

# ***War Crimes by Australian Soldiers: Prosecute or Cover-up?<sup>1</sup>***

## ***A Lesson of the Brereton Report<sup>2</sup>***

**Maj the Hon H G Fryberg QC<sup>3</sup>**

### **Introduction**

In his 1998 lecture *War Crimes Trials and the Future*, Sir Ninian Stephen said:



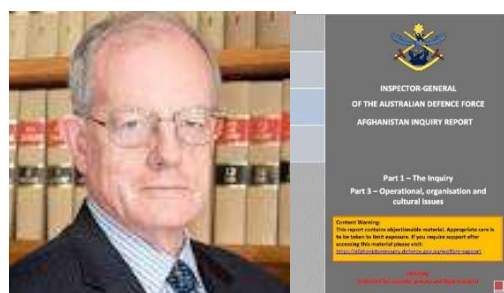
*Sir Ninian Stephen*

“International humanitarian law and the proscription of war crimes have a very long history.

Their origins reach back to the Old Testament and classical times... In this century at least we have fallen sadly short of Elisha’s answer, in *2 Kings* 6, to the King of Israel who asked whether he should slay his prisoners of war and was told ‘You shall not slay them. Would you slay those who you have taken captive with your sword and bow? Set bread and water before them that they may eat and drink and go to their master’.”<sup>4</sup>

Sir Ninian spoke of the last century, but sadly, we now know that there is credible evidence to show that what he said also applies in this one.

### **The Brereton Report**



*Maj Gen Brereton*

*and his Report*

On 29 October 2020 Maj Gen the Hon Paul Brereton, a judge of the New South Wales Court of Appeal and an Assistant Inspector-General of the ADF, delivered the report of his Inquiry Into Questions of Unlawful Conduct Concerning the Special Operations Task Group In Afghanistan in the period 2005 to 2016 (the Brereton Report or BR).

He reported:

“Australian Defence Force members were and are extensively trained on this subject [the war crimes of murder and cruel treatment of non-combatants and persons who are *hors-de-combat*], and the Inquiry did not encounter a single witness who claimed to be under any misunderstanding as to what was prohibited. Uniformly, everyone understood that it was impermissible to use lethal force against a prisoner (or ‘person under control’), or against a non-combatant.

...

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

<sup>1</sup> This is a slightly expanded version of a paper presented to the Queensland University Regiment Association on 25 October 2021.

<sup>2</sup> Redacted version. Much of the material in this paper is drawn from that report.

<sup>3</sup> Retired judge of the Supreme Court of Queensland.

<sup>4</sup> The inaugural Geoffrey Sawer Lecture (ANU Centre for International and Public Law, Paper No 10, 1998), cited BR p 124.

accepted, would be the war crime of cruel treatment. Some of these incidents involved a single victim, and some multiple victims.

These incidents involved:

- a. a total of 39 individuals killed, and a further two cruelly treated; and
- b. a total of 25 current or former Australian Defence Force personnel who were perpetrators, either as principals or accessories, some of them on a single occasion and a few on multiple occasions.

None of these are incidents of disputable decisions made under pressure in the heat of battle. The cases in which it has been found that there is credible information of a war crime are ones in which it was or should have been plain that the person killed was a non-combatant, or *hors-de-combat*.<sup>5</sup>

Gen Brereton recommended that the Chief of the Defence Force refer 36 matters to the Australian Federal Police for criminal investigation. Those matters relate to 23 incidents and involve a total of 19 individuals. The test for making that recommendation was:

“In considering whether to recommend referral of a matter for criminal investigation, the Inquiry has adopted as a threshold test the following question: Is there a realistic prospect of a criminal investigation obtaining sufficient evidence to charge an identifiable individual with a criminal offence. The Inquiry has also had some regard to the ultimate prospects of a conviction.”<sup>6</sup>

A commentator wrote, “For most Australians, this is more than just rogue soldiers being found out for despicable behaviour. The depth of revulsion felt by many reflects the special place the country reserves for its armed forces, who have come to personify all that is best about Australia.”<sup>7</sup>

The possibility that Australian soldiers might be prosecuted for war crimes provoked opposition from some right-wing media. I cite two commentators as examples.

### Commentators’ support for cover-up

*Lt Col Catherine (Cate) McGregor AM (ret)*

Lt Col McGregor is a prominent Australian transgender writer and political commentator who



*Lt Col McGregor*

transitioned from male to female in 2012. In 1977 (the then) he graduated from RMC with Honours. He was promoted to Captain, but resigned in the early 1980s to work in law firms and as a speech writer. In 2001 he rejoined the army and was deployed to Timor Leste. McGregor went on to serve in a number of staff appointments, including as speechwriter for the Chief of Army between 2001 and 2014. She left the army in 2014.<sup>8</sup>

In a TV editorial for Sky News on 16 April this year, still available on You Tube, she said, “If

<sup>5</sup> BR, pp 28-9.

<sup>6</sup> BR, p 40.

<sup>7</sup> Crotty, M and Holbrook, C: “The Anzac legend has blinded Australia to its war atrocities. It’s time for a reckoning”, *The Conversation* <https://theconversation.com/the-anzac-legend-has-blinded-australia-to-its-war-atrocities-its-time-for-a-reckoning-151022>, accessed 29 September 2021.

<sup>8</sup> Wikipedia, [https://en.wikipedia.org/wiki/Cate\\_McGregor](https://en.wikipedia.org/wiki/Cate_McGregor), accessed 29 September 2021.

the Government really has our backs – as we are being assured – then drop all the prosecutions for alleged war crimes in Afghanistan ... .”<sup>9</sup>

*Lt Col Alistair Pope psc CM (ret)*



*Lt Col Pope*

Lt Col Alistair Pope (post-nominals as used by him) graduated from OTU Scheyville in 1967 as a second lieutenant and served in Vietnam, Indonesia and PNG, and as a sub-unit commander in 3 Brigade in Townsville. He retired in 1986 and founded his own business, working internationally as a project manager until his retirement in 2016.<sup>10</sup> He has written widely on military matters.

In an article published in *Quadrant Online* he wrote:

“([A]s far as I know) no Australians were prosecuted or convicted of war crimes in that conflict [Second World War]. The same applies to all other conflicts, from the Great War up to, but not including, Afghanistan. Is our latest war an aberration, or has something happened that has led to the besmirching of the reputations of our front-line combat soldiers? These are the men and women who put their lives at risk when such service is demanded. If the state and its military and political leaders consider it an obligation to prosecute their own troops for actions taken on the battlefield, rather than support and protect them, why would anyone in future sign up to fight for such a country?”<sup>11</sup>

In the same article, Pope also wrote that soldiers who confessed to killing civilians and prisoners in Afghanistan “should not be cut any deals. These criminals should be dealt with severely and given very long prison sentences, according to our laws.” I shall return to that point later.

Both McGregor and Pope opposed prosecution of our soldiers, but non-prosecution is not the only means of covering up war crimes. On the contrary, it is the last resort. Most covering up happens at an earlier stage. Other techniques are:

- Non-reporting
- Discouraging reporting
- Destruction of documents
- Obfuscation
- Censorship
- Code of silence
- Fabrication of evidence, eg throwdowns
- Inaction and delay
- Not investigating
- Charging a lesser or disciplinary offence.

<sup>9</sup> <https://www.youtube.com/watch?v=anGR5oD7rPc>, accessed 29 September 2021.

<sup>10</sup> *The Cove*, <https://cove.army.gov.au/bio/alistair-pope>, accessed 29 September 2021.

<sup>11</sup> “Yamashita’s Shadow Falls on the ADF”, *Quadrant Online*, 11 November 2020, [https://quadrant.org.au/opinion/qed/2020/11/yamshitas-shadow-falls-on-the-adf/#\\_edn2](https://quadrant.org.au/opinion/qed/2020/11/yamshitas-shadow-falls-on-the-adf/#_edn2), accessed 29 September 2021.

It is beyond the scope of this paper to examine the application of these techniques in Australian military history. I note however that, depending on the circumstances, a perpetrator might incur liability as an accessory to a war crime.

While McGregor appealed to self-interest, Pope relied on history. Pope was largely correct in his belief about the absence of prosecutions (or at least convictions) for war crimes from the First World War until Afghanistan. But he was not completely correct. May I indulge in a superficial historical overview.

### **A brief historical overview of Australian war crimes**

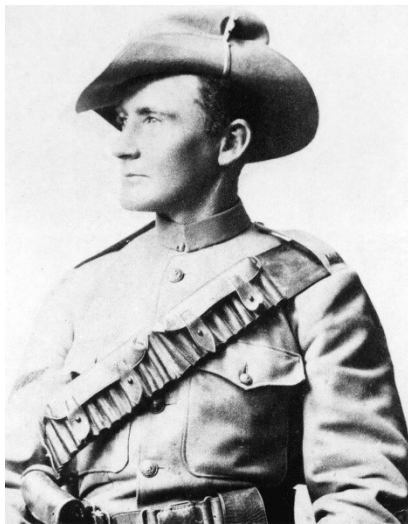
Under the heading “War Crimes in Australian History”, the BR records:

“While Australia has traditionally been firm, but fair, in investigating and prosecuting the war crimes of our adversaries, we have generally been less proactive in dealing with reports or allegations of war crimes by Australian personnel.”<sup>12</sup>

I think that is correct. I give some examples.

#### *The Second Boer War*

Edwin Henry Murrant was born in England but moved to Australia around 1883 at the age of 19. Here



*Breaker Morant*

he changed his name to Harry Harbord Morant. His story is too well known to repeat here. Lieutenants Morant and Handcock, who were under British command (and therefore British military law) were court martialled, charged with murder while on active service. They could have been charged with offences specifically designed to enumerate and prohibit the killing of prisoners or civilians contrary to the customs of war. They confessed to killing prisoners and civilians. Their defence was “superior orders”. They were disbelieved, convicted and were executed.

#### *The First World War – New Guinea*

At the outbreak of the war, an Australian Naval and Military Force was dispatched to German New Guinea. A landing party seized the wireless station at Bita Paka. The BR described what happened:

“During the initial stages of the engagement, an injured German soldier was used to draw out other German forces, who were then surrounded and captured. Seaforth Mackenzie (the official historian of Australia in the Pacific theatre during WWI) notes of this incident:

‘In the employment of a prisoner in this manner, under a threat, a breach of the rules of war appears to have been unwittingly committed. This was more liable to happen, through ignorance, in the early days of the war than later, when the Australian military authorities had supplied officers with pamphlets defining the rules with regard to prisoners, etc ...’<sup>13</sup>

No-one was prosecuted for this.

However, some members of that force were later charged with robbery in circumstances amounting to looting. In 1914, looting was regarded as a breach of the rules of war (we would now call it the war crime of pillaging), although there were some who still regarded it as the victors’ right. Five soldiers were charged. They were court martialled and convicted in the field, and sentenced to penal servitude, later

<sup>12</sup> BR, p 183.

<sup>13</sup> BR, p 206, citing Seaforth Mackenzie, *The Australians at Rabaul: The capture and administration of the German possessions in the southern Pacific (1942)*, *The Official History of Australia in the War of 1914-1918: Vol X*, p 55.



commuted to imprisonment with hard labour, for terms of three years and in one case, four years. After the convicts returned to Australia, they alleged that their officers had engaged in much the same behaviour as they had, so a Court of Inquiry sat for several weeks gathering evidence.<sup>14</sup> “A series of subsequent courts martial were then held at Victoria Barracks, Sydney. Those court-martialled in Sydney in the ‘second wave’ of trials were: One colonel, one captain, two lieutenants, and one sergeant.”<sup>15</sup>



*Maj Gen Paton*

The Sydney charges related in most cases to looting from the captured warship *Komet*. In themselves they were relatively trivial, but the colonel was John Paton, 2IC of the force. He was found with silver souvenirs of the *Komet* in his possession and had used warehouses in Newcastle to store goods for other officers. In his defence, he declared that he had indeed taken cutlery from the ship in the belief that he had a right to trophies of war.<sup>16</sup> All of those charged in Sydney were acquitted, leading to allegations of a whitewash.<sup>17</sup> The BR noted, dryly, “[S]ome of the acquittals of officers in Sydney were regarded as unsatisfactory.”<sup>18</sup> Paton was later promoted to Major General. Those convicted in New Guinea had their sentences remitted after serving six months, following controversy in Parliament.

### *The First World War – Middle East*

An event in the Middle East was more serious. I shall return to it later.

### *The Second World War*

There are many allegations of war crimes committed by Australian soldiers in New Guinea, but few about other theatres. As far as I am aware, no Australian was prosecuted. The BR recorded some convincing examples, including the revelations of Maj Gen Paul Cullen:



*Maj Gen Cullen*

“There are persistent allegations as to Australian summary executions of Japanese PWs [*sic*] and wounded. One allegation concerned the bayoneting to death of five to seven Japanese wounded and prisoners. These POW had been captured by one platoon, then killed by the next platoon that came through the position.

...

This allegation concerned 2/1st Battalion [then commanded by Cullen] at Gorari. Major General Cullen told the Australian Broadcasting Corporation reporter, Tony Stephens, that: ‘I did not see the killings but they were reported to me later and I believe the report. I thought it was bad but we were already moving on to another battle’.<sup>19</sup> He continued:

You might say that’s nothing compared to what the Japanese did to our POWs but, for that reason, I refused to give evidence to the War Crimes trial. It was understandable but I felt it was my battalion, my soldiers. I felt pretty guilty about that.<sup>20</sup>

<sup>14</sup> [Commonwealth Parliamentary Debates, House of Representatives, 22 April 1915, pp 2532-3](#), per J A Jensen, Assistant Minister for Defence, representing the Minister for Defence, Senator G F Pearce.

<sup>15</sup> BR, p 208.

<sup>16</sup> Winter, C: “The theatre with the most meagre audience: War trophies from ex-German New Guinea” <https://www.tandfonline.com/doi/full/10.1080/23311983.2015.1073656>, accessed 28 September 2021..

<sup>17</sup> Major General John Paton <https://aif.adfa.edu.au/aif/OrderOfBattle/Generals/paton.html>, accessed 28 September 2021.

<sup>18</sup> BR, p 208.

<sup>19</sup> Kevin Baker, *Paul Cullen, Citizen and Soldier: The Life and Times of Major-General Paul Cullen* (2005), p 145.

<sup>20</sup> *Ibid*, p 146.

As Kevin Baker concludes, however, 'whatever the feelings of the Australian soldiers involved, the killing of prisoners in the aftermath of the battle of Gorari was a war crime'.<sup>21</sup>

Such reports are not unique. Similarly, for example, Philip Dwyer recounts the following:

Take the 1943 diary entry of Eddie Stanton, an Australian posted to Goodenough Island off Papua New Guinea. 'Japanese are still being shot all over the place,' he wrote. 'The necessity for capturing them has ceased to worry anyone. From now on, Nippo survivors are just so much machine-gun practice. Too many of our soldiers are tied up guarding them'.<sup>22</sup><sup>23</sup>

It would be unfair on that evidence to accuse Cullen of covering up what he knew, but he was not proactive in reporting it.

The BR concluded:

"Whilst there was significantly less ambivalence by 1939 to 1945 regarding the killing of prisoners, there were nevertheless credible reports of executions of Japanese prisoners and wounded. There was also some concomitant command non-reporting or inaction in the face of credible contemporaneous reports of this conduct.

...

Australia took an active and robust role in the prosecution of adversaries for war crimes offences. However, legislation to facilitate such prosecutions passed both in 1945 and in 1988 was explicitly tailored to exclude Australian conduct or allegations of war crimes by Australians from scope."<sup>24</sup>



Interestingly, the Australian War Memorial has in its art collection a charcoal drawing by Capt Ivor Hele, an official war artist, entitled "Shooting wounded Japanese, Timbered Knoll". The AWM describes this work on its web site as "Australians of the 2nd Australian Imperial Force shooting wounded Japanese at Timbered Knoll, New Guinea".<sup>25</sup> It has been claimed that this drawing "was long suppressed"<sup>26</sup>, although author and former Australian War Memorial historian Peter Stanley says he was told it was too fragile to be hung.<sup>27</sup> It does not appear in the catalogue for the 1945 "Exhibition of Paintings and Drawings of New Guinea by Captain Ivor Hele".<sup>28</sup>

<sup>21</sup> *Ibid.*

<sup>22</sup> Philip Dwyer, 'Anzacs behaving badly: Scott McIntyre and contested history', *The Conversation*, 29 April 2015 - <http://theconversation.com/anzacs-behaving-badly-scott-mcintyre-and-contested-history-40955>.

<sup>23</sup> BR, pp 215-6.

<sup>24</sup> BR, p 219.

<sup>25</sup> <https://www.awm.gov.au/collection/C170930>, accessed 28 September 2021.

<sup>26</sup> Miles, M and Gerster, R: *Pacific Exposures: Photography and the Australia-Japan Relationship*, <http://press-files.anu.edu.au/downloads/press/n4597/pdf/ch03.pdf>, accessed 29 September 2021.

<sup>27</sup> Daley, P: "Australia has never been good at acknowledging its troops have been guilty of acts of inhumanity", *The Guardian*, 5 September 2020, <https://www.theguardian.com/commentisfree/2020/sep/05/australia-has-never-been-good-at-acknowledging-its-troops-have-been-guilty-of-acts-of-inhumanity>, accessed 29 September 2021.

<sup>28</sup> <https://anzacportal.dva.gov.au/resources/media/file/ivor-hele-1945-art-exhibition-catalogue>.

## Viet Nam

No Australian was prosecuted for any war crime alleged to have been committed during the Vietnam war. However there have been allegations that Australians were guilty of killing civilians, 'revenge killings' and mistreatment of wounded and captured enemy, mistreatment of corpses, and use of 'throwdowns'.



Australian soldiers escort Viet Cong prisoners, <https://vietnamwar.govt.nz/photo/australian-soldiers-escort-viet-cong-prisoners>, (Ministry for Culture and Heritage), updated 28-Apr-2011

The BR states:

"The Vietnam conflict has been a substantial and lingering source of rumour, allegation, and long-delayed investigation in relation to Australian conduct. More than 50 years after they are alleged to have taken place, there is little chance that any of these allegations will ever proceed beyond initial investigatory stage. The challenges implicit in heavy reliance on recollection, and the difficulties of evidence collection in relation to historical offences, when it relates to a foreign war half a century past, are naturally much exacerbated.

The scope of these allegations is also widely contested, and many are difficult to credit."<sup>29</sup>

## The relevant Australian law

Since 2002, war crimes have been elaborately proscribed in the Commonwealth *Criminal Code*.<sup>30</sup> The Code applies generally, not just to members of the armed forces. All war crimes involve conduct which takes place in the context of, and is associated with, an armed conflict, either international or not. The Code applied to Australian soldiers deployed to Afghanistan from 2005 to 2016<sup>31</sup>.

Before 2002 Australian legislation on the subject of war crimes was piecemeal and complex. The Australian parliament passed the first version of the *Defence Act* in 1903; it came into force on 1 March 1904. It provided:

"55. The Military Forces shall at all times, while on active service, be subject to the Army Act save so far as it is inconsistent with this Act; but so that the regulations may prescribe that any provisions of the Army Act shall not apply to the Military Forces."

The Army Act referred to was the British *Army Act* [1881] "and any Acts amending or in substitution for it and for the time being in force". In 1917 "active service" was replaced by "war service".

Other provisions of the *Defence Act* and regulations made the whole scheme even more complex. It is unnecessary to examine the Act comprehensively because as far as I am aware, all allegations of war crimes allegedly committed by Australian soldiers relate to events occurring overseas, when the soldiers were on active or war service.

The BR summarised the position thus:

"In essence, the effect of this complex scheme was that if an Australian serviceperson on active service / war service was to be charged with murder in a factual nexus that involved a breach of the laws and customs of war (such as killing a prisoner, or killing a wounded combatant who was *hors de combat*, or killing a civilian), the elements of, and detailed

<sup>29</sup> BR, p 222.

<sup>30</sup> Subdivisions D, E, F, G and H of Division 268.

<sup>31</sup> The period covered by the BR.



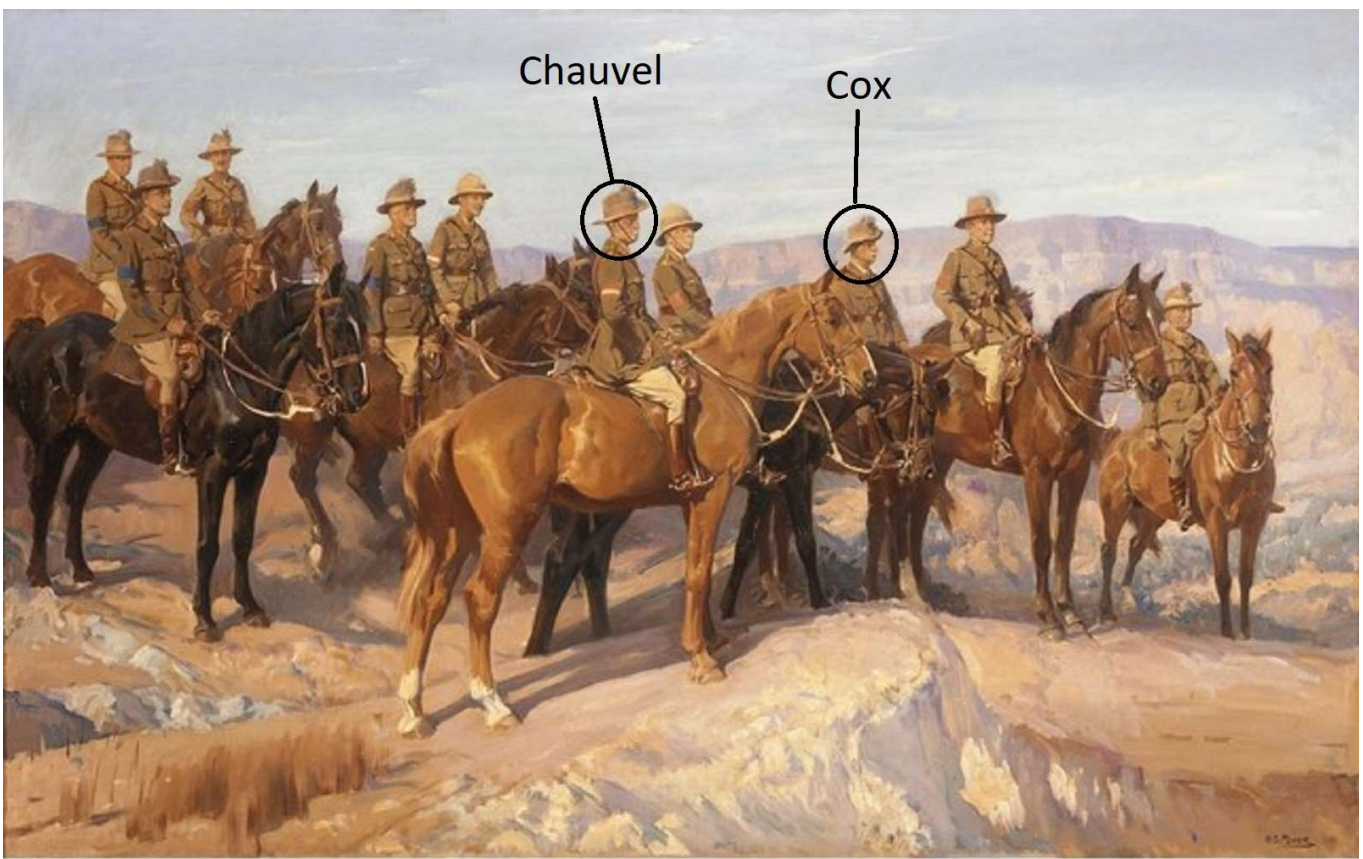
jurisprudence surrounding, the charged murder offence had to be as per the offence of murder in English law, not Australian law.”<sup>32</sup>

That continued to be the position until 1985. This was in my opinion a disgrace to our nation. In 1957 the British replaced their *Army Act* of 1881, but Australia did not want to learn the new British system; it was developing its own. It took nearly 30 more years to do so. The BR recorded<sup>33</sup>:

“In the UK, the *Army Act* was due to be repealed on 1 January 1957, and if no action was taken in Australia, the new UK legislation would automatically apply in Australia. A bill containing a revised *Army discipline code* for Australia was believed, at the time, to be so close to being enacted that the effort required in Australia to implement a new UK discipline code for a short period of time would not be justified. Accordingly, the *Defence Act* was amended to apply the *Army Act* in force as at 29 October 1956, that is, before the *Army Act* 1955 (UK) came into force. No-one at the time could possibly have foreseen that the UK *Army Act* of 1881 would continue to apply under Australian law for nearly 30 years after its repeal in the UK.”<sup>34</sup>

All except perhaps the lawyers among you (and I suspect even they) will be glad to hear that I shall not tax you with detail of the British law between 1914 and 1956.

### A case study: the Surafend Incident



*Leaders of the Light Horse in Palestine, 1918*

In the collection of the Australian War Museum<sup>35</sup> is a painting *Leaders of the Light Horse in Palestine, 1918*, by Harold Septimus Power, who had been an Australian war artist. The scene was a fiction - the painting was “made” in 1926. Among the leaders pictured were Lt Gen Sir Harry Chauvel, commander of the Desert Mounted Corps and Brig Gen C F Cox, commander of the 1<sup>st</sup> Australian Light Horse

<sup>32</sup> BR, p 202.

<sup>33</sup> Citing Bruce Oswald and Jim Waddell (eds.), *Justice in Arms: Military Lawyers in the Australian Army's First Hundred Years*, (2014), p 246.

<sup>34</sup> BR, p 220.

<sup>35</sup> <https://www.awm.gov.au/collection/C173325>.



Brigade. That brigade was part of the Anzac Mounted Division, which also included the New Zealand Mounted Rifles Brigade<sup>36</sup>. The Division was part of the Desert Mounted Corps, which in turn was part of the British Egyptian Expeditionary Force commanded by Gen Edmund Allenby.

On 30 October 1918 Ottoman Turkey surrendered to the allies and the Armistice of Mudros was signed. It took effect at noon the following day. By 9 December, fighting had ceased; the war with Turkey was effectively over.<sup>37</sup>



*Extract from the regional map from the Handbook on Palestine, 1917 edition, Australian Light Horse Studies Centre.*

By then the Desert Mounted Corps was encamped near Surafend<sup>38</sup>, at Kherbit<sup>39</sup> Surafend. Some Scottish soldiers were there too.



*Surafend, Palestine, circa 1918-1919, taken by Wynton Herbert French. Courtesy of Wairarapa Archives, 06-78/3-19.*

<sup>36</sup> <https://anzacportal.dva.gov.au/wars-and-missions/ww1/military-organisation/australian-imperial-force/australian-light-horse#4>, accessed 6 Dec 2020.

<sup>37</sup> <https://www.britannica.com/event/Armistice-of-Mudros>. Of course, no peace treaty had yet been signed.

<sup>38</sup> [http://alh-research.tripod.com/Light\\_Horse/index.blog/1932523/surafend-the-massacre-palestine-10-december-1918-regional-map/](http://alh-research.tripod.com/Light_Horse/index.blog/1932523/surafend-the-massacre-palestine-10-december-1918-regional-map/), accessed 6 December 2020.

<sup>39</sup> "Kherbit", according to the [Australian Light Horse Studies Centre](http://www.alh-research.tripod.com/Light_Horse/index.blog/1932523/surafend-the-massacre-palestine-10-december-1918-regional-map/), but probably "Khirbet". Khirbet is the conjunctive form 'ruin of' (خربة), from the Arabic word for 'ruin' or 'ruin on a hill' (خرب). Consequently the term is found as the first part of many place-names in the Middle East: <https://www.encyclo.co.uk/meaning-of-Khirbet>. It is the spelling favoured by Grainger – see note 40.

The Surafend Incident did not happen in the heat of battle; it took place more than a month after the armistice. It began in the early hours of 10 December 1918. What happened was described in the report of the New Zealand Court of Inquiry, now lodged in the NZ Archive Office:

“The Surafend Affair of 10-11 December 1918 was the premeditated massacre of at least 40 male inhabitants from the Arab village of Surafend, Palestine by soldiers of the ANZAC Mounted Division.

Increasingly tense relations between the local Arab population and soldiers of the ANZAC Mounted Division, coupled with an underlying racism on the part of the soldiers, boiled over on 10 December 1918 when a New Zealand soldier of the Machine Gun Squadron, Leslie Tuhoew Lowry, was killed while attempting to stop the theft of his kit bag. Angry New Zealand troops placed blame on the village of Surafend despite little evidence linking the culprit to the village.

On the evening of 11 December 1918, 200 men, many of them of the New Zealand Mounted Rifles, entered the village of Surafend, expelled the women and children, and then used heavy sticks and bayonets to beat and kill the remaining male villagers. The number of those killed range from 40 to over 100. The village was then burned to the ground.”<sup>40</sup>

The soldiers then burned a neighbouring Bedouin encampment. The New Zealanders were supported by some Australians and Scots.<sup>41</sup>

The BR described what followed:

“In the aftermath of the incident, already tense relations between the Anzac force and the British commander, Allenby, worsened: ‘General Headquarters demanded the men who had led the attack and had been guilty of the killing. The Anzacs stood firm; not a single individual could definitely be charged’.<sup>42</sup> Allenby is reported to have mustered the entire Anzac Mounted Division and addressed them, calling them murderers: ‘Allenby’s outburst left the division sore but unpunished’<sup>43</sup>. A Board of Inquiry obtained no relevant evidence from any witness: ‘It seems that members of the 1st Australian Light Horse Brigade kept their mouths shut because that is exactly what they were ordered to do by their beloved commander’<sup>44</sup>, ...’<sup>45</sup>

### *Brig Gen Cox*

That “beloved commander” was Brig Gen Cox. In 1919 he told the 3rd Light Horse Regiment (part of 1 Bde and a regiment which he had once commanded), “We will speak of this incident no more”.<sup>46</sup>

Cox was not the only person who did not want the incident publicised or remembered.

### *The Canberra Defence establishment*

Volume VII of the *Official History of Australia in the War of 1914–1918*<sup>47</sup> was written by H B Gullett in the early 1920s. During its writing Gullett came under pressure “from the C.G.S., the minister and the

<sup>40</sup> <https://www.flickr.com/photos/archivesnz/32210475828>, accessed 6 December 2020. For a more detailed account, see the English historian Grainger, J D: *The Battle For Syria, 1918–1920*, Boydell Press, London, 2013. Also available as an e-book at <https://vdoc.pub/documents/the-battle-for-syria-19181920-412tcileald0>, accessed 2 October 2021, free download. Grainger wrote, “The New Zealanders persuaded some Australians to join them ...” (p 202).

<sup>41</sup> BR, p 208. See also Interview between military historian Douglas Wyatt and Trooper E H O’Brien of the 3<sup>rd</sup> Light Horse Regiment (part of 1st Australian Light Horse Brigade) recorded in 1988 as part of the Australian War Memorial history series, the text of which can be read at [http://alh-research.tripod.com/Light\\_Horse/index.blog/1932428/surafend-the-massacre-palestine-10-december-1918-ted-obrien-account/](http://alh-research.tripod.com/Light_Horse/index.blog/1932428/surafend-the-massacre-palestine-10-december-1918-ted-obrien-account/), accessed 6 December 2020 .

<sup>42</sup> Henry Gullett, *The Australian Imperial Force in the Sinai and Palestine (1923)*, *The Official History of Australia in the War of 1914-1918*: Vol. VII, p 789.

<sup>43</sup> *Ibid*, p 790.

<sup>44</sup> Paul Daley, *Beersheba: A Journey Through Australia's Forgotten War* (2009), p 258.

<sup>45</sup> BR, p 208, footnotes omitted. The BR account was mainly drawn from *Beersheba: A Journey through Australia's Forgotten War* by Paul Daley.

<sup>46</sup> Docker, J *et al* (eds): *Passionate Histories*, p 58, citing Wyatt, DM, ‘The Surafend Incident’, in *Tasmania's A.I.F. Lighthorsemen*, Peter James Pickering (ed), pp 96–101.

<sup>47</sup> Entitled “The Australian Imperial Force in Sinai and Palestine 1914–1918”.

secretary of the Defence Department” to delete or alter his account of the incident.<sup>48</sup> He did not delete it, writing that what happened “cannot be justified”, and that Surafend “should not be forgotten”.<sup>49</sup>

### *Lt Gen Chauvel*

It is highly likely that Lt Gen Chauvel applied similar pressure. Chauvel believed the incident should have been suppressed. In a letter in 1936 to A P Wavell, the biographer of Gen Allenby, he wrote:

“I don’t know of anything of much interest that has been written about him [Allenby] in Australia. There are a few ‘incidents’ in the Australian official history. I would miss out anything about the Surafend affair. It should never have been mentioned in the Australian Official History and has been long forgotten in Australia.”<sup>50</sup>

In December 1922 Gullett wrote to C E W Bean, general editor of the *Official History*, to warn “of the possibility of ‘trouble with Chauvel’ over his [Gullett’s] account of the Surafend outrage”.<sup>51</sup> Something must have triggered that letter, which suggests Gullett certainly felt under pressure from Chauvel.

The soldiers immediately involved were guilty of mass murder and arson<sup>52</sup>. Quite possibly Cox was an accessory after the fact to murder or was guilty of attempting to obstruct the course of justice. The facts are unclear precisely because they were suppressed and we may assume that none of the brigade would have provided evidence against him. Chauvel does not appear to have committed any offence.

### **The consequences of covering up**

The BR summarised the consequences:

“The failure to comprehensively deal with allegations and indicators as they begin to emerge and circulate is corrosive—it gives spurious allegations life, and serious allegations a degree of impunity. The consequences of not addressing such allegations as and when they eventually arise are measured in decades.”<sup>53</sup>

I return to Lt Col Pope’s question: “If the state and its military and political leaders consider it an obligation to prosecute their own troops for actions taken on the battlefield, rather than support and protect them, why would anyone in future sign up to fight for such a country?” Would prosecutions deter young Australians from signing up? I suggest the answer is, No. Only a tiny minority of the Special Operations Task Group is alleged to have committed war crimes. Most are said to be ashamed and cooperating in the investigation. Most young Australians, I suggest, obey the law and believe in the rule of law.

And what of Pope’s view that those who confessed to war crimes should be dealt with severely? If those who confess are dealt with severely, but those who do not confess are not prosecuted, how many perpetrators are going to confess? And why should those who refuse to cooperate in the administration of justice by confessing, and who are later convicted, not be treated even more severely than those who do confess? It defies common sense. One wonders whether Pope’s real view is that those who confess should be severely punished for breaking the code of silence.

<sup>48</sup> See the Introduction to that volume by A J Hill, [https://www.awm.gov.au/official-histories/first\\_world\\_war/volVII/introduction](https://www.awm.gov.au/official-histories/first_world_war/volVII/introduction).

<sup>49</sup> See generally *Official History*, vol VII, pp 788–791. Consider for yourself whether in fact Gullett at least sought to excuse what happened.

<sup>50</sup> Daley, P: *Beersheba: A Journey through Australia’s Forgotten War*, pp 298-9.

<sup>51</sup> Hill, *loc cit*, n 48. Hill wrote that the expected trouble did not eventuate, but it would be very surprising had Chauvel not communicated his view to Gullett. Bean replied to Gullett strongly urging him to stand firm if Chauvel or any other officer sought changes to safeguard a military reputation.

<sup>52</sup> Whether the Surafend incident was what would today be a war crime, happening as it did after Turkey had surrendered and an armistice had been signed but before a peace treaty was in existence, is beside the point.

<sup>53</sup> BR, Executive Summary, p 183.

**Conclusion**

Australia and its society are founded on two pillars: democracy and the rule of law. Murderers should not escape justice simply because they have friends in high places. And if the murderers and their friends are part of the defence force, the very existence of democracy is threatened. Australia is not a banana republic. Our armed forces are bound by law and are subordinate to the elected government. If we forget that, our society is imperilled.