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Calculated Exoneration: Command Responsibility and War Crimes in Afghanistan



Photograph Source: Petty Officer 1st Class John Collins – Public Domain

Being the scapegoat of tribal lore cast out with the heavy weight of sins remains a popular political motif. Supposedly noble soldiers, by way of example, are punished for not adhering to the rules of war. In breaching the codes of killing and the protocols of acceptable murder, they are banished from a realm supposedly wrapped in law. In doing so, commanding officers, policy makers and politicians are left, purified, their dirt shed.

In the context of war crimes, the subordinate and the minion often take centre stage, heaped upon with sins like a tribal scapegoat and sent out into the metaphorical, prison wild. For the moment, such a figure is Australian Special Air Service trooper Oliver

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Jordan Schulz. That he is the sole figure so far is not going to impress the fair minded, though there may be others to follow.

In a joint statement between the Office of the Special Investigator and the Australian Federal Police, Schulz is alleged to have murdered an Afghan man during the course of his deployment in Afghanistan with the Australian Defence Force. He is being charged with one count of War Crime, specifically murder under the *Criminal Code Act 1995* (Cth). The ABC reports that the victim was Dad Mohammad, slain in May 2012 in central Uruzgan province as he lay helpless in a wheat field.

Speaking in the Downing Centre local court on March 28, magistrate Jennifer Atkinson made a number of remarks. The executed man “was quiet and not resisting.” Schulz “turns towards the Afghan man and shoots towards him three times. The man appears to go limp after the first shot.”

Mohammad, according to the allegations against the defendant, “was not taking an active part in the hostilities”. The defendant “knew, or was reckless as to the factual circumstances establishing that the person was not taking an active part in the hostilities”.

The OSI was established to pursue the findings of the 2020 Brereton Report, also known by its lengthier title as the Inspector-General of the Australian Defence Force’s Afghanistan Inquiry Report. Sharing joint responsibility with the AFP, the office is charged with investigating “allegations of criminal offences under Australian law, arising from or related to any breaches of the Laws of Armed Conflict, by members of the Australian Defence Force (ADF) in Afghanistan from 2005 and 2016.”

The prosecution of Schulz is clearly designed to prevent the prying eyes from personnel based at the International Criminal Court. As a few legal authorities have written, “It seems certain that Australia would not want ICC scrutiny of its conduct in Afghanistan nor the embarrassment of the ICC stepping in to prosecute Australian military personnel.”

The prosecution is already attracting international attention. According to Human Rights Watch, it provides “an important opportunity for authorities to uphold the rule of law by ensuring respect for the fair trial rights of the accused, including the presumption of innocence of any individual charged with criminal offense, and ensuring accountability for war crimes.” It also sows the seeds of concern among the soldiers of other military forces deployed to Afghanistan during that same period.

The nagging worry here is that the military and political higher-ups are going to be given a convenient, well-oiled exoneration. Exonerated, the politicians and deskbound army wonks, who made critical decisions thousands of miles away, will be exempt, professing

ignorance about the activities of a few bad apples in the Special Forces. Never mind why those apples were there in the first place.

The law will not necessarily be of much help here, beyond targeting the lower elements of foot soldiery. Doctrines of command responsibility require an adequate formulation of the “guilty mind”, otherwise known as *mens rea*. The pressing point in such a context is assessing what standard of knowledge is relevant: strict liability, constructive knowledge (that the commanders ought to have known about the crimes), or actual knowledge?

As Douglas Guilfoyle has observed, both the Rome Statute of the International Criminal Court and Australian law tend to exclude strict liability and actual knowledge, yet “contain different formulations of what falls between.” In a co-authored piece, Guilfoyle also notes that international law generally attaches “liability to commanders who, given the circumstances, should have known crimes were being or had been committed.”

The Brereton Report has done a remarkable disservice in shielding the chain of command in terms of operational awareness, and makes no mention of the political process that led to the deployment of such soldiers in Afghanistan in the first place. As the report improbably asserts, there was “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 ... Joint Operations Command, or Australian Defence Command.” Nor was “there any failure at any of those levels to take reasonable and practical steps that would have prevented or detected the commission of war crimes.”

The practice of frequently rotating commanders above the patrol level in the Afghanistan theatre, and the nature of how information was compartmentalised, have served to ignore culpability for practices in the field of battle.

This is not to say that a number of senior officers are not concerned by what Schulz’s trial promises. As *The Australian reports*, citing a military source, “Individuals who were commanding the soldier, right up the chain of command for as high as the defence team can justify, should reasonably expect to be called into court.” The defence team could then point to various “chain-of-command deficiencies”, among them the practice of repeatedly redeploying special service soldiers despite concerns about their state of mind.

Exposing such practices, and their source, would not only be fitting but just. We are otherwise faced with that convenient and all too regular spectacle: that of a soldier punished in isolation from the war machine that emboldened him to kill in the first place.

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