption on your behalf.
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> **Senator LAMBIE**: Some of the allegations took place while you were commander of our forces in Afghanistan. Did you travel to Afghanistan 34 times during your command there?

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[11] Karen Middleton, 'More soldiers willing to testify against Ben Roberts-Smith', *The Saturday Paper* (Sydney, 10 June 2023).

[12] Distinguished Service Cross (DSC) is awarded to officers for 'distinguished command and leadership in action'. Significantly, the citation to General Campbell's DSC reads, 'awarded to Major General Angus Campbell for *distinguished command and leadership* in action as Commander of Joint Task Force 633 during the period 2011 to 2012'. Concurrently, Major General Paul Brereton found that, collectively, the Joint Task Force 633 Commanders, including then Major General Campbell, *did not have 'effective command and control'* such as to warrant investigation under command responsibility.

> **Gen. Campbell**: The first part of your comment is an assumption on your behalf, *which I won't enter into*, and the second part is on the public record. I personally can't remember, but it sounds about right.
>
> **Senator LAMBIE**: On these 34 occasions that you visited Afghanistan …did you, firstly, meet with members of the ADF, and, during that period of time, were there any reports of wrongdoing, possible war crimes or gross violations of human rights put in front of you?
>
> **Gen. Campbell**: I met with members of the ADF on every occasion that I was in Afghanistan, and, no, on no occasion were such reports provided to me.
>
> **Senator LAMBIE**: But, ultimately you had command and control.
>
> **Gen. Campbell**: I held what is known as national command and operational command of Australian forces deployed to the Middle East region of operations during my tenure in command of Joint Task Force 633.[13]

16. A problematic inconsistency exists between the evidence of General Campbell regarding his time as a Major General in command of Australian forces in Afghanistan and the findings of Major General Brereton in his Inquiry Report. The Brereton Report states that:

> [C]ommanders and headquarters at Joint Task Force 633 … 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.[14]

17. General Campbell, however, states that, on the 34 occasions that he visited Afghanistan from his headquarters in Dubai, he met with ADF members but on no occasions were reports of wrongdoing put before him. The upshot is, he and successive Commanders of Joint Task Force 633 ("JTF633") were clearly on notice that allegations of wrongdoing had been made, such that earlier Commanders of JTF633 appointed inquiries at various levels, but he did not exercise his duty to inquire. Rather, he waited for reports of wrongdoing to be put before him and, when no such reports were forthcoming, his job in Afghanistan was done. This is inconsistent with the active duty imposed on the commander to inquire, as articulated by Pre-Trial Chamber II in *Bemba*.[15]

18. In another exchange before the Australian Parliament, a command accountability review recommended in the Brereton Report and performed by General Campbell, is discussed:

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[13] Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 30 May 2023, (Angus Campbell, General, Chief of Defence Force).
[14] Brereton Report (n 8) [35].
[15] *Prosecutor v Bemba (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/05-01/08, 15 June 2009) [433] ('*Bemba Decision on the Confirmation of Charges*').

> **Senator SHOEBRIDGE**: Given that some of the review will be in relation to senior personnel – and I think that includes you, General Campbell – I think there is a reasonable basis for you to tell us who undertook the review. Can you tell us who undertook the review?
>
> **Gen. Campbell**: I undertook the review. It is a uniquely particular circumstance in which, as the Commander of the Australian Defence Force, looking at the question of command accountability, I am the authority to undertake that review.
>
> **Senator SHOEBRIDGE**: But I'm having difficulty understanding how you can review yourself. Perhaps you could help by identifying how you've dealt with that conflict of interest, and whether or not you considered having that aspect of the review undertaken by a separate officer.
>
> **Gen. Campbell**: …
>
> **Senator SHOEBRIDGE**: … but I'm asking you: how did you confront the fact that there was a very obvious conflict of interests? … You were basically marking your own homework.
>
> **Gen. Campbell**: I get it. I can see the perception of the conflict of interest, but having read the complete Brereton report, I felt that this could be done by me …[16]

19. This inability on the part of the higher commanders to properly acknowledge, or even identify, conflicts of interest in assessing command accountability, coupled with the subsequent findings that the Commanders of JTF633, all Major Generals, had no command 'accountability' vis-à-vis the alleged conduct of their subordinates – findings which are strangely consistent with those of Major General Brereton – further grounds an investigation by the ICC.

20. For an analysis of the command concepts of 'national command' and 'operational command', as referred to by CDF in the context of his command appointment as Commander JTF633, in both general terms and with specific reference to the command and control structures in the Middle East Area of Operations during the period subject of the Brereton Inquiry, see chapter 6 of the doctoral thesis at Annex A.[17]

21. Tellingly, and in stark contrast to the flawed reliance on such command nomenclature to avoid accountability, Major General (Ret'd) Fergus McLachlan AO, a former Commander of Australia's Forces Command and former Head of Army Modernisation, stated:

> Commanders who don't believe their command arrangements allow them to adequately supervise units under their full command must seek to have these arrangements

[16] Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 30 May 2023, 69-70 (Angus Campbell, General, Chief of Defence Force).
[17] Glenn Kolomeitz, 'How Long the Shadow? Command Responsibility for War Crimes in Australian Law' (Doctoral Thesis, Research Unit on Military Law and Ethics, School of Law, University of Adelaide, January 2023) chap 6.2.

changed. I don't recall any limit placed on how many days a JTF Commander could spend on the ground supervising troops.[18]

B. *Situation in the Islamic Republic of Afghanistan*

22. On 5 March 2020, the ICC Appeals Chamber, by unanimous decision, authorised the Prosecutor of the ICC to commence an investigation into alleged crimes under the jurisdiction of the Court in relation to the situation in the Islamic Republic of Afghanistan. The relevant terms of the request by the Prosecutor for the authorisation of an investigation at first instance are, as follows:

> [T]o authorise the commencement of an investigation into the Situation in the Islamic Republic of Afghanistan in relation to alleged crimes committed on the territory of Afghanistan in the period since 1 May 2003, as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed on the territory of other States Parties in the period since 1 July 2002.[19]

23. The intended scope of the investigation was clearly broad and encompassed conduct outside the direct perpetration of alleged crimes to include crimes with a situational nexus to the conflict.[20]

1. *Interests of justice test: investigation not feasible*

24. Pre-Trial Chamber II of the ICC, on 12 April 2019, rejected the request by the Prosecutor for approval of such investigation on the basis that there existed substantial reasons to believe that an investigation would not serve the interests of justice.[21] In rejecting the request, Pre-Trial Chamber II held that:

> [N]otwithstanding the fact all the relevant circumstances are met as regards both jurisdiction and admissibility, the current circumstances of the situation in Afghanistan are such as to make the prospects for a successful investigation and prosecution extremely limited[22] [and] [a]n investigation can hardly be said to be in the interests of justice if the relevant circumstances are such as to make such investigations not feasible and inevitably doomed to failure.[23]

25. The interests of justice test is addressed in greater detail later in this Communication, in light of the procedural requirements stipulated in Rule 48 of the ICC Rules of Procedure and Evidence[24] and Regulation

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[18] @FMcL2020 (Fergus McLachlan) (Twitter, 10 June 2023, 9:41am AEST).
[19] Quoted in *Situation in the Islamic Republic of Afghanistan (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/17, 12 April 2019) [5] ('*Article 15 Decision of PTC on the Situation in Afghanistan*').
[20] See ibid [25]-[26].
[21] *Rome Statute* (n 1) art 53(1)(c).
[22] *Article 15 Decision of PTC on the Situation in Afghanistan* (n 19) [96].
[23] Ibid [90].
[24] International Criminal Court, *Rules of Procedure and Evidence,* Doc No ICC-PIOS-LT-03-004/19, r 48 ('*ICC Rules of Procedure and Evidence*').

49(1) of the Regulations of the Court.[25] For present purposes, it is significant to distinguish the facts and circumstances underpinning the Chamber's decision in this matter from those of the command responsibility situation in Australia arising from the allegations relating to Australian forces in Afghanistan. The investigation of the command responsibility mode of liability in the Australian case does not require any logistical or investigative effort on the ground in Afghanistan.

2. *Interests of justice test: not applicable to the Pre-Trial Chamber determination on Article 15(4)*

26. In amending the Pre-Trial Chamber's decision, the Appeals Chamber accepted the broad scope of the request, finding that 'the authorisation of an investigation should not be restricted to the incidents specifically mentioned in the … request under article 15(3) … and incidents that are 'closely linked' to those incidents'.[26]

27. The Communication Senders rely on this finding in advancing the case that an investigation by the OTP into the command responsibility of ADF higher commanders, arising from the allegations identified in the Brereton Report, may properly be conducted in the context of the ongoing activity regarding the Situation in Afghanistan[27] or as a standalone investigation initiated *proprio motu*[28] in the exercise of the 'unconditional and discretionary' right[29] conferred on the Prosecutor by Article 15.

C. *The ADF administrative inquiry by Major General Brereton into allegations of war crimes by Australian forces in Afghanistan*

28. On 12 May 2016, the Inspector-General of the Australian Defence Force ("IGADF"), Brigadier James Gaynor CSC,[30] appointed Major General The Honourable Paul Brereton AM, RFD,[31] as an Assistant Inspector-General of the Australian Defence Force.[32] The purpose of the appointment was to conduct an internal ADF administrative inquiry to ascertain 'whether there is any substance to persistent rumours of criminal or unlawful conduct by, or concerning, the Special Operations Task Group (SOTG) deployments in Afghanistan during the period 2006 to 2016 [and] to make recommendations resulting from [the] findings'. The temporal scope of the Inquiry was subsequently expanded to cover the timeframe 2005 to 2016.

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[25] International Criminal Court, *Regulations of the Court,* Doc No ICC-BD/01-05-16, reg 49(1) ('*ICC Regulations*').

[26] *Situation in the Islamic Republic of Afghanistan (Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan)* (International Criminal Court, Appeals Chamber, Case No ICC-02/17 OA4, 5 March 2020) 3/35 ('*Article 15 Appeal Judgment on the Situation in Afghanistan'*).

[27] International Criminal Court, *Regulations of the Office of the Prosecutor,* Doc No ICC-BD/05-01-09 (entered into force 23 April 2009) reg 27(b) ('*OTP Regulations*').

[28] *Rome Statute* (n 1) art 15(1).

[29] Morten Bergsmo and Jelena Pejić, 'Article 15: Prosecutor' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International criminal Court: Observers' Notes, Article by Article* (CH Beck, Hart, Nomos, 2nd ed, 2008) 585.

[30] Conspicuous Service Cross (CSC) is specifically a military honour awarded to members of the ADF in January and June each year for 'outstanding devotion to duty or outstanding achievement in the application of exceptional skills, judgment or dedication in non-warlike situations'.

[31] Reserve Force Decoration (RFD) is awarded to an officer who has completed '15 years efficient remunerated commissioned service in the Reserve Forces' of the ADF.

[32] Brigadier James Gaynor, *Directions to Assistants Inspector-General of the Australian Defence Force* (IGADF INQ/17/16, 12 May 2016).

1. *The 'blanket exemption' of higher commanders from command responsibility*

29. In terms of the command responsibility of commanders above the highly tactical and low-level patrol commander appointment, the Brereton Report articulates the following findings:

> 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 …[33]

30. The purportedly applicable mental/fault element of 'reckless indifference' is discussed further, below, and is comprehensively analysed in this context in the doctoral thesis at Annex A to this Communication. The terminology broadly exculpating the higher command – 'let alone at higher levels' – is problematic and has been subject of criticism. This terminology in this context was referred to by a government-appointed body tasked with oversight of the Brereton Inquiry recommendations as a 'blanket exemption' from command responsibility given to higher commanders by Major General Brereton.[34]

31. The basis of this blanket exemption, as further detailed in the Brereton Report, is effectively rebutted in the doctoral thesis at chapter 6.2.3 of Annex A.[35] For present purposes, this point seeks to exemplify the extent to which the flawed findings on command responsibility and resultant recommendations in the Brereton report have influenced the exclusion of commanders, especially at the higher command level, from any real scrutiny including criminal investigation.

32. In implementing the recommendations of the Brereton Report, the CDF referred for criminal investigation only those people recommended for such referral by Major General Brereton. This expressly excluded the higher commanders on the basis of the fundamentally flawed findings of the Inquiry. That is confirmed by both the CDF and the Secretary of Defence ("SECDEF"), Mr Greg Moriarty, in the Afghanistan Inquiry Reform Plan[36] annexed to this Communication at Annex B. It has been further confirmed by the CDF in evidence before a Senate hearing in which CDF spoke about the purely administrative Command Accountability Review, conducted by him notwithstanding the clear conflict of interest therein, as discussed above at paragraphs 16 and 17 of this Communication.

2. *The Command "Accountability" Review by CDF, a commander subject of the Review*

33. The Afghanistan Inquiry Reform Plan ("Reform Plan") considers the issue of command accountability and focuses on 'evolv[ing] the Defence Accountability Framework', modernising doctrine and training' and 'ensur[ing] there are clear command structures and clarity of command accountability'.[37] In reading these elements of the reform process, it is difficult not to consider they are little more than an attempt to blame a

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[33] Brereton Report (n 8) chap 1.01 [28] (emphasis added).
[34] Afghanistan Inquiry Implementation Oversight Panel, *Quarterly Report to the Minister for Defence* (Report No 2, 26 February 2021) 5.
[35] Kolomeitz (n 17) 133-6.
[36] Department of Defence, *Afghanistan Inquiry Reform Plan: Delivering the Defence Response to the IGADF Afghanistan Inquiry* (Report, 30 July 2021) ('Reform Plan').
[37] Ibid 21.

purported absence of such clarity of command structures and doctrine in order to continue to avoid command responsibility in its true form as a mode of criminal liability.

34. As identified in the doctoral thesis at Annex A, Australian command doctrine is readily applicable to an analysis of command and control through the lens of the *Bemba* indicia. Similarly, and notwithstanding the Australian command structure in the MEAO undoubtedly appeared opaque to outside observers, such structures are amenable to an assessment of the application of the *Bemba* indicia.[38]

35. In a section of the Reform Plan titled, 'Work currently underway', CDF and SECDEF state:

> CDF administrative consideration of command accountability of individual commanders. In order to avoid risk to OSI and/or CDPP action, action in relation to command accountability will be initiated after the risk has been removed or satisfactorily mitigated.[39]

36. The administrative, and not criminal, nature of the 'administrative consideration of command accountability of individual commanders' was further confirmed by CDF at a hearing before the Australian Senate, as follows:

> **Senator LAMBIE**: What was the nature of the review?
>
> **Gen. Campbell**: This is a question of what's known as command accountability, which Justice Brereton speaks to in his report. It could be simply described as *the accountability of the leader for the performance of the command that they led*.
>
> **Senator LAMBIE**: Have any of these service personnel … been found guilty of a crime …?
>
> **Gen. Campbell**: Your question misunderstands command accountability. It is *distinct and separate from criminal responsibility*. It is *not a criminal process* or an indication of criminal liability but rather, a commander's accountability for the performance of their command. Hence, it is undertaken under administrative arrangements.
>
> **Senator LAMBIE**: …
>
> **Gen. Campbell**: There is a consideration in looking to the question posed by the recommendation in the Brereton Inquiry as to *whether a command accountability arises*, particularly, as Justice Brereton noted, *for credible information of allegations of multiple unlawful killing*.
>
> **Senator LAMBIE**: Nobody is asking you for names. I am asking you for the number. It's nothing.

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[38] Kolomeitz (n 17) 124-133; *Prosecutor v Bemba (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/05-01/08, 15 June 2009) [418] ('*Bemba Decision on the Confirmation of Charges*'); *Prosecutor v Bemba (Judgment)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08, 21 March 2016) [188] ('*Bemba Trial Judgment*').

[39] Department of Defence (n 36) 22.

Gen. Campbell: Exactly. It is a small number.

Senator LAMBIE: It is a small number.

Gen. Campbell: It's a small number of persons who held command appointments during particular periods of operational service in Afghanistan.

37. A key takeaway from a reading of the Reform Plan entry, above, with the evidence of the CDF before the Senate hearing is that the consideration of command accountability, in the form of the Command Accountability Review, has been undertaken such that any risk to the criminal investigations by the Office of the Special Investigator ("OSI") or to any prosecutorial action by the Commonwealth Director of Public Prosecutions ("CDPP") must have been removed or mitigated.

38. It follows that, the only reasonably available inference is that no investigative or prosecutorial action can have been taken or, indeed, been contemplated by the OSI and CDPP respectively in order for the administrative Command Accountability Review to take place. The fact that administrative action has taken place against a number of these commanders,[40] at considerably more junior levels than Commanders of JTF633, is further evidence that criminal investigation is not being contemplated. No action of any nature has been taken against Commanders of JTF633 to date.

39. Interestingly, the CDF states his Review was looking at 'whether a command accountability arises for credible information of allegations of multiple unlawful killing'. Noting a small number of officers were found by the CDF to have such command accountability in the context of such credible information of allegations of unlawful killings, the question begs asking as to why none of these officers have been referred for criminal investigation under the command responsibility provisions. And, further, why only a small number of officers, none of whom held higher command appointments?

3. *A further attempt to abrogate command responsibility using Mission Command*

40. In a further attempt to remove the higher command from the remit of command responsibility in the context of allegations of war crimes by Australian forces, the Brereton Report states:

> The *detailed superintendence and control* of subordinates is inconsistent with the theory of mission command *espoused* by the Australian Army, whereby subordinates are empowered 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.[41]

41. This statement by Major General Brereton, again, demonstrates a misunderstanding and misapplication of the law of command responsibility to the facts of the present case and a lack of consideration of Australian military doctrine. At best, this statement misrepresents the extent of requisite control required to satisfy

[40] Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 30 May 2023, (Angus Campbell, General, Chief of Defence Force).
[41] Brereton Report (n 8) chap 1.01, 31 (emphasis added).

that element of command responsibility. At worst, this statement denies the availability of command responsibility as a mode of liability to all forces employing a mission command philosophy except in the case of actual knowledge akin to criminal complicity, an accessorial mode of liability which is not command responsibility *stricto sensu*.

42. The danger in this approach, as articulated by Major General Brereton, and apparently adopted by the ADF higher command and the Australian Government, is that it perpetuates a culture of impunity which is thus, inconsistent with the broad intent of the Rome Statute and the *raison d'être* of the ICC itself.

43. Whilst a detailed rebuttal of this attempt at the abrogation of command responsibility, inclusive of comprehensive authority and Australian military doctrinal guidance, is in Chapter 6 of the doctoral thesis at Annex A,[42] some rebuttal is essential in this Communication in order to convey to the OTP the improbability of Australian authorities undertaking investigations of the higher commanders in the context of command responsibility.

44. The finding in the Brereton Report that the element of control in command responsibility is somehow inconsistent with the Australian Army's espousal of mission command is, itself, inconsistent with the manner in which mission command is actually *espoused* in the ADF. Australian defence doctrine recognises that mission command is a general rule which 'should not preclude the very necessary element of active control'.[43]

45. Noting Major General Brereton did not deny the applicability of command responsibility to commanders, above the low-level of patrol commander, by reference to a complete deconstruction of the elements of the mode of liability or, indeed, any reference to authority examining those elements, it is telling that an Australian military doctrinal publication rebuts Major General Brereton with the use of an elemental statement straight out of *Bemba*[44] or *Strugar*[45]. It is disappointing at best, and difficult to accept at worst, that a senior Infantry officer of the rank of Major General would not be aware of the leadership philosophy of mission command in practical application and the ethical wisdom, accepted by operational Army officers including former Australian special forces officers, that 'command responsibility necessarily exists within the mission command construct'.[46]

46. In terms of the improbability of Australian authorities investigating higher commanders through the lens of command responsibility, the denial of command responsibility by the application of mission command and, indeed, degrees of authority in the Australian command structure, as interpreted and *espoused* by Major General Brereton, is so pervasive that strategic commentators have endorsed the approach as gospel with little or no critical analysis and little or no understanding of the law of command responsibility and its importance in combating impunity and deterring unlawful conduct by subordinates.[47]

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[42] See Kolomeitz (n 17) 143-9.
[43] Australian Defence Warfare Centre, *Command and Control* (Australian Defence Doctrine Publication, ADDP 00.1, 27 May 2009) [1-1].
[44] *Bemba Trial Judgment* (n 38).
[45] *Prosecutor v Strugar (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-01-42-T, 31 January 2005) [374].
[46] See Kolomeitz (n 17) 144.
[47] See, e.g., Rodger Shanahan, 'The Afghan Inquiry and the Question of Responsibility', *The Interpreter, The Lowy Institute* (Web Page, 7 December 2020), <https://www.lowyinstitute.org/the-interpreter/afghan-inquiry-and-question-responsibility> quoted in, Kolomeitz (n 17) 125.

47. One such commentator, Colonel Rodger Shanahan (Ret'd), stated in media commentary that, '[c]alls for 'higher ups' to shoulder the blame for alleged war crimes must take into account the complex nature of operational command and control'.[48] As a matter of necessary disclosure, Shanahan was the ADF Inquiry Officer appointed to investigate allegations of civilian casualties in Afghanistan. The findings of that Inquiry, including that the deceased nationals were probably 'associates of the senior insurgent' subject of the operation, were subsequently disputed in multiple media reports but were supported by the ADF hierarchy.[49]

48. Of course, legal and strategic academics, international lawyers, human rights advocates, and others calling for the 'higher ups' to be properly investigated as to their criminal liability under the law of command responsibility, as opposed to merely relying on the 'blanket exemption' provided in the Brereton Report, have 'tak[en] into account the complex nature of operational command and control'.[50] Similarly, the *ad hoc* Tribunals and the ICC itself have considered command and control forensically in their respective decisions on point, noting command and control is a requisite elemental construct of the law of command responsibility.[51]

49. The Communication Senders submit that, if the views of such commentators and the basis of the findings in the Brereton Report regarding command responsibility are accepted, the doctrine of command responsibility would have no work to do, other than in the case of direct accessorial liability on the part of commanders, which is not, of course, command responsibility *stricto sensu*. The inaction of the ADF senior leadership in not referring commanders above patrol commander for investigation, and the refusal of the Australian Government to intervene and arrange such referral, allows for an unavoidable inference that, in Australia, the law of command responsibility has become a 'dead letter'. As stated by Major General Brereton:

> Fundamentally, laws are pointless if they're not enforced and the law which is not enforced soon becomes a dead letter.[52]

50. This 'dead letter' of Australia's command responsibility law is enhanced by the co-morbidity of the problematic manner in which Australia implemented Article 28 into domestic Australian criminal law, as discussed further, below.

51. In terms of the commentary refuting command responsibility on the basis of ADF command and control structures and doctrines, the Communication Senders are reminded of the following statement in *Blaškić*:

> The indicators of effective control are more a matter of evidence than of substantive law, and those indicators are *limited to* showing that the accused had the *power to prevent,*

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[48] Rodger Shanahan, 'Australia's military should be held to account – but it's the individual soldier who pulls the trigger', *The Guardian* (Sydney, 9 June 2023).

[49] See Karen Elphick, 'Reports, allegations and inquiries into serious misconduct by Australian troops in Afghanistan 2005-2013' (Research Paper, Parliamentary Library, Parliament of Australia, 9 November 2020) 10-11.

[50] See, e.g., Kolomeitz (n 17) chap 3, chap 6.

[51] See, e.g., *Bemba Decision on the Confirmation of Charges* (n 15); *Bemba Trial Judgment* (n 38); *Prosecutor v Musić ('Ćelebići') (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) ('*Ćelebići Trial Judgment*').

[52] Paul Brereton, 'War Crimes in Australian History: From Boer War to Vietnam War' (Speech, Military History Society of NSW, 15 June 2022).

punish, or initiate measures leading to proceedings against the alleged perpetrators where appropriate.[53]

D. *Conduct of preliminary examination*

52. Noting this Communication relates to a situation already under investigation by the OTP, in its examination of the information contained herein, the OTP may properly determine that paragraph (b) of Regulation 27[54] applies. It follows that the information contained in the Communication, inclusive of annexed material,[55] relates to a situation already under investigation, such that this information may be considered afresh in the context of the ongoing activity or may be considered as part of a preliminary examination to determine whether there is a reasonable basis to proceed with an investigation.

53. The fresh consideration of this information is notwithstanding some preliminary activity by the OTP has purportedly already taken place regarding allegations of criminality on the part of Australian forces in Afghanistan, albeit not in the context of command responsibility. The information contained within, and annexed to, this Communication has not been presented to the OTP or any competent authority to date in light of deliberate and publicly-stated inactivity on the part of Australia regarding the command responsibility of Australian higher commanders in the subject situation, arising from and excused by the recommendations of the Brereton Inquiry as stated in the Brereton Report.

54. The filing of a Communication under Article 15 by a group is, of course, a means by which a preliminary examination may be triggered.[56] This Communication, it is submitted, assists the OTP to 'contribute to the two overarching goals of the Rome Statute: the ending of impunity, by encouraging *genuine* national proceedings, and the prevention of crimes'.[57]

55. In the event the OTP determines that an investigation of the ADF higher command in the context of the ongoing activity in respect of the situation already under investigation is not the preferred course of action, the Communication Senders respectfully submit the considerations warranting an investigation[58] are satisfied, as evidenced in the following sections of this Communication.

III. THE STATUTORY THRESHOLD

56. Article 53(1)(a)-(c) provides the legal framework underpinning the decision to initiate an investigation. These provisions place a non-discretionary obligation on the Prosecutor to initiate an investigation (subject to the approval of the Pre-Trial Chamber) where a conclusion is reached that there is a reasonable basis to proceed with an investigation. This obligation is, however, tempered by the countervailing consideration of 'the interests of justice' at art 53(1)(c), which injects a degree of prosecutorial discretion into the decision to proceed with an investigation following authorisation by the Pre-Trial Chamber.[59]

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[53] *Prosecutor v Blaškić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14-T, 29 July 2004) [68]-[69] ('*Blaškić Appeal Judgment*').
[54] *OTP Regulations* (n 27) reg 27(b).
[55] Note that reg 25(1)(a) of the *OTP Regulations* provides for the examination and evaluation of a situation on the basis of *any* information on crimes, including information sent by individuals or groups.
[56] Preliminary Examinations Policy Paper (n 1) 2.
[57] Ibid 4.
[58] Ibid 2.
[59] Bergsmo and Pejić (n 29) 589.

57. The reasonable basis to proceed with an investigation is thus the statutory threshold to start an investigation. This test, against which the Prosecutor must make the determination, is an evidentiary test, not one of the appropriateness of proceeding.[60]

58. The standard of proof for proceeding with an investigation is 'reasonable basis'. The standard of proof in assessing jurisdiction and admissibility is 'reasonable basis to believe', which is the lowest evidentiary standard provided for in the Rome Statute, because 'the information provided to the Prosecutor [at this early stage] is neither expected to be "comprehensive" nor "conclusive", if compared to evidence gathered during the investigation'.[61]

59. The Communication Senders respectfully submit that the following information and the annexed material, taken in totality, satisfy the statutory threshold to proceed with an investigation to the requisite standard. As stated in paragraph 26, above, this is predicated on the OTP determining not to proceed with an investigation of the ADF higher commanders in the context of the ongoing activity regarding the Situation in Afghanistan.

IV. JURISDICTION

60. Article 53(1)(a) provides the jurisdictional basis on which the Prosecutor is to consider the initiation of an investigation, that is, whether there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been, or is being, committed.[62] Article 15(4) also provides that the Pre-Trial Chamber, in its consideration of the authorisation of an investigation, must consider whether 'the case appears to fall within the jurisdiction of the Court'.[63] In that light, to the standard of a reasonable basis to believe, the information provided to the OTP must fulfil all jurisdictional requirements.[64]

61. Article 11 defines the temporal jurisdiction requirement (jurisdiction *ratione temporis*), the subject matter jurisdiction (jurisdiction *ratione materiae*) – the crimes within the jurisdiction of the Court - is specified in Article 5, and sequentially defined in Articles 6, 7, and 8; Articles 12 and 13(b) specify the territorial jurisdiction (jurisdiction *ratione loci*); and Articles 12 and 26 deal with personal jurisdiction (jurisdiction *ratione personae*).[65]

A. *Temporal jurisdiction*

62. Article 11 provides that the ICC has jurisdiction only with respect to crimes committed after the entry into force of the Rome Statute. In terms of the Situation in Afghanistan, the date of entry into force of the Rome

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[60] Ibid 588.
[61] *Situation in the Republic of Kenya (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya)* (International Criminal Court, Pre-Trial Chamber, Case No ICC-01/09, 31 March 2010) 27 ('*Kenya Article 15 Decision*').
[62] *Rome Statute* (n 1) art 53(1)(a).
[63] Ibid art 15(4).
[64] See *Prosecutor v Lubanga (Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute of 3 October 2006)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06 (OA4), 14 December 2006) [21]-[22].
[65] Ibid [22].

Statute for Afghanistan is 1 May 2003. For completeness, the date of entry into force of the Rome Statute for Australia is 1 September 2002.

63. The Brereton Report identified alleged crimes in the period 2005 to 2016 such that the command responsibility mode of liability applies during that period. The alleged crimes thus fall within the Court's jurisdiction *ratione temporis*.

B. *Subject-matter jurisdiction*

64. The substantive crimes, as alleged in the Brereton Report, are war crimes as defined in Article 8. War crimes fall within the crimes for which the ICC has jurisdiction pursuant to Article 5.

65. In assessing subject-matter jurisdiction, the OTP considers the underlying facts and contextual circumstances, as detailed in the information provided in a Communication or otherwise. The OTP also considers the 'alleged perpetrators, including the *de jure* and *de facto* role of the individual, group or institution and their link with the alleged crimes, and the mental element, to the extent discernible at this stage'.[66]

66. In this Communication, the substantive crimes, as alleged, satisfy the jurisdiction *ratione materiae* of the Court such that, as a matter of logical extension, the command responsibility mode of liability related to those crimes must fit this jurisdictional parameter. That is consistent with the policy guidance of the OTP as to the *de jure* or *de facto* role of the individual commanders and their respective links to the substantive crimes.

67. The mental element attached to the alleged commission of the crimes by subordinates is, according to Article 28(a) of the Rome Statute, one of knowledge or constructive knowledge – in the terms "knew or should have known". [67] The Communication Senders submit that this Communication, and the annexes to this Communication, demonstrate that the elements of Article 28(a) are satisfied to the requisite standard for the purposes of the OTP's consideration in this regard.

C. *Territorial or personal jurisdiction*

68. In the absence of a referral by the UN Security Council or by a State Party to the Rome Statute, which is the case in the present matter, Article 12 provides that the ICC may exercise its jurisdiction based on territorial or personal grounds. Personal jurisdiction is an alternative in the Rome Statute to territorial jurisdiction.[68]

69. At the time of the offending conduct, Afghanistan was a State Party to the Rome Statute in satisfaction of the Court's jurisdiction *ratione loci.* Similarly, at all material times, the ADF higher commanders were nationals of Australia and Australia was, and remains, a State Party to the Rome Statute such that the Court's jurisdiction *ratione personae* is satisfied.

[66] Preliminary Examinations Policy Paper (n 1) [39].
[67] *Rome Statute* (n 1) art 28(a).
[68] Ibid art 12(2).

V. ADMISSIBILITY

70. Article 53(1)(b) requires that the OTP, in determining whether to initiate an investigation, considers whether 'the case would be admissible under article 17'.[69] In turn, Article 17(1) provides that admissibility requires an assessment of both complementarity[70] and gravity[71].

71. At a preliminary stage, such assessment is limited to 'the admissibility of one or more *potential* cases within the context of a situation'.[72]

A. *Complementarity*

72. The application of the issue of complementarity in Article 17(1) of the Rome Statute, as it relates to the admissibility of a case before the ICC, has been conclusively clarified by the Appeals Chamber in *Prosecutor v Katanga*, as follows:

> [I]n considering whether a case is inadmissible under Article 17(1)(a) and (b) … the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answer to these questions is in the affirmative that one has to look at … the questions of unwillingness and inability. To do otherwise would be to put the cart before the horse.[73]

1. *Major General Brereton puts 'the cart before the horse'*

73. In public speaking engagements following the release of the Brereton Report, Major General Brereton described his reliance on what has been termed the 'slogan version of complementarity' [74] in his administrative inquiry, as follows:

> The International Criminal Court can exercise jurisdiction in respect of a particular case *only* if the State with jurisdiction fails genuinely to investigate and prosecute it. That's the principle of complementarity which is *fundamental* to the Rome Statute and to Australia's ratification of it.[75]

74. Australia did, indeed, adopt the flawed definition of complementarity in its process of ratifying and implementing the Rome Statute into Australian law, but not as any declaratory statement on such ratification and implementation, as appears to be the inference to be drawn from the statement of Major General Brereton. Rather, the Australian Parliament's Joint Standing Committee on Treaties ("JSCOT") merely

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[69] Ibid art 53(1)(b).
[70] Ibid art17(1)(a)-(c).
[71] Ibid art17(1)(d).
[72] *Kenya Article 15 Decision* (n 61) 182 (emphasis added).
[73] *Prosecutor v Katanga (Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/07 OA8, 25 September 2009) [78] ('*Katanga Admissibility Appeal Judgment*').
[74] Darryl Robinson, 'The Mysterious Mysteriousness of Complementarity' (2010) 21 *Criminal Law Forum* 67, 68.
[75] Brereton (n 52) (emphasis added).

focused exclusively on the 'unwilling or unable' limb of the test to the exclusion of the first limb of 'inactivity'.[76]

75. In light of the fact that JSCOT's examination of Australia's proposal to ratify the Rome Statute predated the Appeals Chamber's clarification of the application of complementarity in *Katanga*, it is, perhaps, not surprising that the Committee took that approach in its commentary. It is surprising, however, that Major General Brereton adopted and publicly described the flawed 'slogan version of complementarity' as a statement of fact in light of the fact that *Katanga* and, indeed, subsequent cases on point from September 2009 through 2010, pre-dated the Brereton Report and Major General Brereton's public commentary by more than a decade.

2. *Australia adopts the jurisdictionally limiting version of complementarity*

76. In the context of the findings of and referrals for criminal investigation arising from the Brereton Inquiry, the failure to undertake criminal investigations regarding the ADF higher command under command responsibility provisions, as a direct result of recommendations not to do so in an internal military administrative inquiry, is likely to qualify as *a posteriori* inaction on the part of Australia. For further analysis of this point, refer to chapter 7, section 7.5.1 of the doctoral thesis at Annex A.

77. The express adoption of the flawed test of complementarity by Australia, and subsequent adoption by implication of that flawed test, as articulated by Major General Brereton, by Australian authorities in the implementation of the recommendations in the Brereton Report is problematic from the viewpoint of the ICC's determination to put an end to impunity and to contribute to the prevention of war crimes.[77] By applying this jurisdictionally limiting test, Australia is, in practical effect, restraining the ICC from exercising its jurisdiction as long as Australia is theoretically willing and able to investigate and prosecute, notwithstanding its evidenced inaction, which is further demonstrative of an intention not to investigate and prosecute.[78]

78. In the present case, and as further considered below and in chapter 7 of the thesis at Annex A, there is a clear failure to act on Australia's part[79] with respect to the investigation of the command responsibility of the ADF higher commanders and reliance on the Brereton articulation of the complementarity test is unlikely to change that fact. To date, Australia has adopted this fundamental aspect of the Rome Statute in the manner articulated in both the JSCOT Report and the subsequent speech by Major General Brereton such that impunity is prevalent, and the intent of the Rome Statute is being defeated. The OTP has identified that 'the system of complementarity is principally based on the recognition that the exercise of national criminal jurisdiction is not only a *right* but also a *duty* of States'.[80] That duty is made abundantly clear in the Preamble to the Rome Statute.[81] To date, Australia has failed in the exercise of that duty.

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[76] Joint Standing Committee on Treaties, Parliament of Australia, *Inquiry into the Statute of the International Criminal Court* (Report No 45, May 2002) 7-8.
[77] *Rome Statute* (n 1) Preamble.
[78] See Thomas Hansen, 'Case Note: A Critical Review of the ICC's Recent Practice Concerning Admissibility Challenges and Complementarity' (2012) 13 *Melbourne Journal of International Law* 1, 2.
[79] See Office of the Prosecutor, International Criminal Court, *Paper on some policy issues before the Office of the Prosecutor* (Policy Paper, September 2003) 2 ('2003 OTP Policy Paper').
[80] Ibid 5.
[81] *Rome Statute* (n 1) Preamble.

79. The OTP has expressly reflected the two-stage test of admissibility, with inaction as the trigger and unwillingness or inability as follow-up considerations only in the event inactivity is found to not exist, in its admissibility assessments.[82] Further, the OTP has explicitly stated that a focus on low-level officials will not be sufficient to satisfy the requirements of complementarity.[83] To date, only low-level officials at the highly tactical level of patrol commander (Corporal/Sergeant) have been referred by the CDF for criminal investigation as a direct response to the recommendations of Major General Brereton in the Brereton Report.[84]

3. *No 'tangible, concrete and progressive' national investigation of ADF higher commanders*

80. In *Prosecutor v Muthaura* and *Prosecutor v Gbagbo,* the ICC clarified that, for a case to be *inadmissible* before the ICC, in the context of the principle of complementarity, any national investigation must be 'tangible, concrete and progressive' and must cover the same individuals and substantially the same conduct as alleged in the proceedings before the ICC.[85]

81. As stated above, Major General Brereton recommended that no referrals for criminal investigation be initiated against any higher commanders, 'let alone at higher levels such as Commander Joint Task Force 633'[86] (the 'blanket exemption' discussed above). It is patently clear that this recommendation was adopted by General Campbell, the recipient of the Brereton Report, as evidenced in the Defence Response in which only soldiers and low-level tactical commanders (at the lowest possible level of command) have been referred for criminal investigation.[87]

82. In the present matters subject of this Communication, the Communication Senders submit that the information provided and information otherwise available indicates that 'there is a situation of inactivity with respect to the elements that are likely to shape [any] potential cases' [88] involving the higher commanders such that it is not necessary to proceed to inquiries of unwillingness or inability.

4. *Continued verification of the progress of national proceedings*

83. In its Article 15 decision on the situation in Afghanistan, Pre-Trial Chamber II held, as follows:

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[82] See, e.g., International Criminal Court Office of the Prosecutor, *Preliminary Examination Colombia – Decision Not to Prosecute* (Report, 28 October 2021).
[83] 2003 OTP Policy Paper (n 79).
[84] Department of Defence (n 36) 12, 18, 22.
[85] *Prosecutor v Muthaura (Judgment on the Appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute)* (International Criminal Court, Appeals Chamber, Case No ICC-01/09-02/11-274 (OA), 30 August 2011) [39] and *Prosecutor v Gbagbo (Judgment on the Appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo)* (International Criminal Court, Appeals Chamber, Case No ICC-02/11-01/12-75-Red, 27 May 2015) [122], cited with approval in *Article 15 Decision of PTC on the Situation in Afghanistan* (n 19) [72].
[86] Brereton Report (n 8) 31.
[87] Department of Defence (n 36); See, also, Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 30 May 2023, (Angus Campbell, General, Chief of Defence Force).
[88] *Kenya Article 15 Decision* (n 61) 54.

> Given the centrality of the complementarity principle in the overall design and rationale of the Court, it is indeed one of the *most compelling duties of the Prosecution* to continue verifying the *progress of national proceedings* during the course of investigations.[89]

84. Whilst national proceedings are taking place regarding soldiers and low-level tactical commanders, including ongoing investigations of soldiers at those levels and the formal charging of one soldier to date, there are no criminal investigations taking place or proposed regarding the command responsibility of higher commanders including at the Joint Task Force (JTF633) level.

85. The Communication Senders respectfully submit that any ongoing verification of the progress of proceedings in Australia would confirm this – a fact which further grounds an investigation into the liability of the higher commanders under the command responsibility provisions.

B. *Gravity*

86. Article 17(1), whilst reiterating the centrality of complementarity to the Rome Statute, adds the gravity of a case to the consideration of the inadmissibility of a case.[90] Noting the gravity of a case is not exclusively attached to the constituent act but extends to the degree of participation,[91] and the intention of the gravity threshold to maximise the deterrent effect of the ICC by pursuing 'the ones who can most effectively prevent or stop the commission of [war crimes]',[92] the Communication Senders submit that the investigation of the command responsibility of ADF higher commanders is warranted. The Communication Senders draw on the following statement of the Referral Bench of the International Criminal Tribunal for the Former Yugoslavia in *Delić*:

> While a high level of responsibility may arise from the alleged level of participation in the commission of crimes alleged in the indictment, a person holding a high rank may ultimately bear a higher responsibility by virtue of that high position.[93]

87. A quantitative assessment is undoubtedly relevant in considering the gravity threshold of a case. The Communication Senders submit that a qualitative assessment is applicable in the present case in order to properly address the classic impunity paradigm[94] – the apparent sheltering of the ADF higher command from culpability or, even, genuine scrutiny as to culpability. This qualitative approach is consistent with the stated policy of the OTP that, 'as a general rule, the [OTP] should focus its investigative and prosecutorial efforts

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[89] *Article 15 Decision of PTC on the Situation in Afghanistan* (n 19) [73] (emphasis added).
[90] *Rome Statute* (n 1) art 17(1)(c).
[91] 2003 OTP Policy Paper (n 79) 7.
[92] *Prosecutor v Lubanga (Decision on the Prosecutor's Application for a Warrant of Arrest)* (International Criminal Court, Pre-Trial Chamber I, 10 February 2006) [48], [51]-[53].
[93] *Prosecutor v Delić (Decision on Motion for Referral of Case Pursuant to Rule 11 BIS)* (International Criminal Tribunal for the Former Yugoslavia, Referral Bench, Case No IT-04-83-PT, 9 July 2007) [23]. Note that the defendant, *Delić,* was the commander of the Main Staff of the Army of Bosnia and Herzegovina (ABiH) and was 'said to have exercised military command and control over all regular ABiH forces in Bosnia and Herzegovina [11].
[94] See, e.g., William Schabas, 'Prosecutorial discretion and gravity' in Carsten Stahn and Göran (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers, 2009) 229, 245.

and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes'.[95]

88. An appreciation of the need to focus on the ADF leadership is increasingly emerging in Australia in the light of media attention to the issue. Growing public sentiment on the need to hold the ADF higher command to account has been expressed in media reporting by a former Australian Minister for Defence and present Opposition member, Senator Linda Reynolds, as follows:

> Former Coalition Defence Minister Linda Reynolds has called for more transparency about how the Australian Defence Force is improving its culture following the Brereton war crimes inquiry and urged the nation's most senior officers to take greater *responsibility* for alleged wrongdoing in Afghanistan.
>
> "… we can't *sweep this under the rug*. There can be no *legal* or moral excuses for war crimes."
>
> [Senator Reynolds] said there was significant frustration in the veterans' community that the most senior levels of the Defence hierarchy had not been held accountable for *failing to act on widespread rumours* of unethical behaviour by some military units.
>
> "This issue still rankles a lot of people in Defence and Army," she said. "As the Chief of Defence Force acknowledged at the time, there was a serious breakdown of chain-of-command leadership. There were certainly indications all was not well, but *a blind eye was turned*."[96]

89. Significantly, Senator Reynolds is a former Brigadier in the Australian Army Reserve with 29 years of service. The fact that a former Brigadier and Defence Minister from 2019 to 2021 has raised the fact that the rumours of war crimes were widespread, but the higher command failed to act and, indeed, turned a 'blind eye' to the rumours lends weight to three points:

    (1) the unavoidable inference that the higher command had some degree of knowledge of the alleged war crimes before the completion of Operation SLIPPER in 2014, as found by Major General Brereton;

    (2) neither the ADF higher command nor the Australian Government have any intention to properly investigate the issue of command responsibility; and

    (3) the Australian public is not seeing the interests of justice served in this matter to date.

90. This qualitative assessment may properly take into account the problems associated with Australia's implementation of Article 28 into domestic Australian law, the least of which not being the altered mental (fault) element attached to the material (physical) element of the commission of crimes by subordinates, discussed below. Further, the increasingly hostile attitude taken by the CDF to any scrutiny by the Australian

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[95] 2003 OTP Policy Paper (n 79) 7.

[96] Matthew Knott, 'Can't sweep this under the rug: Reynolds calls for more ADF transparency', *The Sydney Morning Herald* (Sydney, 10 June 2023) (emphasis added).

Parliament of his command responsibility,[97] and that of other former Commanders of JTF633, is undoubtedly impacting public perceptions as to the apparent impunity of the higher commanders but is, at the same time, not indicative of any intention on the part of Australian authorities to investigate such commanders.

91. The latter outcome is likely to be attributable to the weight afforded to Major General Brereton's findings and recommendations regarding the alleged conduct of subordinates with little or no critical analysis by Australian authorities of the findings and recommendations regarding command responsibility.

92. The Communication Senders respectfully submit that the jurisdictional and admissibility requirements at Article 53(1)(a) and (b) are satisfied to the requisite standard of 'a reasonable basis to believe'. In that light, and notwithstanding no requirement exists for the OTP to positively establish that an investigation serves the interests of justice,[98] factors going to establishing that the interests of justice are served are detailed in the following section.

VI. INTERESTS OF JUSTICE

93. Noting the strong presumption that investigations and prosecutions will be in the interests of justice, in the exercise of the mandate of the OTP and the object and purpose of the Rome Statute,[99] and the concomitant position that a presumption in favour of investigation and prosecution exists,[100] the Communication Senders submit that an investigation by the OTP pursuant to this Communication is warranted.

94. In considering the factors contemplated in Article 53(1)(c), the Communication Senders submit that the refusal to investigate the ADF higher commanders is an aggravating feature of the Situation in Afghanistan as it relates to Australia's involvement which goes to the issue of gravity. This, coupled with the problematic implementation of Article 28 into domestic Australian law and the flow-on effects of that, as discussed below and examined in forensic detail in the doctoral thesis at Annex A, amplifies the gravity of the alleged offending by subordinates to a level warranting attention by the international community via the ICC.

95. This submission is guided by the objects and purpose of the Rome Statute – the prevention of serious crimes of concern to the international community through ending impunity.

A. *Ending impunity by enforcing command responsibility*

96. It is uncontentious that, in the application of the interpretative provisions of the Vienna Convention on the Law of Treaties,[101] the term "interests of justice" should be guided by the ordinary meaning of the words in the light of their context and the objects and purpose of the Rome Statute.[102]

97. Reference to the Preamble of the Rome Statute assists in this regard. The relevant statements in the Preamble are, as follows:

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[97] See, e.g., Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee (n 87).
[98] Preliminary Examinations Policy Paper (n 1) [67].
[99] Ibid [71].
[100] Office of the Prosecutor, International Criminal Court, *Policy Paper on the Interests of Justice* (Policy Paper, September 2007) 1 ('2007 Interests of Justice Policy Paper').
[101] *Vienna Convention on the Law of Treaties,* opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(1).
[102] 2007 Interests of Justice Policy Paper (n 100) 4.

> **Determined** to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes;
>
> **Recalling** that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes; and
>
> **Resolved** to guarantee lasting respect for and the enforcement of international justice.[103]

98. The following sub-sections address the interests of justice test through the prism of the aforementioned Preambular statements.

1. *If not Australia, then who?*

99. It is clear that Australian authorities have no intention to conduct a criminal investigation into the criminal liability of the ADF higher commanders. This has been expressly excluded by the ADF senior leadership, in adopting the recommendations in the Brereton Report, and the Australian Government has all but abrogated the responsibility for implementing the recommendations to the ADF.[104] In a best case and largely charitable analysis of the application of the flawed findings and resultant recommendations on command responsibility in the Brereton Report, the failure/refusal to investigate may be attributable to a lack of appropriate and lawfully correct information on both command responsibility and the applicable command structures. As stated by the Centre for International Law Research and Policy:

> An absence of information on the construction and application of the [mode of criminal liability] by national authorities may also limit accountability efforts against those most responsible persons who hold positions of authority.[105]

100. This lack of appropriate information, and a reliance on the Brereton Report findings and recommendations underpinning the lack of referral action for investigation, is also likely to apply to the OSI and the CDPP in the event those agencies have even cast their collective minds to command responsibility at levels above those low levels described in the Brereton Report.

101. This analysis by the Communication Senders is supported, in the express context of the Brereton Report's 'blanket exemption' of the higher commanders from command responsibility, by Fellmeth and Crawford, who state:

> The Brereton Report, with its disjunction between the suspicious behaviour of subordinates who committed war crimes and the *exoneration of commanders reluctant to investigate the evidence* … illustrates how national military organizations are often quick to *excuse commanders who indirectly contribute to war crimes* by subordinates,

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[103] *Rome Statute* (n 1) Preamble.
[104] See Department of Defence (n 36); Afghanistan Inquiry Implementation Oversight Panel (n 34).
[105] Centre for International Law Research and Policy, *Command Responsibility* (Guidelines, 2nd ed, November 2016) 8.

> and how a consequential gap in the law of command responsibility can be used to justify that exoneration.[106]

102. The question remains: confirmed inactivity on the part of Australian authorities, justified on the basis of a flawed application of the law of command responsibility to the facts of command in Afghanistan, means that Australia is not, and is unlikely to, undertake a criminal investigation of the higher commanders under this mode of liability. So, who will undertake such investigation?

103. The Communication Senders respectfully submit that Australia, in not investigating the higher command under the auspices of the command responsibility mode of liability, and in abrogating the responsibility to initiate such investigation, has failed in its duty to exercise its criminal jurisdiction over those most responsible and those most capable of preventing the commission of war crimes, in contravention of the objects and purposes of the Rome Statute. This abrogation of responsibility to the same higher commanders who failed in their duty of command – to prevent and deter the commission of war crimes - is further evidence of a failure on the part of Australia to take tangible action to contribute to the prevention of such crimes.

104. The blanket exemption from command responsibility provided by Major General Brereton to the other Major Generals and, indeed, to commanders at higher levels still, coupled with the refusal by higher commanders to be accountable to the Australian Parliament via Senate Estimates hearings, can only serve to maintain the culture of impunity which exists at the highest levels of the ADF and the Defence establishment. This apparent culture of impunity is entirely inconsistent with the objects and purpose of the Rome Statute.

105. The OTP is thus properly empowered to undertake such investigation in the interests of justice and, in the exercise of the broad discretion provided at Article 15.

2. *Australia's command responsibility laws: inconsistent with enforcement of international justice*

106. As discussed in detail in the doctoral thesis at Annex A, when Australia implemented Article 28(a) into domestic Australian criminal law, the mental element of "knew or should have known", as it attached to the material element of the commission of crimes, was replaced with "knew or was reckless". Noting that the alternative "should have known" equates with negligence, a clear inconsistency is created which manifests in practical issues beyond mere semantics. For a detailed analysis of this divergence between the Statute and Code provisions, and the implications arising therefrom, the Communication Senders encourage the OTP to read the analysis in the doctoral thesis at Annex A with an emphasis on chapter 7.

107. For present purposes, in considering the interests of justice in pursuing an investigation into the culpability of the ADF higher commanders, a relevant critique of the application of different standards to command responsibility through the lens of the perpetuation of impunity, is provided by Sherman, as follows:

> The *differing standards* employed for various iterations of command responsibility prosecutions could be tied to one variable in particular: how concerned were those creating a given standard with it potentially being used against themselves? If the answer

[106] Aaron Fellmeth and Emily Crawford, '"Reason to Know" in the International Law of Command Responsibility' (2022) 104(919) *International Review of the Red Cross* 1223, 1261 (emphasis added).

was "not at all", or "not very", then a pro-prosecution rule was likely to be deployed. *The greater the risk of the standard being applied more broadly, especially on those who created it, the higher the requirements* that would be needed to prosecute command responsibility cases.[107]

108. Australia's command responsibility provisions, in deviating from those of Article 28(a), have imposed a high standard such that higher requirements need to be met to prosecute command responsibility under Australian law than is the intent of the Rome Statute. Considering the public outcry when the Australian Parliament first considered entry into the Rome Statute, and the nature of the conflicts that Australia was involved in around that time, it is not difficult to adopt the cynical approach taken by Sherman. The fact that even a suggestion that Australia's laws contribute to the perpetuation of impunity – the fight against which is central to the Rome Statute and the ICC – should satisfy any interests of justice test.

3. *Bringing the administration of international justice into disrepute*

109. The divergence in mental (fault) elements applicable to the material (physical) element of the commission of crimes by forces between Article 28(a) of the Rome Statute and Section 268.115(2) of the Commonwealth Criminal Code has established a different scope of criminality between the Statute and the Code. The net result of such divergence is that a dual system of criminality is established – an outcome which flies in the face of the need for coherence and thus credibility and legitimacy vis-à-vis the system of international criminal justice.[108]

110. It follows that, any divergence which adversely impacts the necessary coherence, credibility and legitimacy of international criminal justice, exercised through the Rome Statute and the ICC is likely to bring the administration of international criminal justice into disrepute. It is entirely unacceptable, as a matter of such coherence, that a higher commander in a State Party to the Rome Statute which implemented Article 28(a) directly is held to a different standard than a higher commander in Australia merely because Australia enacted provisions which place a requisite mental element higher on the culpability spectrum. The practical outcome, of course, is that proving the case against the Australian commander is a more demanding task such that securing a conviction against the Australian commander is more onerous.

111. That divergence is no more apparent than in the findings of the Brereton Inquiry in which Major General Brereton determined that none of the commanders above the tactical level of patrol commander 'knew of or were *recklessly indifferent to*' the alleged crimes of their subordinates. Putting aside, for the moment, the fact that this finding applies a shallow interpretation of "recklessness", even in Australian law, the fact that an entire cohort of officers have been effectively exonerated on the basis of an inconsistent standard of culpability is certain to bring the new legal framework[109] and thus, the system of international justice under the umbrella of the ICC into disrepute.

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[107] Michael Sherman, 'Standards in Command Responsibility Prosecutions: How Strict, and Why?' (2018) 38(2) *Northern Illinois University Law Review* 298, 341 (emphasis added).
[108] Kolomeitz (n 17) 182-3.
[109] See 2007 Interests of Justice Policy Paper (n 100) 4.

B. *The particular circumstances of the accused*

112. Article 53(2)(c) requires the OTP to take into account, *inter alia*, the circumstances of the accused.[110] That includes the status or hierarchical level of the accused.[111]

113. Whilst, as it presently stands, none of the ADF higher commanders responsible for the command and control of forces in Afghanistan are officially accused of any criminal conduct, this Communication is aimed at holding such commanders to account by way of criminal investigation. In that light, the circumstances of the higher commanders may collectively be assessed.

114. It is clear that OTP policy on an assessment of individual circumstances, with a view to whether the interests of international justice are served by prosecution, draws on national jurisprudence and that of the *ad hoc* Tribunals in focusing on the health of such individuals as well as whether they, themselves, have been subject of serious human rights abuses.[112]

115. In the present case, in terms of investigating the command responsibility of ADF higher commanders, these considerations are irrelevant. In the present case, considering the interests of justice by taking into account the particular circumstances of the accused is limited to a consideration of the role of the individual in the crimes as alleged.[113] That is, the failure of the higher commanders to perform their duty in preventing or suppressing the alleged crimes – the deterrent effect of the command responsibility doctrine – as well as the apparent impunity being enjoyed by the higher commanders at present.

VII. CONCLUSION

116. For the reasons detailed in this Communication, above, and on the basis of the organic and attached information, the Communication Senders respectfully request the OTP to undertake an investigation of the ADF higher command in the context of the ongoing activity in respect of the situation in Afghanistan already under investigation. Alternately, the Communication Senders request the OTP to initiate an investigation *proprio motu* under the auspices of the command responsibility provisions of the Rome Statute.

117. Additionally, the Communication Senders, via Global Security Group and Cardinal Legal, request to be informed by the OTP of any further steps and/or decisions to be taken in respect of the Situation in Afghanistan in terms of Australia's involvement in that Situation.

118. Finally, Global Security Group and Cardinal Legal express their availability to assist the ICC OTP in any further investigations. Analysts working with the Communication Senders have accumulated additional evidentiary material of relevance. Pursuant to Article 15(2), that material is available at your discretion.

Respectfully submitted:

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[110] *Rome Statute* (n 1) art 53(2)(c).
[111] 2007 Interests of Justice Policy Paper (n 100) 7.
[112] Ibid.
[113] *Rome Statute* (n 1) art 53(2)(c).

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Annexes:

A. Doctoral Thesis, January 2023
B. Senate Hearing Transcript Extracts, 30 May 2023
C. Afghanistan Inquiry Reform Plan, 30 July 2021
D. Parliamentary Library Research Paper, 2020