

The Inspector-General of the Australian Defence Force Afghanistan Inquiry Report and the applicability of Additional Protocol II to intervening foreign forces

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Abstract

This article critiques the articulation of the legal framework applicable to Australian Defence Force operations in Afghanistan found in the Inspector-General of the Australian Defence Force Afghanistan Inquiry Report (Brereton Report). In particular, using the Australian experience in Afghanistan as a case study, the article argues, on the basis of the rules of treaty interpretation, that where a foreign

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State party to Additional Protocol II (AP II) intervenes in a non-international armed conflict (NIAC) to which AP II applies, that foreign State is bound by AP II, in addition to the host State and non-State armed actors that are parties to the NIAC. The article concludes by outlining the reasons why the Brereton Report's silence in relation to AP II matters.

Keywords: Australia, Afghanistan, non-international armed conflict, Additional Protocol II, foreign armed forces.

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The Inspector-General of the Australian Defence Force's (IGADF) *Afghanistan Inquiry Report* (Brereton Report)¹ concludes that there exists credible information² to suggest that war crimes – specifically unlawful killings and cruel treatment – were carried out by members of the Australian Defence Force (ADF) Special Operations Task Group (SOTG).³ In addition to a series of recommendations aimed at addressing the systemic organizational and operational failings identified as having allowed such conduct to have taken place and to have gone unreported for so long, the Report recommends the referral for criminal investigation of nineteen individuals in relation to twenty-three incidents,⁴ with a view to prosecution in civilian criminal courts.⁵ The commissioning of the Brereton Report and the Chief of the Defence Force's acceptance of its recommendations,⁶ together with the establishment by the Australian government of the Afghanistan Inquiry Implementation Oversight Panel to provide oversight and assurance of Defence's broader response in relation to cultural, organizational and leadership change,⁷ and

- 1 IGADF, *Inspector-General of the Australian Defence Force Afghanistan Inquiry Report*, 2020 (Brereton Report), publicly redacted version available at: www.defence.gov.au/about/reviews-inquiries/afghanistan-inquiry (all internet references were accessed in April 2023).
- 2 In the words of the Report, this “is not a finding, on balance of probability let alone to a higher standard”; rather, it is said to be “analogous to a finding that there are reasonable grounds for a supposition” (*ibid.*, Chap. 1.01, para. 22, Chap. 1.04, para. 37). Noting that the IGADF Inquiry was not confined to evidence that would be admissible in a court of law, and that there may not be admissible evidence to prove a matter beyond reasonable doubt in such a court (Chap. 1.01, para. 23, Chap. 1.04, para. 39), the Report nonetheless states that “findings that there is ‘credible information’ of a war crime have not been lightly reached. Generally, the Inquiry has required eye-witness accounts, corroboration, persuasive circumstantial evidence, and/or strong similar fact evidence, for such a finding” (Chap. 1.01, para. 24). The Report subsequently states that “the Inquiry has generally adopted the approach that unless there is a reasonable prospect of a criminal investigation obtaining sufficient evidence to charge a particular person with a specified crime, it has not made a finding that there is ‘credible information’ that the person has committed the crime” (Chap. 1.04, para. 42).
- 3 *Ibid.*, Chap. 1.01, para. 15.
- 4 The Report specifies that an identified twenty-three incidents concerned the killing of thirty-nine individuals and the cruel treatment of two, and involved twenty-five current or former ADF personnel as either principals or accessories, “some on a single occasion and a few on multiple occasions”. *Ibid.*, Chap. 1.01, para. 16.
- 5 *Ibid.*, Chap. 1.01, paras 21, 74.
- 6 Chief of the Defence Force, “Statement on IGADF Afghanistan Inquiry”, 19 November 2020, available at: <https://news.defence.gov.au/media/media-releases/chief-defence-force-statement-igadf-afghanistan-inquiry>.
- 7 Scott Morrison, Linda Reynolds and Peter Dutton, “Joint Statement on IGADF Inquiry”, 12 November 2020, available at: www.minister.defence.gov.au/minister/lreynolds/statements/joint-statement-statement-igadf-inquiry.

an Office of the Special Investigator (OSI) to conduct criminal investigations,⁸ as well as Defence's adoption of its Afghanistan Inquiry Reform Plan,⁹ make a strong statement about Australia's commitment to its international law obligations. This is particularly notable when the Australian approach is contrasted with the responses to date of other members of the International Security Assistance Force (ISAF) whose personnel have been accused of committing violations of international law in Afghanistan.¹⁰

At the same time, the Brereton Report is open to critique on the basis that it provides an incomplete account of the legal framework applicable to the ADF in Afghanistan between 2005 and 2016. This matters for two reasons. The first is specific to the Australia–Afghanistan context. The scant account of applicable international humanitarian law (IHL) found in the Report raises the question of whether all of Australia's legal obligations were taken into account in assessing the lawfulness of the conduct of the ADF's operations in Afghanistan. This is relevant both to the adequacy of the measures taken in response to the alleged violations of IHL that were identified in the Report and the justice deserved by Afghan victims. The second reason is relevant both to other States and to other conflicts. It relates to the Report's specific failure to acknowledge the applicability of Additional Protocol II to the Geneva Conventions (AP II)¹¹ to Australia's operations. The question of the extraterritorial application of AP II is important because it has a clear operational impact and because it is unsettled: very few authors have addressed the issue, and only a handful go beyond an assertion as to what they claim is the proper interpretation of AP II's Article 1(1), which governs the Protocol's material field of application. The very limited works that are on point are divided, with some authors concluding that AP II does not have

8 See, further, the OSI website, available at: www.osi.gov.au. Importantly, the OSI's mandate is not limited to investigating the individuals and incidents referred to it as a result of the recommendations of the Brereton Report. In March 2023, a former ADF member was charged with one count of the war crime of murder. This is the first war crime charge of murder to be laid against a serving or former ADF member under Australian law. The individual is expected to be the first of multiple persons to be charged with war crimes as a result of the OSI investigation. See OSI, "Former Australian Soldier Charged with War Crime", media release, 20 March 2023, available at: www.osi.gov.au/news-resources/former-australian-soldier-charged-war-crime.

9 See, further, Australian Department of Defence, "Defence Response", available at: www.defence.gov.au/about/reviews-inquiries/afghanistan-inquiry/defence-response.

10 At the International Criminal Court Assembly of States Parties meeting in December 2020, then-president Chile Eboe-Osuji made specific comment on the Brereton Report and the Australian government's initial response thereto and said: "So far, these developments promise much as a correct demonstration of the doctrine of complementarity at work. There is, indeed, seldom a war in which a soldier does not commit a war crime, much to the embarrassment of their commanding officers. This is so, however disciplined the armed force in question. It is a show of leadership in the ethos of the rule of law for the national authorities concerned to conduct the appropriate inquiry and take disciplinary and prosecutorial action against the culprits. Australia deserves all the credit for the promise of being an exemplar in this regard." Chile Eboe-Osuji, "Valedictory Statement and End of Mandate Overview Including Remarks Delivered at the Opening of the 19th Session of the Assembly of States Parties", 14 December 2020, available at: https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/2020-ASP-Valedictory-Statement.pdf.

11 Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II).

extraterritorial effect, some reaching the opposite conclusion, and others simply saying that this as an unresolved question.¹²

The present article argues that where a foreign State party to AP II intervenes in a non-international armed conflict (NIAC) to which AP II applies, that intervening State is bound by AP II, in addition to the host State and armed non-State actors (ANSAs) that are parties to the NIAC. In order to set the scene, the article first canvasses the historic reluctance of States to acknowledge the existence of NIACs and the applicability of IHL, arguing that there are sound reasons to believe that this reluctance has diminished in recent years, especially for third States intervening in a foreign NIAC. Next, the Brereton Report's articulation of the legal framework applicable to the ADF's operations in Afghanistan is examined. It is shown that the Report only briefly and broadly references IHL, rather than methodically establishing that the conflict in Afghanistan was at all relevant times non-international in nature and that Australia was a party to the conflict, and identifying the IHL rules that applied to Australia's operations. In this context, the rules of treaty interpretation are applied to establish that the better view is that the relevant IHL rules included those contained in AP II – a view that Australia has in fact already put on the public record. In this context, the article concludes with an elaboration of the reasons why the Brereton Report's silence on this point matters.

Acknowledging the existence of non-international armed conflicts and the rules that apply therein

Notwithstanding the occurrence of devastating international armed conflicts (IACs) in the twenty-first century, NIACs continue to represent the dominant form of armed violence around the world.¹³ Whether a government is seeking to contain armed violence between two or more ANSAs on its territory, is itself engaged in armed violence with an ANSA, or has been asked to intervene in a situation of armed violence to help a host government defeat or contain an ANSA, the State(s) concerned (and other relevant actors) must assess whether or not a specific situation is properly characterized as a NIAC, principally because such an assessment will determine whether IHL applies as a matter of law.

It is well established that identification of a NIAC is not always straightforward: indeed, in a 2009 issue of the *International Review of the Red Cross* dedicated to the subject of conflict classification, Toni Pfanner, then editor-in-chief, described the matter as “the Achilles heel of international humanitarian law”.¹⁴ It can be difficult to confirm relevant facts on the ground, but a greater challenge is posed by the fact that (1) differing and somewhat inconsistent

12 See below notes 59–69 and accompanying text.

13 See, for example, the Geneva Academy's Rule of Law in Armed Conflict database, available at: <https://geneva-academy.ch/research/rule-of-law-in-armed-conflicts-rulac>.

14 Toni Pfanner, “Editorial”, *International Review of the Red Cross*, Vol. 91, No. 873, 2009, p. 5.

definitions of a NIAC exist in various treaties¹⁵ and under customary international law¹⁶; (2) these definitions are of such a high level of generality that they provide little guidance in non-obvious cases; (3) very few judicial decisions have concerned borderline situations, or situations determined not to amount to a NIAC; and (4) factors identified by international criminal tribunals to assist with the assessment task¹⁷ are, unsurprisingly given the context in which they were developed, more suited to *ex post facto* analysis.

The first treaty provision to extend (minimal) rules of IHL to NIACs, Article 3 common to the four Geneva Conventions of 1949 (common Article 3, CA3), does not provide a definition of NIAC, but rather states that its protections apply in “armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties”. The drafters of CA3 deliberately refrained from including a definition.¹⁸ In part this was because it proved impossible to agree on a set of criteria, but it was also because, at the time, a majority of States were resistant to the notion of IHL applying in NIACs, and did not want the application of the rules to have any degree of automaticity.¹⁹ This was a consequence of the fact that (1) States were opposed to the general idea of international law governing matters wholly within their borders (which was in turn perceived as enabling the interference of external

- 15 Principally, AP II, Art. 1(1); Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002) (Rome Statute), Art. 8(2)(d), 8(2)(f).
- 16 It is broadly agreed that the customary definition of a NIAC (which also establishes the applicability of Article 3 common to the four Geneva Conventions (common Article 3, CA3)) is that set out in International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Duško Tadić*, Case No. IT-940101A, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1996, para. 70, which defined a NIAC as existing whenever there is “protracted armed violence between governmental authorities and organised armed groups or between such groups within a State”.
- 17 See, for example, ICTY, *The Prosecutor v. Fatmir Limaj, Isah Musliu and Haradin Bala*, Case No. IT-03-66-T, Judgment (Trial Chamber), 30 November 2005, para. 86; ICTY, *The Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Case No. IT-04-84-T, Judgment (Trial Chamber), 3 April 2008, para. 49; ICTY, *The Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-T, Judgment (Trial Chamber), 10 July 2008, paras 177, 178, 183; ICTY, *The Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-A, Judgment (Appeals Chamber), 19 May 2010, paras 22, 177; ICTY, *The Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-T, Judgment with Confidential Annex (Trial Chamber), 23 February 2011, para. 1523.
- 18 International Committee of the Red Cross (ICRC), *Report on the Work of the Preliminary Conference of National Red Cross Societies for the Study of the Conventions and of Various Problems Relative to the Red Cross*, Geneva, July 26–August 3, 1946, pp. 14–15, available at: https://library.icrc.org/library/docs/CD/CSN_1946_CONFPRE_ENG_01.pdf; ICRC, *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims*, Geneva, 14–26 April 1947), pp. 8–9; ICRC, *Revised and New Draft Conventions for the Protection of War Victims*, Approved and Amended by the 17th International Red Cross Conference, Geneva, 1948, Art. 2, pp. 9–10, available at: https://library.icrc.org/library/docs/CI/CI_1948_PROJET_ENG_01.pdf; *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. 2, Section B, Federal Political Department, Berne, 1949, Special Committee of the Joint Committee, Summary Records of 41 Meetings, Reports to the Joint Committee and Report to the Plenary Assembly, pp. 40–50, 78–79, 82–84, 93–95, 97–102, 107–109, 120–129, available at: https://library.icrc.org/library/docs/CD/CD_1949_ACTES_ENG_25.pdf, and Minutes of the Plenary Meetings, pp. 268–269, 325–339, available at: https://library.icrc.org/library/docs/CD/CD_1949_ACTES_ENG_29.pdf.
- 19 Boyd Van Dijk, *Preparing for War: The Making of the Geneva Conventions*, Oxford University Press, Oxford, 2020, pp. 116–117, 122, 124, 125, 103, 134, 143.

actors);²⁰ (2) States were concerned that the applicability of IHL rules in NIACs would confer a degree of recognition on ANSAs (undermining the authority of the government, and providing an opportunity for ANSA conduct to be characterized as “acts of war” in order to escape criminal punishment);²¹ and (3) the applicable IHL rules were seen as a constraint on a State’s freedom of action,²² as reflected in the fact that the prevailing view of humanitarians at the time was that IHL should be applied as widely as possible.²³

Perhaps inevitably, the omission of a definition allowed many States to deny the applicability of CA3 to situations of armed violence. This resistance in large part explains why, when more elaborate rules applicable in NIACs were adopted under AP II, its scope of application was carefully restricted under Article 1(1), which refers to

all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.²⁴

20 As expressed by the ICTY Appeals Chamber, “States preferred to regard internal strife as rebellion, mutiny and treason coming within the purview of national criminal law and, by the same token, to exclude any possible intrusion by other States into their own domestic jurisdiction. This ... was clearly sovereignty-oriented and reflected the traditional configuration of the international community, based on the coexistence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demands”. ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision (Appeals Chamber), 2 October 1995, para. 96; David Kretzmer, “Rethinking the Application of IHL in Non-International Armed Conflicts”, *Israel Law Review*, Vol. 42, No. 1, 2009, pp. 21–22.

21 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 1: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, pp. 43–44; Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, 2nd ed., Martinus Nijhoff, The Hague, 2013, pp. 693–694; Fionnuala Ní Aoláin, “The Relationship Between Situations of Emergency and Low-Intensity Armed Conflict”, *Israel Yearbook on Human Rights*, Vol. 28, 1998, pp. 100–101; B. Van Dijk, above note 19, pp. 114–116, 118, 122, 132. This accounts for the inclusion of paragraph 4 of CA3, which provides that “[t]he application of the preceding provisions shall not affect the legal status of the Parties to the conflict”.

22 Dapo Akande, “Classification of Armed Conflicts: Relevant Legal Concepts”, in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2015, p. 37; Marko Milanovic and Vidan Hadzi-Vidanovic, “A Taxonomy of Armed Conflict”, in Christian Henderson and Nigel White (eds), *Research Handbook on International Conflict and Security Law*, Edward Elgar, Cheltenham, 2013, pp. 268–269; Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, Cambridge University Press, Cambridge, 2010, p. 57; D. Kretzmer, above note 20, pp. 21–22.

23 J. Pictet (ed.), above note 21, p. 50.

24 Paragraph 2 of Article 1 further specifies that the Protocol does not apply “to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts”.

As a result of the threshold criteria set out in Article 1(1), it is generally agreed that while CA3 applies in all NIACs, as a matter of treaty law AP II applies to a more limited subset of NIACs—the price paid for reaching agreement on (somewhat) more expansive rules. Specifically, AP II only applies to those NIACs to which governmental armed forces are a party. The application of AP II also requires a greater degree of organization on the part of ANSAs in addition to requiring that ANSAs exercise control over territory, such that they are able to carry out sustained and concerted military operations and implement the Protocol. Finally, it is generally agreed that AP II requires a higher intensity of violence compared to the threshold of hostilities required for a situation of armed violence to be classified as a NIAC generally.²⁵

Since CA3 and AP II were concluded, the reach of international law into internal matters has been normalized, at least to a degree, with the growth of international human rights law (IHRL) and international criminal law in particular, such that resistance to the applicability of international law to matters taking place wholly within the borders of a State is not as sharp as it was at the time of the adoption of the Geneva Conventions and their Additional Protocols.²⁶ With the emergence of ANSAs with sophisticated transnational capacity, such as Al-Qaeda and ISIS, recognition also appears to have become a second-order

25 On the distinction between NIACs governed by CA3 and customary IHL and those to which AP II also applies, see Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds), *Commentary on the Additional Protocols to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987 (ICRC Commentary on the APs), paras 4447, 4453, 4457; Sylvie Junod, “Additional Protocol II: History and Scope”, *American University Law Review*, Vol. 33, No. 1, 1983, pp. 35–38; International Law Association, Use of Force Committee, *Final Report on the Meaning of Armed Conflict in International Law*, The Hague, 2010, pp. 12–13; Dietrich Schindler, *The Different Types of Armed Conflict According to the Geneva Conventions and Protocols*, Hague Academy of International Law, The Hague, 1979, pp. 148–149; Derek Jinks, “September 11 and the Laws of War”, *Yale Journal of International Law*, Vol. 28, 2003, pp. 26–27; Jelena Pejic, “Status of Armed Conflicts”, in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2007, pp. 87–88; Sylvain Vit e, “Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations”, *International Review of the Red Cross*, Vol. 91, No. 873, 2009, pp. 75–80; A. Cullen, above note 22, pp. 102–107; David Graham, “Defining Non-International Armed Conflict: A Historically Difficult Task”, *International Law Studies*, Vol. 88, 2012, p. 47; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, pp. 182–192; D. Akande, above note 22, pp. 51–56; Yoram Dinstein, *Non-International Armed Conflicts in International Law*, Cambridge University Press, Cambridge, 2014, pp. 38–48; M. Milanovic and V. Hadzi-Vidanovic, above note 22, pp. 24–28; Marco Pedrazzi, “Additional Protocol II and Threshold of Application”, in Fausto Pocar and Gian Luca Beruto (eds), *International Institute of Humanitarian Law: The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives; 40th Round Table on Current Issues of International Humanitarian Law*, Milan, FrancoAngeli, 2018, pp. 48–51; Jann Kleffner, “The Legal Fog of Illusion: Three Reflections on Organisation and Intensity as Criteria for the Scope of the Law of Non-International Armed Conflict”, *International Law Studies*, Vol. 95, 2019, pp. 163–164; Marco Sassoli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, Northampton, 2019, pp. 180–184; International Criminal Tribunal for Rwanda (ICTR), *The Prosecutor v. Jean-Pierre Akayesu*, Case No. ICTR-96-4-T, Judgment (Trial Chamber), 2 September 1998, para. 618; ICTR, *The Prosecutor v. George Rutaganda*, Case No. ICTR-96-3-T, Judgment and Sentence (Trial Chamber), 6 December 1999, para. 94.

26 This process arguably reached a high point with the adoption of the 2005 *World Summit Outcome Document*, paras 138–139 of which articulate States’ understanding of the Responsibility to Protect. 2005 *World Summit Outcome Document*, UNGA Res. 60/1, 16 October 2005.

issue.²⁷ Perhaps more importantly, with the development of IHRL, the perception that a law enforcement characterization of a situation of armed violence provides greater freedom of action has greatly receded, such that it is now widely acknowledged that IHL's rules are more permissive than those of IHRL, particularly in relation to the use of lethal force and detention, and thus carry an operational advantage for States.²⁸ As Claus Kreß has written, in the context of his argument that the threshold for the application of customary IHL is likely congruous with that of CA3,

[a]t first glance, this expansion of the scope of application of the law of non-international armed conflict may seem surprising because it implies the recognition by States to be bound by quite a wide range of obligations flowing from international humanitarian law. ... Yet, in light of the (perceived) threat posed by violent non-State actors, States seem to be more interested in availing themselves of the wider powers they can derive from the application of the law of non-international armed conflict (compared with international human rights law) than they are concerned by the restraining effect of [IHL's] obligations.²⁹

At the same time, States are increasingly conscious of the fact that their failure to set out their views consistently on the proper interpretation of IHL's rules (including the test for the legal framework's applicability) has created a vacuum that has been filled by other actors, including courts and tribunals, the International Committee of the Red Cross (ICRC), expert groups, and scholars, in a way that might not always reflect the position of States,³⁰ leading at least some States to attempt to reclaim this space.³¹ In addition, the growth of international criminal

27 See, further, Tom Kaden and Christoph Günther, "Shifting Recognition Orders: The Case of the Islamic State", in Anna Geis, Maéva Clément and Hanna Pfeifer (eds), *Armed Non-State Actors and the Politics of Recognition*, Manchester University Press, Manchester, 2021, p. 88.

28 Eliav Lieblich, *International War and Civil Wars: Intervention and Consent*, Routledge, London, 2013, p. 50; M. Milanovic and V. Hadzi-Vidanovic, above note 22, pp. 306–307; M. Sassòli, above note 25, p. 183; D. Kretzmer, above note 20, pp. 21–25; Rob McLaughlin, "Legal-Policy Considerations and Conflict Characterisation at the Threshold between Law Enforcement and Non-International Armed Conflict", *Melbourne Journal of International Law*, Vol. 13, No. 1, 2012, pp. 104–105; Sasha Radin and Jason Coats, "Autonomous Weapons Systems and the Threshold of Non-International Armed Conflict", *Temple International and Comparative Law Journal*, Vol. 30, No. 1, 2016, pp. 138–139.

29 Claus Kreß, "Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts", *Journal of Conflict and Security Law*, Vol. 15, No. 2, 2010, p. 260.

30 Michael N. Schmitt and Sean Watts, "The Decline of International Humanitarian Law *Opinio Juris* and the Law of Cyber Warfare", *Texas International Law Journal*, Vol. 50, Symposium Issue 2, 2015; Sandesh Sivakumaran, "Making and Shaping the Law of Armed Conflict", *Current Legal Problems*, Vol. 71, No. 1, 2018; Nora Stappert, "A New Influence of Legal Scholars? The Use of Academic Writings at International Criminal Courts and Tribunals", *Leiden Journal of International Law*, Vol. 31, No. 4, 2018; Carrie McDougall, "The Other Enemy: Transnational Terrorists, Armed Attacks and Armed Conflicts", in Leila Nadya Sadat (ed.), *Seeking Accountability for the Unlawful Use of Force*, Cambridge University Press, Cambridge, 2018, pp. 245–251; Knut Dörmann, "The Role of Nonstate Entities in Developing and Promoting International Humanitarian Law", *Journal of Transnational Law*, Vol. 51, No. 3, 2018.

31 For an explanation of this phenomenon, see the position of US and Australian legal advisers: Harold Koh, "The Legal Adviser's Duty to Explain", *Yale Journal of International Law*, Vol. 41, No. 1, 2016; Brian Egan, "International Law, Legal Diplomacy and the Counter-ISIL Campaign: Some Observations",

law means that the consequences of violating IHL are now more real, at least where a relevant court or tribunal has jurisdiction, such that there may be a pressing need to accurately identify the applicable rules of IHL. In situations where one or more foreign States are intervening in a situation of violence at the request of a host State, it is also desirable for military partners to have shared views on the classification of a situation for reasons such as coalition-building and interoperability, as well as public messaging. In other words, while States once deliberately maintained ambiguity, there is reason to believe that at least some States today see an imperative to classify situations of armed violence accurately and to precisely determine the rules of IHL that apply therein.³²

The Brereton Report's description of the legal framework that governed the ADF's operations in Afghanistan

There is certainly no evidence of any reluctance to identify the situation in Afghanistan as a NIAC in the Brereton Report – although the Report's articulation of the IHL rules applicable to the ADF in Afghanistan leaves much to be desired.

In describing the legal framework applicable to ADF operations in Afghanistan between 2005 and 2016, the Assistant Inspector-General of the Australian Defence Force, Major-General the Hon. Paul Brereton, author of the Report, states:

The Government of Australia rightly considered the conflict in Afghanistan to be an armed conflict not of an international character; that is, a conflict between the sovereign Afghan Government on the one hand and insurgents, foreign fighters and remnants or supporters of the former Taliban regime on the other. Thus, Common Article 3 of the Geneva Conventions applies as a matter of legal obligation. In addition, certain provisions of the Geneva Conventions are applicable as a matter of customary international law. As established customary international law, Common Article 3 applied to all ISAF members, as was recognised by the US Supreme Court in 2005, in *Hamdan v Rumsfeld*.³³

The Report then states: "It follows that the applicable offences in Division 268 of the Criminal Code are those concerned with war crimes committed in the course of an armed conflict that is not an international armed conflict, and in particular those in

International Law Studies, Vol. 92, 2016, pp. 244-245; John Reid, "Ensuring Respect: The Role of State Practice in Interpreting the Geneva Conventions", *ILA Reporter*, 9 November 2016, available at: <https://ilareporter.org.au/2016/11/ensuring-respect-the-role-of-state-practice-in-interpreting-the-geneva-conventions-john-reid/>.

32 This may not necessarily correspond to a willingness to concede publicly that a NIAC is in existence: as Rob McLaughlin has explained in detail, there are "significant political, social, operational, reputational and economic consequences that flow from a characterisation decision". R. McLaughlin, above note 28, p. 107.

33 Brereton Report, above note 1, Chap. 1.10, para. 11; see also para. 14.

Subdivisions F and G.”³⁴ As the Report notes, Subdivisions F and G of the Australian Commonwealth Criminal Code respectively mirror Articles 8(2)(c) and 8(2)(e) of the Rome Statute of the International Criminal Court, with Subdivision F containing war crimes that are serious violations of CA3, and Subdivision G covering war crimes that are “other serious violations of the laws and customs applicable in an armed conflict that is not an international armed conflict”.³⁵ The Report concludes that the war crime of murder (Subdivision F, Section 268.70) was the offence “most relevant” to the Inquiry,³⁶ with the war crime of cruel treatment (Subdivision F, Section 268.72) identified as being “also relevant”.³⁷

A critique of the Brereton Report’s analysis of the applicable international law

The correct identification of the legal framework applicable to a military operation is crucial because it determines what bodies of international law apply, as well as the specific rules in the event that IHL is engaged, thereby informing the international obligations of the State, including under the law of State responsibility, as well as the obligations of individual personnel as a matter of international and domestic criminal law. For this reason, it is concerning that the Brereton Report’s conclusions in relation to this issue are scant (a single paragraph in the 465-page public redacted version of the Report is devoted to the identification of the applicable rules of IHL),³⁸ as well as imprecise and incomplete.

It is agreed that at all times relevant to the conduct considered by the Brereton Report, the conflict in Afghanistan was properly classified as a NIAC. This classification of the conflict is widely accepted,³⁹ but it would have been

34 *Ibid.*, Chap. 1.10, para. 12.

35 *Ibid.*, Chap. 1.10, para. 16.

36 *Ibid.*, Chap. 1.10, para. 19.

37 *Ibid.*, Chap. 1.10, para. 21. It is noted that Sections 268.70 and 268.72 of the Commonwealth Criminal Code were amended by the Criminal Code Amendment (War Crimes) Act 2016 (Cth) at the end of 2016, with the effect of narrowing the scope of the offences such that they now exclude actions taken against members of an organized armed group (in addition to persons not taking an active part in the hostilities). The controversial amendments only had prospective effect and thus do not apply to the conduct that is the subject of the Brereton Report.

38 Brereton Report, above note 1, Chap. 1.10, para. 11. An additional fourteen paragraphs set out the applicable crimes under the Commonwealth Criminal Code, with a following fifteen paragraphs concerning accessory liability, and four paragraphs devoted to defences, before the chapter turns to consider the role of the Attorney-General and the International Criminal Court in war crimes prosecutions, and finally the Defence Force Discipline Act 1982 (Cth). Compare this, for example, to the fifty-nine pages devoted to a historical review of Australia’s approach to allegations of war crimes in Chapter 1.08 of the Report.

39 See, for example, Michael N. Schmitt, “Targeting and International Humanitarian Law in Afghanistan”, *Israel Yearbook on Human Rights*, Vol. 39, 2009, pp. 100–101; Robin Geiß and Michael Siegrist, “Has the Conflict in Afghanistan Affected the Rules on the Conduct of Hostilities?”, *International Review of the Red Cross*, Vol. 93, No. 881, 2011, pp. 13–15; Annyssa Bellal, Gilles Giacca and Stuart Casey-Maslen, “International Law and Armed Non-State Actors in Afghanistan”, *International Review of the Red Cross*, Vol. 93, No. 881, 2011, pp. 51–52.

useful for the Report to have included a brief explanation for the conclusion, given that it is not something that is obvious to a non-expert reader. This could have been done succinctly. In 2001, there was a pre-existing NIAC in Afghanistan between the Taliban government and the Northern Alliance. The initial use of force by the United States and United Kingdom against Afghanistan in response to the 9/11 attacks gave rise to an IAC that came into existence in parallel to this NIAC. Following the conclusion of the Bonn Agreement in December 2001 and the UN Security Council's establishment of ISAF under Resolution 1386⁴⁰ in June 2002, the Loya Jirga was convened that established the Karzai government, which was recognized as the authority in effective control in Afghanistan. Thus, in late 2001, or mid-2002 at the latest, the IAC ended, and (generally speaking) ISAF members became party to the NIAC between the government of Afghanistan on the one hand and a range of ANSAs (including the Taliban and Al-Qaeda) on the other. This reflects the prevailing view that when one or more foreign States intervene in support of a host government that is a party to a NIAC, that armed conflict retains its non-international character (as distinct from a scenario where a foreign State intervenes in support of an ANSA).⁴¹

The Brereton Report fails to consider whether Australia's participation in ISAF made it a party to the NIAC in Afghanistan as a matter of law. IHL does not clearly articulate a test for when a State becomes, or for that matter ceases to be, a party to an armed conflict. Assessments generally hinge on the degree and nature of a State's participation in military operations. The ICRC has advanced a support-based approach that focuses on the issue of whether an intervening State's activities "have a direct impact on the opposing Party's ability to carry out military operations", distinguishing this from activities "that enable the Party that benefits from the participation of the multinational forces to build up its military capacity/capabilities",⁴² although some have criticized this as setting the bar too low.⁴³ Nevertheless, in light of the fact that Australia was involved directly in combat operations against the ANSAs in Afghanistan over an extended period of time, it can safely be concluded that from 2005, Australia was a party to the NIAC in Afghanistan as a matter of law.

40 UNSC Res. 1386, 20 December 2001.

41 Lindsey Cameron *et al.*, "Article 3 – Conflicts Not of an International Character", in ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016, para. 404.

42 *Ibid.*, para. 446; Tristan Ferraro, "The ICRC's Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable to this Type of Conflict", *International Review of the Red Cross*, Vol. 97, No. 900, 2015, p. 1231. According to Ferraro, for an intervening State to become a party to a NIAC, the following conditions must be satisfied: "(1) there is a pre-existing NIAC taking place on the territory where the third power intervenes; (2) actions related to the conduct of hostilities are undertaken by the intervening power in the context of that pre-existing conflict; (3) the military operations of the intervening power are carried out in support of one of the parties to the pre-existing NIAC; and (4) the action in question is undertaken pursuant to an official decision by the intervening power to support a party involved in the pre-existing conflict."

43 Marten Zwanenburg, "Remarks at the 'Peace Forces at War: Implications under International Humanitarian Law' Panel", *Proceedings of the Annual Meeting of the American Society of International Law*, vol. 108, 2014, p. 152.

What is not canvassed in the Brereton Report is the fact that Australia's last combat troops were withdrawn from Afghanistan in December 2013, with 400 personnel remaining in Afghanistan as part of a train, advise and assist mission.⁴⁴ Advisers, support staff and force protection elements were assigned to the Afghan National Army Officer Academy and the Special Operations Advisory Group based in Kabul, with additional advisory support provided to the Afghan National Army's 205 Corps Headquarters in Kandahar, and embedded staff in ISAF Headquarters. Until the end of 2014, Australia also assisted with the provision of intelligence, surveillance and reconnaissance through the provision of remotely piloted aircraft.⁴⁵ Following the end of the ISAF Mission at the end of 2014, Afghanistan took the lead on its own security. In October 2015, Australian operations were scaled back further to 250 personnel fulfilling advisory and mentoring roles, and embedded roles in the Afghanistan security ministries and at NATO Headquarters.⁴⁶ Whether the post-2013 Australian mission involved any activities "beyond the wire" that would enable a conclusion to be reached that Australia continued to be a party to the NIAC in Afghanistan is somewhat unclear. On the basis of publicly available information, it seems not to be the case. If this is correct, it would mean that, contrary to what is stated in the Brereton Report, Australia was not in fact bound by IHL as a matter of international law for the final three years of the scope of the IGADF Inquiry.⁴⁷

It is uncontroversial to conclude that as a party to the NIAC in Afghanistan (from 2005 until at least the end of 2013), the ADF was bound to apply CA3. As quoted above, the Brereton Report states that CA3 "applies as a matter of legal obligation". Confusingly, it then goes on to state that "as established customary international law, CA3 applied to all ISAF members". It is thus unclear whether Justice Brereton is of the view that Australia's obligations under CA3 arise as a matter of treaty or customary international law, or both. Moreover, contrary to what is asserted in the Report, the decision of the US Supreme Court in *Hamdan v. Rumsfeld*⁴⁸ provides no support for the proposition that CA3 applies to all parties to NIACs as a matter of customary international law.⁴⁹

44 Australian Department of Defence, "Changes to Middle East Operations Now in Place", media release, 30 June 2014, available at: <https://web.archive.org/web/20140826120544/http://news.defence.gov.au/stories/2014/06/operational-restructure-middle-east-region/>.

45 Australian Department of Defence, "Minister for Defence Visit to Afghanistan", media release, 3 September 2014, available at: www.minister.defence.gov.au/media-releases/2014-09-03/minister-defence-minister-defence-visit-afghanistan.

46 Australian Department of Defence, "Minister for Defence – ADF Completes Training Mission in Afghanistan", media release, 2 October 2015, available at: www.minister.defence.gov.au/media-releases/2015-10-02/minister-defence-adf-completes-training-mission-afghanistan.

47 It is acknowledged that while the temporal scope of the IGADF Inquiry was 2005 to 2016, the chronology of events investigated dates from 2006 to 2013: see Brereton Report, above note 1, Chap. 1.01, Annex B.

48 US Supreme Court, *Hamdan v. Rumsfeld*, 548 US 557 (2006), 2006.

49 The case concerned a successful constitutional challenge to the legality of the military commissions established to try detainees at Guantanamo Bay on the basis that the Bush administration did not have authority to set up the commissions without congressional authority because they did not comply with the US Uniform Code of Military Justice or the Geneva Conventions. The US government controversially argued that the Geneva Conventions did not apply because the conflict between the United States and Al-Qaeda (in the context of which Hamdan had been captured and detained, and

What *Hamdan* does provide authority for is the proposition that CA3, as a matter of treaty law, has extraterritorial effect. Indeed, it is widely agreed that CA3 must be applied by all States party to one or more of the Geneva Conventions that are a party to a NIAC (i.e., the territorial State, as well as any foreign States and multinational forces operating under national command and control that intervene in support of the territorial State), as well as the ANSAs involved.⁵⁰ As such, even though it was operating extraterritorially, the better view is that, as a party to the NIAC in Afghanistan, Australia was bound to apply CA3 as a matter of treaty law. To the extent that there is any room to doubt this conclusion, it is clear that Australia was bound to apply the minimum guarantees contained in CA3 as a matter of customary international law.⁵¹

In the current context, the more significant point to be made in relation to customary international law concerns the Brereton Report's assertion that "certain

which the US government sought to distinguish from its conflict with the Taliban) was "international in scope" and thus did not qualify as a conflict not of an international character under CA3, and fell outside common Article 2 (which establishes the applicability of the balance of the Conventions) because that provision only applies to conflicts between States party to the Conventions. The Supreme Court did not consider the merits of the government's submissions in relation to common Article 2 because it found that at least CA3 was applicable on the basis that "[t]he term 'conflict not of an international character' is used here in contradistinction to a conflict between nations": *ibid.*, p. 67. While the decision has been widely welcomed for rejecting the US government's argument that a conflict with a transnational terrorist organization is unregulated by IHL because it falls outside the traditional IAC/NIAC dichotomy, it has been criticized for failing to engage in any detail on the complex issues relating to the classification of armed conflicts under common Articles 2 and 3 generally or the US engagement in hostilities in Afghanistan in particular: see, for example, Fionnuala Ní Aoláin, "*Hamdan* and Common Article 3: Did the Supreme Court Get It Right?", *Minnesota Law Review*, Vol. 91, No. 5, 2007, p. 1523; Eran Shamir-Borer, "Revisiting *Hamdan v. Rumsfeld*'s Analysis of the Laws of Armed Conflict", *Emory International Law Review*, Vol. 21, 2007, p. 601. The decision does not consider the customary status of CA3 as a whole, nor does it consider the application of that article to States other than the United States.

- 50 L. Cameron *et al.*, above note 41, paras 473, 510; Jelena Pejic, "The Protective Scope of Common Article 3: More than Meets the Eye", *International Review of the Red Cross*, Vol. 93, No. 881, 2011, pp. 11–17; Nils Melzer, *Targeted Killing in International Law*, Oxford University Press, Oxford, 2008, pp. 258–259; M. Milanovic and V. Hadzi-Vidanovic, above note 22, p. 31.
- 51 International Court of Justice, *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, *ICJ Reports 1987*, p. 14, para. 218; ICTY, *Tadić*, above note 16, para. 128; ICTR, *Akayesu*, above note 25, para. 608; Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, Rules 87, 88, 89, 90, 92, 96, 100, 109, 110, available at: <https://ihl-databases.icrc.org/en/customary-ihl>; Françoise Hampson, "Fundamental Guarantees", in E. Wilmshurst and S. Breau (eds), above note 25, pp. 289–292, 299. Indeed, the Rome Statute's *travaux préparatoires* document the fact that a majority of States consider not only that CA3 prohibitions have attained customary status, but also that their violation amounts to a crime under customary international law: see, for example, Hermann von Hebel and Darryl Robinson, "Crimes within the Jurisdiction of the Court", in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer International, The Hague, 1999, pp. 89, 104, 123; William A. Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2001, p. 23; Michael Bothe, "War Crimes", in Antonio Cassese, Paola Gaeta and John R. W. D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002, p. 379; Andreas Zimmermann and Robin Geiß, "Article 8, Para 2(c)–(f) and Para 3: War Crimes Committed in an Armed Conflict not of an International Character", in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary*, 3rd ed., Bloomsbury, London, 2016, pp. 542–543; Eva La Haye, *War Crimes in Internal Armed Conflicts*, Cambridge University Press, Cambridge, 2008, pp. 52–53.

provisions of the Geneva Conventions are applicable as a matter of customary international law”. It is undoubtedly true that customary rules mirroring various provisions of the Geneva Conventions apply in NIACs, but such a conclusion is not particularly helpful given that it provides no guidance as to which rules exactly apply. The statement is also incomplete: the rules of customary international law applicable in NIACs do not exclusively derive from the Geneva Conventions, but also stem from Additional Protocols I⁵² and II, and other treaties, such as those prohibiting the use of various weapons and the recruitment and use of child soldiers.

The Brereton Report’s silence on Additional Protocol II

The Brereton Report’s most significant omission is its failure to refer to the applicability of AP II to the ADF’s operations in Afghanistan.

Debates as to whether AP II applies to a particular NIAC commonly hinge on whether the ANSA party or parties in question are sufficiently organized and in fact exercise control over territory, and whether hostilities have met the requisite intensity threshold. These issues are not particularly controversial in the Afghan context. It was widely accepted that during the relevant period there were continuous hostilities between the government of Afghanistan and a number of ANSAs,⁵³ including the Taliban, which (1) had a membership in the tens of thousands;⁵⁴ (2) employed a hierarchical command structure that was able to replace leaders who were killed, and in some parts of Afghanistan resembled a shadow State;⁵⁵ (3) was governed by successively published codes of conduct (the Layeha for Mujahideen), which included organizational and administrative provisions as well as rules relating to the conduct of hostilities and accountability

52 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I).

53 The extent of hostilities is indicated by the high number of persons killed and wounded year on year: see Neta C. Crawford, “Update on the Human Costs of War for Afghanistan and Pakistan, 2001–mid-2016”, Costs of War Project, Watson Institute of International and Public Affairs, Brown University, August 2016, https://watson.brown.edu/costsofwar/files/cow/imce/papers/2016/War%20in%20Afghanistan%20and%20Pakistan%20UPDATE_FINAL_corrected%20date.pdf.

54 Estimates for different years vary, but tend to range from 15,000 to 80,000. See, for example, Gilles Dorronsoro, “Waiting for the Taliban in Afghanistan”, Carnegie Endowment for International Peace, 20 September 2012, available at: <https://carnegieendowment.org/2012/09/20/waiting-for-taliban-in-afghanistan-pub-49419> (estimating 50,000 members in 2012); Yoshinobu Nagamine, *The Legitimization Strategy of the Taliban’s Code of Conduct: Through the One-Way Mirror*, Palgrave Macmillan, New York, 2015, pp. 22–23 (estimating 15,000–40,000 in 2012).

55 Niaz A. Shah, “The Taliban Layeha for Mujahidin and the Law of Armed Conflict”, *International Humanitarian Legal Studies*, Vol. 3, No. 1, 2012, pp. 207–210; Peter Bergen, “U.S. Intelligence Briefing: Taliban Increasingly Effective”, *Foreign Policy*, 25 January 2010, available at: <http://edition.cnn.com/2010/WORLD/asiapcf/01/25/afghanistan.taliban/index.html>; Theo Farrell and Antonio Giustozzi, “The Taliban at War: Inside the Helmand Insurgency, 2004–2012”, *International Affairs*, Vol. 89, No. 4, 2013, pp. 855–867; Thomas H. Johnson and Matthew C. Dupee, “Analysing the New Taliban Code of Conduct (*Layeha*): An Assessment of Changing Perspectives and Strategies of the Afghan Taliban”, *Central Asian Survey*, Vol. 31, No. 1, 2012, pp. 85–86.

in the event of violation of those rules;⁵⁶ and (4) exercised effective control of a significant overall percentage of the country.⁵⁷ As such, there is little dispute that AP II applied to at least the conflict between the government of Afghanistan and the Taliban.⁵⁸

The key issue that arises in the context of ADF operations in Afghanistan is not whether the NIAC in Afghanistan met the higher applicability thresholds found in AP II compared to CA3, but whether the Protocol has extraterritorial effect, such that it applied to those AP II States Parties that intervened in the NIAC. As noted above, Article 1(1) states that the Protocol applies to “all armed conflicts” that are not covered by AP I “and which take place *in the territory* of a High Contracting Party between *its* armed forces and dissident armed forces” (emphasis added). This is followed by the requirement that dissident armed forces control “part of *its* territory” (emphasis added). While this clearly requires the territorial State to be a party to AP II, and for the requirements of an AP II NIAC between the territorial State and one or more dissident armed forces to have been met, the formulation raises the question of whether AP II obligations are only owed by States Parties in respect to NIACs on their own territory (and their ANSA adversaries that meet the criteria set out in Article 1(1)), or whether a State party to AP II that intervenes in an AP II NIAC on the territory of another State Party is also bound to apply the Protocol’s rules.

Admittedly, available State practice on this interpretive question is quite limited, the ICRC’s influential Commentary on AP II is silent on the matter, and academic work on the issue is threadbare. The little academic opinion that does exist is divided. Jelena Pejic,⁵⁹ Sylvain Vité,⁶⁰ and Annyssa Bellal, Gilles Giacca and Stuart Casey-Maslen⁶¹ are of the view that a State party to AP II intervening in a qualifying NIAC on the territory of another State Party is bound to apply the Protocol’s rules, although only Bellal and her co-authors put forward any

56 Y. Nagamine, above note 54, pp. 27–43, 92–101, Annex III; Muhammad Munir, “The *Layha* for the *Mujahideen*: An Analysis of the Code of Conduct for the Taliban Fighters under Islamic Law”, *International Review of the Red Cross*, Vol. 93, No. 881, 2011; N. Shah, above note 55, pp. 192–229; T. H. Johnson and M. C. Dupee, above note 55, pp. 77–91. I am grateful to Azadah Mariam Raz Mohammad for sharing information regarding the Layeha for Mujahideen with me.

57 Percentage estimates vary year-on-year, but appear to be at least 30%. See, for example, Ken Silanian, “Taliban Control of Afghanistan Highest since U.S. Invasion”, *NBC News*, 30 January 2016, www.nbcnews.com/news/us-news/taliban-control-afghanistan-highest-u-s-invasion-n507031.

58 See, for example, A. Bellal, G. Giacca and S. Casey-Maslen, above note 39, pp. 56–58; M. Munir, above note 56, p. 84; Dapo Akande, “Afghanistan Accedes to the Additional Protocols to Geneva Conventions: Will APTII Govern the Conflict in Afghanistan?”, *EJIL: Talk!*, 30 June 2009, available at: www.ejiltalk.org/afghanistan-accedes-to-additional-protocols/; UN Assistance Mission in Afghanistan and UN Office of the High Commissioner for Human Rights, *Afghanistan: Annual Report 2011: Protection of Civilians in Armed Conflict*, Kabul, February 2012, p. iii, available at: https://unama.unmissions.org/sites/default/files/unama_poc_report_final_feb_2012.pdf. The press release issued by the ICRC on the occasion of the Afghan government’s accession to AP II also implies that it expected the Protocol to be immediately implemented: ICRC, “Afghanistan Accedes to Additional Protocols I and II in Historic Step to Limit Wartime Suffering”, media release, 24 June 2009, available at: www.icrc.org/en/doc/resources/documents/news-release/2009-and-earlier/afghanistan-news-240609.htm.

59 J. Pejic, above note 25, p. 92.

60 S. Vité, above note 25, p. 80.

61 A. Bellal, G. Giacca and S. Casey-Maslen, above note 39, pp. 60–61.

arguments in support of this contention – namely, that such a conclusion “better fits” with the language of Article 1(1), is more in line with the object and purpose of the Protocol, and allows for a more practical application of the law.⁶² Nils Melzer,⁶³ Dapo Akande,⁶⁴ and Robin Geiß and Michael Siegrist⁶⁵ claim that foreign States intervening in NIACs are not bound by AP II, although the authors advance no arguments in support of this conclusion beyond an assertion as to what they claim is the proper interpretation of Article 1(1). Martha Bradley concludes that AP II exclusively applies to the armed forces of the territorial State fighting an organized armed group that satisfies the requirements of AP II inside the borders of the territorial State based on her application of the rules of treaty interpretation to the Protocol’s Article 1(1).⁶⁶ Yoram Dinstein identifies the question as an outstanding issue, saying that “strictly speaking” the text of Article 1(1) “invites the conclusion that AP II is inapplicable” but that “[a] more lenient deciphering of Article 1(1), based on the spirit rather than the letter of the text”, would see AP II apply.⁶⁷ A similar view has been expressed by Andrew Clapham, who states that “[f]rom a humanitarian perspective it makes no sense to deny the applicability of the protective measures in the Protocol to conflicts where the state is a party to the Protocol but the fighting takes place outside its borders”.⁶⁸ However, he goes on to note that not all share this view and that this is an issue that could usefully be clarified.⁶⁹

Notwithstanding the limited authority, I am of the view that the applicability of AP II to the ADF’s operations in Afghanistan was clear.

As with any question of the proper interpretation of a treaty, the starting point must be Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT).⁷⁰ The general rule of treaty interpretation requires a treaty to be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” In concluding that AP II does not apply to intervening foreign forces, Bradley also starts with Article 31(1) of the VCLT. However, she only considers the meaning of the words “in” and “its” and the compound term “High

62 *Ibid.*

63 N. Melzer, above note 50, p. 257; David Turns, “*Jus ad Pacem in Bello?* Afghanistan, Stability Operations and International Law Relating to Armed Conflict”, *Israel Yearbook on Human Rights*, Vol. 39, 2009, p. 230.

64 D. Akande, above note 22, p. 55.

65 R. Geiß and M. Siegrist, above note 39, p. 16.

66 Martha M. Bradley, “Classifying Non-International Armed Conflicts: The ‘Territorial Control’ Requirement under Additional Protocol II in an Era of Complex Conflicts”, *Journal of International Humanitarian Legal Studies*, Vol. 11, No. 2, 2020, pp. 358–363, 383. The focus of Bradley’s article is on “spillover conflicts”, but she also contemplates scenarios where foreign AP II States Parties intervene in an AP II NIAC.

67 Yoram Dinstein, *Non-International Armed Conflict in International Law*, 2nd ed., Cambridge University Press, Cambridge, 2021, p. 117.

68 Andrew Clapham, “Defining Armed Conflicts under the Additional Protocols: Is there a Need for Further Clarification?”, in F. Pocar and G. L. Beruto (eds), above note 25, p. 38.

69 *Ibid.*, p. 39.

70 Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969 (entered into force 27 January 1980).

Contracting Party” and relies on dictionary definitions of these terms, ignoring both other terms and phrases found in Article 1(1), and their context as that concept is defined in Article 31(2) of the VCLT.⁷¹ Further, while Bradley opines that “[t]he specific purpose of this treaty is to offer protection to the victims of NIACs”, she does not take this object and purpose into account in identifying the ordinary meaning of the terms in Article 1(1). Rather, initially, she seems to conflate object and purpose with the circumstances of AP II’s conclusion when she says (immediately after identifying the object and purpose):

It is possible to maintain that as the treaty was drafted in the context of civil war and at the time did not contemplate complex conflicts including cross-border conflicts it can be taken to mean that the armed conflict must occur in the territory of a single State.⁷²

Article 32 of the VCLT of course specifically refers to the circumstances of a treaty’s conclusion, enabling this to be considered as a supplementary means of interpretation in order to confirm the meaning resulting from the application of Article 31, or to determine meaning when the Article 31 exercise leaves the meaning of treaty text ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable – an aspect of the rules of treaty interpretation not canvassed by Bradley. Bradley does revisit the object and purpose of AP II in a later section of her article dedicated to an examination of the territorial scope of AP II in the context of spillover conflicts: here she states that “[a] humanitarian approach or purposive approach from a humanitarian perspective would interpret a provision of a relevant IHL treaty as offering greater protection to the victims of NIACs”.⁷³ She thus concedes that “the purposive or humanitarian approach to the territorial requirement of Additional Protocol II” supports the reading that the Protocol has extraterritorial effect.⁷⁴ She concludes, however, that “the consideration of the object and purpose of a treaty cannot be used to counter a clear substantive provision”, and she asserts that Article 1(1) “clearly determines” a restrictive interpretation⁷⁵ – a matter that, as noted above, her article does not in fact convincingly establish. Finally, Bradley asserts that the drafting history of AP II confirms her preferred interpretation, although the only authority she provides in support of this assertion is a footnoted citation referencing a single document in the *travaux*: neither its content nor its relationship to her preferred interpretation is provided.⁷⁶ A review of the document cited, a Brazilian proposal to amend Article 1(1), sheds no light on the interpretive issue at hand given that it does not address the question of whether or not AP II was intended to have extraterritorial effect.⁷⁷

71 M. M. Bradley, above note 66, pp. 359–360.

72 *Ibid.*, p. 360.

73 *Ibid.*, p. 368.

74 *Ibid.*

75 *Ibid.*, p. 69.

76 *Ibid.*, p. 360 fn. 56.

77 The Brazilian Proposal (Doc. CDDH/I/79, 21 March 1974, reproduced in *Official Records of the Diplomatic Conference on the Reaffirmation and Development of the International Humanitarian Law Applicable in Armed Conflict*, Vol. 4, Federal Political Department, Berne, 1978, p. 8, available at:

For all of these reasons, I would submit that the interpretive exercise engaged in by Bradley is lacking in a number of respects and, as such, is not compelling.⁷⁸

Indeed, I would suggest that a rigorous application of Article 31(1) of the VCLT to Article 1(1) of AP II in fact leads to the opposite conclusion. Article 1(1) of AP II requires, *inter alia*, that one of the parties to the armed conflict in question be the armed forces of the State, and that the opposing dissident armed forces or organized armed group(s) meet requirements relating to responsible command, and control of territory. To read the reference to the host State and the dissident armed force/organized armed group as not only threshold requirements but also an exhaustive list of the parties to such a conflict that are bound to apply AP II would require those references to do double duty, and would ignore the conjunctive “and” that follows the reference to AP I. For this reason, the better view is that a good-faith interpretation of Article 1(1), in accordance with the ordinary meaning of its words, provides that the Protocol applies to *all* armed conflicts that meet the threshold requirements set out in Article 1(1). In other words, the requirement that an armed conflict involve the armed forces of the High Contracting Party in whose territory the conflict takes place should be viewed as a threshold requirement, and not as a factor that excludes the application of the Protocol to the armed forces of foreign States participating in the NIAC alongside the armed forces of the host State. Put another way, if AP I does not apply, and if an armed conflict is taking place on the territory of a High Contracting Party between its armed forces and organized armed groups that meet the requisite threshold tests, then AP II applies to “the armed conflict” as a whole. This means that the words “shall apply to all armed conflicts” are determinative, such that a State which is party to AP II and which intervenes in an AP II NIAC on the territory of another State Party is bound to apply the Protocol’s rules.

A reference to the object and purpose of AP II supports this interpretation. The preamble to AP II confirms that one of its key objectives is to “ensure a better protection for the victims of those armed conflicts”. Clearly, adherence to AP II by all High Contracting Parties participating in a NIAC would best enable the Protocol’s object and purpose to be met. A contrary interpretation would lead to a lacuna in the coverage of armed conflicts by AP II and would mean that

https://library.icrc.org/library/docs/CD/CD_1977_ACTES_ENG_04.pdf reads in full: “Redraft of Article 1 as follows: ‘Article 1, scope of the present Protocol: 1. The present Protocol shall apply to armed conflicts not covered by Article 2 common to the Geneva Conventions of August 12, 1949, relating to the protection of victims of international armed conflicts, in which, on the territory of a High Contracting Party: (a) Organized armed forces or other organized armed groups under a responsible and identifiable authority and clearly distinguished from the civilian population, perform acts hostile to the established authorities to which the latter respond by using their armed forces; and (b) Forces hostile to the government exert continuous and effective control over a non-negligible part of the territory. 2. The foregoing provisions do not modify the conditions governing the application of Article 3 common to the Geneva Conventions of 12 August 1949.’ In relation to the *travaux préparatoires*, see above notes 80–86 and accompanying text.

78 It is acknowledged that Bradley characterizes her interpretive conclusion as “distressful” and notes that “over time the *lex lege ferenda* could offer greater protection by extending the application of Additional Protocol II”: M. M. Bradley, above note 66, p. 383.

foreign armed forces operating in the territory of another State would be bound to apply a different standard of IHL than if they were operating on their own territory, which would sit in tension with the limitations international law generally places on the conduct of foreign States in a host State's territory. It would also mean that the ANSAs party to the conflict would owe different obligations to host State armed forces compared to those of an intervening foreign State, which would raise serious practical challenges in relation to the ability of such ANSAs to distinguish between different forces.⁷⁹ An additional implication would be that host State armed forces and foreign armed forces would more frequently be operating under different rules of IHL, which may pose significant challenges in relation to interoperability and raise sensitivities on the part of a host State. It could even produce the undesirable result of a host State delegating certain functions (such as those relating to detention) to foreign States in order to avoid AP II obligations.

It might be argued that had a broad interpretation of Article 1(1) been intended, it would have been open to the drafters to frame the provision in similar terms to CA3, which merely requires that the conflict take place "in the territory of *one of* the High Contracting Parties". Indeed, if we turn to the *travaux préparatoires* of AP II under Article 32 of the VCLT, it can be seen that the original draft of Article 1, prepared by the ICRC and provided to the Diplomatic Conference, would have given AP II broader application:

Article 1. – Material field of application

1. The present Protocol shall apply to all armed conflicts not covered by Article 2 common to the Geneva Conventions of August 12, 1949, taking place between armed forces or other organised armed groups under responsible command.
2. The present Protocol shall not apply to situations of internal disturbances and tensions, *inter alia*, riots, isolated and sporadic acts of violence and other acts of a similar nature.
3. The foregoing provisions do not modify the conditions governing the application of Article 3 common to the Geneva Conventions of August 12, 1949.⁸⁰

From the outset of negotiations, Article 1 received close attention from States. Thirteen written proposals to amend Article 1 were tabled during the Diplomatic Conference,⁸¹ four of which would arguably have omitted the words that Bradley (and impliedly others) argue prevent AP II's extraterritorial application.⁸² The draft article, together with these proposed amendments, was considered by

79 A. Bellal, G. Giacca and S. Casey-Maslen, above note 39, p. 61.

80 Draft Additional Protocols to the Geneva Conventions of 12 August 1949, June 1973, reproduced in *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Vol. 1, Part 3, Federal Political Department, Berne, 1978, available at: https://library.icrc.org/library/docs/CD/CD_1977_ACTES_ENG_01.pdf.

81 These are reproduced in *Official Records of the Diplomatic Conference*, Vol. 4, above note 77, pp. 6–10.

82 See proposals by Indonesia (Doc. CDDH/I/32, 12 March 1974, reproduced in *ibid.*, p. 7), the German Democratic Republic (Doc. CDDH/I/88, 11 September 1974, reproduced in *ibid.*, p. 8), Norway (Doc.

Committee I, which, after receiving initial views from States, sent it to Working Group B for consideration. Working Group B “spent the greater part of 15 meetings discussing article 1”, before establishing a Sub-Working Group to carry out informal consultations with a view to agreeing a text for the article.⁸³ The version that emerged from the Sub-Working Group on 17 March 1975 remained unchanged until its final adoption by the Diplomatic Conference.⁸⁴

Nothing in the negotiating history of what became Article 1(1), including the rejection of the four proposals that would have omitted explicit references to the territory of a High Contracting Party, can be said to exclude AP II’s extraterritorial application. As the ICRC’s commentary to Article 1(1) notes, the provision was “the result of a delicate compromise, the product of lengthy negotiations, and the fate of the Protocol as a whole depended on it”.⁸⁵ The *travaux préparatoires* plainly demonstrate that the purpose of the restrictions added by States to the draft of Article 1(1) prepared by the ICRC, including the insertion of specific references to territory, was to restrict the situations of armed violence that qualified as armed conflict for the purpose of the Protocol to situations that were comparable to IAC, and to achieve this by the use of criteria that could be objectively applied.⁸⁶ As noted at the outset, this reflected the majority’s concerns about the sovereignty implications of the application of IHL to NIACs. There is no evidence of any intent to exclude the Protocol’s application to foreign States intervening in NIACs. Indeed, had this been intended, an express exclusion, or clearer confinement of the application of the Protocol, could, and arguably would, have been included – or at the very least would have been explicitly canvassed in the extensive *travaux* generated by AP II’s negotiation.

In requiring the dissident armed force or organized armed group to have the capacity to implement AP II as a precondition for the applicability of AP II, it is clear that the notion of reciprocity is fundamental to the material scope of application (notwithstanding the fact that actual implementation is not required). Thus, in favour of a narrow interpretation of Article 1(1), it could be argued that visiting forces operating on the sovereign territory of another State would be unable to meet some of the obligations set out in the Protocol. It is submitted, however, that this would be an unconvincing objection. The majority of AP II

CDDH/I/218, 17 February 1975, reproduced in *ibid.*, p. 9) and the Philippines (Doc. CDDH/I/231, 26 February 1975, reproduced in *ibid.*, p. 10).

83 Committee I Report, Doc. CDDH/219/Rev.1, reproduced in *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Vol. 10, Federal Political Department, Berne, 1978, p. 21, paras 88–90, available at: https://library.icrc.org/library/docs/CD/CD_1977_ACTES_ENG_10.pdf.

84 *Ibid.*, paras 91–92.

85 ICRC Commentary on the APs, above note 25, para. 4446.

86 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Federal Political Department, Berne, 1978, available at: <https://library.icrc.org/library/search/Notice/2374>. See also ICRC Commentary on the APs, above note 25, paras 4453, 4457; Nils Melzer and Etienne Kustner, *International Humanitarian Law: A Comprehensive Introduction*, ICRC, Geneva, 2019, pp. 68–69; A. Cullen, above note 22, pp. 88–96; D. Graham, above note 25, p. 47; D. Jinks, above note 25, pp. 26–27.

provisions relate to obligations to protect and respect protected persons and objects. It is, for example, difficult to argue that the fundamental guarantees owed under Article 4, or the obligations to respect and protect medical and religious personnel under Article 9, or the prohibition on the punishment of persons for having carried out medical activities under Article 10, cannot be met because a party to an armed conflict is a visiting force. Positive obligations, such as those owed to persons whose liberty has been restricted, are explicitly caveated by the statement that the parties to the armed conflict need to respect the obligations “within the limits of their capabilities”.⁸⁷ Similarly, obligations such as the obligation to take all possible measures to search for and collect the wounded, sick and shipwrecked are limited by the phrase “whenever circumstances permit”.⁸⁸ Taking these caveats into account, it is not sustainable to argue that a narrow interpretation of Article 1(1) is militated by the idea that visiting armed forces are unable to apply AP II’s provisions.

For the foregoing reasons, the better view is that AP II applies to a foreign State party to AP II intervening in a qualifying NIAC on the territory of another AP II State Party. As such, the Protocol applied to the ADF in Afghanistan as a matter of treaty law. One complicating factor in the Afghan context is that Afghanistan only acceded to AP II on 10 November 2009, with the treaty entering into force for it on 10 May 2010. It is thus only from this date that Australia was bound to apply the provisions of AP II as a matter of treaty law. As noted above, the scope of the IGADF Inquiry was 2005 to 2016, but it seems likely that Australia ceased to be a party to the armed conflict at the end of 2013, meaning that the ADF was bound by AP II as a matter of treaty law for only part of the Inquiry’s temporal jurisdiction. In this context it should be noted that a chronology of investigated incidents included in the Brereton Report indicates that these incidents fell within the period 2006–13, but that the overwhelming majority date from 2010–13,⁸⁹ during which the ADF was bound by AP II.

Why the Brereton Report’s silence on the applicability of AP II matters

The primary reason why it is important to be clear that AP II applied to the ADF’s operations in Afghanistan from May 2010 as a matter of treaty law is because the customary status of the various provisions of AP II is subject to debate. While it is widely agreed that the “core” of AP II now forms part of customary

87 See AP II, Art. 5(2).

88 See *ibid.*, Art. 8.

89 See Brereton Report, above note 1, Chap. 1.01, Annex B. It is difficult to be precise given the redactions in the public version of the Report (which include the day and month of different incidents investigated, meaning that a count of incidents from 2010 could include some occurrences that pre-date the entry into force of AP II for Afghanistan), but of the sixty-two incidents or issues investigated, eleven (or 18%) are dated from 2006–09, and fifty-one (or 82%) from 2010–13.

international law,⁹⁰ precisely which rules from AP II have achieved customary law status is less clear. Acknowledging that Australia was bound by all of the Protocol's rules removes room for debate over key IHL obligations.

It is acknowledged that during the period when IHL applied to the ADF's operations in Afghanistan, ADF personnel were subject to Subdivisions F and G of the Commonwealth Criminal Code irrespective of the applicability of AP II as a matter of treaty law. However, the IGADF's mandate was not limited to an investigation of criminal conduct: the IGADF was directed by the Chief of the Defence Force to inquire whether there was any substance to rumours of criminal or unlawful conduct on the part of the ADF SOTG deployments in Afghanistan.⁹¹ Moreover, as the ICRC has noted,

the spectacular rise of international criminal law in recent years constitutes an invaluable contribution to the credibility of IHL and to its effective implementation. It would be wrong and dangerous, however, to see IHL solely from the perspective of criminal law. ...

An exclusive focus on criminal prosecution may ... give the impression that all behaviour in armed conflict is either a war crime or lawful. That impression heightens feelings of frustration and cynicism about the effectiveness of IHL, which in turn facilitate violations. More importantly, that impression is simply wrong.⁹²

One would certainly hope that the identification of credible information to suggest that war crimes had been committed would give rise to consideration as to whether any applicable laws of IHL, the violation of which does not attract individual criminal responsibility, were also violated. Consideration of this issue is critical to Australia and Afghanistan's relationship, noting that a serious breach of IHL would likely incur Australia's State responsibility. A review of the ADF's observance of IHL in Afghanistan is also critical to the broader review of the ADF's organizational culture. Adherence to the laws of war is not only a binding obligation, it is central to military honour and the maintenance of morale, and it is critical to mission success: if a State does not obey the laws of war, it risks losing local support for peace-building missions such as those in Afghanistan, and such operations cannot succeed without local support. When a military operation is mandated to help restore the rule of law and members of that operation breach the rules, it threatens the legitimacy of such operations, which

90 See, for example, ICTY, *Tadić*, above note 16, paras 98, 117, 126; ICTR, *Akayesu*, above note 25, paras 609–610; ICTY, *The Prosecutor v. Pavle Strugar, Miodrag Jokić and Others*, Case No. IT-01-42-AR72, Decision on Interlocutory Appeal (Appeals Chamber), 22 November 2002, para. 10; ICTY, *The Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2, Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3 (Trial Chamber), 2 March 1999, para. 31.

91 Brereton Report, above note 1, Chap. 1.01, Annex A, p. 49, "Chief of Defence Force Direction to Inspector-General of the Australian Defence Force – Concerns Regarding Special Operations Command", 14 December 2016, para. 2.

92 ICRC, "Criminal Repression", *How Does Law Protect in War?*, available at: <https://casebook.icrc.org/law/criminal-repression>.

could have significant geopolitical implications, in addition to posing a critical threat to military effectiveness.

It could be that the IGADF found no credible evidence of ADF violations of the rules of AP II (or customary international law) in Afghanistan – but one would have more confidence in this regard had the Brereton Report squarely addressed the issue.

Separate from the specific context of the inquiry into the ADF's operations in Afghanistan, it is important for States to put their views regarding the applicability of AP II on the public record. There are three reasons for this. First, AP II's application is reciprocal: making it clear when States are bound to apply AP II will benefit those personnel who are deployed overseas to fight in AP II conflicts by ensuring that their rights under the Protocol are promoted, enhancing the prospect of those rights in turn being respected.

Second, the publication of States' views on the proper interpretation of IHL treaties is critical to building a consistent and shared interpretation of those treaties by other States, as well as international courts and tribunals. As I have argued in detail elsewhere,⁹³ contemporary military operations pose a host of unresolved IHL questions. As noted above,⁹⁴ the vacuum created by State silence in relation to such questions is being filled by other actors. To ensure that IHL continues to reflect the views of States and, consequently, is seen as relevant by States, which is critical to maintaining and enhancing compliance with IHL's rules by both States and ANSAs, it is necessary for States to put their views on the law on the record.

Third, the explanation of a State's views on applicable international law is a significant component of any assessment of the legitimacy of that State's actions. This fact has not been lost on Australia. George Brandis, the former Australian Attorney-General, articulated this view in a lecture at the T. C. Beirne School of Law when he said: "It is vital that States (and their international legal advisers) have the courage to explain and defend their legal positions."⁹⁵ Picking up the central theme in Harold Koh's seminal article on "The Legal Adviser's Duty to Explain",⁹⁶ Brandis observed that explaining legal positions would strengthen our "culture of justification"⁹⁷ by making "our legal deliberations more transparent,

93 C. McDougall, above note 30, pp. 235–245.

94 See above notes 30–32 and accompanying text.

95 George Brandis, "The Right of Self-Defence against Imminent Armed Attacks in International Law", lecture delivered at the T. C. Beirne School of Law, University of Queensland, 11 April 2017, p. 12, available at: <https://tinyurl.com/2s43zpvb>.

96 H. Koh, above note 31. As Koh puts it, "[t]o participate in a system of international law, nations owe each other explanations of why they believe their national conduct comports with global norms and follows not from mere expedience but from a sense of legal obligation (opinio juris). By laying out her government's legal theory in public, the legal adviser shoulders the nation's responsibility to give its citizens, the media, legal communities, and legislators, as well as the international legal community, a fuller opportunity to assess the legal theory offered to authorize a given action and to test the government's present and future actions in light of that theory" (p. 190).

97 This term was borrowed by Brandis from Etienne Mureinik, "A Bridge to Where? Introducing the Interim Bill of Rights", *South African Journal on Human Rights*, Vol. 10, No. 1, 1994, p. 32.

so that decisions are understood and respected – by Australians as well as by the international community”.⁹⁸ As Brandis explained:

International law should not be characterised merely as a set of constraints upon State action. It is more than that. When we hold firmly to an international rules-based order, the law’s “wise restraints” (in the words of Professor John MacArthur Maguire) provide legitimacy to States’ conduct. They do so because when we adhere to them – and we do so explicitly for reasons we are prepared to articulate, explain and defend – we demonstrate that our conduct on the international stage is principled. And it is only when we behave in a principled fashion that we can hope our conduct will be respected and regarded as lawful and legitimate.⁹⁹

While Brandis’ remarks were made in the context of a speech setting forth Australia’s interpretation of the meaning of imminence for the purpose of the exercise of the right of self-defence, they are of no less relevance in relation to a State’s views on IHL. Indeed, consistent with the rationale expressed in Brandis’ lecture, while I was an Australian government legal adviser, I delivered a public presentation on the very issue of the applicability of AP II to foreign States intervening in AP II conflicts.¹⁰⁰ The presentation outlined the reasons why Australian government legal advisers had reached the view that AP II does indeed apply. This makes the silence in the Brereton Report all the more surprising.

Conclusion

In declaring that credible information exists to suggest that ADF SOTG members committed war crimes in Afghanistan, there is much to commend about the Brereton Report. It is an important example of ownership of a country’s wrongdoing, and it is indicative of a genuine intent to punish those responsible and to take steps to prevent such wrongs from being committed again. In this context, it is important to acknowledge that there existed critics who “aired not only doubts and misgivings but overt hostility to the establishment of the Inquiry”,¹⁰¹ and that much effort was needed to break the code of silence that traditionally governs SOTG operations¹⁰² – which is to say that the Brereton Report is the outcome of a sensitive and difficult undertaking.

While acknowledging the overall positive contribution of the Brereton Report, it would be remiss of us not to consider its weaknesses. Among these is

⁹⁸ G. Brandis, above note 95, p. 12.

⁹⁹ *Ibid.*, p. 13.

¹⁰⁰ Carrie McDougall, “The Application of AAPI to States Intervening in NIAC”, Conference on Non-International Armed Conflict, Asia Pacific Centre for Military Law, Melbourne Law School, University of Melbourne, 19 March 2015.

¹⁰¹ Brereton Report, above note 1, Chap. 1.02, para. 18.

¹⁰² *Ibid.*, Chap. 1.01, paras 19, 67, Chap. 1.04, paras 22, 45, 50, Chap. 3.01, paras 18, 19, Chap. 3.03, Annex A, “Special Operations Command: Leadership and Ethics Review”, para. 50.

the myopic nature of the Report. In focusing so closely on the alleged war crimes that were committed by SOTG members in Afghanistan, the Report neglected to present a complete account of the international law applicable to the ADF's operations. In this way, the Report failed to convey the impression that the Inquiry had comprehensively considered Australia's observation of its IHL obligations; this could have obscured IHL violations, or at worst, could be interpreted as an exercise in scapegoating.

In failing to set out Australia's views on the important, and unsettled, issue of the applicability of AP II to foreign States intervening in AP II NIACs, the Brereton Report also missed the opportunity to stand as a prominent example of State practice on the issue. This article has argued that the Protocol has extraterritorial effect for an AP II State Party intervening in a foreign NIAC governed by AP II. This conclusion has been based on the application of the VCLT's rules of treaty interpretation to Article 1(1), which governs the Protocol's material scope of application. Clearly, however, the conclusion would be more compelling if it could be complemented by a study of State practice in relation to this interpretive issue. As such, it is hoped that this article might serve as something of a call to arms for States to put their views on this important subject of operational significance on the public record.